2001

Book #23

Roger J. Miner ’56

Follow this and additional works at: http://digitalcommons.nyls.edu/scrapbooks

Part of the Courts Commons, Judges Commons, Legal Biography Commons, Legal History Commons, and the Legal Profession Commons

Recommended Citation

http://digitalcommons.nyls.edu/scrapbooks/2

This Article is brought to you for free and open access by the The Honorable Roger J. Miner ’56 Papers at DigitalCommons@NYLS. It has been accepted for inclusion in Scrapbooks by an authorized administrator of DigitalCommons@NYLS.
Sept 21, 2001

Dear Jackie - Roger -

I realized to my horror that perhaps you didn't receive these materials - although you inspired so much of it.

I'll check in next week.

Best regards,

Al Ross
The research for this report was principally conducted by Lee Cokorinos and Julie R.F. Gerchik.

Institute for Democracy Studies

Board of Directors:
Robert M. Pennoyer, Co-Chair
Roberta Schneiderman, Co-Chair
Anne Hale Johnson
David A. Jones
Barbara S. Mosbacher
Alfred F. Ross
Hon. Harold R. Tyler, Jr.
Amb. William vanden Heuvel

Law Program Advisory Board:
Victor A. Kovner
Robert Rifkin
Irwin Schneiderman
Frederick A.O. Schwartz, Jr.

Staff:
Alfred F. Ross, President
Lee Cokorinos, Research Director
John Tessitore, Communications Director
Julie R. F. Gerchik, Associate Director & Program Associate, Law and Democracy
Lewis C. Daly, Senior Program Associate, Religion and Democracy
Gillian Kane, Program Associate, Reproductive Rights and Democracy
Robert Palumbos, Development Associate
# TABLE OF CONTENTS

I. Introduction ................................................................................. 1  
   A. Origins ................................................................................. 5  
   B. Funding ................................................................................. 5  
   C. Publications ......................................................................... 6  

II. Structure .................................................................................... 7  
   A. Leadership ............................................................................ 7  
   B. Membership Divisions .......................................................... 13  

III. Activities ................................................................................. 17  
   A. The ABA Watch Project ......................................................... 17  
   B. Practice Groups ................................................................... 20  

IV. Conclusion ............................................................................... 27  

Appendix ....................................................................................... 29  

Notes ............................................................................................. 33
I. INTRODUCTION

"[S]o much of the [Federalist] Society's leadership consists of active politicians and others whose slouching towards extremism is self-proclaimed."³
—Former American Bar Association President, Jerome Shestack

As the conservative movement develops its challenge to fundamental institutions in the American body politic, ranging from the public schools to the Republican Party and the mainline religious denominations, it has not ignored the legal front. Extreme conservative legal organizations sponsoring a combination of right-wing litigation and advocacy are opening the way for a radical transformation of the American legal system.

One of the most significant developments has been the emergence of the Federalist Society for Law and Public Policy Studies, formed in 1982 and based in Washington, D.C. This organization has developed comprehensive challenges to a broad range of constitutional principles, and it is targeting the courts, the law schools, and the American Bar Association (ABA) itself.

Serious questions also have been raised about the Federalist Society in the federal judicial selection and confirmation process. Senior Judge Roger J. Miner of the U.S. Court of Appeals for the Second Circuit warned as long ago as 1992 that the power of appointment of federal judges "has shifted away from Presidents and Senators to staff," and that "the force of history and attachment to the coattails of political winners have catapulted them [the right-wing lawyers clustered around the Federalist Society] to positions of power, first as law clerks, then as movers and shakers in the office of the Attorney General, and now in the office of the President. This has been accomplished not by acquiring political power but by co-opting it. Lee Liberman, a founder of the new Federalists and now Assistant Counsel to the President, examines all candidates for federal judgeships for ideological purity. It is well known that no federal judicial appointment is made without her imprimatur."²

These developments have already had an effect in stimulating the rising anti-federalist jurisprudence of important Supreme Court decisions.³ The push for significant restrictions on Congress’s authority to legislate goes far beyond public skepticism about the efficacy of government programs, a renewed desire for regulatory efficiency, and necessary streamlining. Strategic constitutional challenges are being mounted at the state and federal levels in areas that were previously viewed as settled law and enjoyed widespread consensus. Meanwhile, an extensive network of large foundations, attorneys in prominent private and public interest law firms, activist groups, and political interests are expanding their institutional capacity while demonstrating growing sophistication in organizing toward their strategic goals.

At the heart of this process is the Federalist Society, an often underestimated but increasingly powerful and influential organization of conservatives and right-wing libertarians in the bar.
The Federalist Society's leaders include some of the most influential figures on the right, among them former Attorney General Edwin Meese III, former federal judge and Supreme Court nominee Robert Bork, and former president of the Christian Coalition Donald Paul Hodel. Another key leader of the organization, former President Bush's White House counsel C. Boyden Gray, was cited by The Washington Post as a "possible attorney general in a George W. Bush administration." Several sitting Supreme Court justices have spoken under the auspices of the Society, and several leading judges on the federal bench serve in an advisory capacity to the Society's local chapters. Backed by several million dollars from right-wing foundations that have played a leading role in building the conservative movement, they are successfully shaping the direction of the challenge to a democratic jurisprudence.

Decisions that reflect evolving constitutional concepts of social justice are denounced as lacking the necessary grounding in the constitutional authority of the court. Conversely, many radical legal interpretations conforming to so-called traditional values or radical deregulatory positions find acceptance as good law.

The Federalist Society drives its agenda behind a seductive façade of "intellectual debate," seeking to project the appearance of a genuine desire to engage constructively with mainstream positions on legal issues. The effectiveness of the Federalist Society is apparent in its significant presence in law schools, as well as in its involvement in recent challenges to the role of the American Bar Association. The Society membership includes more than 40,000 lawyers, policy experts, and business leaders who are involved in sixty Lawyers Division chapters nationwide. The Society also offers continuing legal education (CLE) programs and promotes rightist views through publications and a number of sophisticated Web sites.

In its efforts to shape the parameters of debate in law schools and to develop a capacity for recruitment and career development, the Federalist Society has launched a Faculty Division, as well as a Student Division with a network of some 140 law school chapters containing 5,000 members nationwide. Edward Lazarus, a former law clerk for Justice Harry Blackmun, wrote in his book, Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court, that membership in the Society "became a prerequisite for law students seeking clerkships with many Reagan judicial appointees as well as for employment in the upper ranks of the Justice Department and the White House." With an annual budget of close to $3 million, the Society holds high-profile annual national student symposia and numerous local conferences targeting lawyers, law students, and faculty to showcase conservative views on key legal issues. The Society claims the academic high ground by staging "balanced" debates through which it can introduce its agenda into the law school environment. It also exploits the prevailing anti-regulatory mood (the growing interest in "new federalism") to legitimize a dubious and, in fact, anti-federalist view of the beliefs of Madison and other framers of the Constitution.

Federalist Society representatives and publications frequently criticize what they term "judicial activism." These criticisms seek to impugn, unfairly, judicial actions that do not accord with their philosophy. Decisions that reflect evolving constitutional concepts of social justice are denounced as lacking the necessary grounding in the constitutional authority of the court. Conversely, many radical legal interpretations conforming to so-called traditional values or radical deregulatory positions find acceptance as good law. The Society's many publications and forums offer arguments that challenge the public sector in the name of the Non-Delegation Doctrine, attack government administrative fees, and argue for the abolition of the Securities
and Exchange Commission and the limitation of directives from the Environmental Protection Agency and the Occupational Safety and Health Administration.

Federalist Society publications and panels often feature discussions targeting the foundation of federal civil rights law, finding and exploiting alleged shortcomings, for example, in voting rights laws, gender equity protections, and desegregation orders. In the area of labor rights, contributors to the Society's publications have celebrated the defeat of disparate impact theory as applied in a California age discrimination case and challenged sexual harassment law, Title IX, the Americans with Disabilities Act, and standard "wage gap" statistics.

Another target in Society discourse has been the separation of church and state, one of the cornerstones of American jurisprudence. Reflecting the presence of the religious right in its leadership, membership, and targeted constituencies, the Society's forums and outlets have given prominence to arguments for "school choice" and "charitable choice" (church involvement in state efforts to reform welfare), as well as creationist teachings and the distribution of religious materials in public schools.

By creating an image of itself as a catalyst for principled, high-level discussion of the law, the Federalist Society has been able to avoid sharp scrutiny by the legal profession. This is particularly the case in regard to the significant role that leading members of the Society, such as Senator Orrin Hatch (R-Utah), have played in politicizing the process of judicial selection, and in undercutting the nation's premier organization of attorneys, the American Bar Association, and in particular its Standing Committee on the Federal Judiciary.

The Society's religious right and right-wing libertarian ideological strains come together around anti-federalist principles advocating a broad diminution of the role of the courts and of the federal government in general. The breadth of the Society's reach highlights the significance of its fifteen practice groups, spanning areas such as religious liberty, national security, cyberspace, corporations law, and environmental law. The practice groups provide the operational capacity for the promotion of a range of conservative and libertarian views, including some that are quite extreme. For example, in 1998 the chair of the Financial Institutions practice group advocated abolishing the Securities and Exchange Commission.9

The mainstream legal community has begun to recognize that Federalist Society leaders are playing a disproportionate role in the judicial selection process. Former President George Bush's White House Counsel, C. Boyden Gray, who is a longtime leader of the Federalist Society, employed Lee Liberman Otis, a co-founder of the Society, as a key player in the screening of candidates for the federal bench.10 Former Iran-Contra special prosecutor Lawrence Walsh has written that he was "especially troubled that one of White House Counsel Boyden Gray's assistants had openly declared that no one who was not a member of the Federalist Society had received a judicial appointment from President Bush."11

The Society has set its sights on the American Bar Association. Perhaps most clearly evidenced by the Federalist Society's publication ABA Watch, Society members have been
involved at all levels of the attack on the ABA. As heralded in a “special edition” of ABA Watch in March 1997, Senator Hatch, chair of the Senate Judiciary Committee and co-chair of the Federalist Society board of visitors, announced that he would no longer invite the ABA to participate on a pro forma basis in the Senate judicial confirmation process.

Furthermore, in the keynote address on “judicial independence” at the 1999 Federalist Society National Lawyers Convention, Justice Clarence Thomas openly denounced the ABA: “I am doubtful whether the ABA can ever ‘reform’ itself.” He then juxtaposed the ABA, which he labeled “an interest group,” with the Federalist Society: “The Federalist Society, by the way, should be commended for maintaining the wall of separation between law and politics.” Shortly thereafter, the Federalist Society announced that it would develop “voter guides” for ABA elections—an unprecedented effort to influence the governance of the ABA. This is reminiscent of the Christian Coalition’s allegedly partisan efforts to influence elections by regularly issuing voting guides.

The Federalist Society goes to great lengths to present itself as nonpartisan, claiming that, unlike the ABA, it does not take official positions as an organization. Steven Calabresi, a founder and co-chair of the Society’s board of directors, told The National Law Journal that “a conscious decision” was made early on “not to be a specific advocacy organization” to make participating judges “feel more comfortable.” In practice, however, this decision made the Society’s partiality informal, but no less aggressive. The Federalist Society’s practice groups, conferences, and written material routinely illustrate that there is little about the Society that is unbiased. Rather, these various platforms serve as a “mainstream” venue for conservative and right-wing libertarian beliefs, considered far outside the mainstream in their opposition to important federal and civil rights legal standards. In fact, The National Law Journal noted, although the “group is officially nonpartisan, the sometimes hidden influence of the Federalist Society...has already been felt—in the Reagan and Bush Justice Departments, which filled their ranks with members, and among judges, who participate in the Society’s programs and hire members as clerks.”

In addition, the Federalist Society’s activities complement the objectives of other important legal institutions on the right. These institutions include radical right-wing law schools, such as Pat Robertson’s Regent University School of Law in Virginia and the recently launched Ave Maria School of Law in Michigan. Thomas S. Monaghan, former owner of Domino’s Pizza, sponsors Ave Maria, and its faculty includes Robert Bork. There are also a number of sophisticated legal advocacy and litigation organizations on the right, such as the Institute for Justice, the Washington Legal Foundation, the Center for Individual Rights, and the Pacific Legal Foundation, among others. Complementing these secular right groups, there has been a proliferation of religious right litigation organizations gaining in resources, vastly increasing their power base, and successfully building a strategic litigation capacity. These organizations include Pat Robertson’s American Center for Law and Justice, the Christian Legal Society, and the Rutherford Institute. The Alliance Defense Fund, whose board of directors includes leaders of the most powerful of the religious right organizations, pools millions of dollars to sponsor
challenges to the separation of church and state and further the agenda of fundamental legal change being promoted by extreme religious interests.18

The Federalist Society is more than a group of lawyers with reactionary ideas. Although the Society never argues a motion or files a case, it is quietly gaining influence in key areas of the American judicial system. Although its members clearly have the right to further their debate on extreme conservative and right-wing libertarian legal positions, the mainstream legal community of America also has the right to an open and informed discussion on exactly who is behind this emerging legal power on the right, and what its purpose is. This understanding is of particular importance at a time when much of the accepted jurisprudence of the last few decades is under severe attack.

A. Origins

The Federalist Society for Law and Public Policy Studies began in 1982 as a small group of radical conservative students at Yale and the University of Chicago, backed by a few prominent names in the right-wing legal establishment, including Robert Bork, Ralph Winter, and Antonin Scalia. With seed money provided by the Institute for Educational Affairs (headed at the time by neoconservative guru Irving Kristol and the late William E. Simon),19 and major investment over the years by the Bradley, John M. Olin, Sarah Scaife, and other right-wing foundations, the Federalist Society grew quickly throughout the 1980s and 1990s.

During this period, the Society gained visibility by staging numerous "debates" and "seminars" on controversial issues, masking the marginal extremism of its speakers by presenting them alongside highly regarded legal scholars. The radical libertarian deregulation position of the Federalist Society facilitated its ability to rapidly expand its membership with attorneys whose clients would benefit from such an agenda. Its successful recruitment on these issues has proceeded apace, notwithstanding the presence of a strong wing of the Society that favors an activist, radical rightist social agenda.

B. Funding

The primary funding sources of the Federalist Society reveal a far-reaching effort by some of the largest right-wing foundations in the country. For the year 1998, the Society received the following funding: $135,000 from the Lynde and Harry Bradley Foundation;20 $175,000 from the Sarah Scaife Foundation;21 $349,404 from the John M. Olin Foundation;22 $45,000 from the Castle Rock Foundation,23 created with a $36 million endowment from the Adolph Coors Foundation;24 $25,000 from the Richard and Helen DeVos Foundation;25 $50,000 from the Earhart Foundation;26 $10,000 from the Milliken Foundation;27 $5,000 in 1998 and $55,000 in 1999 from the John W. Pope Foundation of North Carolina;28 $158,000 from the Charles G. Koch Charitable Foundation;29 and $120,000 for support of the Practice Groups from the E.L. Wiegand Foundation.30 From these foundations alone, and apart from individual contributions and grants from smaller foundations, the Federalist Society received a total of $1,072,404 for the year 1998.
Although its members clearly have the right to further their debate on extreme conservative and right-wing libertarian legal positions, the mainstream legal community of America also has the right to an open and informed discussion on exactly who is behind this emerging legal power on the right, and what its purpose is.

