



# FEDERALLY SPEAKING



Number 21

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.*

## U.S SUPREME COURT HEADS UP!

**U.S SUPREME COURT HEADS UP!** Reserve Wednesday, March 12, 2003, for an all day **Supreme Court Update** for CLE credit, featuring **U.S. Supreme Court Clerk General Bill Suter**, presented to you by the West Penn Chapter of the Federal Bar Association, in conjunction with Duquesne Law School. ***But why the heads up so early?*** Up to 20 lucky eligible participants will become members of the **U.S. Supreme Court Bar** that day and be sworn-in by General Suter. However, slots are filling quickly and may be gone by the time you read this. Phone or e-mail your friendly ***Federally Speaking*** columnist immediately concerning eligibility and to see if any spaces remain.

**WHISKEY REBELLION.** Whether or not you make the U.S. Supreme Court admissions cut, you can still celebrate (or drown your sorrows) at the annual FBA West Penn Whiskey Rebellion Blast, at 5 pm on Wednesday, November 6, 2002. Cost \$12.00 (including Corn Whiskey Punch). Or come early, and earn two hours/credits of whiskey-related CLE (including one hour of ethics), for the meager stipend of \$42.00 (including Blast). However, ***reservations*** are a ***must***. Please contact Susan Santiago ***now*** at 412/281-4900.

## **LIBERTY'S CORNER**

**THE DEBATE IN A DUCK'S BILL.** Two recent quotes from the same Editorial Page of the Pittsburgh Tribune-Review sum-up the current post-9/11 debate in a "duck's bill." On the right-wing, Bruce Tinsley has Mallard Fillmore Duck quip, in his popular conservative political cartoon strip: "Have you heard about the teacher in North Carolina whose school system accused her of something she didn't do ... Then forced her to apologize for it, and sent her for 're-education' so she won't do it again? If you haven't, don't be too hard on the media ... ***They've got their hands full worrying about the suspected terrorists' rights.***" On the opposite wing, Reuters News Service is reported as noting under a photograph of "Ground Zero," in an article entitled: "**Rights the First Victim of 'War on Terror'.**" that: "***Human rights ... have been a casualty of the U.S. 'war on terror' since Sept. 11.***" (Emphasis added.) That's both wings in a duck's bill! (But, Mallard did not for long duck the fact that the "media" had actually reported on this "poor judgment" teacher incident. The very next day, Mallard quacked the admission that he had seen from his birds-eye view the Wilmington Star report of the North Carolina teacher who was forced by school officials "to apologize and undergo 'sensitivity training' for explaining the ... Norwegian origin ... word 'niggardly,' which means 'stingy,' to her class.") However, so far, "Liberty" appears to be ahead by a beak (peek at the next item)!

**“SO FAR” LIBERTY IS WINNING A PASSING GRADE!** That’s the view of George Washington Law Professor Jeffrey Rosen as reported in the Washington Post: “So far, in the face of great stress, the system has worked relatively well. The executive branch tried to increase its own authority across the board, but the courts and **Congress** are insisting on a more reasoned balance between liberty and security. ... In a series of court cases, federal judges have insisted on the importance of judicial oversight of the president’s powers of detention and deportation. And in the debates over the **USA Patriot Act** and the homeland security bill, **libertarians** on the right have joined with **civil libertarians** on the left in persuading Congress to repudiate the Bush administration’s more draconian proposals for expanding surveillance authority.” Rosen reports that even the **Fourth Circuit’s** three judge panel, which espoused, at least initially, a showing of "deference to the political branches" in reviewing the government's designation of a U.S. citizen as an "enemy combatant," declined to buy into the government's urgings that the court "may not review at all its designation of an American citizen as an enemy combatant - that its determinations on this score are the first and final word," cautioning instead that "*with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely with-out charges or counsel on the government's say-so.*" (*Hamdi v. Rumsfeld*, No.02-6895 (4th Cir, 2002); emphasis added).

