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Frank Easterbrook: A Portrait of the Next Chief

Hail to the Chiefs

Joan Leckow and the 2006 Thomas E. Fairchild Lecture: A Judge's Legacy

Four "All American" Jury Concepts – A View from the Trenches

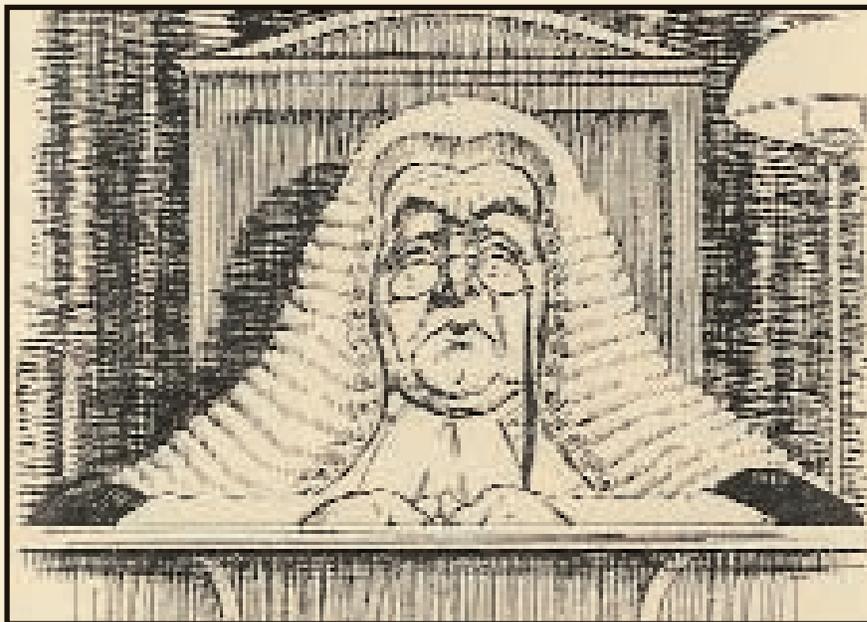
*Demise of the No-Citation Rules; The Supreme Court Approves
Federal Rule of Appellate Procedure 32.1*

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Letter from the President

President James R. Figliulo
Figliulo & Silverman, PC



The theme for this year is “We are all in this together.” Regardless of our role or our particular job we all benefit from a system of justice which is fair, efficient and just. We face increasingly frequent attacks from politicians, serious cost and budgetary challenges, and criticisms from within our profession and from the media. Our system is not perfect and some of the criticism is justified, but on the whole, given the challenges we face, our system of law and administration of justice is as fair, effective and just as any that has existed in human history. The Seventh Circuit is an important part of that system, and operates better than most. Part of our Circuit’s success results from the strong professional relationship between the bench and the bar. That relationship is founded on mutual respect, an appreciation of our roles and a willingness to reach out beyond our roles and to do more than what is required by our day-to-day jobs.

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Annual Meeting Committee

A Message from the Chair

John J. Hamill, Jenner & Block, LLP

Fellow Attorneys and Members of the Judiciary:

In my role as the Chair of this year’s Annual Meeting Committee, I encourage you to attend the upcoming 55th Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit at Chicago’s Hotel Intercontinental on May 21 through 23. By now you should have received registration materials. They are also available on the Seventh Circuit Bar Association’s website, www.7thcircuitbar.org.

From the opening evening reception at the famed Chicago Cultural Center on May 21 through a series of cutting edge programs culminating on May 23—and thanks to outstanding efforts by Program Chair Mike Monico and President Jim Figliulo—this year’s conference promises to be exciting and informative. Featured events include remarks from Justice John Paul Stevens of the United States Supreme Court and a tribute to Chief Judge Flaum of the Seventh Circuit at the May 22 Annual Dinner, a kickoff address by Dean Kenneth Starr on the importance of an independent judiciary in the morning on May 22, and much more. One theme of this year’s Meeting will be to explore the state of the jury system. Key programs will include perspectives from Chief Justice Michael Black of the Federal Court of Australia to be presented at the May 22 Annual Luncheon and sessions dedicated to considering the findings of the American Jury Project. Other pertinent programs will address emerging issues in corporate criminal prosecutions, current issues in bankruptcy law, hot topics in civil law and procedure, and a special session on May 23 dedicated to helping newer lawyers navigate and find opportunities to handle their first appeal.

The Meeting once again offers an unusual opportunity for members of the bench and bar to join together socially and professionally and share views and ideas on issues important to us all. We hope to see you there.

Very truly yours,
John J. Hamill
Jenner & Block, LLP



Letter *from the* President

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Many lawyers and judges participate over and above their daily jobs to serve our profession and our judicial system. Our recent experience with the Seventh Circuit American Jury Project is an excellent example of the service provided by judges and lawyers to our profession that goes beyond their jobs. The Seventh Circuit American Jury Project Commission, composed of lawyers and judges from this Circuit, engaged in an important study to test innovations for our jury system. We took some of the ideas that had been generated by the ABA American Jury Project, and put those ideas to work in the Seventh Circuit. By developing the Project Manual and the procedures for using these concepts, we were able to break out of our more familiar and comfortable roles and work together to see if we can improve on what is already established as one of the great parts of our American democracy—the jury system. We will be reporting our findings and discussing the merits of the tested innovations at our Annual Meeting. The Seventh Circuit American Jury Project encouraged judges and lawyers to work together to try to make the jury experience more meaningful to the jurors, and hopefully lead to more well reasoned results. The results are most interesting, but the process was even better.

We thank all of the judges and lawyers who participated in the preparation of the Project Manual, served as facilitators to work with the judges to obtain the questionnaires, and a special thanks to all of the judges who participated in this project, as well as the lawyers who joined with them in this test. It has been quite rewarding to be a part of this process and to observe first-hand the dedication, the concern, and the willingness to stretch and try something new to see if there are ways of making the jury experience more meaningful. While the results and the merits of these concepts will be debated and discussed, and may very well lead to some improvements in the jury experience, no one can doubt the value of the process. Mutual respect, understanding and appreciation of our roles in our justice system together with a willingness from time to time to consider issues from different perspectives are crucial to the continued vitality of our system of justice. My own observations this past year, leave little doubt in my mind that we have been blessed with talented, thoughtful judges and lawyers who care very much, not just about cases, but about our system of justice.

I also want to take this opportunity on behalf of the Seventh Circuit Bar Association to express our collective appreciation to those of you who serve our federal system of justice. We tend to take people for granted when things are going smoothly and we too often fail to acknowledge the contributions they make. Being President of this organization has given me a great vantage point to observe the day-to-day contributions by so many people. I would like to acknowledge your work and thank you for your service.

The Chief Judge of the Seventh Circuit, the Chief Judges of the Districts, the Chief Judges of the Bankruptcy Courts, the Chief Magistrate Judges all face daunting administrative, budgetary and management issues every day locally in their own courts, regionally in our Circuit, and nationally. They perform their jobs quietly and competently. We do not see directly the work they do; but without this work, the system would not operate. Thank You!

The Circuit Executive, Collins Fitzpatrick, is an extraordinary public servant and possesses as much, or more, institutional knowledge about our Circuit than anyone. Collins is an outstanding representative of our Circuit. Thank You!

The Clerks of our Courts play a critically important role in the smooth functioning and continuity of our Courts. Gino Agnello, the Clerk of the Seventh Circuit, and the Clerks in each of the Courts have been leaders in electronic filing issues and otherwise handling the administrative functions so essential to the operation of our system of justice. Thank you!

The administrative executives and their staff work without fanfare but provided day-to-day service from which we all benefit. Thank You!

All of the lawyers who serve as Staff Attorneys and the law clerks to the various judges at the Court of Appeals, the District Courts, the Magistrate Courts and the Bankruptcy Courts perform a vitally important service to their Courts and to our system of justice. Thank You!

The settlement conference lawyers work patiently to bring parties together after trial and before the appellate process is complete to find common ground to settle cases before the finality of appeal. Thank You!

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Frank Easterbrook:
A Portrait of the Next Chief

By Stephen M. Shapiro, Andrew L. Frey, and Kenneth S. Geller¹

We would like to offer an anticipatory salute to our former Justice Department colleague, Frank Easterbrook, who will be assuming the position of Chief Judge for the Seventh Circuit in November 2006. Lawyers can expect a continuation of the outstanding leadership of Chief Judge Joel Flaum with, undoubtedly, an addition of some new administrative perspectives.

The Chief Judge serves as the presiding panel member in a full array of cases reaching the Court, but also is responsible for the administration of the Court of Appeals and the District Courts and Bankruptcy Courts in the seven districts of the Circuit. He is a member of the U.S. Judicial Conference and head of the Judicial Council for the Circuit. Fortunately for the Court and members of the bar, Judge Easterbrook is the most organized and efficient administrator we have encountered. His mental Lexis is quick, his wizardry with computers is legendary, and his knowledge of substantive law and procedure is comprehensive.

Most members of the Association know something of the background of Judge Easterbrook, a man of extraordinary credentials. He was a law review officer at the University of Chicago Law School, a clerk for Judge Levin Campbell of the First Circuit, and then Assistant to the Solicitor General and Deputy Solicitor General in the 1970s. He joined that office along with Danny Boggs and Bob Reich (Chief Judge of the Sixth Circuit and former Secretary of Labor, respectively) immediately after his clerkship. In this position he argued 17 cases before the Supreme Court and briefed hundreds more.

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¹Messrs. Shapiro, Frey and Geller are all partners in the Appellate and Supreme Court Practice Group at Mayer, Brown Rowe & Maw. Each served previously as Deputy Solicitor General of the United States, and all worked extensively with Judge Easterbrook during his tenure in the Office of the Solicitor General. Mr. Shapiro and Mr. Geller are coauthors of *Stern, Gressman, Shapiro & Geller, Supreme Court Practice* (8th ed 2002).

A Portrait of the Next Chief

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Following his service in the Solicitor General's Office, Judge Easterbrook became a tenured faculty member at the University of Chicago Law School and a principal in Lexecon, the economic and financial consulting firm. He continued his Supreme Court practice in the private sector, presenting three more cases to the high Court before President Reagan nominated him to the Seventh Circuit in 1985. In our view, Frank Easterbrook was one of the very top advocates appearing before the Supreme Court in his days at the bar.