In addition to these foundations, the Federalist Society is greatly helped by corporate law firms that underwrite or give generous support to its many events. For example, the back cover of the Society's 1999 National Lawyers Convention program extends "special thanks to The Federalist Society's Law Firm Sponsors for their generous support: Cooper, Carvin & Rosenthal; Covington & Burling; Gibson, Dunn & Crutcher; Munger, Tolles & Olson; Sidley & Austin; Steptoe & Johnson; Wiley, Rein & Fielding; and Wilmer, Cutler & Pickering." For the Society's 2000 National Lawyers Convention, many of the same firms are named, although Maupin, Taylor & Ellis, Rosenman & Colin, and Winston & Strawn have also been added to the list. Although a law firm's "support" does not necessarily signify that all partners agree with the Society's aims and stated purpose, nevertheless these firms' contributions help to strengthen the Federalist Society's financial base, as well as to give the Society added credibility both in prominent legal circles and among impressionable law students.

In addition to supporting Federalist Society events, some law firms have given direct financial contributions to the Society. According to the Federalist Society's 1997 annual report, Covington & Burling; Gibson, Dunn & Crutcher; Munger, Tolles & Olson; and Wilmer, Cutler & Pickering all contributed in the "$1,000 to $25,000" range. In fiscal year 1998, the Munger, Tolles & Olson LLP Foundation contributed in the "$5,000 to $25,000" range, and Covington & Burling; Gibson, Dunn & Crutcher; Sidley & Austin; Steptoe & Johnson; Wiley, Rein & Fielding; and Wilmer, Cutler & Pickering each contributed between $1,000 and $5,000.

C. Publications

As one of the benefits of membership, Federalist Society members receive The Federalist Paper, a quarterly newsletter detailing Society events across the country, updates on the law, summaries of recent Supreme Court cases, and reviews of recent law and public policy books. The Society also publishes ABA Watch, Class Action Watch, and newsletters for each practice group. Two law journals that promote politics paralleling those of the Federalist Society have been developed at prominent law schools—the Harvard Journal of Law & Public Policy and the Cornell Law School Journal of Law and Public Policy. The Society describes the Harvard Journal of Law and Public Policy as "the Federalist Society's anchor law journal," with "one of the largest law review circulations in the country." E. Spencer Abraham, a co-founder of the Federalist Society itself, was the founder and president of the Harvard Journal of Law & Public Policy. This journal has been supported by the John M. Olin Foundation and Scaife Family Trusts, and it is a key tool for disseminating emerging conservative and libertarian jurisprudence. It serves as a distinguished venue in which rising students and professors can publish their latest papers. A special issue of the Arizona State Law Journal reproduced the proceedings of a conference on "Federalism and Judicial Mandates" organized by the Federalist Society and the Goldwater Institute and sponsored by a number of conservative foundations, including John M. Olin and Earhart.
Supreme Court, Congress, private and public interest law firms, and numerous law schools. As of 1998, members of the Federalist Society were state judges in at least nine states and occupied at least twenty-two positions on the federal bench. U.S. Supreme Court Justices Anthony M. Kennedy, Antonin Scalia, Clarence Thomas, and Chief Justice William H. Rehnquist are "close affiliates of the Federalist Society."² At least nine members of Congress were Federalist Society members, according to the Federalist Society's 1998 list, and three state attorneys general held membership.

Backed by millions of dollars from leading right-wing and libertarian foundations,³ the Federalist Society is successfully shaping emerging jurisprudence through the fifteen practice groups of its Lawyers Division, which span the entire spectrum of the law: federalism, civil rights, telecommunications, church-state relations, and many other areas. In an effort to shape the contours of debate in the law schools, and to develop a capacity for future generations of ultra-conservative lawyers to influence American jurisprudence, the Federalist Society has also started a Faculty Division. This complements the Society's long-established Student Division, a network of 140 law school chapters with 5,000 members nationwide.

**Excellence vs. Ideology?**

Serious questions have also been raised about the role of the Federalist Society in the federal judicial selection and confirmation process. Senior Judge Roger J. Miner of the U.S. Court of Appeals for the Second Circuit warned as long ago as 1992 that the power of appointment of federal judges "has shifted away from Presidents and Senators to staff," and that "the force of history and attachment to the coattails of political winners have catapulted them [the right-wing lawyers clustered around the Federalist Society] to positions of power, first as law clerks, then as movers and shakers in the office of the Attorney General and now in the office of the President. This has been accomplished not by acquiring political power but by co-opting it. Lee Liberman, a founder of the new Federalists and now Assistant Counsel to the President, examines all candidates for federal judgeships for ideological purity. It is well known that no federal judicial appointment is made without her imprimatur."⁴

Similarly, Edward Lazarus, a former law clerk for Justice Harry Blackmun, wrote in his book, Closed Chambers: The Rise, Fall

**The leadership of the Society includes some of the most influential figures on the Right, including former Attorney General Edwin Meese III, former Supreme Court nominee Robert Bork, and the former President of the Christian Coalition, Donald Paul Hodel.**

and Future of the Modern Supreme Court, that membership in the Society "became a prerequisite for law students seeking clerkships with many Reagan judicial appointees as well as for employment in the upper ranks of the Justice Department and the White House."⁵

In addition, the Federalist Society's activities reinforce the objectives of other important legal institutions on the right. These include radical right-wing law schools, such as Pat Robertson's Regent University School of Law in Virginia and the newly formed Ave Maria School of Law in Michigan, founded by former Domino's pizza baron and aggressive antiabortion activist Tom Monaghan. Ave Maria's new faculty includes Robert Bork. The Federalist Society also complements the activities of a number of sophisticated legal advocacy and litigation organizations on the right, such as the Institute for Justice, the Washington Legal Foundation, the Center for Individual Rights, and the Pacific Legal Foundation, among others.

**IDS Insights**

**ALFRED F. ROSS**
Editor-in-Chief

**LEE COKORINOS**
Editor

**INSTITUTE FOR DEMOCRACY STUDIES**

President
Alfred Ross
Research Director
Lee Cokorinos

External Relations and Development Director
Kathy St. John

Program Associates

Lewis C. Daly
Religion and Democracy
Julie R. F. Gerchik
Law and Democracy
Gillian Kane
Reproductive Rights and Democracy

Asst. to the President
Elizabeth Santucci
Senior Fellow
Frederick Clarkson

Editorial Consultation and Design
Alice Allen Communications

Interns: Laura Eichelberger, Yvonne Nix,
Martina Pomeroy, Vineetha Reddy,
Allyson Ryan, Laurie Tiberi

Board of Directors:
Anne Halle Johnson
Barbara Mosbacher
Robert M. Pennoyer
Alfred F. Ross
Roberta Schneiderman
Hon. Harold R. Tyler, Jr.
Amb. William vanden Heuvel

Subscriptions for four issues of IDS Insights are $25 for individuals and nonprofit organizations; $20 students/low income; $50 other organizations.

Please make checks payable to the Institute for Democracy Studies 177 East 87th Street, Suite 501 New York, NY 10128
Ph: 212-423-9237, Fax: 212-423-9352
IDSInsights@institutefordemocracy.org
www.institutefordemocracy.org

IDS is a 501 (c)(3) nonprofit, tax-exempt organization. © Institute for Democracy Studies, 2000

**IDS Insights**
January 1, 1999

To: RJM
Re: Rachel Finkelstein Ranis, of Hudson, NY

MEMORANDUM OF JAC

At a Christmas party last week Rachel Ranis (as we know her) made a great point of asking me whether you and I were colleagues, and then asking me to convey her regards and best personal wishes. She remembers you well, and fondly, from your teenage years in Hudson, NY. I have known Rachel since about 1978, when I was General Counsel of Yale. She is married to Gustav ("Gus") Ranis, the Frank Altschul Professor of International Economics, and Director of the Yale Center of International and Area Studies; Gus is a specialist in development economics, and a great authority on third-world economic development. Now a senior faculty member, he numbers many national leaders among his former students, including (for example) President Zedillo of Mexico, who took his Ph.D. in Economic at Yale under Gus's supervision.

Happy New Year for Jackie and to you.

JAC
January 6, 1997

Dear Judge and Mrs. Miner,

How nice of you to send a holiday card.

We remember so very fondly your visit with us and
fire lecture - in the
midst of such trying times for you.

Hope you have a wonderful new
year.

Best regards,

Dick Ottinger
Panel Sanction

Continued from page 1, column 3

research any legal theory that comes to mind, and serve generally as an advocate for appellant,” the panel declared in an unsigned per curiam ruling in The Ernst Haas Studio Inc. v. Palm Press Inc., 97-9259. “We decline the invitation.”

The opinion, filed Tuesday, comes two months after Second Circuit Judge Roger J. Miner used a speech at Pace University School of Law to call for sterner responses from the court, including sanctions, to what he perceived as a rise in shoddy appellate advocacy. Circuit judges must do more to “advance the cause of professional responsibility,” Judge Miner said in his talk. (NYLJ, Nov. 16)

In addition to sanctioning Mr. Weingrad, the three-judge Second Circuit panel also affirmed dismissal of the suit filed by his client, The Ernst Haas Studio, which alleged a greeting cardmaker, Palm Press, had infringed its copyright in a photograph of Albert Einstein taken by the now-deceased photographer Ernst Haas. The panelists were Second Circuit Chief Judge Ralph K. Winter and Second Circuit Judges Thomas J. Meskill and Pierre Leval.

Theory Lost

In response to the sanction, Mr. Weingrad said, “I don’t accept as fair or just sanctioning a lawyer because he was espousing his client’s claim.” He conceded, however, that his brief was particularly short. He said he had to remove portions of his argument when the case’s main theory—that scuttled because the registration was denied. He said the lower court had prevented him from amending his complaint to reflect a new theory—that the photographer never had abandoned his copyright in the disputed photo.

His adversary, Jeffrey A. Berchenko, of Berchenko & Korn, in San Francisco, said he actually was a little disappointed by the Second Circuit ruling. “I could be guilty of wanting to have my cake and eat it, too,” he said. In addition to granting the sanctions, he had wanted the Circuit to address the case’s merits, he said.

The New York-based Ernst Haas Studio, run by Alexander Haas, the photographer’s son, licenses the Haas photographic collection. The disputed photo—titled “Albert Einstein Thinking”—was one Mr. Haas had taken in 1953 of the late physicist in his study at Princeton. The image was published in the June 1953 issue of Vogue, a Conde Nast Publication.

In May 1996, the Haas Studio filed suit against Palm Press, of Berkeley, Calif., after Palm used the image on a series of note cards. The Haas Studio claimed it was awaiting registration for the photo from the Register of Copyrights. When registration was denied, Southern District Judge Loretta Preska dismissed the suit.

“Plaintiff has not properly alleged the first element of its copyright infringement claim”—ownership of a valid copyright, Judge Preska found. On appeal, The Haas Studio claimed two errors by the district court. First, it claimed errors in reviewing its claim that Conde Nast, which obtained a copyright registration for its magazine in 1953 and renewed that in 1981, had reverted the photo copyright to The Studio. Second, it claimed The Studio had been denied permission to amend its complaint to raise that point.

Nine Pages

The Second Circuit found multiple deficiencies with The Studio’s appellate brief asserting those claims.

“Although the issues raised are complex,” the panel noted the brief was just nine pages and lacked any copyright statute, case citations or clear articulation of its legal theories. The panel said the brief failed to satisfy the requirement in Fed. R. App. P. 28 that an appellant’s main briefs contain key issues and contentions, and support in case law, statutes and the record.

“Appellant’s brief utterly fails to comply with this mandatory direction,” the panel wrote. “A reasonable reader of the Brief is left without a hint of the legal theory proposed as a basis for reversal.”

The panel affirmed the case dismissal and ordered sanctions of reasonable appellate attorney’s fees to be paid by Mr. Weingrad, pursuant to Fed. R. App. P. 38. “Because the frivolous nature of the Brief is due to counsel, he should bear sole liability for these fees,” the panel wrote.

The panel ordered the amount of the fees be fixed on remand by the district court.
January 12, 1999

The Honorable Ruth Bader Ginsburg
Supreme Court of the United States
Washington, D.C. 20543

Dear Justice Ginsburg:

It is hard to believe that the date of the Law Review’s banquet in your honor is coming upon us so quickly. A few months ago, Nadine Strossen wrote you that we would provide you with some informational materials about New York Law School, our Law Review, and the Froessel Award. I have enclosed these materials, which I hope you will find helpful. I have also enclosed a letter from Second Circuit Judge Roger Miner, a past Froessel Award recipient, who unfortunately will be unable to attend the Banquet.

I look forward to meeting you and your husband on February 12. I will be in touch with Cathy or Linda in the coming weeks to finalize all of the plans for the event.

With all best wishes for a happy and healthy new year,

Amy L. Tenney
Supervising Editor

encls.

cc: (w/o encls.)
Nadine Strossen, Faculty Advisor, NYLS Law Review
Dean Harry Wellington
Judge Roger J. Miner
Hon. Roger J. Miner
United States Courthouse
445 Broadway, Suite 414
Albany, NY 12207

January 25, 1999

Dear Roger:

I can only begin to express to you how much José and I appreciate your letter of January 19. Your commentary about the Guidelines is terrific -- and I only wish that we could have quoted you in our book, for you make some important points more powerfully than we did. Perhaps in the second edition? (Unlikely, I know!) I agree that this would be a perfect time to reconsider the structure of guideline sentencing in the federal courts. My goodness, with no Commissioners now on board, why not move the whole responsibility to the Judicial Conference? Alas, I regret that no one in the halls of power seems to be considering that idea.

We had such a nice time at your lovely home and pool in 1997. The swim was about as refreshing as one could imagine -- between the heat of the day, the luxury of the pool, and the extraordinary vista. I look forward to seeing both of you again soon, at the Judicial Conference if not before. I hope that we can find time to have a meal together then.

Please give our best to Jackie.

Sincerely,

~

P.O. BOX 208215, NEW HAVEN, CONNECTICUT 06520-8215 · TELEPHONE 203 432-4835 · FACSIMILE 203 432-1148
COURIER ADDRESS 127 WALL STREET, NEW HAVEN, CONNECTICUT 06511 · EMAIL KATE.STITH@YALE.EDU
Dear Roger:

Thank you for sending me the beautiful booklet recounting the adventures of the intrepid Miners on their travels in Baja. I had read it originally in *Experience*, but found it interesting all over again. It came at the right time because it put me in the holiday mood. The not so intrepid Feinbergs are leaving at the end of this week for a month in Tucson, and we are really looking forward to it. I hope the weather cooperates.

Shirley and I send you and Jackie our warmest regards and best wishes for many more trips.

Sincerely,

Hon. Roger J. Miner  
U.S. Circuit Judge  
James T. Foley Courthouse  
445 Broadway - Suite 414  
Albany, NY 12207-2929
January 28, 1999

Dear Roger —

I very much enjoyed reading (last night) the article by you and Joel on the "unforgotten criminals." It seems I have been an amazing hiker — you folk obviously retain your youthful taste for adventure. Thanks for sharing the piece with us.

With warm regards & you & Joel.

[Signature]

141 Church Street, New Haven, Connecticut 06510
Dear Regis Torre

I have you so much for your wonderful article on the experience you had on Tiberius. Your description of what you saw and experienced are fascinating. I hope you and I have a chance to see what you have done in exploring new worlds. May your adventures continue in 1999 and may you enjoy good health and every other blessing. Hope I have a chance to say hello in person one time soon.

Roddy,

1/21/99
January 28, 1999

The Honorable Roger J. Miner  
Circuit Judge  
United States Court of Appeals  
Second Circuit  
United States Court House  
445 Broadway, Room 414  
Albany, New York 12207

Dear Judge Miner:

I am in receipt of the article you wrote for Experience magazine titled, Unforgettable Peninsula: Travels in Baja California. It was splendidly written and a tour-de-force; and I thank you for it.

Familiar as I am with Baja California, I can appreciate your grasp of the peninsula's beauty and charm, as well as the minor problems you encountered throughout the area. It was a delight to read such an insightful article.

I am enclosing an inscribed copy of my latest French-Impressionist art book which I authored titled, "A Passion For Art" for your reading enjoyment.

