



# Federally Speaking

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by Barry J. Lipson

*The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column Federally Speaking. The views expressed are those of the author or the persons they are attributed to and are not necessarily the views of the FBA or ACBA.*

## **SHE WILL BE MISSED!**

**THE HONORABLE CAROL LOS MANSMANN.** The Western Pennsylvania Bar, the FBA and the ACBA have lost a dear friend. Society will remember her for her many accomplishments and her exemplary service on the bench of the U.S. Court of Appeals for the Third Circuit. We remember her for her special qualities – friendship, graciousness and a willingness to help. She was an Honorary Member of the Federal Bar Association, a Charter Member of the Advisory Council of the FBA Western Pennsylvania Chapter, and thanks to her, U.S. Supreme Court Justice Sandra Day O'Connor is now an honorary member of our FBA Advisory Council. She was also the one who recommended that judges be ineligible for the coveted FBA Federal Lawyer of the Year Award, as they “already have enough recognition.” At the FBA Western Pennsylvania Chapter re-chartering luncheon, she not only presented then Chief U.S. District Court Judge Donald E. Ziegler with Honorary FBA Membership, but also with a brick from their then demolished Dormont High School, where they had attended school together. And, happily, she recently participated in the awarding by the FBA West Penn Chapter of the **First Carol Los Mansmann Distinguished Public Service Award** to U.S. Supreme Court Justice O'Connor, at ceremonies held at the Duquesne University School of Law. She will be missed!

## **LIBERTY'S CORNER**

**WHO CAN YOU TRUST?** Traditional wisdom says none of the following four assurances can be trusted: "I gave at the office!" "The check is in the mail!" "I'll respect you in the morning!" And "*Believe me*, I'm from the **Federal Government!**" Recently, the existence of the short-lived **Pentagon Office of Strategic Influence**, setup in the wake of the 911 attacks, was exposed to the light of public opinion and was apparently abruptly axed with the terse and great sounding **Presidential** statement: "**We'll tell the American people the truth.**" Ironically, it was "public opinion," that was intended to be influence through the **Office of Strategic Influence's** dissemination of **disinformation**, that caused this prompt announcement of its demise. Even more ironic, in any war effort, the dissemination of disinformation to the enemy, and the application of the other aspects of **Psychological Warfare**, is often essential for success. If we had not misled and confused the **Nazis** as to when and where the **D Day** invasion would be, many more **American** lives would have been lost and the **Allies'** liberation plans may have been thwarted. The trick here is to fool the enemy, while telling "the **American** people the truth." A "**Catch 22**" situation if there ever was one! Already it has been reported that, according to a recent poll, the "Taliban Office of Strategic Influence" has succeeded in convincing the vast majority of overseas "man in the street" Moslems, that those responsible for 911 were not Moslems, where probably not Arabs, and may well have been **Americans**. But is this a report of actually true poll results or is it itself just more disinformation? Then, too, was the reported axing of our **Office of Strategic Influence** also disinformation, to mislead our enemies at home and abroad? Perchance, even the casual leaving of the Olympic **Vice Presidential** protection plans in a souvenir shop in Seattle was still another Machiavellian ploy to spread disinformation, this time perhaps as to the true caliber of our intelligence community? Indeed, the rumor may just be true that our overt intelligence community is really a clever cover for our truly effective covert intelligence operations! But then again, am I now spreading more disinformation? Trust me, I'll never tell!

## **Fed-pourri™**

**BIG ENOUGH TO DRIVE A TRUCK THROUGH!** While with **Corporate America**, I often quipped: "What's big enough to drive a truck through?" My response to blank stares was: "**GAAP**" or "Generally Accepted Accounting Principles." Now the **Federal Regulators** and **Congress** are beginning to realize what corporate insiders have known all along, that all too often, as the corporate fiscal year closes, **CPA's** sit in "smoke-filled" board rooms with top management and decide, through the artful application of **GAAP**, whether the company will make or lose money that year, and how much! This "truism" has recently been made public by Ken Brown of the **Wall Street Journal**: "In these Enron-tainted days, regulators and investors are finding out that the numbers often are scratched in silly putty;" and that the certified public "number crunchers often present a company's finances in the most flattering light." One method is to switch between the **LIFO** (last in, first out) and **FIFO** (first in, first out) methods of inventory evaluation, another is to sell inventories to third parties under agreements that they will be bought back later, usually at inflated prices. Ken Brown also points to other financially distorting practices such as the transferring of shaky transactions to separate legal entities while retaining non-disclosed financial responsibility, and the premature booking of credit sales and potential sales. He cites as prime examples, the recent "regulators forced" bringing "back onto its books" by **PNC Financial Services Group Inc.**, of "bad loans" it had put "into three off-balance-sheet companies, ... a move that reduced its 2001 earnings by 28 percent;" and the \$11 million in fines obtained by the **Securities and Exchange Commission (SEC)** from the top management of **Microstrategy Inc.** "for prematurely recording revenue from software sales by booking sales before determining the full extent of services it would have to provide in connection

with those sales." Congress is currently re-evaluating the role of the "Certified Public Numbers Cruncher" (CPNC).