**“GOOD JUDGES ... TRY AND GET IT RIGHT.”** With these words the newest member of the **U.S. Circuit Court of Appeals for the Third Circuit**, D. Brooks Smith, left behind the exhilaration of the Chief Judgeship of the **U.S. District Court for the Western District of Pennsylvania**, and the acrimony of the **U.S. Senate** confirmation process, and confirmed to all that he places “real people” and their very real particular “cases” above all. After being sworn in and donning his appellate robe, he stressed that “good judges must always keep in mind the sacred trust they hold;” good judges must “decide cases,” not broad issues; good judges “must remember real people are affected by our decisions;” good judges must “recognize their own fallibility ... and at the end of the day, try and get it right.” He then pledged, “I will try my utmost to be a good judge.”

**ACCOLADES TO JUDGE LEE!** Service on a **Federal jury**, or any jury, is one of the cornerstones of Liberty’s Corner. All too often such service goes unacknowledged. Not so in the Court of Senior **U.S. District Judge Donald J. Lee**, of the **Western District of Pennsylvania**. A very happy “jurist,” Lisa A. Himes, has graciously agreed to share with us the letter she received from Judge Lee at the completion of her jury service on a recent Federal criminal case: “Dear Ms. Himes: Trial by jury is a fundamental concept in our American system of justice, and it has been instrumental in the preservation of individual rights while at the same time serving the interests of society in general. Your service as a juror during the above case has been a remarkable demonstration of your willingness to accept an unusual degree of responsibility and to contribute greatly to your community. I know how much time you have devoted to your jury service and how much of a sacrifice it has been for your family members as well. Notwithstanding the burdens imposed, I hope that your experience as a juror was both pleasant and beneficial in providing an opportunity to learn more about the courts and our system of justice. I would like to take this opportunity to acknowledge your dedicated service to your community and to personally thank you for your service as a juror in our Court.” Would this thus spread throughout the Land so that our citizens would now object to being passed over, instead of trying to avoid this, their one real opportunity to be truly involved?

## **FED-POURRI™**

**A COSTLY PRIVILEGE!** It’s always a “privilege” to cooperate with the government, but forgoing “privilege” may just be too costly. Isn’t the “privilege” of enriching the U.S Treasury by \$840,000,000.00

enough? Apparently not! The **U.S. Court of Appeals for the Sixth Circuit**, in a 2-1 decision, recently affirmed the ruling of the **U.S. District Court for the Middle District of Tennessee** in *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 192 F.R.D. 575 (M.D. Tenn. 2000), that "voluntary disclosure of privileged materials to the government constitutes a waiver of the **attorney-client privilege** to all other adversaries [citing *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997)]," and that "by disclosing the documents to **DoJ**, Columbia/HCA waived any protections under the **work product doctrine** as well [citing *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991)]," even though the attorney-directed internal audits in question were turned over pursuant to a confidentiality agreement with the **DoJ** (the **U.S. Department of Justice**) which specifically provided that disclosure "by one party to the other does not constitute a waiver of **any applicable privilege** or claim under the **work product doctrine**" (*In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, No. 00-6059 (6<sup>th</sup> Cir. 2002)). The **Sixth Circuit** found that while "the '**work product doctrine** is distinct from and broader than the **attorney-client privilege**' and extends beyond confidential communications between the attorney and client to 'any document prepared in anticipation of litigation by or for the attorney'," the **Third Circuit's** reasoning in *Westinghouse* and "other reasons 'persuade us that the standard for waiving the **work-product doctrine** should be no more stringent than the standard for waiving the **attorney-client privilege**' -- once the privilege is waived, waiver is complete and final." Such "other reasons" include the "ease of judicial administration as well as a reduction of uncertainty for parties faced with such a decision." Sixth Circuit Judge Danny J. Boggs, however, believes that cooperation with **DoJ** would actually be bogged down on this "unrealistic" path. "Realistically speaking," he advised, "the choice before this court today is not between narrower and wider disclosure, but between a disclosure only to government officials and **no disclosure at all**. Because I am convinced that a government investigation exception to the third-party waiver rule would increase the information available over that produced by the court's rule and would aid the truth-seeking process, I respectfully dissent [emphasis **not** added]." Here, once the private Medicare insurers learned of the \$840,000,000 settlement with the **DoJ** for overcharges incurred due to the alleged fraudulent miscoding of Medicare patients, they also wanted the **attorney-client privileged** and **attorney work product** internal coding audits the **DoJ** was given, so they, too, could get pieces of the pie. Do you believe for a moment that Columbia/HCA would have accepted the "privilege" of so cooperating with the government if it knew that the certainly less costly Boggs approach would not be the law?

