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.***

LIBERTY'S CORNER

JEFFERSON ON THE CHURCH & STATE "WALL." "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should '**make no law respecting an establishment of religion, or prohibiting the free exercise thereof,**' thus building a ***wall*** of separation between Church & State. … That society shall here know that the limit of its rightful power is the enforcement of social conduct; while the right to question the religious principles producing that conduct is beyond their cognizance." **Thomas Jefferson's** letters to the Danbury and Delaware Baptist Associations of January 1, 1802 and July 2, 1801, citing the **First Amendment to the U.S. Constitution** (emphasis added). The strength of **Jefferson's Wall** has wavered from time to time. In most recent times, the U.S. Supreme Court has both sharply intensified its strength by banning all public school sponsored prayer, and de-intensified it a bit by permitting states to adopt school voucher programs where there is a non-religious valid public purpose for so doing, even if most of the funds may find their way to the coffers of religious schools. The former was just two years ago in the 6-3 school sporting events decision in ***Santa Fe Independent School District v. Doe***, No. 99-62 (Sup. Ct, June 19, 2000; "The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events"); and the latter this year in the nearly split 5-4 school voucher decision in ***Zelman V. Simmons-Harris,*** No. 00-1751 (Sup. Ct. June 27, 2002). Now a new test of **Jefferson's Wall** has exploded on the scene. A three-judge panel of the **U.S. Court of Appeals for the Ninth Circuit**, by a 2-1 majority, has found the phrase "under God" in public school recitations of the **Pledge of Allegiance** to be **unconstitutional,** as taking the **Pledge** from the secular side of **Jefferson's Wall** where it had resided for its first for 62 years. The historical prospective is that there was no **Pledge of Allegiance** until 1892, when socialist clergyman and editor Francis Bellamy wrote for ***The Youth's Companion*** the original "Godless" generic **Pledge of Allegiance**: "I pledge allegiance to my flag and to the Republic for which it stands: one nation, indivisible, with liberty and justice for all." (The word Bellamy really wanted to add, but was dissuaded from, was "equality" not "God.") Sixty-two years later, during the era of the Cold War and McCarthyism, Congress inserted "under God" (but not "equality") into the Pledge, primarily through the efforts of the Knights of Columbus, a Catholic men's club, to distinguish the Pledge from similar rhetoric used by the so-called "godless communists." According to the Panel's opinion, written by Circuit Judge Alfred T. Goodwin, inserting "under God" is as **unconstitutional** as inserting "we are a nation `under Jesus,' a nation `under Vishnu,' a nation `under Zeus,' or a nation `under no god,' because none of these professions can be neutral with respect to religion," and, therefore, would be a government endorsement of religion in violation of the

First Amendment. And according to Susan Jacoby in ***Newsday***, at the 1787 Constitutional Convention our founding fathers extensively debated using the word "God" in the **U.S. Constitution** "and the secularists prevailed." But, by Zeus, we have yet to hear from the full **Ninth Circuit** or the **U.S. Supreme Court**.

SUPREME COURT STRUGGLES WITH BOUNDARIES. In the following weighty two "ton" cases of ***Drayton*** and ***Stratton***, decided recently on the same day, the **U.S. Supreme Court** expanded one **constitutional** boundary and narrowed another, in both with eyes over their shoulders looking out for international and/or domestic "terrorists:"

FIRST AMENDMENT - EXPANDED. In ***Watchtower Bible and Tract Society Of New York, Inc., v. Village Of Stratton,*** No. 00-1737 (Sup. Ct. June 17, 2002), a Stratton ordinance made it a misdemeanor to engage in door-to-door solicitation without first registering with the mayor and receiving a permit. The 8-1 majority found the ordinance **unconstitutional** as violating the **First Amendment free speech rights** protecting: a) ***anonymous*** political speech; b) door-to-door religious proselytizing, espousal of unpopular causes and non-commercial solicitation; and c) the distribution of handbills. Chief Justice Rehnquist, the sole dissenter, in arguing against declaring this Stratton ordinance **unconstitutional,** recounted the following horror story: "Two teenagers murdered a married couple of Dartmouth College professors, Half and Susanne Zantop, in the Zantop's home. Investigators have concluded, based on the confession of one of the teenagers, that the teenagers went door-to-door intent on stealing access numbers to bank debit cards and then killing their owners…. Their ***modus operandi*** was to tell residents that they were conducting an environmental survey for school…. They were allowed into the Zantop home. After conducting the phony environmental survey, they stabbed the Zantops to death." The majority, however, found that the Village had failed to establish that the rights of unfettered public discourse and anonymous free speech were outweighed by the public policy concerns of preventing crime and protecting the villagers' privacy, especially as there was no evidence in the record of a special crime problem relating to door-to-door solicitation.