**"A BROKEN SYSTEM, PART II."** More than a decade ago, the **Chair of the U.S. Senate Committee on the Judiciary** asked Professor James Liebman, of the Columbia University School of Law, to calculate the frequency of relief in **Federal habeas corpus** death penalty cases. Subsequently, the study was expanded to determine why so many death penalty convictions were overturned. Finally, in June 2000, the landmark study, "**A Broken System, Error Rates in Capital Cases 1973-1995,**" was released, finding there was serious reversible error in nearly 7 out of 10 (68%) fully reviewed capital cases. Now the long awaited follow up study, "**A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can be Done About It,**" examines the causes of these errors in capital cases. The "principal conclusion" is that "heavy use of the death penalty, especially when it sweeps in cases where the evidence supporting a capital verdict is not substantial, is a leading predictor of serious capital error." The study concludes the its "most important" point is that over "decades and across dozens of states, large numbers and proportions of capital verdicts have been reversed because of serious error. The capital system is collapsing under the weight of that error, and *the risk of executing the innocent is high.* Now that explanations for the problem have been identified, and a range of options for responding to it are available, the time has come to fix the death penalty, *or end it*" (emphasis added). If the humanity of terminating human terminations is not to be recognized, then some of the suggested options are increasing the **Government's** required "burden of proof in capital cases" from beyond a reasonable doubt, "to eliminate 'any doubt' of guilt," and "that judges be required to inform juries that life without parole is a sentencing option," the latter already having found favor in the **U.S. Supreme Court** (see **Federally Speaking**, June 1, 2001; Wesley Aaron Shafer, Jr. v. South Carolina (2001 U.S. LEXIS 2456; 149 L. Ed. 2d 178 (2001), "the failure to instruct the jury that parole was NOT available if the defendant was sentenced to life imprisonment, constituted a denial of due process").

**HOLY ICON RESTORED.** **Federal Prosecutors** all over the nation have breathed a sigh of relief. **U.S. District Judge Louis H. Pollak of the Eastern District of Pennsylvania** has reversed himself. The Holy Icon of Fingerprinting has been restored. On January 7, 2002 Judge Pollak had ruled that while fingerprint experts could testify about prints found at a crime scene and compare them with those of the suspect, the experts could not testify that the prints were a "definite match." The Judge was concerned that there were no concrete standards for what constituted a match and no study had been conducted to determine what the "error rate" was. **Federal Prosecutors** quickly convinced Judge Pollak to hold a three day fingerprint accuracy hearing at which they acquainted him with the "secret" **FBI Fingerprint Examiner Proficiency Tests** and persuaded him that there was no evidence to show that the error rate of **FBI Certified Fingerprint Examiners** was "unacceptable high." (Does this mean there is "evidence" to show that the error rate is "acceptably high"?) So it looks like the sanctity of the Fingerprint Icon is secure until, at the least, it is supplanted by the DNA Deity.

**ASHCROFT AWARDEE RESIGNS.** Just last August, **Attorney General John Ashcroft** awarded Eric Schaeffer, the **Environmental Protection Agency (EPA) Director of Regulatory Enforcement**, the **U.S. Department of Justice's John Marshall Interagency Litigation Support Cooperation Award** for his efforts in settling the **Oil Refinery Pollution Litigation**. Now Director Schaeffer, a Republican who joined the **EPA** during the **first Bush Administration**, has resigned from the **EPA** because he is weary of "fighting a **White House** that seems determined to weaken the rules that we are trying to enforce." His beef involves the reluctance of defendant electric utilities to continue towards controlling the emissions from their coal-fired smokestacks once they got "down wind" of the likelihood that the current **Bush Administration** may cutback on the applicable emission

standards. Schaeffer's expressed concern is that these defendants' 41 power plants, as **Congress** was advised by the **EPA** last year, annually spew seven million tons of pollutants into the air, causing "more than 10,800 premature deaths; at least 5,400 incidents of chronic bronchitis, more than 5,100 hospital emergency visits; and more than 1.5 million lost work days." Most likely, Mr. Schaeffer will not be considered for an **Interagency Cooperation Award** this year.