For the last two decades, Judge Easterbrook has served with distinction on the Seventh Circuit while teaching two or three courses at the law school every year. In the words of Dean Saul Levmore: "Frank Easterbrook continues to have a reputation here, at the University of Chicago Law School, as a must-have teacher. He is also a brilliant and constructive participant in workshops. Some presenters (especially from other schools) may dread the verbal missiles, usually hurled from his front-row center seat, but most learn that it is a treat to rethink one's paper in light of a thoughtful comment from Easterbrook. I dare say that a

good part of what I have learned in my years at the law school can be traced to Frank Easterbrook's comments at these faculty workshops. Finally, Easterbrook is an important influence on legal education through his judicial opinions. Course after law school course has changed for the better as Judge Easterbrook's opinions have made their way into the curriculum. So long as he decides cases, and decides them in a way that cuts to the heart of an issue with such skill and pressure, no area of law can be dull."

The recent law school graduates who served as his clerks have found the experience to be, according to David Lisitza, a most rewarding one. Easterbrook is, he states, an "excellent boss," who provides a "well-rounded cultural experience for his clerks." "His fondness for Alaska and opera humanize him. As far as outdoors in Alaska, I was shocked to learn that he

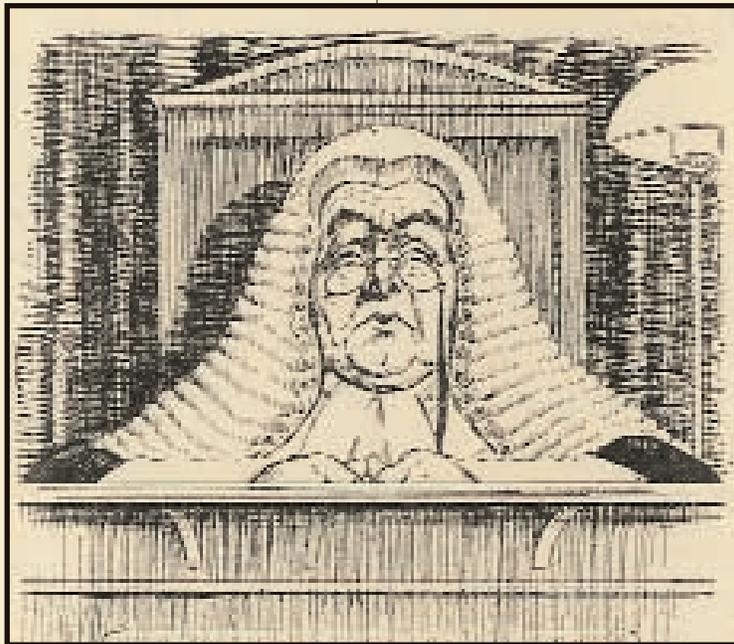
doesn't hunt or fish—he likes to look at the animals, not kill them."

Does this soft touch extend to counsel presenting oral arguments? And will serving as Chief Judge do anything to mute Judge Easterbrook's style of questioning? Arguing counsel who have graded the judges, while praising Easterbrook's knowledge, intellect, and opinion-writing skills, have sometimes stated that he can be hard-nosed and demanding in argument. Is the Judge guilty as charged?

Those who do not appear regularly before the Seventh Circuit would do well to read Judge Easterbrook's comments on oral argument in the August 2, 2004 interview by Howard Bashman, <http://howappealing.law.com/20q>. He makes the point there, which the other Judges of the Court undoubtedly

endorse as well, that counsel cannot expect to give a speech, but must rather be prepared to participate in a conversation, guided firmly by the judges.

Those planning to give an uninterrupted presentation should check their argument outline at the door. Lawyers can serve their clients best by boning up on the case in every respect to prepare for the questions that are sure to come. And they should not be surprised if the interrogation is unceasing, exhausting all of their allotted time, as often occurs in the Supreme Court.



Judge Easterbrook no doubt has strong opinions. After all, he has now been on the Court of Appeals for more than twenty years, and as Justice Frankfurter once observed, "weak characters ought not to be judges." No judge who studies the briefs and the record comes to oral argument without impressions about the case. But as Judge Easterbrook states in his interview, a well prepared lawyer can show him what is wrong with those first impressions and help his or her client in the process. This same interview contains valuable advice on preparation of a brief for the Seventh Circuit to comply with its numerous rules—among the most important suggestions is that counsel send a draft of the brief to the clerk for inspection before the filing date to assure compliance with all governing protocols.



A Portrait of the Next Chief

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Is there anything the Seventh Circuit can do to address concerns of arguing counsel that the flood of tough questions and the limited time for argument preclude an adequate presentation of their clients' position? Here are three suggestions for the next Chief:

Judge Easterbrook has indicated that on some occasions a post-argument letter or memorandum addressing a difficult question raised during argument may be of assistance to the Court. Arguing counsel do not know when such a submission would be of assistance to the Court and when it would be an undue burden. We realize that nothing is more vexatious than a lawyer who keeps filing paper outside the governing rules. We suggest a general rule allowing submission of a 500 word letter, within 48 hours of argument, and a response within the next 48 hours, similarly limited. If these materials are of no use to the panel, they can be placed in the circular file.

An old tradition of the Supreme Court, largely abandoned during the years of Chief Justice Rehnquist but now revived under Chief Justice Roberts, allows arguing counsel to address the Court for a minute or two before the deluge of questions begins. The advantage of such a short interlude of silence is that arguing counsel, after extensive preparations, may have additional useful insights that cut through the detail of the briefs and which would be of value to the Court if time permitted their expression. Of course, this indulgence always depended on the Court's needs and in some cases was not observed, even in the leisurely days of 60 minute oral arguments. When another Justice jumped in immediately with a host of questions, Justice Holmes was overheard to say: "Damn it, I want to hear the argument."

Last but not least, we hope the Seventh Circuit will harmonize views within the Court on amicus practice. At the moment, the Seventh Circuit has led practitioners to believe that amicus briefs are a waste of money and a waste of time, with several well known opinions of motions judges striking these briefs. Judge Easterbrook has stated that while he disapproves repetitive amicus briefs, those expressing an important and independent perspective with new and helpful analysis should be permitted. In this respect, Judge Easterbrook is in tune with the views of the Supreme Court and most other circuits. We believe that amicus briefs can perform an important and valuable function for the development of the law, as well as allowing persons whose interests may be affected by the rule of law under consideration to have their views heard by the

decision makers, and would hope to see the Court relax its current negative views on this point. John Paul Stevens, our Circuit Justice, has asked us to pass along to Judge Easterbrook his congratulations in anticipation of his succeeding Chief Judge Flaum later this year:

"My respect and admiration for my friend Frank Easterbrook dates back to my early years on the Court when he was in the Solicitor General's office arguing cases on behalf of the United States. Potter Stewart could and did ask difficult and penetrating questions. Frank never hesitated in giving a straightforward and honest answer even when he was fully conscious of the fact that the answer might not be the one that Potter hoped to hear. Frank has maintained his characteristic brilliance and intellectual honesty throughout his years as a Circuit Judge and will, I am confident, make an excellent Chief Judge when he succeeds Joel Flaum in that important office."

Justice Antonin Scalia, a former member of the faculty at the University of Chicago School of Law, adds the following:

"I am pleased to congratulate Judge Easterbrook (or, if he prefers, to commiserate with Judge Easterbrook) on his forthcoming elevation to Chief Judge of the United States Court of Appeals for the Seventh Circuit. He has been a good friend and a confidant for many years, since we were colleagues together on the faculty of the University of Chicago Law School. I learned much from him then, and have learned much from his clear and trenchant opinions since then. My pleasure at his elevation might be mingled with regret if I thought there were the slightest chance that his new administrative responsibilities would cause him to cut back on his case production or abridge his scholarship. Knowing Frank, I am not worried."

Finally, Judge Levin Campbell offers his congratulations and recollections of the law clerk who served with him three decades ago:

"I am delighted to congratulate my former law clerk, Judge Frank Easterbrook, upon his forthcoming elevation to the post of Chief Judge of the Seventh Circuit. Back in 1973-1974, when he clerked for me, Frank was a formidable law clerk who not only followed the Supreme Court's every move, but could cite from memory to the relevant new opinions from every circuit court in the nation. While entirely respectful, he did not hesitate to let me know what he thought on most topics, and his thoughts were always cogent and stimulating. He is one of today's outstanding judges and legal minds. This November he will become the able chief of a most distinguished circuit."



Hail *to the* Chiefs

By Jeffrey Cole ¹

In a recent interview, Justice Stevens, when reminded of the extraordinary fact that only nine Justices in the history of the Supreme Court have served longer than he, remarked: “Chief Justice Roberts very graciously mentioned that a few days ago from the bench. I hadn’t thought about it that much, but whenever anybody brings that up, I find it amazing. Time just goes by so fast.” So it is for those of us who have grown up professionally with Chuck Kocoras and Jim Holderman. It is hard to imagine that they have been judges of the United States for 26 and 21 years respectively. Their careers have so many parallels that it is altogether fitting that on July 1st Judge Holderman will become the Chief Judge of the United States District Court for the Northern District of Illinois, and Chief Judge Kocoras will assume senior status, after four years as Chief Judge.

The decision to step down was, as Judge Kocoras has publicly acknowledged, an exceedingly difficult one, made only after much reflection and consultation with his family. In a moving and elegiac speech at a Federal Bar Association Luncheon in April where he delivered his Annual State of the Court Address, he explained how anguishing the decision was and paid tribute to Judge Joan Lefkow, whose dignity, strength and grace, he said, were a source of inspiration and sustenance for him.

In 1971, after graduating as Valedictorian of his DePaul Law School class, Chuck Kocoras became an Assistant United States Attorney in Chicago. By the time he left six years later, he had become one of the office’s outstanding trial attorneys. He was the recipient of Department of Justice’s Special Commendation Award for Outstanding Service in 1974, and in 1976 he received the Department’s Director’s Award for Superior Performance as an Assistant United States Attorney.

In 1977, Tom Sullivan became the U.S. Attorney for the Northern District of Illinois. In later years, he would say that one of the smartest things he ever did was to follow his priest-brother’s advice that when a new pastor arrives in a parish he should not change the altar for a year – so as not to offend the ladies in the Altar and Rosary Society. Complying with that admonition, Tom retained Chuck as First Assistant until Chuck left in November 1977 to become Chairman of the Illinois Commerce Commission. Tom has described Chuck as his “anchor,” and he has praised his uncommon wisdom and common sense approach. Decisions, he said, were never made by Chuck on the basis of what was expedient, but always on the basis of what was right and what was principled.