With every good wish...

Sincerely,

Dr. Samuel J. LeFrak
February 1, 1999

Judge and Mrs. Roger J. Miner
One Merlin's Way
Camelot Heights, NY 12534

Re: Baja, California

Dear Judge and Mrs. Miner:

Thanks very much for the most interesting write-up of Baja, California.

Kindest personal regards.

Sincerely,

James L. Adler, Jr.

JLA/ms

cc: Ralph Carmichael
Dear Julie and Roger,

"Travel to Baja" couldn't have come at a better time. Reading your colorful account of your trip to that exotic peninsula was a wonderful escape from the winter doldrums. I gazed over the text and the pictures, like a frustrated gardener salivating over a spring flower catalogue in February.

Your magazine is a must-read for anyone planning a trip along the Transpensacola Highway—a guide that AAA ought to distribute. Your details describing the hotels and restaurants and what they served are absolutely wonderful. One telephone per hotel is an eye-opener, and knowing when one cannot buy gasoline is a lifesaver. And—wow! the scenery is a magnet.

I have never before been particularly curious about that part of the world—
now I am!! And when I go, your
information publication will
accompany me. (Along with Julian,
of course.)

Thanks so much for sending
it to us. Your account has truly
made Baja the unforgettable peninsula.
Next time we get together we want
to hear more of your travels. Are you
going to do an article on your cruise
and South America?

Keep warm on your beautiful
holidays! So far winter '81 hasn't
been too punishing.

Warm love,

[Signature]

P.S. We love the pictures of Roger
and look for some of you - Jilene!
until we realized that you were
the photographer.
February 3, 1999

PERSONAL

Honorable and Mrs. Roger Miner
One Merlin’s Way
Camelot Heights
Hudson, New York 12534

Dear Roger and Jackie:

I found your article "Travels in Baja, California" to be particularly interesting. I have a residence in Rancho Mirage, California which resembles the terrain in Baja, California. I also have a Ford Taurus - 106,000 miles - which is still very reliable. Thanks for the article. Stay well.

Sincerely,

[Signature]

Michael A. Telesca
United States District Judge

MAT/jc
Dear Jack and Roger,

The account of your trip through the USA arrived as I was leaving for Florida.

Many thanks. It is an interesting account of a journey through an area with which I have not been familiar.

Hope all is going well.

Best regards,

[Signature]
Kirkpatrick & Lockhart LLP

is pleased to announce that the following associates have been elected to join our partnership

THOMAS J. EDGINGTON
PETER N. FLOCOS
JUDITH J. HLAFCSAK
MARK R. LESLIE
MARK A. RUSH

Our new partners are resident in our Pittsburgh office

JANUARY 1999

Dear Judge,

I thought you'd enjoy this. Just got your article on Baja, and I can't wait to read it. Please give my best to Jackie, Shirley and Mary Ann. Hope to see you soon.

Peter

www.kd.com
The Honorable Roger J. Miner  
U.S. Court of Appeals for the Second Circuit  
445 Broadway, Suite 414  
Albany, New York 12207

Dear Judge:

I was so happy to receive the excerpt from Experience that you and Mrs. Miner recently sent to me. You did such an outstanding job of describing what you encountered on your journey to Baja California that I felt as if I had joined you on your trip. I could sympathize with your frustrations with the lack of amenities at various points along the way, yet take delight in all of the natural wonders that you enjoyed. Your vivid descriptions of the spectacular scenery and local cuisine encouraged me to put Baja at or near the top of my list of destinations to visit. Undoubtedly, anyone planning a visit there would be well served to read your narrative in advance of his or her trip.

It was really nice speaking with you by phone a few weeks ago. I hope that you are enjoying some of your time off and looking forward to seeing you before too long. Please give my best regards to Mrs. Miner.

Sincerely,

Jeff Bernstein
February 4, 1999

Dear Roger -

Many thanks for the intriguing article on the Baja. It makes me (in addition to envious) regret my record as a high school Spanish student and yearn for a day when I can write that many words without citation or footnote.

Thanks again.

Bob Sack
Dear Roger and Jackie,

Many thanks for sending your Baja California article. I particularly enjoyed the Tropic of Cancer photo.

Roger, thank you also for the opportunity to work with Ariella on the Kalamazoo case. She was a pleasure.

Regards,

Loretta
Dear Jackie:

Read the report you and His Honor wrote about your trip to the Baja Peninsula. What a wonderful trip it must have been, although sometimes much to be desired!

But---I did enjoy every moment of your trip, and was so glad Margaret left it on the table for me to read. I went there on Friday the 29th I think, and found myself alone, as the family went to Hudson. I had stopped over after the opera. You know they insist that I NOT drive home at midnight.

I saw this picture in the NY Times, and I hope you did not have to put up with a crowd of cars like the enclosed.

Sincerely,

[Signature]
Hon. and Mrs. Roger J. Miner
One Merlin's Way
Camelot Heights
Hudson, New York 12534

Dear Jackie and Roger:

Thank you so much for the reprint of the publication depicting your trip to the Baja Peninsula.

I found the story most informative and interesting and somewhat envy your originality and creativity. Much more important, I am delighted to learn you are both well and enjoying semi-retirement.

Thank you again for remembering me and thank you for your warm and enduring friendship.

Fondly,

[Signature]

Leonard A. Weiss
Roger & Jackie:

Your pamphlet was wonderful. At a recent conference in San Diego, Peter & I drove into Mexico and traveled down the Peninsula for two hours. We thought about the possibility of a longer trip some day, and your pamphlet stimulated the desire once again. Please let me know when you are sitting next so we can plan on dinner if you two are up to a late night in the City. Warmly, Sonia Sotomayor
Dear Jacki & Roger,

Nancy & I enjoyed

frustrating through Baja California! Sounds like what we'd like to do some day. Thanks for sending it along.

I am back in S. Carolina now until early March when I return to SPS for 2 weeks then back to SPS to return March 16th in the middle of May. This is a tough life, huh to be a senior! Best to you both!

88 just completed 2 days at the 4th event.
February 9, 1999

Judge and Mrs. Roger Miner
One Merlin’s Way
Camelot Heights
Hudson, NY 12434

Dear Jackie and Roger:

Many thanks for sending us “Unforgettable Peninsula: Travels In Baja, California.” Your trip sounded fabulous. Merle and I enjoyed the article very much indeed.

We have been planning to take a trip to Baja, California next winter or the winter after. As you know, we are making plans to spend more and more time in Phoenix so we can be near our grandchildren.

Your trip sounded fabulous; however, I was not thrilled to learn how bad the highway is: “The road is banked in the wrong direction, and there are sheer drop offs without guard rails.” We are simply too old for that sort of nonsense. Moreover, the hotels sounded worse than mediocre: “The rooms were unclean, the light fixtures were broken, the swimming pool was filthy, and most of the time there was no hot water.” Merle and I do not place a high priority on luxurious accommodations and service, but we do like our rooms clean. We are finicky that way.

Knowing you, Jackie, I am sure you raised holy hell with the hotel for trying to palm off this type of room on you.

With warmest personal regards and deepest affection.

Cordially yours,

E. Donald Shapiro
The Joseph Solomon Distinguished Professor of Law

EDS/dr
Dear Jackie & Roger

Thanks for the "Travels in Baja" monograph. I did find it very interesting, and am somewhat jealous! It sounds like you had a great trip.

Thanks

[Signature]
February 11, 1999

Honorable Mr. & Mrs. Roger Miner
One Merlin's Way
Camelot Heights
Hudson, New York 12534

Dear Roger & Jackie:

Michele and I greatly enjoyed your spectacular description of the Baja Peninsula. We felt that we were traveling in your Taurus along that dusty road and you let us appreciate the wonderful things you did.

As a family that keeps Kosher, we were especially enticed by the fact that the only meat we could eat is pork. We also drooled over your luscious description of the hearty lobster meals. We would still like to know if there are any Kosher butchers in San Jose' del Cohen.

It was really a most entrancing brochure as we were able to vicariously enjoy the warmth and beauty of Baja, California. May you have many more healthy, happy trips in 1999 and into the next millennium. Warm personal regards.

Sincerely,

[Signature]

Lawrence E. Kahn
United States District Judge

P.S. - I only wish your decisions were written as well! I guess Jackie makes the difference!
February 12, 1999

Dear Jackie Goyer,

Your travel log of the Baja Peninsula arrived and has been read and re-read. What a fantastic idea! Are you doing this with each of your trips?

Your trip sounded so interesting—scenery from sea shore to mountains to desert. We are planning a trip to the USA next fall to visit our son, Rick, and your journal gave me a great idea for a side trip. Do you think a car rental would work? Howard said he could take a month (or longer if we all have to see it) so perhaps there's a chance—we have done a little traveling and there's so much to see and do in this world.

Thank you for sharing your trip with us. We really enjoyed reading it.

Sincerely,
Keith Mcgar
February 15, 1999

Dear Judge and Mrs. Mine,

Thank you very much for sharing with me your delightful article on Baja California. My daughter spent a portion of her year between high school and college studying sea mammals at the university in her bay, and we went there to visit her and to have a vacation outside of Casa San Lucas. So your article brought back many pleasant memories. To be honest, though, we were nowhere as adventurous as you were—we just flew in and out of her bay for the U.S. Your article gives many intriguing suggestions for a future trip. Many thanks for thinking of me.

Sincerely,

John D. Gordon, III
Judge and Mrs. Roger Miner
1 Merlins Way
Hudson, NY 12534-4157

Dear Jackie and Roger,

Now that the clerkship madness is over and I have a moment to catch up, I and wanted to thank you for the lovely article: *Travels in Baja California*. It was a delight and both Anne and I enjoyed it a lot.

We look forward to seeing you soon.

Cordially,

[Signature]
Commodities Rulings
Appealable to Circuit

Decision Breaks With Eighth Circuit Holding

BY DANIEL WISE

A UNANIMOUS federal appeals panel yesterday rejected a contention by the Commodity Futures Trading Commission that appeals of its rulings reviewing administrative disciplinary orders must be taken to U.S. district court.

In finding that the appropriate review path was a direct appeal to a federal appellate court, the Second Circuit created a split in the circuits by refusing to follow a 1995 ruling from the U.S. Court of Appeals for the Eighth Circuit.

The decision will be published Monday.

The ruling was a procedural victory for Michael J. Clark, a floor broker on the Commodities Exchange (COMEX), who had sought review directly in the Second Circuit. The panel’s ruling did not address the merits of Mr. Clark’s claims that he should not have been fined $25,000 and suspended from trading for three months on several violations, including withholding customers’ orders for the benefit of another broker and trading in a manner that conflicted with his customers’ interests.

The initial findings and penalties were imposed in 1996 by COMEX, an exchange where futures and option contracts related to a variety of commodities are traded, and affirmed in

Continued on page 8, column 5

Excerpt From The Decision

The Second Circuit’s analysis starts with proposition the statute governing appeals from CFTC orders, when it is acting in its review capacity, is “ambiguous.” The Commodities Exchange Act, 7 USC §12c(c) merely refers to the availability of “judicial review” without specifying to which court.

Judge Roger J. Miner
Commodities Rulings' Appeals

Continued from page 1, column 5

July 1998 by the Commodities Futures Trading Commission (CFTC), which supervises a number of trading exchanges.

The Second Circuit's analysis starts with the proposition that the statute governing appeals from CFTC orders, when it is acting in its review capacity, is "ambiguous," Judge Roger J. Miner wrote in Clark v. Commodities Futures Trading Commission, No. 98-4291. The Commodities Exchange Act, 7 USC §12c(c), Judge Miner pointed out, merely refers to the availability of "judicial review" without specifying a court.

"Florida Power" Factors

The fact that the Commodities Exchange Act provides for direct review to the circuit for disciplinary orders issued by the CFTC when it acts on cases in the first instance, rather than in a review capacity, was pivotal under the factors announced by the U.S. Supreme Court in its 1985 ruling, Florida Power & Light Co. v. Lorion, Judge Miner concluded.

In Florida Power, the Supreme Court set forth four factors for determining the procedures for judicial review of administrative decisions: overall structure of the relevant statute; legislative history; congressional purposes behind the legislation; and general principles regarding the allocation of review authority.

The Eighth Circuit, in Jaunich v. U.S. Commodities Futures Trading Commis-
February 21, 1999

The Honorable Judge Roger J. Miner
U.S. Court of Appeals, Second Circuit
United States Courthouse
445 Broadway, Suite 414
Albany, NY 12207

Dear Roger:

Many thanks for your cordial, interesting letter of February 3. It was so good to hear from you on a range of topics.

First, as to the matter that had prompted my previous letter to you: the application of my Academic Assistant, Amy L. Tenney, for a clerkship with you. As you have no doubt now heard from Amy herself, she was given an attractive clerkship offer by another federal judge who follows a very different schedule from yours, and required Amy to "take it or leave it" in a short time period, a couple weeks ago. You're certainly right that the timing pressures concerning judicial clerkships -- magnified by widely ranging schedules followed by various judges -- are a challenge for applicants and judges alike. Still, while I'm sure that if Amy had waited, she would have received other attractive offers, the "bottom line" is that she now has lined up a clerkship with an excellent and personable judge -- Leonie Brinkema of the U.S. District Court in Alexandria, Virginia -- which should be a valuable educational experience. And I have no doubt that you will have your pick of other outstanding law students, including from our own favorite school, New York Law School!

I'm intrigued by the idea of collaborating on our courses, although it sounds as if yours focuses more on appellate practice than mine does; mine really focuses more on constitutional law, using appellate advocacy as the specific vehicle for honing the students' substantive knowledge and analysis. Since you were kind enough to suggest that we collaborate on a "manual," I'm taking the liberty of enclosing the Course Manual for this semester's installment of my seminar. As you can see, it's quite a tome! While I've been using some version of this document for many years now, each time I teach the course, I refine/revise the manual to reflect the most recent experiences with the current crop of students. If you'd be interested in seeing any of the other course materials (a collection of Background Materials and five case-specific packets regarding the five cases on which we concentrate -- always varying, from semester to semester, depending on what's on or moving toward the Supreme Court's docket), please let me know.
What a treat to get the travel brochure on Baja California! I had no idea you were such a
Renaissance Man! Since my husband and I took a marvelous trip to Baja several years ago, and
definitely will return, I very much look forward to reading it, as well as your lecture.
(Unfortunately, due to the demands of my “dual career,” I haven’t yet had the pleasure of reading
either of your enclosures -- but I do look forward to both.)

Again, Roger, thanks so much for your letter, and for all you do for New York Law School. I
very much look forward to our paths crossing again. In the meanwhile, all best regards.

Very truly yours,

[Signature]

encl.: ACLA Course Manual
February 24, 1999

Judge Roger & Jackie Miner
One Merlin Way
Camelot Heights
Hudson, NY 12534

Dear Jackie and Roger:

We thoroughly enjoyed your interesting and informative article about Baja Peninsula and your trip through southern California. I read it during one of the freezing weekends we spent in the Berkshires. It was a delicious read in contrast to the weather and thought for sure you’re both escaping the cold and enjoying a rest as well as the warmth of your retreat in Florida.

Lo and behold I saw the February 19th article on the front page of the Law Journal (regarding the statute governing appeals from the Commodity Future Training Commission) and recognized that the good Judge, as usual, is hard at work, making good sense out of complicated legal issues.

Al joins me in thanking you for sending us a copy of your article and extending our best wishes for your continued good health and good work. We are very proud of both of you.

Warm regards.