FOURTH AMENDMENT - NARROWED. In the other case, ***United States V. Drayton***, No. 01-631 (Sup. Ct. June 17, 2002), a 6-3 majority found that the **Fourth Amendment prohibition against illegal searches and seizures,** does not require police officers to ***advise*** bus passengers of their right ***not*** to cooperate and their right to ***refuse*** consent to the search, as the "officers gave the passengers no reason to believe that they were required to answer questions." The majority grounded there opinion here on their earlier case of ***Florida v. Bostick,*** 501 U.S. 429 (1991) which they advised held that the "**Fourth Amendment** permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, ***provided a reasonable person would understand that he or she is free to refuse***" (emphasis added). The majority later acknowledged that the ***Bostick*** Court "identified two factors "particularly worth noting'," to wit: "First, although it was obvious that an officer was armed, he did not remove the gun from its pouch or use it in a threatening way. ***Second, the officer advised the passenger that he could refuse consent to the search***"(emphasis added). Here there were three officers strategically placed, one of whom advised Drayton that he was looking for weapons and drugs, and requested and received permission from Draytron to search him. He, however, had not advise Drayton that he could refuse to be searched. The officer arrested Drayton when the search revealed that drugs were strapped to his body. The three-Justice minority seemed to view the real-life circumstances differently than the majority. As reasoned by Justice Souter, who was in the majority in ***Bostick***, writing for the minority here: "Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses. There is therefore an air of unreality about the Court's explanation that bus

passengers consent to searches of their luggage to 'enhanc[e] their own safety and the safety of those around them'." Applying "***Bostick's*** totality of circumstances test, and to ask whether a passenger would reasonably have felt free to end his encounter with the three officers by saying no and ignoring them thereafter…. the answer is clear. The Court's contrary conclusion tells me that the majority cannot see what Justice Stewart saw" in ***United States v. Mendenhall,*** 446 U.S. 544, 554 (1980), the effect of the "threatening presence of several officers." It is interesting to note that the majority found the non-compliance advisory, as admittedly given in ***Bostick,*** to be unnecessary "here and now."

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CORPORATE COUNSEL BEWARE? You as in-house legal counsel advise a member of management by e-mail that it "might be useful to consider" reminding accounting personnel "of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy." Several days later, in reviewing a memorandum of a conference call concerning a forthcoming press release, you again by e-mail advise as follows: "●I recommend deleting reference to consulting with the legal group and deleting my name on the memo. Reference to the legal group consultation arguably is a waiver of attorney-client privileged advice and if my name is mentioned it increases the chances that I might be a witness, which I prefer to avoid. ●I suggest deleting some language that might suggest we have concluded the release is misleading. ●In light of the 'non-recurring' characterization, the lack of any suggestion that this characterization is not in accordance with GAAP [Generally Accepted Accounting Principles], and the lack of income statements in accordance with GAAP, I will consult further within the legal group as to whether we should do anything more to protect ourselves from potential **Section 10A** issues." Is any of this counsel you may have given? Are there any problems that you see? Does concern over being "a witness" impute knowledge of an impending investigation and/or exhibit doubt as to the availability of the attorney/client privilege here in the first place? Do you ever even consider the "staying power" of e-mail? Some things to consider in these regards: a) timing may be everything; b) lawful attorney/client privileged communications remain privileged even if memorialized in writing by proper parties to these communications provided they are ***not*** shared with persons outside the ambit of the privilege; and c) the attorney/client privilege never provides a "safe haven" for communications that facilitate, aid or abet an ongoing offense. Read on!

THE "CORRUPT PERSUADER." We are sure that when joining the legal group at Arthur Andersen, Nancy Temple, Esq., may have expected to be called "Counselor," or "Barrister," or even "Mouthpiece," and she hoped her counseling would be persuasive, but she never expected or strove to obtain the title of **"Corrupt Persuader."** However, according to the post-conviction "exit" interviews, that was the dubious "honor" bestowed upon her in the **U.S. District Court for the Southern District of Texas** by the jury in the **Arthur Andersen Obstruction of Justice Criminal Trial**. According to these interviews her latter e-mail quoted verbatim above, recommending deletions and indicating possible lacks in "full disclosure," was apparently considered by the jury to be ***the*** one crucial piece of evidence, ***on which all the jurors could agree,*** to convict Arthur Andersen of obstruction of justice. (Based on its timing, her former "documentation and retention policy" e-mail most likely also helped.) In light of this e-mail correspondence, the jury found this relatively new member of the Andersen legal group to be the **"corrupt persuader."** Ironically, the jury did so even though the day before U.S. District Judge Melinda Harmon had ruled that the jury ***need not*** unanimously agree that there was but one "corrupt persuader," it would be sufficient if they found that more than one person had "acted knowingly and with corrupt intent." It appears that the jurors believed that Ms. Temple guided Andersen's attempt to misdirect or avoid the **Security and Exchange Commission (SEC)** investigation. While she has not yet been charged with a crime, she may be. She did invoke her **Fifth Amendment right against self-incrimination**, and did not testify at trial.