Following his departure in January 1979 from the Commerce Commission, there was a brief period in private practice with Stone, McGuire, Benjamin & Kocoras. In 1980, Chuck was nominated by President Carter to be a United States District Judge for the Northern District of Illinois.

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¹ Jeffrey Cole is a United States Magistrate Judge in Chicago and is the Editor of *The Circuit Rider*.



Hail to the Chiefs

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The next twenty six years were a fulfillment of all of the promise of his earlier years in public service. For more than three decades he has been Adjunct Professor at John Marshall Law School teaching trial advocacy and related courses. In 1999 he was awarded an Honorary Degree of Doctor of Laws by the John Marshall Law School.

Judge Kocoras is widely viewed as an outstanding judge and an even more outstanding person. Perhaps as good a test of character as any for a judge is the way they are viewed by their clerks over time. As former Assistant United States Attorney, David Hoffman put it in his lovely tribute to Chief Justice Rehnquist, for whom he clerked in 1996: "Family is the right word, for the bond that forms between judge and clerks during the short but intense time period is unique and life-long." *In Memory of the Chief*, 32 LITIGATION 55 (Winter 2006). What was remarkable about the assessments of Judge Kocoras by his clerks was not merely their consistency, but their almost reverential quality.

Each spoke about the Judge's keen intellect, common sense, compassion, fairness, loyalty, integrity and even-handedness and his irrepressible wit, which was surpassed only by his love of the federal judiciary and his esteem for his judicial colleagues, whom he cherished as family. But the most telling comments were of a deeply personal nature. Illustrative is that of Ellen Robbins, for whom the passage of fifteen years had not dulled in the slightest her memory of the Judge: "His passion for the law, the judiciary and for life in general are qualities that I will always admire. I consider myself so fortunate to have had such a tremendous role model, who showed me how to earn the respect of your peers, superiors and subordinates, how to deal with adversity, how to be a staunch advocate, yet remain cordial, and how to keep priorities in line. Judge Kocoras's guidance and tutelage have made me both the lawyer and the person that I am today. It was a privilege to clerk for Judge Kocoras nearly 15 years ago, and it is an even greater privilege today to consider him a friend."

Matt Basil also said he considered Judge Kocoras "not only a mentor, but also a friend." He felt that his year with Judge Kocoras, perhaps most of all, taught him "to be a better person. When our year of clerking concluded, my co-clerk, Sam Cole, and I presented Judge Kocoras with a plaque that included the following quote from Thomas Edison: 'You can easily judge the character of a man by how he treats those who can do nothing for him or to him.' Sam and I thought that these words appropriately summarized one of Judge Kocoras' more endearing characteristics." Sam Cole, now an Assistant

U.S. Attorney in Chicago, echoed these sentiments and said, "he made his entire chambers feel like a part of his family. I know he made a lot of people feel the same way because it seemed like every day there were people coming to visit the Judge, showing off new babies or growing kids. And when my children came to visit me downtown since I've been at the U.S. Attorney's Office, we headed straight up to chambers to visit the Judge. It was an honor to work for Judge Kocoras and learn from him, and I am absolutely a better person and attorney because of that year."

One of my own experiences with Judge Kocoras proves how perfect a gift the plaque was. Many years ago Judge Kocoras had sentenced a man named John Cappas to almost forty years in jail for very serious drug offenses. I was hired to represent John in the Court of Appeals. The only question presented dealt with sentencing, and the Court of Appeals reversed and sent the case back for a new sentencing hearing. Ultimately, Judge Kocoras reduced the sentence to seventeen years—an extraordinary act of introspection and humanity in itself. As a result, Mr. Cappas did not die in jail and is a free man today, leading a productive life. But the real significance of this story lies in its aftermath. Cappas began writing to Judge Kocoras on a personal level and over time the two actually developed a relationship. When Cappas received his degree from the University of Wisconsin *in prison*, Judge Kocoras drove four hours to Oxford to attend the graduation.

The Chief's long time friends, Dan Webb and Jim Richmond, have aptly summarized what his service has meant to the court: "Judge Kocoras' service as the Chief Judge has greatly enriched an already outstanding court, and his legacy will be long remembered."

Chief Judge Kocoras' successor comes remarkably well-equipped for his new job. After graduating from the University of Illinois College of Law in 1971, where he was the Managing Editor of the Law Review, Jim Holderman clerked for Judge Hanson in the Northern District of Iowa. There followed a stint as an Assistant United States Attorney, serving with Chuck Kocoras and with a striking group of young lawyers, including Dan Webb, Rob Martin, Tony Valukas, Scott Turov, and Ty Fahner. After leaving the Office in 1978, he became a partner at Sonnenschein, Nath & Rosenthal until his appointment by President Reagan in 1985.

He has given freely of his time to serve as an Adjunct Professor at the University of Chicago Law School, John Marshall Law School, Chicago-Kent College of Law and Northwestern University School of Law.



Letter from the President

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Each judge has his or her own staff, administrative assistants, minute clerks, court reporters, law clerks, and together they operate each Court. All of them contribute in very practical, real and meaningful ways to the efficient operation of our Courts and the system of justice. Thank You!

The U.S. Marshall's office provides security for our judges and help keep our courthouse secure and safe. Thank You!

It is not only the judges and the court personnel who operate the judicial machinery who make our system of justice strong; it is also the lawyers who practice in our courts: the lawyers who work for the government, the lawyers who work for defendants in criminal matters, the civil lawyers who handle business disputes, employment actions, civil rights claims, injunctions and tort claims for both plaintiffs and defendants. We all have a role to play, and for the most part we work hard, professionally and competently, to serve our clients and to participate in the bigger picture of serving the law. To the lawyers also, who respect the system, respect the law, respect the courts, and respect each other: Thank You!

The jurors also play a key role in the administration of justice and in the participation of our democracy. This is not an easy role, and yet it is very important. To the jurors, who serve in our Federal Courts who give up parts of their daily lives to listen, to decide and to participate: Thank You!

We are all in this together!

I hope to see you at the Annual Meeting. It will be a great couple of days.

Hail to the Chiefs

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Matt Crowl, one of the Judge's former law clerks and now First Deputy Chief of Staff to Mayor Daley, said that the Judge "is a gifted teacher" whose students routinely state that he was the best professor the student had in law school. He has been a speaker at numerous judicial and bar association seminars, both nationally and internationally, and has also been a long-standing faculty member at trial advocacy programs sponsored by the National Institute for Trial Advocacy.

The Judge has been an important part of the International Intellectual Property Law summer program since it began in 2002. He has been honored with the "Distinguished Judicial Service Award" by the Intellectual Property Law Association of Chicago for exemplary service in continuing legal education. Judge Holderman has taught an intensive "Intellectual Property Trial Advocacy" course with his wife, Adjunct Professor Paula Holderman, at the University of Illinois College of Law.

Consistent with his love of teaching, Judge Holderman is a frequent contributor to law reviews and other legal publications. His most recent article is *Section 1927 Sanctions and the Split Among the Circuits*, 32 LITIGATION 44 (Fall 2005).

Judge Holderman served with Jim Figliulo, President of the Seventh Circuit Bar Association, and Judge Diane Sykes as one of the Co-Chairs of the Seventh Circuit American Jury Project Commission, which has instituted an important pilot program to test certain jury trial innovations. That program is ongoing and promises to alter traditional ways of handling juries. President Figliulo has praised Judge Holderman's leadership on the Project and has said that that leadership has been a primary ingredient in the success the project has enjoyed. Judge Holderman clearly has justifiably earned the unqualified respect of all of the judges at all levels of the Circuit, President Figliulo stressed. Finally, all are agreed that the implementation of the electronic filing system in the Northern District of Illinois could not have been accomplished without Judge Holderman's active oversight and intensive involvement.

No judge has been more devoted to the proper outcome of cases on the merits and to the overall administration of justice in the federal courts than has Judge Holderman. If he has a perceived fault – and most discerning observers would deem it a great virtue – it is an unwillingness to compromise his exacting standards of excellence. If his demands of the lawyers who appear before him are exacting, they are no more so than the demands he places on himself.

But all of this does not begin to convey an accurate sense of the kind of individual Jim Holderman is – of the generosity of spirit that is manifested in ways great and small and not only to those of us who have the privilege of daily association with him.



Hail to the Chiefs

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Matt Crowl recalled that the Judge never forgot important occasions in the lives of friends and colleagues, and that each occasion was remembered with an appropriate card, note, letter or call. A recent incident typifies the kind of personal concern Judge Holderman has for others. In 2004, Judge Gettleman's son, a journalist with the New York Times, was kidnaped by insurgents in Iraq (happily for only a brief period). It was Judge Holderman who immediately called and volunteered to take over Judge Gettleman's judicial duties for as long as necessary.

As with Chief Judge Kocoras, Judge Holderman's clerks prized their time with him, and each felt that he or she was infinitely richer and better for the experience. Joannie Wei, Art Gunther and Susan Haling's memories typify those of all of the Judge's clerks. Each was impressed with Judge Holderman's tireless work ethic and his dedication to the legal profession and to public service. "He continues to be our great role model" was a commonly expressed sentiment. All his clerks fondly recalled that the Judge "never missed an opportunity to teach us," and each knew the Judge derived great satisfaction from helping shape them into successful lawyers. But their fondest memories were of the care and concern Judge Holderman had for others. Matt Bettenhausen, who is now the Director of the Office of Homeland Security for Governor Schwarzenegger, said that his two-year "clerkship with the Judge was a fantastic experience." He said that the Judge was "extraordinarily intelligent with a quick and nimble mind," and that he was "unfailing in looking after all of us both personally and professionally."

In reflecting on his long association with Chief Judge Kocoras and Judge Holderman, Scott Turow had this to say:

"I first met both Chief Judge Kocoras and Chief Judge-designate Holderman at virtually the same moment, when I arrived in June, 1977 to begin my stint as an intern in the U.S. Attorney's Office. By whatever happy coincidence, I was assigned to do research for both of them within days of when I started. My first exposure to Judge Kocoras involved sitting in on a meeting with the Judge, who was then First Assistant, and a famous and highly paid defense lawyer, who was cheerfully complaining about the conduct of an AUSA in a corruption trial. Even I who knew next to nothing realized that the complaints were poppycock, and I was impressed by the patience and unflappability Chuck, as we then called him, showed. I learned a lot about how to be a prosecutor from that one meeting. Over the years, the same evenness of

judgment and demeanor has remained a hallmark of Judge Kocoras's performance on the bench. I would note only one exception. I tried a lengthy advance-fee fraud case in front of him. It was one of those cases that gives rise to the saying about frauds that there are no victims. It was hard to believe that anybody could have been gulled by the preposterous behavior of the defendant con men. One of our witnesses solemnly described how he was taken in by one of the co-conspirators who, during the course of a meeting, crawled under an antique table and thereafter disappeared. Everybody in the courtroom lost it—lawyers, jurors, even the judge.