Sincerely,

SDG:adg

SYLVIA D. GARLAND
February 26, 1999

Judge Roger J. Miner
United States Court of Appeals
Second Circuit
Albany, New York 12201

Dear Roger,

I'd like to pass along an additional comment, beyond what I previously wrote, about your Pace lecture/article. I've thought considerably about the instruction you used to give in criminal cases when you were a trial judge, to the effect that "the question here is not whether the government wins or loses in this case. The government always wins when justice is done." I think that these few words sum up what it's really all about, and I believe this instruction must, in many instances, have had a profound or calming effect on jurors. I hope that many trial judges will have an opportunity to read the article, and be persuaded to give a similar instruction.

Thank you for sending me a copy of the article, "Travels in Baja California," authored by you and Jackie. I found it interesting, educational, and certainly well written. Best of all, I learned that you and Jackie were able to enjoy a fine vacation.

I hope that all is well with you and Jackie when this letter arrives.

Sincerely,

[Signature]

The New York Law School: At the heart of New York's legal community for over 100 years
DEAR ROGER:

What an interesting way of describing your vacation, it was a great pleasure reading your experience through The Baja Peninsula.

I have traveled The Peninsula seven times and it is always something new and interesting that astonishes my mind when I lay eyes on it.

I can only congratulate you for having the courage of doing this trip especially since you live in New York.

In hopes of having the pleasure of meeting you personally, please receive my kindest regards for the trouble of sending your adventure through Baja California.

SINCERELY YOURS

FRANCISCO BULNES M.

FB/jg
Dear Judge Miner:

I enclose a reprint of my article, *Mail Fraud Meets Criminal Theory*, with the thought that it may be of interest to you.

In this Article, I analyze the federal crime of mail fraud in terms of criminal theory and recent cases. I conclude that the statute now prohibits three offenses: pecuniary fraud, honest services fraud, and intangible property fraud. The analysis also reveals that courts often conflate the elements of conduct and culpability in cases of honest services fraud. I propose a two-level culpability test, based on that used in inchoate offenses, that uses harm to distinguish conduct and culpability.

Federal criminal law in general and the specific crime of mail fraud are of continuing interest to me, and I welcome your comments.

Sincerely yours,

Geraldine Szott Moohr

For more on mail fraud—

And thank you for the cite in Denver.
March 29, 1999

Dear Jackie and Roger:

You certainly know how to get away from it all. Unforgettable Peninsula: Travels in Baja California was just great. Thanks for sending it to me.

In the coincidence department, within days of this enjoyable read, an invitation to my niece’s wedding arrived. Tracy is getting hitched in Cabo del Sol, over Columbus Day weekend. We are all staying at the Hacienda Del Mar, a few miles down the road from San Jose del Cabo. Thank you for the warning on “over-built and...honky-tonk” Cabo San Lucas. I will not wander there.

I have been keeping bust here in horse country. Completed work in January on the civil war era doctor’s office on my property. It is now the main office of a “high-powered”, now mostly libertarian, lobbyist whom you know. My clients are great. I spend the greater part of each day on the Hill and can hardly ever wait to get back here. Please come visit on the way to your next adventure. Am only 55 miles to Washington but a long, long way in space and time. My house, however, does have both electricity and in-door plumbing.

I follow New York on-line with the Times and the Post. Ben Gilman’s press releases come regularly in the mail. Strange, all seems very familiar. Many faces have changed but the Hudson still keeps rolling a long. What’s the morning line in the Valley on GWB? Seems the most likely to at least get to the starting gate. As far as the House goes, both the Repubs and Dems seem down right contrite and desperate to pass matters of substance. Except for client matters, I know we would all be safer if they just passed Commemorative Resolutions....”National Trip to Baja Day” and cut taxes.

Again, your travelogue was most welcome and I thank you for thinking of me.

All the best and much love,

[Signature]

P.S. Jackie, I guess the federales didn’t recognize you south of the border or is that why you took the Taurus with Roger’s license plates?
March 30, 1999

Dear Roger and Jacqueline:

I just read your Travel in Baja which, until yesterday, was hidden by a stack of New Yorker, Atlantic Monthly, National Geographic and Civilization magazines. Iisten to tell you how much I enjoyed it and to thank you for sharing it. As I read it, I was reminded of the informative pieces Calvin Trillin has written over the years about similar journeys and the marvelous essays, delivered verbally, by Charles Kuralt.

I trust this finds you both in good health and good spirits.

With kind personal regards,

[Signature]

[Address]

[Postmark]
March 29, 1999

Dear Jackie and Roger,

Ermalee and I just recently returned from spending a month in Hawaii and found your beautiful brochure on your travels in Baja, California. It was interesting reading and we appreciate your thoughtfulness in sending it to us.

We love to travel by car also. There's no better way to learn about the country.

Best wishes to you both.

Sincerely,

Walter J. Hickel
March 31, 1999

To: RKW, ALK, JMW, DJ, PNL, JAC, FIP, CJS, RSP, RDS, SS
cc: WF, JLO, EVG, TJM, JON, RJC, RJM, JMcL
xcc: JRGibson


Memorandum of GC

I vote against a rehearing in banc. The underlying issue is a very close one, and, at the moment I rather think DJ has the better of the argument, but I am far from sure. Nevertheless, I don't think the case warrants our going in banc.

I. As everyone has noted, this is an issue that will ultimately be resolved by the Supreme Court, and, indeed, that it is likely to be taken up by that Court sooner rather than later. This does not, by itself, mean that an in banc is a waste of time. One of our principal jobs in cases in which we act as an intermediate appellate court (because the last word will come from the Supreme Court) is to prepare a menu for the Court laying out the various arguments so that its final decision is as well informed as it can be.

It was for that reason that I looked forward to an in banc in Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996), rev'd 521 U.S. 793 (1997) (the assisted suicide case). RJM's powerful opinion said much that needed to be said, my concurrence added some, but there remained room for any number of other views. (In particular, nobody had spelled out the advantages of a Pullman abstention, or a certification to the New York Court of Appeals to figure out whether the -- uninterpreted -- New York anti-assisted suicide statute applied in the cases before us. Cf. Arizonans for Official English v. Arizona, 520 U.S. 43 (1997)). Accordingly, I think that the Supreme Court would have been better served in Quill if it had not preempted an in banc by its speedy grant of cert.

The above reason, however, does not support an in banc here. The issues have, it seems to me, been very fully and ably discussed by PNL and DJ and there is not that much more that is useful to add, which does not mean, of course, that we won't spend a lot of time trying to do so if we do go in banc.

II. DJ to the contrary notwithstanding, I don't think this is a case where the result will have important consequences in the circuit's law. Once one allows affiliates to do what the legal services provider cannot do itself, much the same results will obtain, regardless of whether PNL's or DJ's views win out. Moreover, I find it hard to believe that there will be floods of welfare law cases whose outcome will turn on the difference between DJ and PNL.
III. That leaves a less commonly asserted ground for going in banc, but one that I think sometimes plays a part: Is the opinion so wrong that it is an embarrassment to the circuit or so upsetting to us that, even if it does not create a major litigation issue, we cannot abide it? This ground is dangerous, since admitting it would go a long way toward making our practice like that of those "misguided" circuits that rehear in banc *ad nauseum*. But even if we concede this as an acceptable ground for an in banc, *Velazquez* doesn't qualify. The issue is close; the Supreme Court not only hasn't settled on a view; it hasn't even really made the direction it was heading toward clear. (I don't believe we need go ahead of the Supreme Court when it has indicated -- without yet getting there -- where it probably was going. But, however one feels about what lower courts should do in that situation, in the case before us I'd be hard put to guess which way the Court would intend for us come out.)

IV. That leaves only the fact that the question in the case is interesting. But, tempting as it may be, we should not take up collective time to resolve hard questions unnecessarily just because they are fascinating. The issue is "nice," as the English would say, but that doesn't make it warrant our review.

The panel may be wrong (or it may not) but leaving the result in place will have few effects. We are unlikely to help the Supreme Court much by going in banc. And, while I would have loved being on a panel that dealt with the issue, my interest hardly justifies in banc review.

GC
April 7, 1999

Honorable Roger J. Miner
and Jacqueline A. Miner
1 Merlin’s Way
Camelot Heights
Hudson, New York 12534

Dear Judge and Jacqueline:

I finally got around to reading about the “unforgettable peninsula”, and I am glad that I did. Your travels in Baha appear to be the experience of a lifetime. For me, knowing that you completed your journey in your trustee Taurus makes me feel much better about driving my 1988 Bronco II.

Most importantly, I hope that the both of you are well, and Carol and I look forward to seeing you at the Sagamore.

Best regards,

William M. Skretny
United States District Judge

WMS/jd
Greetings to Mrs. Miner as well!

Tiflis – Altstadt mit Moschee
Fotoc: Udo Hirsch

Greetings from Tbilisi, Georgia.
Yes, there’s one mosque but also two synagogues. The Jewish community has been here for 2,600 years! (Unfortunately, the number has declined from 75,000 a few years ago to 1,500 today).

I am here with Bob Lipschier (Court 15th C.E.) giving a workshop to the new appellate judges appointed last week by President Shevardnadze. The World Bank is sponsoring it to train the judges in court administration.

Regards,
Carolyn Clark Campbell

Greetings!
I was getting ready to mail this from Tbilisi when they told me it would take up to three months.

ccc [Smiley]

Roger J. Miner
U.S. Court of Appeals for the Fifth Circuit
40 Foley Square
New York, NY 10007
U.S.A

AIR MAIL
The Honorable Roger J. Miner  
Senior Judge, Second Circuit  
414 US Courthouse  
445 Broadway  
Albany, NY 12207  

Dear Judge Miner:

On behalf of the Cornell Law School Moot Court Board, I would like to invite you to judge the final round of one of our moot court competitions during the next academic year. They are:

The 1999 Cuccia Competition on Saturday, November 6, 1999;  
The 2000 Winter Moot Court Competition on Saturday, February 19, 2000; and  
The 2000 First-Year Moot Court Competition on Saturday, April 15, 2000.

As an honored guest of the Moot Court Board, all expenses for travel, lodging and meals for you and your companion are absorbed courtesy of the Moot Court Board. We provide accommodations at the Statler Hotel unless you prefer otherwise. The Finger Lakes Region of New York State offers many beautiful attractions including several award-winning wineries. We would be happy to provide you with a rental car and suggestions for local excursions if you so wish. The final rounds are held on a Saturday evening, but you should feel free to travel at your convenience and to stay as long as your schedule permits. Our travel coordinator will arrange your travel in accordance with your schedule and wishes.

We would be honored to have you judge the final round of one of our competitions. If you have any questions about this invitation or our moot court program, please contact me at the Moot Court Office at (607) 255-1670 or at home at (607) 256-0274.

Sincerely,

Heather J. Pellegrino, Chancellor  
Cornell Law School Moot Court Board
A WHITE man who claims that he was fired from his job as a Suffolk County policeman for complaining about his colleagues’ racist treatment of minority citizens had no basis for a retaliation claim, a federal appeals panel has ruled.

In the first decision of its kind by the U.S. Court of Appeals for the Second Circuit, a three-judge panel said that the federal employment discrimination law does not cover a retaliation claim arising from opposition to discrimination by colleagues against non-employees.

The decision will be published on Tuesday.

Following three other circuits that have decided the issue, the judges said that the federal employment discrimination law, 42 U.S.C. 2003 (Title VII), is not a “general bad acts” law that covers every instance of discrimination.

Writing for a unanimous court, Circuit Judge Roger J. Miner instead explained that Title VII is designed to deal with retaliation arising from the opposition to “an unlawful practice of an employer, not an act of discrimination by a private individual.”

Continued on page 8, column 4

Officer’s Retaliation Claim Dismissed

Continued from page 1, column 3

Title VII, he added, was not enacted to protect whistleblowers who speak out about any act of discrimination they see at the workplace, but to eradicate “discrimination by employers against employees.”

Noting that the plaintiff, Paul Wimmer, had not produced any evidence that he had heard a racial epithet directed against himself or others in the department, Judge Miner concluded that a district judge was correct in dismissing his Title VII claims.

Mr. Wimmer’s claim that the racist behavior, which allegedly included slurs made on the police radio and two instances of racial profiling, created a racially hostile work environment, the judge said, but that could not save the suit, since the people against whom the hostility was directed were not employees.

Circuit Judge Fred I. Parker and Eastern District Judge Raymond J. Dearie, sitting by designation, joined in the panel’s 27-page opinion in Wimmer v. Suffolk County Police Department, 97-7321, issued late Wednesday.

Hatred of Racism

After passing a civil service exam in 1993, Mr. Wimmer joined the Suffolk County Police Force as a probationary member. Under Department rules, he was required to undergo six months of training at the Suffolk County Police Department Academy followed by 12 weeks of field training before being considered for permanent employment.

In a “self-introduction” statement, Mr. Wimmer made at the beginning of his training, he described himself as “lover of wisdom and justice” whose legal mentor was Thurgood Marshall. He said he was a member of “Humanity against Hatred,” a group formed by New York City police officers and clergy to oppose bias and discrimination.

Mr. Wimmer claimed that some Field Training Officers (FTOs) were alienated when they learned of his membership in the Humanity against Hatred group. At one point in his training, Mr. Wimmer contends that he witnessed two occasions in which an officer stopped a car containing minorities without probable cause. Mr. Wimmer said he was “dissuaded” from asking questions about those incidents.

He also claims to have overheard racial slurs being used by officers over the police radio.

During the course of Mr. Wimmer’s field training, various officers made evaluations asserting that he had shown an inability to accept criticism and had failed to show the ability to perform under pressure.

In February 1994, Mr. Wimmer received a letter from Police Commissioner Peter F. Cosgrove advising him that he was being terminated because of his “unsatisfactory performance” during the probationary period. Mr. Wimmer claims that after he was fired, he was told over the phone by an officer with the department that this “stop hatred thing had gotten him off on the wrong foot with some of his FTOs.”

No Retaliation

Mr. Wimmer then filed suit in Brooklyn federal court, alleging that he had been unlawfully fired in retaliation for speaking out against racism in the department in violation of Title VII.

He also contends that department officials violated his federal civil rights under 42 U.S.C. 1983 by depriving him of his constitutional right to free speech through terminating him for expressing his political beliefs.

A jury trial on both of Mr. Wimmer’s claims was held before Eastern District Judge Leonard D. Wexler. After testimony but before the case was submitted to the jury, Judge Wexler dismissed both the Title VII and the 1983 claims.

In addition to affirming the dismissal of the retaliation claim, the panel agreed that Mr. Wimmer had failed to show that the police department had violated his civil rights under 1983. The evidence did not show that Commissioner Cosgrove’s decision was based on any “unconstitutional motive,” Judge Miner wrote.

Instead, the judge noted, the Commissioner’s decision to fire Mr. Wimmer was based on his review of documentation which painted “a picture of a trainee who had serious difficulty performing necessary elements of his job.”

There was no indication that the decision to fire Mr. Wimmer was based on his self-introductory statement or friction with his training officers over his membership in Humanity against Hatred. Judge Miner added.

Traycee Ellen Klein, of Dienst & Serrins, represented Mr. Wimmer. Christopher A. Nicollino, Theodore D. Sklar and James M. Catterson, of the Suffolk County Attorney’s office, represented the Department.
Dear Judge Miner,

I regret at missing your phone call. I am in the City for meetings during May and completion of classes at New York Law.

Andrew Solow and April Swenger are the two top Pace candidates the deans and faculty endorse. Others are strong but I am aware of time constraints.

I attach letter to editor in Saturday NY Times re Athens from John Fass. I believe he is of counsel to a firm retained by Athens Generator. My friends in Columbia + Shenandoah County claim it is a done deal. My friends in Westchester and New York say it will not happen and my friends in Albany are mixed.

Whether 2-3 or 3-2 we are in the extra innings of a game which I predict, albeit have extra innings

Best wishes,

Jay
May 11, 1999

Honorable Roger J. Miner  
United States Court of Appeals  
Second Circuit  
United States Courthouse  
445 Broadway, Suite 414  
Albany, New York 12207

Dear Judge Miner:

Thank you so much for your lovely note.