**NOBODY'S PERFECT!** Recently, the **Immigration and Naturalization Service (INA)** formally notified Huffman Aviation in Florida that two of its student pilots had been granted **M-1 Student Visas** to attend technical schools in the U.S. No discrimination or profiling here, they are Arab immigrants from Egypt and the United Arab Emirate. The only problem is that they are both missing and presumed dead. You see, according to **American Intelligence** reports, they had each been on a different ill-fated plane that had been crashed into the Twin Towers of the World Trade Center. The **INA** was understandably embarrassed, blaming the infamous **Federal** paperwork backlog. The names of these aviation students will live on in infamy, Mohamed Atta and Marwan Al-Shehhi. **President Bush** and the rest of us are, understandably, "stunned and not happy."

## **FOLLOW-UP**

**THE OTHER SHOE DROPS!** In our last three columns we have been reporting on the efforts of the Administration to keep documents secret. First, we reported on the **Executive Order** to overrule **Congress** and protect certain **Reagan-era Presidential Papers**; then the **White House** directive not to comply with a **Congressional Subpoena** for documents relating to **Clinton-era** campaign financing and apparently unrelated alleged **FBI** corruption; and finally the **White House's** refusal to turn over to the **General Accounting Office (GAO)** documents from **President Bush's Energy Task Force**, headed by **Vice President Dick Cheney**. Now, Judge Gladys Kessler of **the U.S. District Court for the District of Columbia** has ordered 7,500 pages of many of the same documents sought by the **GAO**, to be turned over by the **U.S. Department of Energy** to the **Natural Resources Defense Council (NRDC)**, a private organization, documents that will allegedly make public the extent of industry influence in the Administration's Energy Policies. According to Judge Kessler, "there can be little question that the **Department of Energy** has been woefully tardy" in providing the **NRDC** this documentation under **NRDC's Freedom of Information Act (FOIA)** request. "The subject of energy policy, especially since the terrible events of September 11, 2001, is of enormous concern to consumers, to environmentalists, to the Congress, and to industry."

**THE FTC RESPONDS, "KINDA".....** Five monthly **Federally Speaking** columns back we "exposed" the prevalent pervasive practices of sellers adding extraordinary and unexpected charges, many of them disguised and/or hidden, to consumer products and services, and challenged **FTC Chairman Timothy Muris** to protect consumers from these "clearly deceptive and 'unfair trade practices'." We have now received not one, but two virtually identical unsigned responses, not from the **FTC Chairman**, but from the Lord High "**FTC Consumer Response Center**" (no individual denoted). And we are implicitly asked, "to keep those letters coming," as: "Letters from consumers and businesses are very important to the work of the **Commission**. They are often the first indication of a problem in the marketplace and may provide evidence to begin an investigation." We are further informed that, as appears here, the **FTC** can "act when it sees a pattern of possible violations developing." We are then provided with reasons why the **FTC** may not proceed and left hanging as to what may or may not occur. Hopefully, our exposé and the fact that a Consumers Union study has reached similar conclusions, will provide enough impedes for the **FTC** to proceed. If you would like to add your voice, the **FTC** file reference is "**FTC Ref. No. 1787101.**"

## **THE FEDERAL CORKBOARD™**

**NEW FBA SECTIONS.** The FBA West Penn Chapter is in the process of exploring the establishing of new Sections and expanding existing ones in such areas as International Law, Bankruptcy, Alternate Dispute Resolution, Social Security, Non-Citizens Rights and Obligations, Labor Relations, etc. If you are interested in actively participating or chairing any of these Sections, or have suggestions as to other Sections that may be of value to the Western Pennsylvania Federal Bar, please contact President Joe Perry at 412/281-4900.

**NEW AND EXCITING CLE.** The officers of the FBA West Penn Chapter have recently returned from the Spring FBA National Council in Washington, DC with a basket full of new CLE programs and speakers that you will read about in future columns. West Penn will also be continuing its popular CLE programs such as the **FBA LearnAbout™ Luncheon Series** (Open to All). Call Arnie Steinberg (412/434-1190) for information and reservations.

**Lunch With A Federal Judge Series,** for FBA members, continues. Call Susan Santiago for information and reservations (412/281-4900).

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*The purpose of Federally Speaking is to keep you abreast of what is happening on the Federal scene All Western Pennsylvania CLE providers who have a program or programs that relate to Federal practice are invited to advise us as early as possible, in order to include mention of them in the Federal CLE Corkboard™. Please send Federal CLE information, any comments and suggestions you may have, and/or requests for information on the Federal Bar Association to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX 412/566-1088; E-Mail [blipson@wgbglaw.com](mailto:blipson@wgbglaw.com)). Federally Speaking thanks LexisNexis for aiding in research.*

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