When I looked at the bench, Judge Kocoras was gone, hiding, ironically, under it. The only sign of him was his hand, groping along the bench trying to find the Kleenex box, so he could wipe away the tears of laughter.

"My connection to Judge Holderman is even closer. After I worked for him, I found myself, years later, after he'd left the office, as the prosecutor trying to gain access to his client, a Swiss national, whose presence we were compelling under the Swiss-American Mutual Cooperation Treaty on Criminal Matters. It was a unique case, and we had a good and respectful time working through the complexities of a treaty that had never before been utilized in the Northern District of Illinois. Jim did a great job for his client, of whom I was deeply suspicious, and who proved to be completely innocent. Years later, I was lucky enough to try to fill Jim's shoes at Sonnenschein, when he left to go on the bench. Because Judge Holderman would not hear any Sonnenschein cases for his first years on the bench, and because my other life kicked in during that period, my appearances in his courtroom have been rare. But I did represent a lawyer who was called to testify as the victim of a crime committed by a client. The contours of the attorney-client privilege in that context are often murky, and I was deeply impressed by the Judge's unsparing respect for the privilege, and for the lawyer caught in the unenviable dilemma of duty as a citizen and witness, and a continuing systemic duty to his client."

One can be assured of little in life. But there can be no dissent from Scott Turow's prediction for Judge Holderman: "He will be a great Chief."



Judge Joan Lefkow *and the*
2006 Thomas E. Fairchild Lecture:

A Judge's Legacy

By Jeffrey Cole

Thomas E. Fairchild is one of the most respected figures in the history of the Seventh Circuit. Thus, it was not at all surprising that almost twenty years ago, as a tribute to the Judge, an annual lectureship was initiated by his law clerks to be delivered at his alma mater, the University of Wisconsin Law School. It was envisioned that the Thomas E. Fairchild Lecture would be delivered by a distinguished member of the legal profession to speak on a topic of importance to the profession. It was fitting that the inaugural lecture in 1988, "A Judge's Use Of History," was delivered by Justice John Paul Stevens, who had served with Judge Fairchild on the Seventh Circuit from 1970 to 1975.

In the intervening years, the Lecture has been delivered by a host of luminaries, including Justice Sandra Day O'Connor, Judges Harry Edwards (of the D.C. Circuit), Reena Raggi (of the Second Circuit), Mary Schroeder (of the Ninth Circuit), Shirley Abrahamson (of the Wisconsin Supreme Court), Professors Stephen Bright, Mark Galanter, David Ruder and Elizabeth Warren, and Senator Russ Feingold, Governor Patrick Lucy, Kenneth Starr, Lawrence Walsh, and Sol Linowitz.

It was against this backdrop that Judge Joan Humphrey Lefkow of the United States District Court for the Northern District of Illinois was asked to deliver the 2006 Fairchild Lecture. For many reasons, she was the perfect choice. She had clerked for Judge Fairchild during what was perhaps the most tumultuous term in the Court's history, during which he authored the Chicago Seven conspiracy case, *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972) – the most well known opinion of his career and one of two opinions that he, himself, characterized as the most important he had ever written.

Judge Lefkow's vision for the 2006 Lecture was different from those of previous lecturers, many of whom dealt with academic themes or addressed issues pertaining to the work of appellate courts, the work that constituted the larger portion of Judge Fairchild's career. "The Judicial Function And The Elusive Goal Of Principled Decision Making," "The Court Of Appeals And The Future Of The Federal Judiciary" and "The Development Of Legal Doctrine Through Amicus Participation" were but three of the many scholarly themes. Other Lectures, although perhaps less academic, were also highly specialized, such as "Appellate Justice Fairness Or Formulas," "The Role Of Social Science In Shaping The Law," "The Shelf Life Of Justice Hugo L. Black" and "The Role Of The District Courts." And of course, there were lectures dealing with "The Moment Of Truth For The Legal Profession," "Upholding An Oath To The Constitution: A Legislator's Responsibilities," and "The Future Of The Independent Counsel Statute."

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Judge Lefkow's approach to the 2006 Lecture was quite different and was, as she said at the opening of her Lecture, quite personal. She wanted to speak about Tom Fairchild, the man – lawyer, politician, judge, mentor and friend. She expressed the hope – and it was one that would be realized beyond her fondest expectations – that through the words of Judge Fairchild, himself, and through the words of his former clerks, she could illustrate how the Judge had affected the character and values of so many people in so many fields of endeavor. Her theme, quite appropriately, was “Thomas E. Fairchild, A Judge's Legacy.”

Born on Christmas, 1912 in Milwaukee, Wisconsin, young Tommy Fairchild had politics in his very blood. At the age of 12, according to his own memories that are part of the oral history of Judge Fairchild as told to Collins T. Fitzpatrick, the Court's Circuit Executive, he ran campaign tables for Coolidge and Dawes on the front lawn of his family home. In 1932, at the age of 20, he was a member of the Princeton Young Republicans, playing in a makeshift band and making speeches for Herbert Hoover out of the back of a truck.

After receiving his A.B. from Cornell University in 1934, he entered law school at University of Wisconsin Law School. Judge Lefkow paused to remind those in attendance that the tuition at that time was \$37.50 a semester. With impeccable timing, Judge Lefkow waited for the gasps and laughter to die down before moving on to discuss the Judge's involvement with the Progressive Movement and his marriage in 1937 to his beloved Eleanor. It was at this point that Judge Lefkow's stage managing technique came into play: Jed Rohrer, a law student at the University, would, at appropriate times, begin speaking in the Judge's own words taken from the Oral History or from then contemporaneous newspaper accounts. Later in Judge Lefkow's presentation, Jordan Russell, another law student, would speak for certain of the Judge's former clerks, who had

contributed their thoughts and memories for inclusion in the Lecture.

Here is an example: Judge Lefkow noted that following graduation from law school in 1937, Tom Fairchild clerked for his father, a Justice of the Wisconsin Supreme Court. There immediately followed an observation by Judge Fairchild (through Jed Rohrer taken from the Oral History) about his father's insistence that he go to work for a small firm in Portage. This was immediately followed by the words of former clerk, Ann Fisher (as narrated by Jordan Russell) recalling a memorable incident of her clerkship:



I still remember the morning early in my second year of clerking, when the Judge came into my office to tell me the analysis that had come to him while he was shaving that morning. He beamed . . . he was proud. He was excited. (And, not incidentally, of course, he was right). I think it was in that moment that it all came together. There was something beyond facts and the law, beyond substance and procedure. There was the Law – with a capital ‘L.’”

Judge Lefkow then took the audience through Fairchild's wartime service with the U.S. Office of Price Administration through his post-war law practice in Milwaukee at the firm now known as Foley & Lardner. She recounted how, in 1948, he was elected Attorney General of Wisconsin and how he actually rode with President and Mrs. Truman on the campaign train. As Judge Lefkow said, what had begun as a largely symbolic campaign had turned into an overwhelming victory. Tom Fairchild was not only the only winner on the Democratic ticket, the 622,000 votes he received was the highest number any Democrat had ever received in Wisconsin for state office. This was quite an accomplishment for a fledgling politician who had only been able to campaign on evenings and weekends because of his day job at the law firm. With characteristic humility, Fairchild said, “it was a lucky win.”

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Despite all of the good he did as Attorney General, his bid for the office of United States Senator in 1950 foundered on his unpopular decision to outlaw "Stop the Music," a radio show awarding big prizes. President Truman appointed him as United States Attorney for the Western District of Wisconsin in 1951. A year later, he resigned and ran unsuccessfully against Joseph McCarthy for the United States Senate, convinced, as Judge Lefkow said, that "the communist-baiting tactics of junior Senator Joseph R. McCarthy. . . had to be defeated." As Judge Fairchild recalled it, he "had no money, and would just as soon not have run but for the demands of conscience."

The newspapers of the day reported that while McCarthy had access to unlimited campaign funds, Fairchild's campaign had been one of the most poorly financed in Wisconsin history. And if that were not enough, there was Fairchild's "serious and mild-mannered temperament," which at least one paper thought did not command the requisite crowd appeal for a successful candidate. Ever true to his own sense of rectitude, Fairchild ran his campaign not focusing on McCarthyism but on what he stood for and what the people could expect from him. David Walther, a former clerk, recalled that the courage of principle Fairchild showed by putting his career at risk and challenging McCarthy continues to provide a personal and political model.

The Senate's loss – and as it turned out, the country's – was the judiciary's gain, and in April 1956 he was elected to the Wisconsin Supreme Court. Former Clerk, David Walther, recalled that it was not until 1960 that the Wisconsin legislature, for the first time, established law clerks for Supreme Court Justices. For Judge Fairchild, the most significant case of his career on the Supreme Court was his dissent in *Ross v. Ebert*, 275 Wis. 523 (1957), which involved racial discrimination by a union. For Judge Fairchild, the crucial question was whether members of a union are the sole arbiters of those with whom they desire to associate and can exclude applicants against whom the members have no grievance except that the applicants belong to a different race or creed. Michael Zimmer, another of the Judge's clerks, commented that the *Ross* dissent was a perfect example of the seeming effortless of Judge Fairchild's opinions: "the words just leap off the page in perfect order. Each word is exactly the right one. No extra words interrupt the logical flow or cloud the meaning." But the effortless is illusory; it is the product of hard work.

The *Ross* dissent was so compelling that it prompted an appreciative letter from former President Truman, who came up with this timeless insight: "As you know from long experience, when certain organizations become powerful they do things they otherwise would never have done under any circumstances. It is often the case that when the underdog gets on top, he's a darn site meaner than his predecessor ever was."