I am happy to learn that you have a connection with my hometown.

Mary Shea is an accomplished young lady, and your kind words make me even more proud of her than I was before. I am also counting on her discretion. She would not dare tell what she knows about all the Bagleys.

I look forward to seeing you in June.

Sincerely,

Carol Bagley Amon  
United States District Judge
The at-large system gives a town's elected officials the freedom to make a tough decision that is in the best interests of the entire township. Under the ward system, a council member would have no choice but to vote for the narrow parochial interests of his or her district or face certain defeat at the polls.

The ward system segregates one community from another, one class from another and one race from another, while the at-large system binds all town residents in a common approach to building a better quality of life. At-large representation is the only system that truly provides equal representation for all town residents.

-Joseph N. Mondello, Nassau County Republican Committee chairman The at-large system essentially is contrary to the American way. It allows for the monopolization of power in the hands of the very few, as opposed to spreading the power around. A federal judge said it was unlawful in Hempstead.

But the town fathers didn't want to hear it, so they had to be taken into court and have their dirty laundry aired. Unfortunately, people with power don't yield it without a fight. For instance, in the Town of Hempstead, it's the ability to control a $292-million annual budget. Councilmanic districts allow for individuals who might not be part of that inner sanctum to be involved in the decision-making process. Inclusion must be the word of the day, not exclusion.

-Frederick K. Brewington, a civil rights attorney, and lead counsel in the pending case of Dorothy Goosby vs. Town of Hempstead over the constitutionality of at-large voting I don't see why having people represent a particular area should re-create the city's ward politics. It's tough on the council people to try to cover an entire town when they're all at-large. Many of the local issues are fairly specific to an area. And if you know that area, you bring a certain ability and knowledge to explain that issue to the rest of the board. Overall, it's better and more democratic.

-May Newburger, supervisor of North Hempstead (D) Of course, I'm in favor of the at-large system. One reason is that for 300 years, minorities, especially blacks, have been working toward integration. To go to councilmanic districts in the Town of Hempstead is segregating one group of people. Now if councilmanic districts come about in the Town of Hempstead, the Democrats would have one vote and the Republicans would have five. And I feel that very little would get done. I can get more done in an at-large system. This way you don't get into partisan politics. I feel very happy that I can help people in Seaford, as well as Hempstead, in Elmont as well as New Hyde Park. And I get calls every day from a lot of those areas.

-Curtis E. Fisher, Town of Hempstead councilman (R) Councilmanic districting will bring town government even closer to our residents by allowing neighborhoods and communities to elect their own representatives. This gives people the chance to run for office without having to raise a million dollars. They can run on a shoe-string budget and use a lot of shoe-leather to meet their neighbors in their district. If the resolution is approved in Babylon, there will be six districts of about 35,000 people each.

You may run the risk of having several council people gang up on one district, but at the same time it might thwart NIMBYism because council people could support a particular project if it benefits the whole town.

-Richard Schaffer, Supervisor of Town of Babylon (D)
A FEDERAL appeals court has rejected an at-large election system for the Town Board of the Town of Hempstead, saying the Long Island town's scheme violates the rights of minority voters.

The decision will be published Wednesday.

In a unanimous ruling, the U.S. Court of Appeals for the Second Circuit upheld a decision by Eastern District Judge John Gleeson, who also directed the 725,000-resident Town to establish six voting districts to elect the town board.

The appeals court, in its decision yesterday in Goosby v. Town of Hempstead, 97-7403, endorsed both the findings and the remedy imposed by Judge Gleeson.

The district judge made his ruling after finding that black voters of the Long Island community were effectively excluded from representation.

Town residents Dorothy Goosby and Samuel Prioleau filed a class action suit in 1988 alleging that the Town's 100-year-old at-large system violated the Voting Rights Act of 1965 as amended.

When they filed the suit against the Town, which has long been dominated by the Republican Party, blacks made up just under 10 percent of the population, and only one black resident, a Republican, had ever served on the town board.

"The town's argument implies that if blacks registered and voted as Republicans, they would be able to elect the candidates they prefer. But they are not able to elect preferred candidates under the Republican Party regime that rules in the town."

— Judge Roger J. Miner

The Town answered the complaint by arguing that partisanship, and not race, was the issue, because blacks in the community were more likely than not to vote for Democrats.

But Judge Gleeson found that the plaintiffs had established three of the criteria needed for a showing under the Voting Rights Act as interpreted...
Hempstead Voting Scheme Upheld

Continued from page 1, column 6


The judge found that the "minority group is sufficiently large and geographically cohesive to constitute a majority in a hypothetical single-member district."

He also found that black voters in the Town "are politically cohesive," and that there was a "legally significant white bloc voting" such that the white minority is usually able "to defeat the minority-preferred candidate."

**Discrimination**

But Judge Gleeson also found that, under the totality of the circumstances, the at-large method "impaired the ability of black voters to participate equally in the political process and elect candidates of their choice."

Judge Gleeson made a series of findings as to the history of discrimination in the Town, the way the electoral system dilutes the power of black voters, the town board's lack of responsiveness to the black community and the way in which the Republican Party selects candidates for town elections.

He instructed the Town to submit redistricting proposals.

The first proposal would have established two districts, one to elect one board member from an area in which the majority of the black community lived and a second at-large district that would elect five members from the remaining five-sixths of the population.

Judge Gleeson rejected this plan a violation of the Equal Protection Clause of the Fourteenth Amendment because it was race-based and was not narrowly tailored to remedy the violation. He then went on to endorse the six-district plan for the same reasons and stayed implementation of the plan pending appeal.

**Upheld on Appeal**

The Second Circuit agreed with Judge Gleeson in finding the at-large system unconstitutional and said his remedy was appropriate. Writing for the court, Senior Circuit Judge Roger J. Miner said "even though the six-district plan required strict scrutiny" because it was race-based, "it is in any event narrowly tailored to the goal of remedying the vote dilution found here."

"It includes six reasonably compact districts that are normal in shape and approximately equal in size of population," he wrote. "It respects local community boundaries, and racial concerns were addressed only insofar as necessary to remedy the violation."

"The court also rejected the Town's contention that "the plaintiff's claim of racial vote dilution was a mere euphemism for defeat at the polls and legally insufficient."

"The Town's argument implies that if blacks registered and voted as Republicans, they would be able to elect the candidates they prefer," he wrote. "But they are not able to elect preferred candidates under the Republican Party regime that rules in the Town. Moreover, blacks should not be constrained to vote for Republicans who are not their preferred candidates."

Senior Circuit Judge Joseph M. McLaughlin joined in the opinion. Judge Pierre N. Leval concurred in a separate opinion.

Randolph M. Scott-McLaughlin, Frederick K. Brewington and Richard Charles Hamburger represented the plaintiffs.

Katherine I. Butler, of the University of South Carolina Law School, Evan H. Krinck, Joseph J. Ortego and Kenneth A. Novikoff, of Rivkin, Radier & Kremer, represented the Town of Hempstead.

Upheld

**Court Upholds District Voting For Hempstead**

By JOHN T. McQUISTON

MINEOLA, N.Y., June 23 — The Second Circuit of the United States Court of Appeals upheld today a Federal District Court's February 1997 order that Hempstead, the largest municipality on Long Island, dismantle its at-large electoral system because it consistently excluded blacks from the Town Council.

Today's ruling was a reaffirmation of a victory for a group of black residents who sued Hempstead in 1988, charging that the town's at-large system was racist and violated the Federal Voting Rights Act of 1965.

The Second Circuit ruling upheld Judge John Gleeson's finding that Hempstead's at-large system "operated to invidiously exclude blacks from effective participation in political life."

Judge Gleeson ordered that the town be divided into six single-member districts, and that members of minority groups hold a majority in one of those districts. The town appealed that ruling.

Under the century-old at-large system, all six of the Council members were elected by all town residents, rather than by voters within individual districts, where minority residents might be concentrated. The town has 725,000 residents, 12 percent of them black.

In appealing the ruling, Republican town officials argued during a Second Circuit hearing a year ago that the town's election system was based on a traditional pattern of partisan politics long dominated by Republicans, not race.

"The only black person to serve on the Council was Curtis Fisher, a Republican appointed by the party leadership in 1993 and elected the same year."

In the 56-page ruling issued late today, the appeals court said that Judge Gleeson "undertook an extensive examination of the factual circumstances of this case."

In upholding his plan, the panel of three circuit court judges said Judge Gleeson's six-district plan "respects local community boundaries, and racial considerations are addressed only insofar as necessary to remedy the violation."

A spokesman for Town Supervisor Richard V. Guardino said officials had received a copy of the ruling and were reviewing it, but had not yet made a decision about further appeal.
Lawyers for two African-American Hempstead Town residents claimed victory yesterday in their fight to abolish at-large town council seats in the Republican-dominated community.

The claim was made after a federal appeals court affirmed a lower court ruling that the town's at-large election system violated the rights of minority voters.

The decision by the 2nd Circuit U.S. Court of Appeals in Manhattan was handed down late Wednesday.

It came in a case brought 11 years ago by Dorothy Goosby and Samuel Prioleau, two Hempstead blacks who contended that having six at-large council seats violated the federal voting rights act.

"This case from the beginning has been about the right of choice, the right of African-American voters in this town to choose their own candidates and representatives, not to be dictated to by one party," said one of their attorneys, Pace University law Prof. Randolph Scott-McLaughlin.

It was in 1997 that U.S. District Court Judge John Gleeson agreed with Goosby and Prioleau's argument and ordered the town to establish six council districts proposed by the plaintiffs from which to elect councilmen to the board.

Fred Brewington, another attorney who represented Goosby and Prioleau, said he would ask Gleeson to enforce his order in time for Election Day in November. Three seats will be on the ballot this year.
"This is a momentous day in the history of the Town of Hempstead," Brewington said at a rally on the steps of town hall.

"This is a victory not only for African-Americans; it is a victory for every resident that believes in democracy and representative government."

But any decision to implement councilmanic districts could be delayed, pending an appeal to the U.S. Supreme Court.

A spokeswoman said Town Supervisor Richard Guardino and the town board would make a decision on an appeal in two weeks. She said the supervisor was withholding comment until a decision is reached.

However, one member of the board did react.

Curtis Fisher, the only black on the town board, said he would urge the board to appeal. Fisher's appointment to the board by Nassau County Republican Chairman Joseph Mondello was cited by Gleeson as a factor in why he decided the case the way he did.

Said Fisher, "I felt this whole case was based on politics, not race."

No Democrat has been elected to it since the town board was created in 1907. The Nassau Democratic Party supported the legal challenge.

As proposed, the six districts would include one that would be 52% black.

Of the town's 725,000 residents, 12% are black.

In its unanimous decision, the three-member 2nd Circuit panel agreed with the remedy proposed by Gleeson.

"It includes six reasonably compact districts that are normal in shape and approximately equal in size of population," Senior Circuit Judge Roger Miner wrote. "It respects local community boundaries and racial concerns were addressed only insofar as necessary to remedy the violation."

GRAPHIC: WILLIE ANDERSON DAILY NEWS THE VICTORS: Attorney Randolph McLaughlin (c.) is flanked yesterday by plaintiff Samuel Prioleau and fellow attorney Frederick Brewington (r.) at rally after winning voting rights case in federal court against Town of Hempstead.
July 28, 1999

Hon. Roger J. Miner
Senior Circuit Judge
U.S. Court of Appeals
Second Circuit
U.S. Courthouse
445 Broadway, Suite 414
Albany, NY 12207

Dear Judge:


I also wanted to let you know how much I enjoyed "Unforgettable Peninsula: Travels In Baja, California." You and Jackie have authored a delightful travelogue that has inspired Kathleen and me to place Baja among our "must-see" destinations.

Best regards.

Sincerely,

Jeffrey A. Van Detta

JAV/cm

Encl. (1)
August 2, 1999

Judge Roger J. Miner  
United States Court of Appeals  
Second Circuit  
Albany, New York 12201

Dear Judge:

I am glad to see you are as prolific as ever. I will read you latest masterpiece with great interest.

I have been at my latest stomping grounds (Whitman Breed) for almost a year, where I work on a daily basis with Charlie Sullivan's sister (Kerry) handling various international and domestic commercial litigation matters, as well as several white collar criminal cases.

I will try to stop by in the not too distant future during one of your sittings in New York.

Hope all is well. Best regards to you and Mrs. Miner.

Sincerely,

[Signature]

Jeffrey W. Berkman
August 2, 1999

Honorable Roger J. Miner  
U.S. Court of Appeals  
445 Broadway, Room 414  
Albany, NY 12207

Dear Judge Miner:

It finally happened. I have left Cravath and, of course, I find myself at the one entertainment law firm that you suggested I check out. Although I have been here only a week, I am very optimistic. The firm's practice is quite diverse and the lawyers are very bright and friendly. I will keep you informed.

Many thanks for sending me a copy of your Philip Blank Memorial Lecture. I thoroughly enjoyed it! I found particularly interesting and thought-provoking your discussion of the rule requiring disclosure of adverse authority. I suspect that few New York practitioners know about the rule, much less subscribe to it. Additionally, I share your concerns about the loss of collegiality among attorneys. The trend you discuss is symptomatic of a growing problem not just in the legal profession, but in all sectors of our society -- civility and humanity are on the decline. Your examples of the way "things used to be" made at least this attorney crave a return to such a time. However, the first step in correcting any problem is making people think about it. Your lecture does just that.

Please give my best to Mrs. Miner and the rest of the crew.

Warm regards.  

Cordially,

Jeffrey A. Bernstein

JAB/lp
167451/1/9999/0008
August 3, 1999

Judge Roger J. Miner  
United States Court of Appeals  
Second Circuit  
455 Broadway  
Albany, NY 12207

Dear Roger:

Thank you for forwarding to me your very interesting article, “Professional Responsibility in Appellate Practice: A View from the Bench.” For many years I was the Chairperson of the Second Circuit Committee on Admissions and Grievances, the committee to which you refer on page 342 of your article. I am currently a member of that committee, so that my experience probably extends over a period of at least two decades. Despite Judge Kaufman’s repeated complaints about the quality of the bar, I recall only one instance in which the Court referred to us a matter involving the violation of Disciplinary Rules which, as your article points out, should be applied to advocates before the Second Circuit. The one exception involved a case that had nothing to do with the quality of the brief which, according to the late Francis Plimpton, the hearing examiner we appointed, was of very high quality. Judge Kaufman referred the matter to us on a side issue that is somewhat humorous and that I will relate to you when next we meet.

Thanks again for forwarding the article with which I am in complete agreement.

Sincerely,

Norman Redlich

NR:mg
Aug. 3, 1999

Dear Judge Miner,

Thank you for sending me a copy of your Pace lecture. I found it most interesting and insightful, as usual. Representing an appellate frequently sued by press, I question your admonition to orally argue all cases. Arguing against a press is almost a no-win situation. The court will ask questions to have the attorney argue (then refute) the case the press tried to make. A well-written brief should suffice in that situation. Otherwise, I take every opportunity to go to New York and argue before the Court.
On a more personal note, I am getting married next May. Willing Karen and I would be pleased and honored if you and Mrs. Miller could attend the wedding, on May 27, 2022, here in Buffalo.

Very truly yours,

David R. Hayes
Circuit Denies State's Disability Challenge

BY MARK HAMBLETT

THE U.S. Court of Appeals for the Second Circuit has joined four other federal circuits in ruling that Congress, when it passed the Americans with Disabilities Act, did not exceed its power by abrogating state immunity under the Eleventh Amendment.

In a case of first impression in the Second Circuit, a united three-judge panel in Muller v. Costello, 98-7491, found that "the anti-discrimination provisions of the ADA provide a narrowly tailored and reasonable response to the problem of discrimination against people with disabilities."