Deputy Attorney General Larry Thompson, who was featured in the June 2002 **Federally Speaking** column, advised that this "verdict confirms that Andersen knew full well that these documents were relevant to the inquiries into Enron's collapse and … directed these efforts to destroy evidence." He indicated that additional indictments would be sought. Federal Prosecutor Andrew Weissman had some sage advise for corporate counsel: "When you expect the police, you don't destroy evidence," and here the **SEC** is the police! (For an earlier Enron-related corporate counsel caution, see the June 2002 **Federally Speaking** column.)

"GRAY PANTHERS" FIGHT BACK – WANT SPAN NOT SPAM! While the **Congressional** debates over alleviating the high cost of senior citizens' prescription drugs drone on, while the rising costs of drugs to seniors nearly trebled the rate of inflation, and while drug manufacturers maneuver to keep their "status quo'ed", the Gray Panthers and other senior and groups "won't wait." The official Gray Panthers, tired of getting only "spam," have organized over 120 organizations, representing seniors, consumers and patients, into "SPAN" or "Stop Patent Abuse Now!" SPAN's purpose is to reform legislation and regulations used to block consumer access to less-costly prescription drugs. Other senior groups also just "won't wait around for their members to be assigned a harp!" Thus, hark; here comes "AARP," the American Association of Retired People, who is making "***federal cases***" out of such abuses. Perhaps know best for its travelers' discounts for workers and retirees fifty and over, AARP has intensified its legal battle against prescription drug manufacturers' efforts to allegedly commit genocide on generic drugs (and underfinanced seniors), and is now "co-counseling" three "pro-generic" antitrust suits, charging the manufacturers of major brand name drugs with collusion, suppression of competition and patent abuse, for the purpose of doing away with generic drugs. AARP, in so doing has allied itself with its new "PAL," the Prescription Access Litigation Project, a coalition of health and consumer groups, organized last year by Community Catalyst, a national health care access advocacy group headquartered in Boston. The first such case is ***In Re: Tamoxifen***, a class action in the **U.S. District Court for the Eastern District of New York**, against AstraZeneca Pharmaceuticals LP, the brand name manufacturer, and Barr Laboratories, Inc., the generic manufacturer, for allegedly agreeing to refrain from marketing a generic version of Tamoxifen, a widely used breast cancer drug. The next is ***In Re: K-Dur Antitrust***, also a class action, in the **U.S. District Court for the District of New Jersey**, which alleges agreements by three pharmaceutical companies (Schering-Plough Corporation, ESI Lederle, Inc. and Upsher-Smith) to prevent the marketing of a generic alternative to K-Dur20, widely used to treat the side effects of high blood pressure medications. And the third in this troika is ***In Re: Buspirone Antitrust Litigation***, in the **U.S. District Court for the Southern District of New York**, which charges Bristol-Myers Squibb Company with allegedly misrepresenting to the **FDA** that a reasonable claim of patent infringement could be made against generic manufacturers of buspirone (brand name BuSpar), used for the treatment of anxiety, by initiating "anxiety causing" patent infringement litigation against these competitors, and thereby triggering the automatic 30-month stay of **FDA** approval of these generics (see the **Hatch-Waxman Amendments, 21 U.S.C § 355**, to the **Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, et seq. (1994)).** Previously, AARP had filed an ***amicus curiae*** brief in the ***In re: Cardizem CD Antitrust Litigation***, before the **United States Court of Appeal for the Sixth Circuit** in Cincinnati, arguing "that an agreement by [Hoechst Marion Roussel, Inc. (HMRI) which became] Aventis Pharmaceutical, the maker of Cardizem, a high blood pressure medication, and Andrx, a generic manufacturer, to keep a generic off the market, has harmed consumers." This is an appeal from the Order of U.S. District Judge Nancy G. Edmunds of the **U.S. District Court for the Eastern District Of Michigan (Southern Division),** Master File No. 99-md-1278 (June 6, 2000), of "Creppy Directive" fame (see **Federally Speaking** for July 2002), holding that "the HMRI/Andrx Agreement is an agreement between horizontal competitors that allocates the entire United States market for Cardizem CD and its bioequivalents to Defendant HMRI, and thus constitutes a restraint of trade that has long been held illegal ***per se*** under established Supreme Court precedent." We can expect to see more of "Gray Panther Power." Beware the bark of AARP!