In 1966 President Johnson appointed Judge Fairchild to the Seventh Circuit, where he was Chief Judge from 1975 to 1981. The Judge's first office was tucked away along the south wall of the building that Judge Stadtmueller has described as "Milwaukee's crown jewel" – a striking, Romanesque, five-story building built in 1900 as Milwaukee's Post Office, Court and Customs House. Apart from the now almost impossible to imagine exercise of actually reading cases in hard cover volumes, Judge Fairchild actually wrote his own opinions on white legal tablets, recalled Martha Olson, Bill Connelly and Mike Zimmer. Draft after draft would be produced until the Judge was satisfied and the opinion actually complied with the rules of English, which the Judge recalled he had been painstakingly taught by his high school English teacher, Mary Howe. John Skilton's memory of those opinions was vivid: "his opinions were constrained by the record: they were short, crisp and directed solely at the issues that had to be addressed and resolved in order to dispose of the appeal. No humor; no fluff; no hyperbole; no dicta – and no shots at attorneys." The last point – perhaps virtue is a better word – was underscored by Judge Lefkow.

Judge Fairchild never doubted that the most consequential opinion of his career on the Seventh Circuit was his opinion for the Court in *United States v. Dellinger*. The *Dellinger* case grew out of the riots in Chicago during the 1968 Democratic National Convention. Those confrontations led to the indictment under the then recently enacted Anti-Riot Act of 1968, to a trial that was the subject of intense, national attention, and ultimately to convictions, and an appellate court opinion that reversed the convictions based upon the conduct of the district judge. It probably does not miss the mark by much to say that few cases in history provoked so much controversy and so much national attention. The trial transcript was more than 22,000 pages, and the government's four volume brief ran almost two thousand pages. Indeed, one whole volume spanning hundreds of pages was devoted to the conduct of the defendants in the courtroom and their interactions with Judge Julius Hoffman. The defendants' brief ran some 500 pages.

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It is a little-known fact that Otto Kerner was originally on the *Dellinger* panel, along with Judges Pell and Cummings. When Kerner was indicted by a federal grand jury in Chicago, Judge Fairchild replaced him on the panel. Judge Lefkow and her two co-clerks worked for more than six months on the case. Judge Fairchild worked as tirelessly as they. As Judge Lefkow recounted, "Judge Fairchild read [the 22,000 page record], page after page, day after day, week after week, until he was finished." It was at this point in the Lecture that Janet Lindgren (a former clerk) floated this priceless epigram: "It takes longer to write an opinion when you take the record seriously." Lest the audience think that Judge Fairchild's attentiveness in *Dellinger* was a function of the case's celebrity, Judge Lefkow and all his clerks recalled that that was just the way he functioned in all of his cases. It was that kind of faithful attention to the facts that made him the kind of judge he was and accounted for his willingness to change early and tentative views about a case if the facts led to a different conclusion.

The Lecture ended with the question: "Do you think the Judge will look at all we have written about what we learned from him and wonder, 'Did I really do that?'" With impeccable timing and perfect pitch, Judge Lefkow gave the only answer the record of the Judge's life allowed: "Judge Fairchild – YOU DID!" In the last analysis, as Judge Lefkow recognized, this is Judge Fairchild's legacy, and it is the one that matters most. All else is ephemeral. It is of no consequence if no one remembers the *Ross* dissent, or even the opinion in *Dellinger*, which has lost most (perhaps all) of its significance except to historians and those few who were actively involved in the case. What is important and what lingers and endures is the never to be effaced example that Judge Fairchild set and which has influenced the lives of so many who, in turn, have affected the lives of so many more. That is the message and the genius of Judge Lefkow's Lecture, and it is surely the greatness of Judge Fairchild's life.¹

¹ Judge Lefkow's Lecture in its entirety will appear in an upcoming issue of the *University of Wisconsin Law Review*.

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 meetings held during the Annual Conference, which are held in the location of that particular year's conference. Meetings will be held on:

Saturday, September 9, 2006

Saturday, December 2, 2006

All meetings will be held at the East bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM



A View from the Trenches

Four “All American” Jury Concepts

By Alan Salpeter and Dana Douglas ¹

Several months have passed since the beginning on the Seventh Circuit Jury Project. It has become clear that several of the test concepts are valuable tools that can be used effectively by judges and trial lawyers during jury trials and will, in our judgment, make for better jury trials. In particular, we see the Questionnaires, Preliminary Instructions, Jury Questions and Interim Statements as worthy measures for making jury trials more understandable for jurors and more efficient for courts, litigants and counsel. Here is our take on these four concepts, which continue to be tested in the district courts of the Seventh Circuit:

Questionnaires

From the trial lawyer’s perspective, the use of voir dire questionnaires has two primary advantages: (1) questionnaires lead to the disclosure of additional information by the prospective jurors, and (2) they increase the efficiency of the voir dire process. In the first instance, the use of questionnaires allows jurors an opportunity to disclose sensitive information in written responses to the questionnaire rather than in open court. Obviously, the more information counsel have, the more informed their judgment about the juror and the more informed their challenges, whether for cause or peremptory. Written disclosure should lead to more information being revealed to the parties and the Court. In the second instance, the use of juror questionnaires makes the voir dire process more efficient, by eliminating repetitive voir dire questioning and by focusing on the voir dire on relevant topics. Prospective jurors who cannot serve on a jury can be promptly eliminated from the voir dire process without having to be questioned in open court.

One noteworthy criticism of the use of voir dire questionnaires is that the issuance of the questionnaires puts an additional strain on the Clerks’ Office, which would be used to distribute the questionnaires prior to the voir dire. This issue can be remedied by keeping the questionnaires short and directed only towards pivotal issues that need to be addressed during the voir dire. If the parties keep the questionnaires short, the potential jury pool should be able to answer the questionnaires when they arrive at the courthouse, thus alleviating the burden associated with advance mailing of the questionnaires.

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¹ Alan Salpeter is a partner at Mayer Brown Rowe & Maw in Chicago and has tried more than 70 civil cases to verdict. Dana Douglas is an associate at Mayer Brown Rowe & Maw in Chicago. She clerked for Justice (then Judge) Alito. She recently participated in a jury trial before Judge Amy St. Eve where interim statements were used successfully during the trial. Both Mr. Salpeter and Ms. Douglas have been involved in the Seventh Circuit Jury Project.

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Preliminary Instructions

From the attorneys' perspective, the use of preliminary instructions also is an important tool that can be used to better facilitate decision-making by the jury as well as provide the jury with an explanation of the civil jury trial process. Preliminary instructions should increase the jurors' ability to recall relevant evidence and apply the law to the facts especially if the jurors understand in advance the context in which they will be required to evaluate or analyze the evidence presented during trial.

Recently, in *Federal Ins. Co. v. Arthur Andersen LLP* and *Larry J. Gorrell*, 03 C 1174, Judge St. Eve recommended that the parties agree on the Seventh Circuit Jury Project's preliminary jury instructions. They did so and proposed modifications. Judge St. Eve ultimately decided which preliminary instructions were to be read to the jury, and they were given after the jury was empanelled but before opening statements. No additional instructions were offered during the taking of evidence.

The preliminary instructions given by Judge St. Eve explained the jurors' responsibilities, the role of evidence, and the trial process generally. During the reading of the instructions, the jury appeared to pay close attention. From the lawyers' perspective, the preliminary instructions were useful because the lawyers did not have to address the jury's responsibilities, the way in which the trial was going to progress, or the weight of evidence during opening statements, thereby allowing more time to devote to the substance of the case. Because the instructions were given by Judge St. Eve, they understandably were viewed by the jury as thoroughly credible and as dealing with matters that should be viewed by the jury as significant. While the preliminary instructions likely did not impact the ultimate deliberations, they certainly put the trial process into perspective for the jury. In so doing, they performed an invaluable function in that they made the jury feel more comfortable, more informed and more of an active participant in the process from the very beginning.

Juror Questions

In our view, allowing jurors to ask questions – subject of course to the district court's control and supervision – is a

salutary concept and one that will lead to better trials by having a more enlightened and involved jury. It human nature to want to ask questions and have them answered. Indeed, it would seem intuitive that allowing juror questions would be a welcomed innovation: it would focus their attention on the issues raised during the trial, provide answers to questions, if unanswered, could distract the jury during deliberations and cause them to speculate and to arrive at decisions on issues that should have played no role or a limited role in those deliberations. Moreover, an opportunity to ask questions invites more careful attention and encouraging jurors to actively participate in the case promotes overall involvement and attentiveness. In short, allowing jurors to ask questions promotes a more well-informed jury with a better understanding of the evidence.

Judge Posner has rightly said that it is impossible to crawl into people's minds. Posner, *Overcoming Law*, 276 (1995). By allowing the jury to ask questions, the trial lawyer now has an invaluable means to get a glimpse into the jury's mind and to try to respond to concerns that it has. A clear and complete understanding of what is on the jury's mind and how best to deal with evidentiary gaps is enhanced by jurors' questions. Numerous courts have used juror questions during trial effectively. These courts have found that juror-inspired questions serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, and altering the attorneys to points that require additional clarification. See, e.g. *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992).

And yet, this is perhaps the most controversial of the American jury concepts. Some courts and trial lawyers have been reluctant to permit juror questions because of concerns that they might relate to matters that are inadmissible under the Federal Rules of Evidence or that the parties have chosen as a matter of trial strategy not to make a part of the case. In that event, the court would be required to give some explanation and to refuse to allow the question to be answered. Critics contend that a disappointed questioner – and perhaps the remainder of the jury as well – might feel put-off and that the failure to have answered the question could adversely affect judgment and thereby prejudice one or both parties – and conceivably result in the very speculation in the jury room that the asking of questions was designed, in part, to eradicate. Another criticism rests on notions of efficiency: juror questions will disrupt the flow of the trial and unnecessarily use trial time to deal with inquiries that in the aggregate do not justify the endeavor.

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In our view, the concern regarding unanswered juror questions is easily addressed in advance by instructing the jury that there may be any number of reasons why juror questions may not be answered, and that the jury should not draw any inferences should that occur. The simple asking of a question by a juror whether in writing or orally, does not disrupt in the slightest the decorum in the courtroom, and the efficiency of the trial process is easily maintained by using established procedures for juror questions (i.e., submit them in writing at a break in the trial). Some of the judges in the Northern District of Illinois have allowed jurors to ask questions and have reported no untoward consequences from the practice.

The Seventh Circuit Jury Project recommends that the Court tell the jurors at the beginning of trial that they will be allowed to submit written questions following the conclusion of direct and cross examination of a witness. If, after the court makes the inquiry, there are questions, they should be put in writing and handed to the judge, who will then determine whether the jurors should be sent into the jury room while the attorneys review the questions. Outside the presence of the jury, the judge should read each question for the record and permit the attorneys to object to the scope or content of the questions. The judge will then rule on the objection. If it is not sustained, the witness should be instructed to confine the answer to the precise question. If the objection is sustained, the judge should instruct the jury that evidentiary rules (beyond the control of the parties) prohibit the question and that no significance should be attached to that fact or to the question itself. The attorneys then should be given an opportunity to conduct further examination of the witness limited to the scope of the question.