The decision will be published on Monday.

Keith E. Muller was a correctional officer employed by the Department of Correctional Services at the Midstate Correctional Facility beginning in 1988. He fell ill with pneumonia in 1989, and two years later, was diagnosed with severe bronchitis with a severe asthmatic component. His doctor recommended that he have no exposure to tobacco smoke while at work.

Over the next six years, Mr. Muller fought a running battle with Midstate officials over his assignment to areas of the facility where smoking was ongoing. Despite numerous attempts to reach a compromise on assignments, and several failed remedial measures that included his wearing a breathing mask at work, Mr. Muller was finally told by a supervisor that he could not return to work because the facility could not meet his conditions.

Mr. Muller filed suit under the ADA claiming, among other things, that he was being retaliated against because of his disability.

Following a trial that began in 1997, the jury found Mr. Muller was a victim of retaliation and awarded him damages that were eventually capped by Northern District Judge Frederick J. Scullin Jr. at $300,000.

Continued on page 2, column 3
August 12, 1999

Honorable Roger J. Miner
United States Court of Appeals
James T. Foley U.S. Courthouse
445 Broadway
Albany, New York 12207

Dear Judge:

Thanks for your recent Pace Law Review publication.

I recently wrote an outline on "Federal Civil Practice: Pitfalls and Best Practices," published by PLI as part of a program on Legal Malpractice.

I also joined the Board of Directors of the New York Criminal & Civil Bar Association, a 106 year old organization. I’m hoping to imbue the enterprise with new blood, as I suspect some of those running it might be the original founders.

I attach a joke right up your alley. I also enclose a photocopy of my kids taken 1-1/2 years ago at ages 6 months, 6 months and 2-1/2 years. Home is extremely busy.

Regards,

Brian (D. Graifman)
August 12, 1999

The Honorable Roger J. Miner,
United States Court of Appeals for the Second Circuit
James T. Foley Courthouse
Suite 414
Albany, NY 12207

Dear Roger:

Thanks for the reprint of your lecture on appellate advocacy. I share your views and was gratified by your reference to the article I did.

I think that appellate judges are derelict in not publicly citing and imposing costs on lawyers who write briefs that are either mendacious or seriously incompetent. If judges will not do it, nothing will be done elsewhere. Yet the appellate bench keeps complaining about bad briefs. I think that “hanging” a few lawyers will have very substantial deterrence effects.

Good to hear from you.

Best wishes.

Sincerely,

Geoffrey C. Hazard, Jr.
August 13, 1999

Re: “Professional Responsibility in Appellate Practice”

The Honorable Roger J. Miner
U.S. Court of Appeals, Second Circuit
U.S. Courthouse
445 Broadway, Rm. 414
Albany, NY 12207

Dear Judge:

Thank you for the copy of your Spring 1999 piece for the Pace Law Review. It laid out thoughtfully many of the themes of attorney behavior that I know are close to your heart. I, of course, enjoyed the humor as much as the message. My favorite line has to be: “My own general view of scholarly criticism is that it provides great food for thought but I am usually glad it does not represent controlling law.” I am sure your oral delivery added to the evident good humor of the piece; I’m sorry I missed the lecture.

Work at Simpson goes well — I was initially doing banking work and have now been in the mergers and acquisitions department for about seven months. The hours are grueling, but the work is interesting. Jennifer is well, although she has a hard time coping with the unpredictable demands of my work schedule.

Please extend my kindest regards to Shirley, Mary Anne, the clerks (incoming and outgoing), and especially to Mrs. Miner. I hope you are both happy and healthy and enjoying the summer.

Very truly yours,

Andrew W. Smith
August 16, 1999

The Honorable Roger J. Miner
Circuit Judge
United States Courthouse
445 Broadway, Suite 414
Albany, NY 12207

Dear Judge Miner:

Thank you for sending a copy of your article. I will mention it in a future issue of The ALI Reporter.

Sincerely,

Michael Greenwald
Editor
The ALI Reporter
August 23, 1999

Hon. Roger J. Miner  
United States Court of Appeals  
United States Courthouse  
445 Broadway  
Albany, New York 12207

Dear Roger:

I was so pleased to receive the reprint of your Pace Law Review lecture. You have flagged a number of points that are reminders to those of us "in the well". I have sent copies to all of our litigation partners throughout the country.

All the best to you and Jackie and thanks again.

Sincerely,

Barry H. Garfinkel
August 25, 1999

The Honorable R. Miner  
United States Court of Appeals  
for the Second Circuit  
United States Courthouse  
New York, NY 10007

Dear Judge Miner,

Thank you for sending me the copy of your law review article "Professional Responsibility in Appellate Practice: A View from the Bench." I found the article to be both interesting and insightful. I presume that you sent it to me because of the column that I write for "The Champion" on appellate advocacy. You did give me several ideas for future columns.

I am always looking for new ideas for subjects of my column. If you have any suggestions, I would be happy to receive them. If you would be interested in doing a short piece for "The Champion" relating to appellate practice, I believe that would be very informative to our readers.

Sincerely,

G. FRED METOS  
Attorney at Law

GFM/ac
August 25, 1999

The Honorable Roger J. Miner
United States Court of Appeals for the Second Circuit
United States Courthouse, Suite 414
445 Broadway
Albany, NY 12207

Dear Judge Miner:

I was delighted to learn from the editors of our Law Review that you have given us permission to mail a reprint of your lecture to your colleagues on the federal bench. Your message is critically important to the profession and merits thoughtful consideration from us all. We will send copies of the reprint to bar association officers as well. A copy of my letter to your colleagues is attached.

With sincerest appreciation,

Yours truly,

[Signature]

David S. Cohen
August 27, 1999

Dear [salutation] [lname]:

As the newly appointed Dean of the Pace University School of Law, it is my pleasure to have my first communication to you and your colleagues on the Federal Bench, include the truly remarkable lecture delivered by Judge Roger J. Miner at our Law School last year. In his remarks, *Professional Responsibility in Appellate Practice: A View from the Bench*, Judge Miner addresses some of the most difficult issues facing the legal profession. His important message received much attention from the legal media and the bar in New York State. I enclose a reprint of the lecture as published by the *Pace Law Review*.

Pace Law School is proud to have as part of our annual academic lecture series, a lecture devoted specifically to the issues of attorney ethics and professional responsibility. Judge Miner's visit to the Law School as the Ninth Distinguished Philip B. Blank Lecturer on Attorney Ethics, attracted a standing-room only gathering of students, practitioners, and local members of the Bench. Providing an opportunity for distinguished jurists to address the profession is just one of the ways that we hope to contribute to a continuing dialogue between the bar, the bench, and the academy about practice and jurisprudential issues. As educators, we recognize the importance of this dialogue to our students' nascent sense of themselves as future members of the profession.

Yours sincerely,

David Cohen
Dean and Professor of Law

Enc.
Honorable Roger J. Miner  
United States Court of Appeals  
United States Courthouse  
445 Broadway, Suite 414  
Albany, NY 12207  
U.S.A.

Dear Judge,

Thank you for the copy of your Pace Law Review article. I see you have not slowed down the pace at all. You should see appellate practice here, if you really want to be shocked.

Best wishes,

Norman Feder
The Honorable Roger J. Miner  
United States Court of Appeals  
for the Second Circuit  
P.O. Box 858  
Albany NY 12201-0858

Dear Judge Miner,

Thank you very much for sending me your article, "Professional Responsibility in Appellate Practice: A View From the Bench."

I strongly agree with everything you say in the article (with one predictable exception), and expect to be quoting it in my class materials and in a revised edition of UNDERSTANDING LAWYERS ETHICS, which is due out next year.

To your discussion of prosecutors' ethical responsibilities, I would add one thing. It is bad enough when a prosecutor at trial uses inflammatory language, withholds exculpatory material, or engages in other improper conduct. At that point, it is misconduct of only a single prosecutor. When, however, the government seeks to justify the misconduct on appeal -- even with an argument of harmless error -- the improper conduct becomes, in effect, government policy. And, of course, the trial lawyer is rarely if ever disciplined for the misconduct, especially if he or she gets a conviction and it is upheld.

With regard to citing adverse authority, we have little disagreement, at least in practical result. What you would require as a matter of ethics, I would virtually always require as a matter of sound tactics. The only time I have violated the rule was in a case at the trial level, on a motion to dismiss an amended complaint. Opposing counsel had sought to evade an earlier motion to dismiss the original complaint by a patently false amended complaint -- one that contradicted the allegations of the original complaint in material respects. What he was trying to do was to prolong a meritless case in hopes of extorting a settlement. Counsel, I should add, had a reputation for such sleazy tactics (you would probably recognize the name). I found seven cases in the jurisdiction that related to
the motion to dismiss. Six supported my position; one was adverse. Having no
desire to help opposing counsel to prolong the matter further, I cited the six
favorable cases and omitted citation to the one adverse case. I have no regrets
about having done so.

Thank you again for your thoughtfulness in sending me the reprint.

Sincerely,

[Signature]

Monroe H. Freedman
Howard Lichtenstein Distinguished Professor of
Legal Ethics
Dear Roger,

I read your nice piece lecture with great enthusiasm.

As a former teacher of professional responsibility for ten years of Duke students and three years of Nova's, I thought it extremely well thought out and educational. Congratulate and I hope this finds you well.

Jim
Memorandum from ... 

JOSEPH L. FORSTADT

RECEIVED
SEP 17 1999
ROGER J. MINER
U.S. CIRCUIT JUDGE
ALBANY NEW YORK

Dear Roger,

Thank you very much for the Times article. Thank you do
for the Law Review reprint.

Please note that our new
address is 180 Maiden Lane,
New York 10038.

All the best to you and Jackie,

Happy New Year,

Joe
September 15, 1999

Honorable Roger J. Miner
United States Circuit Judge
445 Broadway, Suite 414
Albany, NY 10007

Your Honor:

The law school favored me with a copy of your article in the Spring 1999 issue of Pace Law Review, which I read with gratitude and pleasure. The perversion of the "adversary system" disturbs me too. I enclose something that I have said on the subject.

I am delighted, my friend, to see that you remain active and that you contribute your experience and values to the profession.

Felicitations,

Thomas M. Reavley
September 17, 1999

Hon. Roger J. Miner
414 James T. Foley
United States Courthouse
445 Broadway
Albany, New York 12207

Dear Roger:

I recently read your article in the Spring 1999 Pace Law Review ("Professional Responsibility in Appellate Practice: A View From the Bench"). I agree entirely that there has been a deterioration of professionalism (and, perhaps, competence) at the appellate bar. And like you, I too favor an increased use of sanctions.

I did find your recommendation to abolish Strickland's second prong somewhat surprising. We would probably have an interesting debate on that point . . . .

In all events, the real reason for this note is that it gives me an opportunity to touch base. I hope that your health is good, and that our paths will cross again some day. My best to Jackie.

Cordially,

Bruce M. Selya
United States Circuit Judge
2d Circuit rejects Texaco fees

An award of $1 million in attorney fees stemming from the settlement of a shareholder derivative suit against Texaco over its handling of a racial discrimination case was reversed on Sept. 13 by the U.S. Court of Appeals for the 2d Circuit.

The ruling came in a "piggyback" suit brought by shareholders challenging Texaco's agreement to pay $115 million to settle a landmark racial discrimination case brought by black employees.

Finding the benefits from the piggyback suit "illusory," a unanimous court said that lead counsel Milberg Weiss Bershad Hynes & Lerach and four other law firms were not entitled to fees in Kaplan v. Rand, No. 98-9377. (The other law firms were not identified in court papers or by attorneys in the case.)

Texaco agreed to a $115 million settlement with black employees in 1996 in Roberts v. Texaco Inc., 979 F.Supp. 185 (1997). As part of the settlement, the company also agreed to establish a task force to make improvements and monitor the company's progress in hiring and promoting minority employees.

Two weeks after the Roberts action was filed, three shareholders brought the Kaplan suit against the company and several executives for breach of fiduciary duties and contractual obligations in connection with the Roberts allegations. That case settled in December 1997, and while the plaintiffs in Kaplan received no relief against the officers and employees, the settlement called for Texaco to make reports by the task force available to shareholders and to insert a nondiscrimination clause in its vendor contracts.

Southern District Judge Charles L. Brieant ruled that the Kaplan settlement was fair and reasonable, and he found that Milberg Weiss and other plaintiffs' counsel had conferred a benefit upon Texaco, and referred the case to a special master for computation of attorney fees.

Plaintiffs' counsel requested $1.4 million in fees, but the special master recommended an award of $1 million. His finding was adopted by Judge Brieant. The fee award was then challenged on appeal by nonparty objector William C. Rand, a shareholder who is also an attorney at Paul, Hastings, Janofsky & Walker L.L.P.

Writing for the 2d Circuit, Senior Judge Roger J. Miner said that New York state law governed because this was "a diversity action based on state law claims of breach of fiduciary duty, corporate waste and mismanagement and violation of contractual obligations."

In New York, he said, "plaintiffs in a derivative action are entitled to counsel fees upon a settlement of the action only when the non-monetary, therapeutic benefits obtained are substantial in nature."

"Even under the most liberal definition of 'substantial benefit,' the settlement in the case does not meet the test," he said. "Far from providing a remedy for clearly identified past misconduct, the settlement in this case strives to provide therapeutic 'benefits' that can only be characterized as illusory."

— Mark Hamblett
September 27, 1999

Hon. Roger J. Miner
United States Court of Appeals
for the Second Circuit
414 United States Courthouse
445 Broadway
Albany, New York 12207

Dear Judge Miner:

Thank you for sending me your recent article on Professional Responsibility in Appellate Practice. As usual, it was both direct and easy to read. I agree with virtually all your points and you made a real contribution in making them so strongly.

I hope all is well with you. All the best.

Sincerely,

BWN:mi
September 28, 1999

Hon. Roger J. Miner
Circuit Judge
United States Courthouse
445 Broadway, Suite 414
Albany, N.Y. 12207

Dear Judge Miner:

I am doubly grateful to you – for your kind words of congratulations and for the St. John’s Law Review issue honoring the centennial of the Second Circuit. I very much admired your essay on planning for the second century of the Second Circuit. I believe that it is as fresh today as it was eight years ago when it was written.

I am honored to be your junior colleague and look forward to October 18.

With every good wish,

Sincerely,

Robert A. Katzmann

40 Foley Square, New York, N.Y. 10007
September 29, 1999

Dear Judge,

It has been a long time since I last wrote to you and I wanted to catch up with you. I hope all is well with you and your family. As for me, a number of new things have happened in my life over the last year.

In August of last year, I left Sullivan & Cromwell and I joined Irell & Manella. Irell has about 180 lawyers and has three offices in the Los Angeles area. Irell is particularly known for its intellectual property practice, although it also has litigation and corporate work groups. I currently work in Irell's downtown Los Angeles office, where there are about twenty-five lawyers. I still am doing corporate transactional work, with a focus now on mergers and acquisitions. I enjoy working with the partners at Irell, and I have been doing interesting work, so I'm satisfied with my job right now.

I've had changes in my personal life as well. I am engaged to be married to a woman named Michelle Reynolds. Michelle is originally from Dallas, and she came to Los Angeles over three years ago to work in the entertainment industry. She now works at Home Box Office and is involved in the production of their original movies. She also is working on a couple of screenplays on the side that she hopes will be made into movies. Our wedding is set for March 18, 2000 in Los Angeles at the Riviera Country Club. We plan on traveling to England for our honeymoon.

Also, in July of this year, I bought a house in Sherman Oaks, which is in the San Fernando Valley in Los Angeles County. It is really nice to own a house for the first time, and it is keeping me busy with many new homeowner projects. My new home address is: 5406 Norwich Ave., Sherman Oaks, CA 91411, and my home phone number is (818) 787-6285. In case you do not have my work address, it is: Irell & Manella, 333 South Hope St., Suite 3300, Los Angeles, CA 90071 (213) 229-0578.