CANADIANS TAKE LEAD FIGHTING SCANS SCAMS. The **Canadian Competition Bureau,** to help fight pricing scams**,** recently announced it's new "scans" policy, which is to endorse the new "Scanner Price Accuracy Voluntary Code" (also called the "Scanning Code of Practice"), developed jointly by the Retail Council of Canada, the Canadian Association of Chain Drug Stores, the Canadian Federation of Independent Grocers, and the Canadian Council of Grocery Distributors. The Code provides that, on "a claim being presented by the customer, where the scanned price of a product at checkout is higher than the price displayed in the store or than advertised by the store, the lower price will be honoured; and (a) if the correct price of the product is $10 or less, the retailer will give the product to the customer free of charge; or (b) if the correct price of the product is higher than $10, the retailer will give the customer a discount of $10 off the corrected price," on the first item. This problem also exists South of the Border, and according to Mary Bach, Vice President of the Pennsylvania Scanning Certification Advisory Board, we "are actually seeing more scanner mistakes now than in the past." Take, for example, the experience of Mary Kay Brennan as reported to Yvonne Zanos, KDKA-TV Consumer Editor. It seems that Mary Kay went to a Kuhn's Market in the greater Pittsburgh, PA area, where via scanner an unbelievable "13 of 21 sale items rang up wrong" (of which she only caught 11 at checkout). Kuhn's, however, "refused" to do what she expected and what other stores were doing, honor the Canadian approach. Zanos has determined that in the Pittsburgh-area already most "Giant Eagle, Shop 'n Save and Foodland stores have policies that promise if you are charged more at the checkout scanner than the advertised price or shelf price, you get the item for free, up to $10. If the item costs more than $10, you get $10 off." Bach had further advised Zanos "Kmart and Wal-Mart have policies that promise if you are charged a higher amount and the item costs $3 or less, you get it for free. If the item costs more than $3, you get $3 off. Office Depot and Sears have $5 policies, and there are others." To keep retailers honest, Bach recommends that consumers sue retailers under the **Pennsylvania Unfair Trade Practices Act**, where there is "a pattern of overcharging," as she herself has done. But, is this not an area where our **Federal Trade Commission** should take the lead from our Northern Neighbor's **Competition Bureau** and either encourage the adoption of such a national industry-wide voluntary "code," or hold hearings and issue a mandatory **Trade Practices Rule** to a similar effect?

FOLLOW-UP

INNOCENCE PROTECTION. In last month's **Federally Speaking** column we reported on the provisional ruling of **U.S. District Court Judge Jed S. Rakoff of the Southern District of New York**, that under the **Fifth Amendment** to the **U.S. Constitution** the death penalty is **unconstitutional** "on the grounds that innocent people are being sentenced to death 'with a frequency far greater than previously supposed … as DNA testing illustrates'." After giving the **Government** an additional opportunity to convince him otherwise, Judge Rakoff has now made this ruling of **unconstitutionality** final. Indeed, according to the ACLU, in recent years "numerous studies have found that one in seven people sent to death row is later proven innocent" and that in "the last 25 years, 101 innocent people have been released from death row." In response to these concerns, **U.S. Senator** Patrick Leahy, a former prosecutor and Democrat from Vermont, and **U.S. Representative** William Delahunt, Democrat from Maine, have introduced into **Congress** the "**Innocence Protection Act**," to provide new safeguards in capital cases, with 25 **Senators** signing on as co-sponsors of the **Senate Bill (S. 486)** and 234 **Representatives** signing on as co-sponsors of the **House Bill (H.R. 912)**. This Act would allow prisoners on death row to request DNA testing on evidence from their cases that is still in the **Government's** possession; would help insure that everyone on death row has access to a professional and experienced attorney; and would encourage states to make sure that juries are aware of all their sentencing options (such as "life in prison without the possibility of parole"). In related matters, the **U.S. Supreme** Court in a 6-3 ruling, involving a defendant with an IQ of 59, has held that the execution of the mentally retarded is "cruel and unusual punishment' under the Eighth Amendment to the U.S. Constitution, based on evolving currently prevailing standards of decency (***Atkins***

v. ***Virginia***, No. 00-8452 (Sup. Ct. June 20, 2002)); and in a 7-2 ruling has held that under the **Sixth Amendment right to trial by jury**, only a jury (and not a judge) can impose a death sentence (***Ring v. Arizona***, No. 01-488 (Sup. Ct. June 24, 2002)); though at the same time a sharply divided Court (5-4) ruled that a judge could stiffen a "non-stiff" (non-capital) sentence (***Harris v. United States*****,** No. 00-10666 (Sup. Ct. June 24, 2002)). The debate continues.

THE FEDERAL CORKBOARD™

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