Interim Statements

We view the use of interim statements during the presentation of evidence as useful – especially during complex or lengthy trials – because they give counsel an opportunity to frame the issues for the jury, to connect with the jury, to contextualize the case before closing arguments, to focus on evidence counsel thinks particularly meaningful, and to provide a preview of what is to come. In addition to explaining the evidence, interim statements also help the jurors to remain focused and encourage counsel to streamline the presentation of evidence.

We recently tested interim statements during a jury trial, again before Judge St. Eve, in *Federal Ins. Co. v. Arthur Andersen LLP and Larry J. Gorrell*, 03 C 1174. We were quick to agree to Judge St. Eve's giving each party the opportunity to give 15 minute interim statements. The parties could allocate their total time in any way they wanted during the trial, so long as the statement came after the conclusion of a witness' testimony. The parties effectively used their 15 minutes to highlight the testimony of key witnesses in the case. One side used its time to underscore the progression of the timeline of events, while the other used its time to sum up the evidence before a weekend break and again after the close of its case-in-chief. It was our sense that overall the jury was receptive to the statements, listened carefully, and took notes of the points raised during the statements. Lawyers for both sides spoke with the jury after the trial, and they said that their understanding of the case was helped by the interim statements.

From the lawyers' perspective, we had the opportunity to more meaningfully gauge our connection with the individual jurors. Since the trial lasted more than two weeks, the interim statement allowed us to explain certain components of the evidence that we thought critical to the case and to highlight the testimony of key witnesses without having to wait until closing arguments. We concluded that the interim statement was beneficial to the whole process.

One of the criticisms of the use of interim statements is that both parties may want to address the jury at the same time, thus creating a conflict. The Seventh Circuit Jury Project has addressed this issue by providing that an attorney can make a statement only when that attorney "has the floor"-- i.e., before or after questioning of a witness. Under this framework, attorneys generally would not have the opportunity to speak at the same time -- except for the end of the week or at the beginning of the week. In a situation where one attorney wants to summarize direct testimony immediately before the opposing party previews its cross examination of the same witness, the lawyer who just finished direct examination should be allowed to address the jury first, then the opposing counsel should proceed. In this situation, the intention would be that the second speaker would not argue against the first speaker, but would only preview the upcoming cross examination testimony.

The ultimate goal of the American Jury Project is to provide for better jury trials for everyone involved in civil cases. These four concepts, in our view, do improve the quality of the trial itself.



The Demise of the No-Citation Rules

The Supreme Court Approves Federal Rule of Appellate Procedure 32.1

By Jeffrey Cole

In 1926, Cardozo lamented that “the fecundity of our case law would make Malthus stand aghast. Adherence to precedent was once a steadying force, the guarantee, as it seemed, of stability and certainty. We would not sacrifice any of the brood, and now the spawning progeny, forgetful of our mercy, are rending those who spared them.” *The Growth Of The Law*, 4. In 1926, there were 300 volumes in the first series of the Federal Reporter and 12 in the Second, and both contained the decisions of the district courts as well as the circuit courts of appeals.

Even Cardozo could not have dreamed that today the Federal Reporter would be in its third series and would have grown to over 1,700 volumes and the Federal Supplement, which did not even begin until 1932, would have grown to 1,400 volumes (in two series). The Supreme Court Reports now stand at almost 550 volumes, and the bankruptcy and tax courts – to say nothing of the outpouring of the state courts – are turning out opinions in record numbers. Even this does not begin to tell the whole story. In 1926, volume 12 of the Federal Reporter 2d. was under 1,000 pages even with its combined contents. Volume 436 F.3d is almost 1,400 pages in length, and, of course, does not include district court opinions or the “unpublished opinions” of the courts of appeals, which, according to current statistics, comprise approximately 80% of the courts of appeals’ annual production.

Little wonder that many courts reacted by promulgating rules that sought to reduce the proliferation of published opinions and the citation of unpublished opinions. See Seventh Circuit Rule 53(a). The rules led to what became an acrimonious debate over the permissibility of citing unpublished opinions (the designation, “unpublished,” is somewhat misleading since the opinions are available on electronic databases such as Westlaw and Lexis). The controversy resulted in scores of law review articles. See, e.g., *Symposium: Have We Ceased To Be A Common Law Country? A Conversation On Unpublished, Depublished Withdrawn And Per Curium Opinions*, 62 Wash. & Lee L.Rev. 1597 (2005); Steven Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)?*, 32 Fla.St.U.L.Rev. 1077 (2005); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging In The U.S. Courts*, 56 Stan.L.Rev. 1435 (2004).

Over the past several years, the Advisory Committee on Appellate Rules received over 500 public comments from supporters and opponents of the no-citation rule. The comments came from federal and state judges, attorneys from all segments of the profession, more than two dozen law professors and prominent bar organizations and public interest groups. In September 2005, the U.S. Judicial Conference, the policy-making arm of the federal judiciary, endorsed new Rule 32.1, Federal Rules of Appellate Procedure, that was four years in the making."

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John Roberts and Samuel Alito both served on the Advisory Committee of the Federal Rules of Appellate Procedure when they were Circuit Judges – Judge Alito was the Chairman – and both supported abolition of the no-citation rule. As a member of the Advisory Committee, Judge Roberts had said, “a lawyer ought to be able to tell a court what it has done.”

The debate over the use that can be made of unpublished opinions goes back a number of years and divided the federal judiciary. Unpublished opinions were heralded as a time-saving device for judges facing an explosion of appellate filings. In 2000, Judge Arnold wrote a controversial opinion in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), vacated on other grounds, 235 F.3d 1054 (8th Cir. 2000)(*en banc*) holding that the Eighth Circuit Local Rule that specified that unpublished opinions had no precedential effect was unconstitutional. See Rob Shapiro, Advance Sheet, *Publish or Perish*, 27 LITIGATION 59 (Spring 2001); Rob Shapiro, Advance Sheet, *Case of the Living Dead*, 29 LITIGATION, 63 (Fall 2002).

Perhaps the leading (or at least the most vocal) spokesman for the anti-Rule 32.1 position was Alex Kozinski of the Ninth Circuit, who was characteristically colorful in his phrasing of his support of the no-citation rule. After noting that the unpublished opinions are drafted entirely by law clerks and staff attorneys – which must have come as a surprise to a number of litigants – he went on to say “when the people making the sausage tell you it’s not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway.”

Judge Kozinski’s position was that publication of all opinions would either produce a deterioration in the quality of opinions or impose burdens on appellate judges who were already struggling under constantly increasing case loads. He went so far as to say that removal of the no-citation rule would “have serious adverse consequences for the court and the parties appearing before it.” See Charles L. Babcock, *No-Citation Rules: An Unconstitutional Prior Restraint*, 30 LITIGATION 33 (Summer 2004)(discussing at length Judge Kozinski’s position as well as that of the opposition point of view).

On April 12, 2006, the Supreme Court approved Federal Rule of Appellate Procedure 32.1, which provides that a court cannot prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent” or the like; and issued on or after January 1, 2007. The rule is limited only to federal decisions. A party citing such an opinion that is not available in a publicly accessible electronic database must file and serve a copy with the brief in which it is cited.

The Committee Note stressed that Rule 32.1 “is extremely limited.” It does not require any court to issue an unpublished opinion or forbid it from doing so. It does not deal with the procedures that a court chooses to employ in determining to designate an opinion or order as unpublished. Perhaps most importantly, the Committee emphasized that the new rule “says nothing about what effect a court must give to none of its unpublished opinions or to the unpublished opinions of another court.” Finally, the Committee Note explains that under Rule 32.1(a), a court may not place any restriction on the citation of unpublished opinions, including instructing parties that the citation of unpublished opinions or forbidding parties to cite unpublished opinions when a published opinion addresses the same issue.

Congress has until December 1, 2006 to overturn the Rule.

Currently, only the Second, Seventh, Ninth and Federal Circuits have rules prohibiting their use. The remaining circuits have various rules discouraging their use. The war over unpublished opinions now moves to the states, about half of which have no-citation rules.



Speech Honoring Michael Francis Lefkow

At Northwestern Law School's 3rd Annual Student Funded Public Interest Fellowships (SFPIF) Public Service Benefit Dinner, April 11, 2006

By Carol A. Brook¹

Michael Lefkow had a broad knowledge of a great many things and an uncanny ability to weave that knowledge into his everyday life. For example, he once read *The Canterbury Tales* – in the original Anglo-Saxon – to his children.

This story (apocryphal or not) illustrates how, whether he was discussing politics or religion or law, Michael was able to effortlessly drop in references to – for example! – the Glorious Revolution of 1688 or St. Augustine or the ancient Greeks.

So we will start with the Greek word for virtue – ARETE. For the Greeks, the notion of virtue was tied to the notion of function – a virtuous life was a productive life, a meaningful life, a life well-lived.

Michael's life was the epitome of what the Greeks had in mind.

All of you who have taken the time to come here tonight understand better than anyone the importance of living a virtuous life, and the hardships that come along with it.

You understand the danger of being trapped by a failure of imagination.

The risk of being limited by concerns over looking foolish.

And the fear of feeling the pain that comes from immersing ourselves in the suffering of others.

Michael overcame all of this in his life. He showed us that we can live our lives true to our beliefs.

I know this first-hand. I am lucky to have known Michael as a neighbor, as a colleague and as a friend.

I know that Michael was a pioneer in civil rights work at a time when that work was neither popular nor chic.

In 1966, when Michael graduated from this law school, the War on Poverty had barely begun. Yet, immediately upon his graduation, Michael enlisted in that war, and by the time of his death, he was a four-star general in it.

Continued on page 20

¹ Carol A. Brook is Deputy Director Federal Defender Program in Chicago.

Speech Honoring Michael Francis Lefkow

Continued from page 19

A recent law review article notes that between 1965 and 1974, visionary lawyers like Michael, lawyers who couldn't stand to see injustice go unchallenged, brought 164 cases to the United States Supreme Court.

The article cites only five of those cases by name, one of which is Michael's case, *Townsend v. Swank*, where he convinced the Court it was wrong to deny benefits to students from poor families just because they had the wherewithal (or more likely at the time, the chutzpah) to dare to attend college.



I know that Michael was both erudite and eloquent.