I hope all is well with you and your family. Hopefully, Michelle and I will be able to travel to New York, and then it would be great to see you again.

Yours truly,

Mike Lowe
To: Dean John D. Feerick

From: Professor Rachel Vorspan, Director of Legal Writing

Date: September 27, 1999

Re: Judge Miner’s Article

I found Judge Miner’s article on professional responsibility in appellate practice to be extremely interesting and useful. It was important for me to learn that he considers the standards of competence of appellate attorneys to have significantly declined in recent years. I was particularly struck by his observation that briefs and oral arguments reflect inadequate legal and factual preparation on the part of lawyers. Judge Miner’s observations on the ethical lapses of lawyers (for example, their failure to cite pertinent adverse authority) are also perceptive and intriguing.

I will make sure that all the Legal Writing professors are aware of this article and will use its insights in teaching appellate advocacy to first-year students next spring. Hopefully, we can instill in our students a greater appreciation of the need for lawyers to fulfill their ethical obligations in appellate practice. Thank you for sharing with me this most illuminating essay.
October 5, 1999

Hon. and Mrs. Roger J. Miner
U.S. Court of Appeals
James T. Foley U.S. Courthouse
445 Broadway
Albany, NY 12207

Dear Roger and Jackie:

We missed you at the Court dinner. I hope you were vacationing in some wonderful place. I did read Roger's article from the Spring 1999 issue of Pace Law Review, Professional Responsibility in Appellate Practice: A View From the Bench. Pace was kind enough to send me a copy.

Every Fall term, I make a guest appearance at an appellate advocacy seminar taught at Syracuse College of Law by two assistant U.S. Attorneys. I am about to do that soon, and would be grateful if you could have someone from the chambers send me the following articles: The Don'ts of Oral Argument, in A.B.A. SEC. PUB. APPELLATE PRACTICE MANUAL 263 (Priscilla A. Schwab, ed. 1992); and The "Do's" of Appellate Briefwriting, 3 SCRIBES J. OF LEGAL WRITING 19 (1992). I wouldn't bother you, but I suspect they may be hard to track down.

I hope to see you both soon.

Very truly yours,

Rosemary S. Pooler
U.S. Circuit Judge

RSP:clm
October 6, 1999

Dear Judge Miner:

On behalf of The Copyright Society of the U.S.A., I would like to invite you to attend the Society's twenty-ninth annual Donald C. Brace Memorial Lecture as a guest of the Society.

We are pleased to announce that this year's Brace Lecturer will be the Honorable Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, who will be speaking on "Fair Use, Free Speech and Equitable Remedies." The lecture will take place at 6:30 p.m. on November 11, 1999 in the James B. M. McNally Amphitheatre at Fordham University School of Law. We hope very much that you will be able to attend.

Over the years, our Brace lecturers have included a wide variety of topics related to copyright given by many of the nation's foremost copyright scholars and practitioners on copyright law, including most recently Lloyd L. Weinreb, Dane Professor of Law, Harvard Law School in 1998, Jane Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia Law School in 1997, the Honorable John M. Walker, Jr., United States Circuit Judge, United States Court of Appeals for the Second Circuit in 1996, the Honorable Roger J. Miner, United States Circuit Judge, United States Court of Appeals for the Second Circuit 1995, and Professor Gerald Gunther, Stanford Law School in 1994.

If you are able to attend the lecture and reception, please call the Society's Administrator, Barbara Pannone at (212) 354-6401.

Respectfully yours,

Michael J. Pollack
President
The Donald C. Brace Memorial Lecture

This is the twenty-ninth in a series of annual lectures on domestic copyright given in memory of Donald C. Brace who, in 1919, founded Harcourt, Brace & Co. as a publisher. Apart from his interest in the art of literature, he was deeply interested in copyright legislation, the protection of creative talent, and freedom of the press. In 1950, he was awarded the Columbia University Medal of Excellence in recognition of his distinguished contributions to publishing.

This series is made possible by a gift from his daughter, Mrs. Donna Brace Ogilvie. The Society wishes to express its appreciation to Mrs. Ogilvie.

Donald C. Brace Lecturers
1970-1998

1. Melville B. Nimmer
2. John Schulman
3. Hon. Theodore R. Kupferman
4. Robert B. McKay
5. William Jovanovich
6. Hon. Barbara Ringer
7. Irwin Karp
8. Harry G. Henn
9. Sigmund Timberg
10. Harriet F. Pilpel
11. Leonard Zissu
12. Robert A. Gorman
13. Hon. David Ladd
14. Leo J. Raskind
15. Harrison E. Salisbury
16. Ralph S. Brown
17. Floyd Abrams
18. Nicholas A. Velioes
19. Hon. Pierre N. Leval
20. Hon. Richard Owen
21. Paul Goldstein
22. David Lange
23. Thomas Mallon
24. Gerald Gunther
25. Hon. Roger J. Miner
27. Jane Ginsburg
28. Lloyd L. Weinreb
November 2, 1999

Dear Judge Miner,

Enclosed is my draft of the report on the course in Appellate Advocacy which I intend to submit to the Non-tenure-track Faculty Committee. If you have any comments or suggestions concerning it, please let me know.

Sincerely,

Robert J. Tymann
For the course in Appellate Advocacy, Judge Miner assigns readings from Hornstein, Appellate Advocacy (Second Edition) and a "Compendium of Materials," a collection of 63 judicial opinions, 32 statutes and 2 Law Review articles compiled by the Judge. Six of the opinions contained in the Compendium are dated 1999, evidencing Judge Miner's regular updating of the materials. Additional items are distributed in some of the class meetings. A three-page syllabus, designating the topic, required readings and "Recommended Readings" for each session is distributed at the beginning of the course. The final grade is calculated on the basis of marks for an Appellate Brief, Oral Argument of an Appeal and Class Participation, equal weight being given to each component.

On October 20th, a week before I attended a session of the course, the class was held in New York City, where the students attended a morning session of the United States Court of Appeals for the Second Circuit. They listened to oral arguments, waited while Judge Miner was in conference with his colleagues, took a brief tour of the Court, and then sat with the Judge discussing each of the oral arguments they had heard that morning. He educed their opinions on each issue that had been argued, commenting upon, questioning and challenging each view as it was presented. Students told me that they felt like they were getting a summary of the conference the Judge had just attended.

I sat in on the October 27th meeting of the course, at which seven of the eight students enrolled and the Judge's clerk attended. Judge Miner noted the absence of one student, who had contacted the Judge and explained that he would be busy preparing for a Moot Court Team competition. The Judge announced that he would consider this an unexcused absence.

Judge Miner began by describing a session of the Court just two days after the students had been there. The Court had been petitioned to stay an order requiring New York City to grant permission for members of the Ku Klux Klan to parade with their faces covered. He explained the issues, including the application of an old statute, and asked each student's view of an appropriate resolution. The Judge commented upon each response, and raised a number of relevant questions. He then disclosed the Court's decision, and described the review of that decision by Justice Ginsberg at the United States Supreme Court the next day.

The class then continued discussion of the topic they had begun in an earlier session, "Standards of Review." For each of the opinions in the Compendium assignment for that day, Judge Miner had one of the students present the case, interjecting commentary and questions throughout the presentation. He frequently walked around the classroom (Rochester/Old Moot Court Room) while doing so, allowing a very comfortable, informal atmosphere, without diminishing the demanding quality of the colloquy. Toward the end of the session, he continued in this style as they began discussion of the next subject, "The Harmless Error Doctrine."
Later in the course, each student will present oral argument before a three-judge panel including Judge Miner and two guest jurists. Each argument will involve a decision of the Second Circuit upon which the United States Supreme Court has granted certiorari, but has not yet rendered its opinion. At the end of the course, each student is required to submit a brief for petitioner in a particular case decided by the Second Circuit, Judge Roger Miner writing for the Court; although the United States Supreme Court has denied certiorari in this case, the students are presented with the task of drafting arguments for reversal of Judge Miner's opinion, as if cert had been granted.

It is clear to me that students in this course are receiving an extremely valuable educational experience. The methods Judge Minor has adopted are challenging at the same as being stimulating. Students from the class mentioned to me that the informal atmosphere of the class "makes it easier to learn"; they clearly appreciate the experience and respect the instructor. There are only seven student evaluations available from past years. On every one of these evaluations, all ten questions calling for evaluation of the teacher's abilities and qualities resulted in responses of "4", i.e., "excellent." Commentary was made concerning the professor's experience, capacity to stimulate interest in the subject matter, sense of humor and fresh, original approach.

I have no reservation in stating that this course as designed and presented by Judge Miner is an excellent component of our curriculum.
November 23, 1999

Hon. Roger J. Miner
414 United States Courthouse
445 Broadway
Albany, New York 12207

Dear Roger:

Thank you for the kind note you sent when my mother died. She had not been in the best of health, but the end was very sudden and unexpected. She had a heart attack and did not survive the subsequent bypass surgery.

It was very comforting to receive your kind note. It often seems that the people who are the busiest find time to do the little kindesses that truly make a difference.

Thank you.

[Signature]
November 23, 1999

The Honorable Roger J. Miner
Circuit Judge
United States Court of Appeals
for the Second Circuit
United States Courthouse
445 Broadway, Suite 414
Albany, NY 12207

Dear Judge Miner:

Thank you so much for your letter of November 17 (with enclosure), and especially for your nice comments about my "Cf." article. I am writing now simply to say that, after I sent you the article last month, I learned that one of my prize students, Ben Razi, will be clerking for you next year. I know you will like him. He is a wonderful student and a wonderful person.

Thank you again. I look forward to reading your Pace Law Review article.

Sincerely,

[Signature]

Ira P. Robbins
Barnard T. Welsh Scholar and
Professor of Law and Justice

P.S. I remember well your presentation at the Law Review's 1992 banquet. As the Review's faculty advisor for the last nineteen years, I can honestly say that your banquet speech was the best we've had!
2-6-00

Dear Judge and Mrs. Miner,

Mike and I want to thank you both for sending us the beautiful crystal bowl. What a lovely and thoughtful gift. We will miss you both at the wedding and we hope you can visit us if you are ever in Los Angeles.

Thanks again! Yours truly,

Michelle Reynolds

(Michael Lowe's fiancée)
School District’s Right
To Refuse Access Upheld

BY MARK HAMBLETT

A DIVIDED federal appeals panel has upheld a school district’s right to refuse access to school facilities to an after-school religious program.

In The Good News Club v. Milford School District, 98-9494, the U.S. Court of Appeals for the Second Circuit found that the group’s teachings were “quintessentially religious” and were thus barred under the First Amendment’s doctrine of the separation of church and state.

The decision will be published on Monday.

In 1992, Milford School District adopted a policy on community use of school buildings that expressly forbade use for religious purposes. Although the community-use policy allowed groups such as the Girl Scouts and the 4-H Club, school officials rejected the application of the Good News Club, which offers religious instruction to children ages 6 through 12.

The club, one of several throughout the country, is affiliated with the Child Evangelism Fellowship, a Christian missionary organization.

Its meetings open with a prayer from the Reverend Stephen Douglas Fournier, the singing of a club theme song that refers to Jesus Christ, and then a moral lesson based upon a verse from the Old or New Testament.

Included in the lesson plan is a “memory verse,” which children are encouraged to learn and then repeat at the next lesson. This lesson plan, in calling for the “memory verse,” makes a distinction between children who are “saved” and “unsaved.”

After being denied access to school facilities, the club and Reverend Fournier’s wife Andrea, sued in the Northern District of New York alleging a violation of the First Amendment.

Although Northern District Chief Judge Thomas J. McAvoy initially granted a preliminary injunction against the school, he later found for the school district on cross-motions for summary judgment, stating that it was clear that the central purpose of the meetings was religious instruction and prayer.

On appeal, the Second Circuit, with Senior Circuit Judge Roger J. Miner and Judge Fred I. Parker in the majority, upheld Chief Judge McAvoy.

“The activities of the Good News Club do not involve merely a religious...
School’s Right to Deny Access Upheld

Continued from page 1, column 6

perspective on the secular subject of morality,” said Judge Miner, writing for the court. “The Club meetings offer children the opportunity to pray with adults, to recite biblical verse, and to declare themselves ‘saved.’”

Both sides in the case conceded, and the appeals court agreed, that the district, in issuing its policy on community use of school facilities, had created a “limited public forum,” meaning that the school cannot discriminate against different groups who want to use school grounds.

But the two sides differ on whether allowing the club access would constitute the school district’s endorsement of religion, which would violate the First Amendment’s mandate that church and state remain separate.

The school district had argued that the club’s activity crossed the line dividing a discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer.

The club, in the words of Judge Miner, countered that “these practices are necessary because its viewpoint is that a relationship with God is necessary to make moral values meaningful.”

“Even accepting that this prospect is a viewpoint on morality and not religious principle, it is clear from the conduct of the meetings that the Good News Club goes far beyond merely stating its viewpoint,” Judge Miner said. “The Club is focused on teaching children how to cultivate their relationship with God through Jesus Christ. Under even the most restrictive and archaic definitions of religion, such subject matter is quintessentially religious.”

Judge Miner also rejected an argument made by the school that the Boy Scouts, Girl Scouts and 4-H Club are involved in moral instruction that is no different from their own.

“We do not find this argument persuasive,” he said. “While the Boy Scouts teach reverence and a duty to God generally, this teaching is incidental to the main purpose of the organization, which is personal growth and development of leadership skills.”

Judge Miner said there was nothing in the record to show that any of the scouting groups or 4-H even remotely approach the type of religious instruction and prayer provided by the club. Accordingly, the Milford school’s decision to exclude the Good News Club from its facilities was based on content, not viewpoint.

In dissent, Judge Dennis G. Jacobs said that “the area of my agreement with the majority is substantial,” but that he would reverse the district court. He agreed that the school district had created a limited public forum.

Then, citing the Supreme Court in Rosenberger v. Rector of University of Virginia, 515 U.S. 819 (1995), Judge Jacobs said that in such a forum, content discrimination is allowed if it preserves the purpose of that limited forum, but viewpoint discrimination is “impermissible when directed against speech otherwise within the forum’s limitations.”

“In my view, when the subject is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters,” he said.

Judge Jacobs said the distinction is “elusive and subtle,” and “especially slippery where the viewpoint in question is religious, in part because the sectarian religious perspective will tend to look to the deity for answers to moral questions.”


There the Eighth Circuit found it was impermissible viewpoint discrimination to allow the Boy Scouts access while bar­ring the Good News/Good Sports Club only because its approach to moral development was religiously grounded.

The majority in this case, he said, criticized the Eighth Circuit for “apparently taking for granted the club in Mis­souri was only speaking on moral character and development.”

But Judge Jacobs said that the court in the Missouri case correctly found that the rejection of the Missouri club was based on viewpoint, not content.

In the Milford club’s view, he said, its moral teachings can not be “expressed and promoted,” without these religious activities, and “forcing them to do so would prevent them from expressing their point of view, in violation of the First Amendment.”

The distinction drawn by the majority between activities that are “quintessentially religious,” and those that focus on: “the secular subject of morality,” he said, is a “fallacy” because “it treats morality as a subject that is secular by nature, which, of course it may be or not, depending on one’s point of view.”