**THE PUBLICATION DILEMMA.** The **U.S. Court of Appeals for the Sixth Circuit**, in discussing the necessity for openness in court proceedings, recently cautioned: "Selective information is misinformation;" and "Democracies die behind closed doors" (*Detroit Free Press v. Ashcroft*, No. 02-1437, 6<sup>th</sup> Cir, August 26, 2002; see also *Federally Speaking*, "Creppy Directive Revisited," October 2002). While this was directed towards the **Executive Branch** and secret trials, some commentators have suggested that the **Judicial Branch** should also be examining its own house. Why? At the 1964 **Judicial Conference of the United States**, apparently in light of the proliferation of judicial opinions, it was resolved that "the judges of the **courts of appeals** and the **district courts** authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct." This resolution has apparently borne fruit as it has been reported that now approximately three-fourths of these courts' opinions are not officially published (Administrative Office of the United States Courts Report, Judicial Business Table S-3 (1999)), and six out of the thirteen circuits do not even allow citation to such unpublished opinions "except to support a claim of res judicata, collateral estoppel or law of the case" (Strongman, "*Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*," 50 U. Kan. L. Rev. 195, 199 (2001)), even when available on the Internet. In 2000, a unanimous Eighth Circuit three-judge panel, in an opinion written by Circuit Judge Richard S. Arnold (then a potential Clinton **U.S. Supreme Court** nominee), held that its own **Rule 28A(i)** against recognizing unpublished opinions as precedent was "**unconstitutional**," as it purported "to confer upon the courts a power that went beyond the 'judicial,' within the meaning of **Article**

**III of the Constitution.**” Fellow Circuit Judge Gerald W. Heaney went so far as to write in a separate concurrence: “I agree fully with Judge Arnold's opinion. He has done the public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished opinions” (*Anastasoff v. U.S.*, 223 F.3d 898 (8<sup>th</sup> Cir. 2000)). Ironically (or politically), the **IRS**, who had successfully urged the giving of precedential effect to the unpublished per curiam tax refund opinion in *Christie v. U.S.*, No. 91-2375MN (8th Cir., March 20, 1992), abruptly abandoned its winning position and the favorable holding of *Christie*, and paid Anastasoff her complete, but allegedly “untimely” applied for, \$6,436.00 tax refund, plus interest. The **Eighth Circuit** then, sitting en banc, in an opinion also attributed to Judge Arnold, unanimously declared *Anastasoff* to be moot and announced that the “**constitutionality** of that portion of **Rule 28A(i)** which says that unpublished opinions have no precedential effect remains an open question in this **Circuit**” (*Anastasoff v. U.S.*, 235 F.3d 1054 (8<sup>th</sup> Cir. 2000)). But was Arnold really right in the first place? In the law review article, “*Stalking Secret Law,*” Merritt and Brudney paint a very scary picture (54 Vand. L. Rev. 71, 119 (2001)). They report that in their survey of such opinions, not only did “the unpublished opinions we studied included a surprising number of reversals, dissents, and concurrences,” but “we discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases. Together, these findings suggest that panels authoring unpublished opinions reach some results with which other reasonable judges would disagree,” which “raises the very specter described by the **Eighth Circuit**” in *Anastasoff*, that “like cases will be decided in unlike ways,” and that “judges’ decisions will be ‘regulated only by their own opinions’” (see also 1 Blackstone Commentaries 258-59). This then is the publication dilemma.