One of the many bonuses I received from being given the honor of preparing this speech, was the opportunity to review so many of Michael's writings, from Christmas letters

to appellate briefs. (But I am not going to read from those Christmas letters here!) His writings make clear what everyone who knew Michael already knows – Michael was not only eloquent, he was witty as well.

Although I only have time to read you one short excerpt – it more than makes the point.

In an article published in 2004, entitled, "Targeted & Tarnished: Salvaging Employees' Jobs," Michael wrote:

"A threatened job is not pleasant, but consider the wisdom of Swiss psychiatrist Carl Jung who said that the right way to wholeness in life is through fateful detours and wrong turnings. Once the employee's job lands, not in a field of dreams, but in a junk yard, the right turn is to find a good lawyer and fight for fairness. Tough-mindedness can triumph over tribulation and termination."

For all of this, I think the most extraordinary thing about Michael was that he lived his ideals in all aspects of his life – just ask anyone – his children's grammar school teachers, his fellow church congregants, friends, colleagues, clients – and most of all, of course, his wonderful daughters and extraordinary wife.

To Michael, public service was not a burden to be borne, but a privilege to be cherished, not a way to practice law, but a way to live his life.

Michael's life is the modern day example of ARETE – proof, as Justice Holmes once said, that, "It is possible to live greatly in the law."



Profile

James P. Brody -Past Association President (1973-1974)

*By Nancy Joseph
Federal Defender Services of Wisconsin
Milwaukee*

Recently, I had the distinct pleasure of speaking to James P. Brody, one of the past presidents of our association. Mr. Brody, known to his friends as “Pat,” retired from the practice of law seventeen years ago. He spoke about his background, practice and tenure as president of the Association.

Born in 1920 to James and Pauline Brody, Mr. Brody grew up in Cashton, Wisconsin. He has been married to Lorraine Brody since 1948. They have four children and nine grandchildren. Mr. Brody joked that his children are split between the worlds of law and medicine: his daughter, Mary and son Michael are both lawyers; his son Pat is a doctor and his daughter Katie is a surgical nurse.

Mr. Brody reminisced about growing up in the small town of Cashton with great fondness. After high school, he attended La Crosse State College, then transferred to UW-Madison for his senior year where he majored in American Institutions (a combination of history, economics and political science) and graduated with a Bachelor of Science degree.

After college, although Mr. Brody had flirted with the idea of studying journalism, he pursued his dream of going to law school. From the outset, he wanted to be a civil trial lawyer. In 1942, after one year of law school, he enlisted in the Navy. Initially, he served as an aerographer (meteorologist). He was then commissioned as an officer, and no longer in aerology, saw combat in the Pacific aboard an attack cargo transport. His year of law school was put to some use; one of his side assignments was to act as prosecutor when needed. Mr. Brody explained that as prosecutor he usually found a way to handle the young sailor’s infractions without taking matters too far.

In 1946, Mr. Brody returned to law school along with many other servicemen who returned from the war. Apprehension about returning to law school after an absence of almost four

years dissipated after his performance on his first exam. He was admitted to Phi Delta Phi and Order of the Coif.

In 1947, Mr. Brody joined Miller, Mack and Fairchild, which eventually became Foley and Lardner, where he remained until his retirement. As a young lawyer at the firm, he did almost everything. Eventually, he joined the litigation team where he had a broad litigation practice including anti-trust law, First Amendment and libel law-representing newspapers, product liability and tax law.

One of the memorable cases that he worked on as a young lawyer was as second-chair in an anti-trust case that was at the time the longest running trial in Milwaukee’s federal court. He also spoke with pride of his work representing one of the defendants in a case where the City of Milwaukee was attempting to take land in the Third Ward for urban renewal. At the time, the Wisconsin Constitution required a jury verdict on the question of necessity in takings cases. The case was one of the last major cases where a jury was asked to make such a finding. When asked whether he won that case, Mr. Brody answered with laughter, “Of course, that’s why I am telling you about it.”

In 1973, Mr. Brody was elected president of Seventh Circuit Bar Association. During his tenure as president, the Association held its first annual meeting in Milwaukee. Wisconsin native and then associate justice Rehnquist was the keynote speaker. The best part of being president and involved in the Association for Mr. Brody was meeting and developing relationships with lawyers from throughout the Circuit.

Presently, though a leg injury has slowed him down a little, Mr. Brody is spending his winters in Arizona, reading history, science, biographies, and whodunits, playing with computers and best of all enjoying his family.



Milwaukee AUSA Aiding Development *of the* Rule of Law in Iraq

By Pamela Pepper¹

Assistant United States Attorney James L. “Jim” Santelle has a demonstrated commitment to public service. He has served as a federal prosecutor for most of his career, working in Milwaukee, Washington D.C. and Grand Rapids. But his public service took an exotic and exciting turn in February of this year, when he began a one-year assignment as a Resident Legal Advisor (“RLA”) in the Republic of Iraq.

On Sunday, February 5, 2006, Jim left Milwaukee, traveled through Chicago and Frankfurt, Germany to Kuwait City. He then traveled by military air transport to the Baghdad International Airport, where he was taken to the International Zone in downtown Baghdad. Since then, he has lived in a small trailer in the Green Zone, surrounded by sandbags and the sound of helicopters delivering injured soldiers to the military hospital nearby.

Jim’s job, while in Iraq, is to help the Iraqi judiciary develop and promote the rule of law in their courtroom processes, and to help the Iraqi law enforcement officials promote the development and rule of law in their investigative units. He provides instruction for judges and law enforcement agencies on things like due process, procedural fairness, investigative techniques and justice-based disposition of charges. He also hopes to have the opportunity to help develop a uniform criminal code that balances the critical work done by law enforcement with the rights of suspects and defendants.

According to an interview with Jim which appeared in the April 8, 2006 edition of the Milwaukee Journal Sentinel, Jim leave the Green Zone for outlying areas a few times a week. He must take with him a helmet, a flak jacket, a security detail and an Arabic translator. He is qualified to fire certain military weapons, but hopes not to be required to do so during his one-year stay. He works 14- and 16-hour days—too much work and too little time make sleep a luxury.

Jim earned his undergraduate degree from Marquette University in 1980, and his law degree from the University of Chicago in 1983. He told the Journal Sentinel that the opportunity to help this phase of Iraqi development was one that does not come along frequently in one’s career. While he did not leave behind a spouse or children, he did leave behind his father—not an easy task. But he indicated that doing the work he is doing is an opportunity to ensure that the lives that have been lost in the Iraq conflict were not lost in vain.

Jim is scheduled to return to the United States on some occasions during his stay, and at the end of his tour of duty will return to Milwaukee as an Assistant U.S. Attorney. The Seventh Circuit Bar wishes Jim a safe and rewarding year and looks forward to welcoming him back in 2007.

¹ Pam Pepper is a Bankruptcy Judge in the Eastern District of Wisconsin.



The United States District Court *for the*
Northern District of Illinois Makes Significant
**Modifications to
Its Local Rules**

By Jeffrey Cole

On April 20, 2006, the District Court in Chicago adopted amendments to five Local Rules and approved a new form for consenting to the jurisdiction of a magistrate judge, which allows, under certain circumstances, a consenting party to withdraw consent. The affected Rules are LR5.2, 5.7, 5.8, 26.2, and 56.1.

LR5.2. Form of Documents Filed

The amendments to LR5.2 were designed to eliminate time spent sorting and separating documents. The Rule now mandates that the judge's paper copy of any filing "shall be bound on the left side and shall include protruding tabs for exhibits." An exhibit list must now be provided for each document that contains more than one exhibit. The Seventh Circuit has repeatedly required that evidence supporting a party's position be clearly identified and readily accessible. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (judges are not like pigs hunting for truffles); *Alexander v. City of South Bend*, 433 F.3d 550, 552 (7th Cir. 2006). Compliance with the Rule will substantially facilitate a judge's review and analysis of a party's submissions.

LR5.7. Filing Cases Under Seal

LR5.7 has added subsection (4) which provides that in addition to the elements that must accompany a written request for filing a complaint under seal as required by subsections (1)-(3), the request must now also contain the attorney's or party's email address if the attorney or party is registered as a Filing User of electronic case filing, the caption of the case, and the title of the document. The amendment to LR5.7 is technical and was designed to ensure that the Rule is in compliance with Amended LR26.2 regarding restricted documents.

LR5.8. Filing Materials Under Seal

The Rule provided that any document to be filed as a restricted or sealed document as defined by LR26.2 must be accompanied by a cover sheet which contains the caption of the case (including the case number), the title "restricted document pursuant to LR26.2," a statement indicating the document is filed as restricted in accordance with an order of court and the date of the order, and the signature of the attorney of record or unrepresented party filing the document (LR5.8 (A)-(D)). The amendment to the Rule provides that in addition to these requirements the cover sheet must now also include the attorney's or party's name and address, including email address if the attorney or party is registered as a Filing User of electronic case filing, the caption of the case, and the title of the document.

Continued on page 24

Modifications to Its Local Rules *Continued from page 23*

The amendment to LR5.8 was designed to ensure that the Rule is in compliance with Amended LR26.2 regarding restricted documents. The amendment is a technical one that amends LR5.8(D).

LR26.2 Restricted Documents

LR26.2 was captioned "Protective Orders." The amendments to LR26.2 are extensive and, according to the Committee Comments, were designed to address two matters of increasing concern under the Rule. The amendment to LR26.2 specifies what is required for filing with the clerk of the district court materials to which access is restricted.

The term "Protective Orders" in the old Rule has been replaced by "Restricted Documents," although the original definition has been maintained: "a document or an exhibit to which access has restricted either by a written order or by a rule." Restricting order is now defined as any order restricting access to one or more documents filed or to be filed with the court. A "sealed document" is a restricted document that the court has directed be maintained within a sealed enclosure such that access to the document requires breaking the seal of the enclosure.

No attorney or party may file a restricted document without prior order of court specifying the particular document or portion that may be filed as restricted. The order must provide the identity of those who are to have access to the documents without further order of court and contain instructions for their disposition following the conclusion of the case. A copy of the restricting order must be included with any document presented for filing as restricted. The amendment also provides for the information that must be included at the time of the filing of the restricted documents,

including the attorney or party's name and address, including email address, the caption of the case, and the title of the document. (LR26.2(b)-(c)).

Subsection (d) is new. It allows the court, at its discretion and as an alternative to the filing requirements in subsection (c), to order the parties to retain copies of all documents provided in discovery containing confidential information under the restricting order. In camera submissions shall be provided in a sealed envelope bearing the prescribed case identifying information and identifying information of the counsel submitting the documents. A redacted copy of all documents containing confidential information shall be filed with the clerk of the court.