**“A NEW ETHIC OF CORPORATE RESPONSIBILITY”** Under this banner **President** Bush signed into law **House Bill H.R. 3763**, the **Sarbanes-Oxley Act of 2002**. The **U.S. Attorney General** immediately notified all of his key players to “take all appropriate steps to implement fully and expeditiously the provisions of the Act,” as the **U.S. Department of Justice** “will play a critical role in implementing the Act and in helping to restore confidence in America's corporations and financial markets.” To accomplish this, the **White House** advises, **Sarbanes-Oxley** “improves the quality and transparency of financial reporting, independent audits, and accounting services for public companies; ... creates a **Public Company Accounting Oversight Board** to enforce professional standards, ethics, and competence for the accounting profession; strengthens the independence of firms that audit public companies; increases corporate responsibility and the usefulness of corporate financial disclosure; increases penalties for corporate wrongdoing; protects the objectivity and independence of securities analysts; and increases **Securities and Exchange Commission** resources.” And, oh yes, a most interesting innovation, “CEOs and chief financial officers must personally vouch for the truth and fairness of their company's disclosures,” and those “financial disclosures will be broader and better than ever before.” Among the provisions that the **Attorney General** identifies as “important” are “enhanced penalties for **mail and wire fraud** and **ERISA** violations” and “new criminal penalties for **securities fraud**, attempts or conspiracies to commit fraud, certifying false financial statements, document destruction or tampering, and retaliating against **corporate whistleblowers**.” Moreover, the “penalties for obstructing justice and shredding documents are greatly increased,” the “**SEC** will now have the administrative authority to bar dishonest directors and officers from ever again serving in positions of corporate responsibility,” and at those times “when workers are prevented from buying and selling company stock in their pensions or **401 (k)s**, corporate officials will also be banned from any buying or selling.” Now we most wait and see if this “new ethic” takes hold or if it is still “business as usual.”

**ONE IN THE COCA BUSH...** Chief Circuit Judge Belvin Perry, Jr., of Florida’s 9<sup>th</sup> Judicial Circuit in Orlando, ruled recently that **Federal Law** protecting the privacy of drug treatment center patients, outweighs the interest of police officers in a criminal investigation (**42 USC §290dd-3 and §290ee-3; 42 CFR, part 2**), for as Judge Perry explained, if drug treatment counselors were forced to testify “all patients

who suffer relapses could be hauled out of treatment programs and into criminal courts on the whim of a state prosecutor or police officers." The beneficiary of this ruling to keep the coke "in the bush," was 25-year-old Noelle Bush, Florida Governor Jeb Bush's daughter and President Bush's niece. After being arrested for attempting to use a forged prescription to buy the anti-anxiety drug Xanax, Noelle had been placed in a court-ordered rehabilitation program. She is currently a patient at the Center for Drug-Free Living, where a fellow patient had allegedly phoned the "pigs" to squeal that Noelle had hidden crack cocaine in her shoe. Under **Federal Law**, it is a **Federal crime** for program personnel to breach the confidentiality of an eligible program's alcohol and drug abuse patient records, or reveal to a person outside the program any information identifying a patient as an alcohol or drug abuser, or that a patient even attends the program, unless: (1) the patient consents in writing; (2) the disclosure is allowed by a court order; or (3) the disclosure is made to medical personnel in a medical emergency or to qualified personnel for research, audit, or program evaluation. Forms have also been used in at least such some programs wherein patients acknowledge that disclosure of "information about a crime committed by a patient either at the program or against any person who works for the program, or about any threat to commit such a crime," is not protect, nor is disclosure of "information about suspected child abuse or neglect under State law to appropriate State or local authorities." Judge Perry had been asked to activate the second exception, and his ruling instead, protecting evidence of "relapses," is believed to be the first of its kind. While such relapse evidence would appear to be construable as "information about a crime," making **Federal confidentiality protection** apparently inapplicable, drug treatment practitioners are concerned that such an interpretation would have a "chilling effect" on treatments generally, and specifically on treating relapses. Indeed, without such secrecy, they feel junkies would go untreated, continuing to hide in the coca bush.

**DID YOU KNOW?** Did you know that when admitted to the **U.S. Supreme Court Bar** you can obtain a Certificate with or without the words "in the year of our Lord, ...". To obtain the "without" version you must "opt out."

## **FOLLOW-UP**

**DEATH KNELL SOUNDING FOR DEATH PENALTY?** Is the guillotine falling on the black-hooded Axman? Has the death knell begun to sound for the death penalty? In the July and August, 2002 issues of *Federally Speaking*, we reported on the 7-2 ruling of the **U.S. Supreme Court** that under the **right to trial by jury, as protected by the Sixth Amendment** to the **U.S. Constitution**, only a jury (and not a judge) can impose a death sentence (*Ring v. Arizona*, 536 U.S. \_\_\_, 122 S. Ct. 2428 (2002)); and the ruling of the **U.S. District Court for the Southern District of New York** that under the **right to due process**, as protected by the **Fifth Amendment**, the death penalty itself is **unconstitutional** (*U.S. v. Quinones* (2002 U.S. Dist. Lexis 7320 (SDNY, 2002)), "on the grounds that," according to U.S. District Judge Jed S. Rakoff, "innocent people are being sentenced to death 'with a frequency far greater than previously supposed ... as DNA testing illustrates'." Indeed, in his concurring opinion in *Ring*, Justice Stephen Breyer pointedly observed "the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to incapacitate offenders, or to rehabilitate criminals" (*Ring*, 122 S. Ct. at 2446). Now, building on *Ring* and *Quinones*, U.S. District Judge William K. Sessions III of the **U.S. District Court for the District of Vermont**, has declared the **Federal Death Penalty Act of 1994 (FDPA)** unconstitutional "on the ground that the **FDPA's §3593(c)**'s direction to ignore the rules of evidence when considering information relevant to death penalty eligibility is a violation of the **Due Process Clause** of the **Fifth Amendment** and the **rights of confrontation and cross-examination** guaranteed by the **Sixth Amendment**" (*U.S. v. Fell*, No. 2:01-CR-12-01, September 24, 2002). As Judge Sessions cautioned: "If the death penalty is to be part of our system of justice, due process of law and the fair-trial guarantees of the Sixth Amendment require that standards and safeguards governing the kinds of evidence juries may consider must be rigorous, and constitutional rights and liberties scrupulously protected. To relax those

standards invites abuse, and significantly undermines the reliability of decisions to impose the death penalty.” As reported in the September 2002 *Federally Speaking* column, post-conviction DNA testing has already spared at least 110-convicted murders from the “Axman’s” wrath (or pro-longed incarceration).

**PRIVATE ACTION FOR SLAVERY.** A U.S. District Judge for the **Eastern District of New York**, Nicholas G. Garaufis, has ruled that under the **Thirteenth Amendment to the U.S. Constitution** and its enforcing criminal statute, **18 U.S.C. § 15845**, there is a private civil cause of action for slavery or involuntary servitude, as they apply not only to state action but also to private conduct (*Manliguez v. Joseph*, EDNY 2002, No. 01-CV-7574 (NGG)). The **Thirteenth Amendment** “confers upon individuals the federal right to be protected from involuntary servitude,” which is defined as “a condition of servitude in which the victim is forced to work for a defendant by use or threat of physical restraint or injury or by use of coercion through law or legal process.” Here the evidence reveals that the defendant required the servant, Elma Manliguez, a Philippine national, ”to perform all the household work without compensation or days off, physically and emotionally abused her, refused to allow her to contact with family and friends and provided her with substandard food and housing. ... She further claims that they denied her any extended periods of rest, confiscated her passport, prohibited her from communicating with people outside their immediate family, fed her stale leftovers, denied her the most rudimentary personal hygiene items, and attempted to sever her ties with her mother in the Philippines, among other allegations. ... These allegations describe acts of barbarism and unrelenting mental brutality reminiscent of the gulag memorialized by Aleksandr Solzhenitsyn in his novel entitled *One Day in the Life of Ivan Denisovich.*” For other reports of modern day slavery in America see the *Federally Speaking* columns for November 2001 and January 2002.

## **THE FEDERAL CORKBOARD™**

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**WHISKEY REBELLION.** Wednesday, November 6, 2002, 3:45 PM CLE; 5 PM “Blast from the Past” Reception (see lead story for more details or call as noted above).

**SUPREME COURT UPDATE.** Wednesday, March 12, 2003, all day CLE at Federal Courthouse, with U.S. Supreme Court Clerk Bill Suter. Call for details.

**LUNCH WITH A FEDERAL JUDGE SERIES,** for FBA members, continues.

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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). Federally Speaking thanks LexisNexis for aiding in research.*

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