Subsections (c), (d), and (e) have been redesignated as (e), (t), and (g) with certain deletions to the provisions of old subsection (c).

Rule 26(c), Federal Rules of Civil Procedure, authorizes protective orders that limit disclosure of material produced in discovery. The pre-amendment version of LR 26.2 allowed for protective orders that identified categories of documents entitled to restricted status, and for parties thereafter to file documents with the clerk's office under seal without

further court order. The amendment to LR 26.2(b) (and the addition of new LR 26.2(c)) changes the Rule by prohibiting any filing under seal of a document that has not been determined by the court to be deserving of protection. In short, parties cannot file briefs or exhibits as "restricted" or "under seal" absent an express, and particularized court order. As before, a judge's courtesy copy may include a copy of the restricted documents.

The amendment to the Rule addresses two matters that were of increasing concern under the old Rule. First, the Seventh Circuit has made clear that care should be exercised when restricting access to materials that are filed with the court, such as an exhibit to a motion.

Modifications to Its Local Rules *Continued from page 24*

While parties may have property or privacy interests that warrant the filing of certain documents under seal, there is a compelling public interest in what goes on at all stages of a judicial proceeding. *Citizens First Nat'l Bank of Princeton v. Cincinnati Insurance Co.*, 178 F.3d 943, 945-946 (7th Cir. 1999). By requiring a particularized court order allowing an under-seal filing, parties will be discouraged from indiscriminately designating documents to be filed under seal. Judicial stewardship of such decisions will ensure that the necessary balance between public and private interests will be maintained.

Second, the amendment addresses the very practical problem of storage of under-seal filings. Indiscriminate filings tax to the breaking point the clerk's storage capacities and impose needless and substantial costs on the court. LR26.2(f) also addresses the burden on the clerk's office by requiring retention of under-seal filings only up to 63 days following the disposition of the case and, in addition, directs that at that end of that period, the clerk simply return the documents under seal to the attorney or party filing them.

The amendment to LR26.2(d) which offers a second option regarding protective orders, stemmed from comments received from the bar. Offering two options for protective orders allows the court to test the proposal in which the parties maintain the sealed records and only provide redacted information to the clerk's office. The general bar compared the proposed procedure to the current procedure for maintaining exhibits and felt this may be a more efficient way of keeping the volume of restricted documents manageable in the clerk's office. Each judge has a web page that allows the judge to post which option will be used in the management of protective orders

LR56.1. Motions for Summary Judgment

The most significant aspect of the amendment to LR56.1 is the prohibition that a movant shall not file more than 80 separately numbered statements of undisputed material fact without prior leave of court. LR56.1 (a)(B). LR56.1 (b)(3)(A) now provides that the concise response to the movant's statement of material fact shall contain "numbered paragraphs, each corresponding to and stating a concise summary of the paragraph to which it is directed." Subsection



(b)(3)(A) and (B) have been redesignated as (b)(3)(B) and (C). The latter subsection now also provides that without leave of court, a respondent to a summary judgment motion shall not file more than 40 separately-numbered statements of additional facts.

The Committee Comments state that LR56.1 was in response to the experience a number of judges in the district have had with frequent inclusions in LR56.1 statements of facts that are unnecessary to the motion and/or are disputed. Thus, it was concluded that in the vast majority of cases, a limit of 80 asserted statements of fact and 40 assertions of additional statements of fact would be more than sufficient to determine whether the case is appropriate for summary disposition. A party may seek leave to file more asserted statements of fact or additional fact, upon a showing that the complexity of the case requires a relaxation of the prescribed limit.

Consent to Magistrate Judge Jurisdiction

Once consent to jurisdiction by a magistrate judge is voluntarily given, it cannot be arbitrarily withdrawn. *Carter v. Sea Land Services, Inc.*, 816 F.2d 1018, 1020 (5th Cir. 1987); *United States v. Neville*, 985 F.2d 992, 1000 (9th Cir. 1993). Questions had arisen from time to time regarding the permissibility of a party withdrawing consent to jurisdiction where there had been a new magistrate judge assigned to the case after the consents were executed. The problem has been solved in the Northern District of Illinois by the use of a new form of consent, which allows any consenting party to withdraw consent within 30 days after a new magistrate judge is assigned. In that event the case will be reassigned to the district judge to whom it was originally assigned.

Seventh Circuit Annual Report Summary

By Gino Agnello¹

One would probably never expect to hear the words “exciting” and “statistic” in the same sentence. Maybe “exciting” is too strong a word, but “interesting” could describe the 2005 judiciary statistics. Whichever words you may choose, last year’s national and Seventh Circuit judiciary caseload numbers were dramatically affected by new legislation, Supreme Court decisions and even the weather.

The Courts of Appeals saw an historic 9% increase in filings nationally (68,473 cases) and a 10% jump to 3296 cases filed in the Seventh Circuit. The *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *United States v. Booker*, 125 S. Ct. 738 (2005) decisions and the Board of Immigration Appeals are the major factors for this increase.

The Seventh Circuit continues to hear oral argument in almost all cases that can be argued, although followed very closely by the DC Circuit (50% argued) and the Second Circuit (49%).

In the nation’s district courts, civil filings dropped 10% (253,273 cases) and criminal case filings were down by 2% (69,575 cases). Civil filings in the Seventh Circuit district courts followed the same pattern as the national numbers but filings were up about 10% in criminal cases. Trials in civil cases were up slightly. (289 trials versus 280 trials in 2004)

For the bankruptcy courts, the “800 pound gorilla” of statistics came as a result of new legislation rather than historic decisions from the Supreme Court. The nation’s bankruptcy courts experienced a tidal wave of new cases in the weeks prior the October 17, 2005 - the start date for the Bankruptcy Abuse Prevention Consumer Protection Act of 2005. Some districts reported thousands of new case filings as compared to the same six week period of 2004.

Continued on page 27

¹ *Gino Agnello is Clerk of the Court.*

Annual Report Summary *Continued from page 26*

For all of last year, bankruptcy filings were up 10% to a new high of 1,782,643 cases nationally and up 14.2% to 187,042 new cases filed in the Seventh Circuit (see fig. 1).

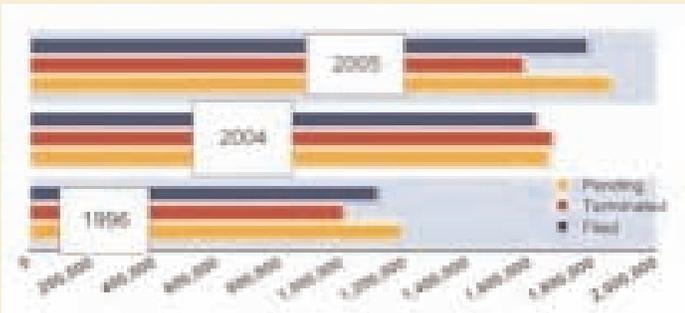


Figure 1

The filing increases due to Blakely/Booker and the BABCPA were not really much of a surprise to anyone, however hurricane Katrina was a factor no one predicted. The courts in the affected areas of Louisiana, Mississippi and Texas did an incredible job working through the disaster as well as effectuating a speedy recovery. The Fifth Circuit Court of Appeals evacuated New Orleans and set up court in Houston within a few weeks of the disaster. The Appellate Court received about 700 to 1000 less appeals in that period than the normal filings of years past. Just a few months later, the Fifth Circuit folks returned to New Orleans and were back to full operation.

Nationally, the average “life span” of a case from the filing in the trial court level through disposition in the appellate court has been twenty-four to thirty-six months. The timing for 2005 was the same with the Seventh Circuit holding steady at about two months less for most civil case types. However in criminal cases the average time is the same as the national average and bankruptcy cases terminate five months faster. (See fig.2)

The timing from notice of appeal to final disposition is about eight to twelve months. From notice of appeal to final disposition the Seventh Circuit takes two months less in all case types except four months less in bankruptcy cases.

After the BAPCPA start date and into 2006 bankruptcy filings seemed to disappear. Now, the bankruptcy courts are slowly starting to see new filings. One year after Booker the appellate court filings are returning to the annual 3-5% average increase we have seen for decades.

The courts of the Seventh Circuit remain productive and continue the slow and steady growth they have seen in the last decade despite the unusual events we experienced in 2005. It remains to be seen whether there will be more criminal sentence appeals after Booker or if bankruptcy filings ever return to the levels of the past.

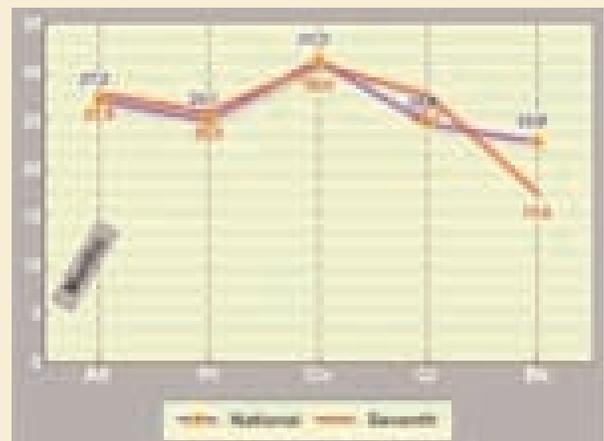


Figure 2



Continuing to Have Trouble Creating PDF Documents?

As many of you know, the Seventh Circuit encourages parties to file copies of their briefs in electronic format, either by uploading the brief online (the preferred method), or by submitting the brief on disk. In order to submit an electronic copy of the brief, however, you must be able to produce the brief in PDF, or “portable document format.” Many practitioners and their staff members remain mystified about how to create PDF documents out of their trusty Word or WordPerfect texts. To help, the Seventh Circuit has provided on its web site information about several different ways to convert documents to PDF. To learn more, log on to www.ca7.uscourts.gov, and click on the “FAQs” link at the bottom of the home page.

Send Us Your E-Mail

The Association is now equipped to be able to provide many services to its members via e-mail. For example, we can send blast e-mails to the membership advertising up-coming events, and we can publish The Circuit Rider electronically.

We are unable to provide you with these services, however, if we don’t have your e-mail address. Please send your e-mail address to changes@7thcircuitbar.org.

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.

Writers Wanted!

The Association publishes The Circuit Rider three to four times a year. We always are looking for articles 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 Editor Jeffrey Cole at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.

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