Thomas J. Marcelle of Slingerlands, N.Y., represented the Milford club. Frank W. Miller, of Ferrara, Florenza, Larrison, Barrett & Reitz, represented the Milford school district. Jay Worona of the New York State School Boards Association Inc. appeared as amicus curiae.
April 30, 1999

Honorable Stanley S. Harris
Chairman, Committee on Intercircuit Assignments
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Intercircuit Assignment of the Honorable Roger J. Miner to the United States Court of Appeals for the Fourth Circuit

Dear Judge Harris:

The Fourth Circuit Court of Appeals has requested the Honorable Roger J. Miner, Senior United States Circuit Judge for the Second Circuit, to assist our court during its term of court, from Monday, April 3, 2000, through Friday, April 7, 2000. Judge Miner has graciously accepted our invitation, with the approval of your Committee.

I enclose a Certificate of Need for your consideration.

Sincerely,

J. Harvie Wilkinson III

cc: Honorable Ralph K. Winter, Jr. (CUSCJ, 2nd Cir.)
Honorable Roger J. Miner (SUSCJ, 2nd Cir.)
Samuel W. Phillips, Circuit Executive
Patricia S. Connor, Clerk
AO Form 23 (Rev. 10/01/94)

INTER-CIRCUIT ASSIGNMENT OF A UNITED STATES JUDGE

CERTIFICATE OF NEED

Pursuant to the provisions of Chapter 13, Title 28, United States Code, I certify that a need exists for the assignment of a United States judge from another circuit or special court to perform judicial duties in the following court.

Honorable Roger J. Miner
Senior U. S. Circuit Judge
U. S. Court of Appeals for the Second Circuit

TO: United States Court of Appeals for the Fourth Circuit

FROM: Monday, April 3, 2000 TO: Friday, April 7, 2000

Date April 30, 1999

J. Harvie Wilkinson III
Chief Judge

FOURTH CIRCUIT

Please mail the original form to:
Honorable Stanley S. Harris
Chairman, Committee on Intercircuit Assignments
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

If time is limited, please transmit an advance copy by FAX to:
(202) 273-0011.
Dear Judge Miner:

Enclosed is a consent to assignment form with regard to your proposed intercircuit assignment to sit on the U.S. Court of Appeals for the Fourth Circuit for the period April 3-7, 2000.

As you probably are aware, a senior judge may sign his own consent to assignment, and signing the form conveys the fact that your Circuit's chief judge has no objection to the assignment.

For your convenience, we have prepared and enclose the requisite form. Please sign, date, and return it to me at your earliest convenience so that we may forward all the necessary material to the Chief Justice for his approval.

Sincerely,

[Signature]

Stanley S. Harris, Chairman

Enclosure

Copies: Hon. J. Harvie Wilkinson III (4th Cir.)
Hon. Ralph K. Winter (2nd Cir.)
CONSENT TO THE INTERCIRCUIT ASSIGNMENT OF A SENIOR UNITED STATES JUDGE
(Revised October 1997)

Pursuant to 28 U.S.C. § 294(d), I certify that I am willing and able to undertake the following intercircuit designation and assignment. The Chief Judge of my Circuit (and District, if applicable) has been notified and has no objection to this assignment.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Court to which I will be assigned:

Period of assignment:

from April 3, 2000, through April 7, 2000

OR

Specific case(s):

I understand that this assignment is for the period or case(s) stated, and for such time as needed in advance to prepare and to issue necessary orders, or thereafter as required to complete unfinished business.

ROGER J. MINER
Senior Judge (typed name)

Date: May 14, 1999

Please mail the signed original form to:

Honorable Stanley S. Harris
Chairman, Committee on Intercircuit Assignment
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001-2802

If time is pressing, please transmit an advance copy by facsimile to: (202) 354-3414
JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON INTERCIRCUIT ASSIGNMENTS

May 17, 1999

Hon. Stanley S. Harris, Chairman
United States District Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2802

Tel: (202) 354-3410
Fax: (202) 354-3414

Leonidas Ralph Mecham, Director
Administrative Office of the U.S. Courts
Washington, DC 20544

May 17, 1999

Re: Intercircuit Assignment

Requesting Chief Judge: Chief Judge J. Harvie Wilkinson III,
U.S. Court of Appeals for the Fourth Circuit

For Assistance to: U.S. Court of Appeals for the Fourth Circuit

Consent of: Senior Judge Roger J. Miner,
U.S. Court of Appeals for the Second Circuit

Dates of Service: April 3-7, 2000

Dear Mr. Mecham:

The Committee on Intercircuit Assignments recommends approval of the above-noted assignment. I enclose copies of the appropriate certificate of necessity and consent forms and related correspondence. Please forward this material to the Chief Justice for his review and approval.

Sincerely,

Stanley S. Harris, Chairman

Enclosures

Copies: Hon. J. Harvie Wilkinson III (4th Cir.)
Hon. Ralph K. Winter (2nd Cir.)
Hon. Roger J. Miner (2nd Cir.)
Samuel W. Phillips (Cir. Exec. - 4th Cir.)
George Lange III (Cir. Exec. - 2nd Cir.)
Ms. Carolyn Clark Campbell  
Clerk  
United States Court of Appeals  
1702 United States Courthouse  
40 Centre Street  
New York, NY 10007-1561

Ms. Patricia S. Connor  
Clerk  
United States Court of Appeals  
501 United States Courthouse Annex  
1100 East Main Street  
Richmond, VA 23219-3517

Dear Ms. Campbell and Ms. Connor:

Enclosed is the Chief Justice's designation of the Honorable Roger J. Miner of the United States Court of Appeals for the Second Circuit to perform judicial duties in the United States Court of Appeals for the Fourth Circuit during the period of April 3, 2000 - April 7, 2000. Pursuant to 28 U.S.C. § 295, please file and enter this assignment on the minutes of your respective courts. Also, so that Committee files reflect your receipt of the designation, please sign the enclosed acknowledgment form and return a copy to me in the envelope provided. Thank you.

Sincerely,

[Signature]

David L. Cook

Enclosures:  
(Clerk of Lending Court, Ms. Campbell — Original Designation)  
(Clerk of Borrowing Court, Ms. Connor — Certified Copy of Designation)

cc:  
Honorable Ralph K. Winter, Jr.  
Honorable J. Harvie Wilkinson III  
Honorable Roger J. Miner  
Honorable Stanley S. Harris (w/designation packet file copies)  
Ms. Karen Greve Milton  
Mr. Samuel W. Phillips

A TRADITION OF SERVICE TO THE FEDERAL JUDICIARY
MEMORIAL CEREMONY

In honor of

Honorable Sam J. Ervin, III

April 5, 2000
2:00 p.m.

LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE
En Banc Courtroom
Richmond, Virginia
HONORABLE SAM J. ERVIN, III

UNITED STATES CIRCUIT JUDGE
(1980 - 1999)
CHIEF JUDGE, FOURTH CIRCUIT
(1989 - 1996)
PROGRAM

Convening of Court:
HONORABLE J. HARVIE WILKINSON III
Chief Judge, Fourth Circuit

Remarks:
HONORABLE H. EMORY WIDENER, JR.
United States Circuit Judge

Poem in Remembrance:
HONORABLE PAUL V. NIEMEYER
United States Circuit Judge

Remarks:
HONORABLE J. DICKSON PHILLIPS, JR.
United States Circuit Judge, Retired

Frank C. Patton, III, Esquire
Former Law Clerk to Judge Ervin

Recognitions:
Mrs. Wilma M. Williams
Mrs. Jayne C. Clark
Secretaries to Judge Ervin

Presentation of the Portrait:
Martin H. Brinkley, Esquire
Former Law Clerk to Judge Ervin

Response by Family:
Samuel J. Ervin, IV, Esquire

Acceptance of the Portrait and Adjournment of Court:
Chief Judge Wilkinson

At the conclusion of the ceremony, refreshments will be served in the Bank Street Lobby.
Dear Judge Mined:

Thank you so very much for writing for us for this April issue. We appreciate your updating efforts and are certain it will be well read.

Please let us know if you get any feedback.

Thanks again.

[Signature]
Honorable Roger J. Miner  
Senior United States Circuit Judge  
United States Court of Appeals for the Second Circuit  
Suite 414, James T. Foley U.S. Courthouse  
445 Broadway  
Albany, New York 12207

Dear Judge Miner:

I certainly do thank you for helping out the Fourth Circuit this past week. In addition to all the good assistance you gave us, we also enjoyed the opportunity to have you visit. I am so happy you could be with us.

With warmest personal regards.

Sincerely,

J. Harvie Wilkinson III

Thank you, Roger! It was so very nice to get to meet you. You added a lot to our week.

As always,

Jay
April 18, 2000

Honorable Roger J. Miner  
Senior United States Circuit Judge  
United States Court of Appeals for the Second Circuit  
United States Courthouse  
445 Broadway, Suite 414  
Albany, New York 12207

Dear Roger:

Thank you for your letter of April 12. It was such a pleasure to have you with us and I hope you may return again soon.

Please give my very best to Mark. I know the two of you must be mighty proud of one another.

As always,

J. Harvie Wilkinson III
Chambers, The Best Line I Have Heard All

To: Chambers
From: Tracy Timbers <ttimbers@dpw.com>
Subject: The Best Line I Have Heard All Day
Cc:
Bcc:
Attached:

QUOTE FROM THE NYLJ:

"Tenzer argues," and we agree," Judge Feinberg said, that Judge Brieant "may not have fully understood his authority to depart in this case."

Ok, I know it's the Second Circuit, but this time they really got it wrong. We all know, and anyone who has ever been in Judge Brieant's courtroom can tell you, that if there is one thing Judge Brieant fully understands, it's his authority!

Hope all is well,
Tracy

---

Tracy:

Another thing Judge Brieant knows is that Lenin said that for things to become better first they must be made worse.

Good to hear from you.

CLB
PUBLIC AGENCIES cannot be obliged under the Family and Medical Leave Act to provide 12 weeks of leave to employees who need to attend to their own illnesses, the U.S. Court of Appeals for the Second Circuit has decided.

While other benefits of the FMLA, which became law in 1993, must be provided by government employers — with the employee having a remedy in court if it is not — the refusal to grant leave for the employee's own illness can not be the subject of a lawsuit, the three-judge panel concluded.

That is because, unlike the bulk of benefits mandated by the FMLA, the own-illness leave does not connect with the remedial nature of the law, the court said in an opinion by Circuit Judge Roger J. Miner.

The decision will be published on Wednesday.

In Hale v. Mann, 99-7326, the plaintiff was the former youth facility director of the New York Secure Center in Goshen, and was an employee of the state Office of Children and Family Services. Plaintiff Monroe Hale said he was discharged without regard to his right to 12 weeks' leave to attend to his illness, described as "job-related stress." Mr. Hale also said that he was demoted from his tenured position in retaliation for the exercise of his First Amendment free speech rights.

The FMLA requires employers to provide 12 weeks of leave for child care or the illness of a family member.

The provisions of the Family Medical Leave Act were made to apply to government agencies such as state Children and Youth Services, and the law includes language lifting such agencies' constitutional immunity from suit.

The Eleventh Amendment to the U.S. Constitution, which gives immunity from suit to governmental units, may be lifted by an act of Congress. The appeals court said that Congress intended to make the FMLA generally enforceable against public agencies and provided a legal remedy for employees to vindicate that right.

Under the terms of the FMLA, governmental immunity was lifted because of a Congressional finding that the act was needed to ameliorate family and gender discrimination.

"In light of Congress' failure to specifically find that women are disproportionately affected by "serious health conditions," this gender-neutral grant of leave [to sue the public agency] is overbroad," Judge Miner said. "There is no evidence that this conferment of federally-protected leave is tailored to remedy sex-based employment discrimination."

Judges Amalya L. Kearse and Jose A. Cabranes joined Judge Miner in the unanimous decision.

The court upheld Southern District Judge Charles L. Brieant III, who granted summary judgment to the state agency on the FMLA issue. However, the appellate panel sent the case back to Judge Brieant for possible trial on the First Amendment claims.

Judge Miner said that Mr. Hale had produced enough evidence to create a genuine issue of material fact as to whether he was demoted because he criticized policies adopted by his superiors in the agency. Judge Cabranes dissented from this portion of the ruling.

Roger Miner, district attorney of Columbia County and a teacher of a credit-free class at Columbia-Greene Community College titled "Law for the Police Officer," was recently presented with a plaque expressing gratitude from the 40-member class.

The Columbia County Taxpayers' Council Monday launched what it hopes will become a statewide campaign for legislation limiting to one in two years the number of bond issues school boards may propose to voters. The present law permits two in one year.

The Hudson Day Care Center, housed at 10-12 Warren St., will hold an open house Friday and Saturday. Started six years ago in July by the Hudson YWCA, the center provides an all-day educational program for preschool children.
Ruling adds to race debate

U.S. court's decision upholds program's intent to send minority students to suburbia

By Jay Tokasz
Democrat and Chronicle

(May 13, 2000) -- A federal appeals court ruling Thursday on a long-running school transfer program adds a new wrinkle in the national debate about using race as a basis for admission.

For the past 18 months, 10-year-old Jessica Haak has attended classes at Iroquois Elementary School in the West Irondequoit School District.

In the fall, she might have to go back to Rochester's School 39.

The 2nd Circuit U.S. Court of Appeals overturned a lower court ruling that allowed Jessica, a white city resident, to attend classes in Irondequoit as part of a program aimed at integrating schools.

"We're very pleased with this outcome," said Kevin Coomer, attorney for the Urban-Suburban Interdistrict Transfer Program, one of the parties sued by Jessica's parents. "It is, I think, going to be of immense national significance . . . This was as strong (a ruling) or stronger than we could have hoped for."

Jessica's attorney, Jeffrey Wicks, now has three options: try the case at the district court level; appeal to the Supreme Court; or ask for a special hearing before a broader panel of circuit judges.

"It's going to be disruptive to the child, and that's my biggest concern," he said.

Jessica has made new friends and is earning straight A's in her new school, Wicks said.

The ruling differs from those in other recent cases involving race, experts said.

In cases in Boston and Texas, for example, courts said that race could not be used in determining admission to government-funded programs simply for the sake of diversity. The programs needed to be designed specifically to remedy past discrimination.

David J. Armor, a professor at George Mason University in Virginia who studies desegregation, called Thursday's ruling "surprising" and "out-of-step" with other decisions.

"The Supreme Court has not declared diversity by itself to be a compelling enough argument," Armor said. "I would be very surprised if this is going to hold up."
Jessica was accepted in 1998 for the 35-year-old transfer program. It enables black, Hispanic and Native American students from the city -- where the concentration of minority students is 80 percent -- to attend school in one of five suburban districts.

White students from the suburbs, which have minority populations of less than 10 percent, can opt to attend school in the city.

The program, overseen by the Monroe Board of Cooperative Educational Services, is unique in the state and one of only two or three in the country.

When Urban-Suburban officials realized Jessica was white, she was told she could not transfer.

On her behalf, Jessica's parents, Laurie A. Brewer and Jodie Foster, sued the program and two of its employees, the West Irondequoit district and one employee, and BOCES.

In January 1999, U.S. District Court Judge David G. Larimer ruled that the district had violated Jessica's equal protection rights and ordered that she be allowed to attend Iroquois Elementary.

The 2nd Circuit U.S. Court of Appeals threw out Larimer's ruling in a split decision, although it said Jessica could stay at Iroquois until the end of the school year.

The court said that the six Urban-Suburban school districts in Monroe County might be segregated. If so, the districts can use "racial classification" to reduce segregation and improve diversity.

The court sent the case back to Larimer for a closer look at segregation.

In reaching its decision, the appeals court relied on a 1979 2nd Circuit case centering around a desegregation plan at Andrew Jackson High School in Queens.

"If reducing racial isolation is standing alone a constitutionally permissible goal, as we have held it is under Andrew Jackson, then there is no more effective means of achieving that goal than to base decisions on race," Judge Chester J. Straub wrote in the majority opinion.

The Supreme Court has not ruled on whether school districts can use diversity as a reason to make decisions based on race, Armor said.

"In one sense, what (the ruling) does is re-open the question, and in a significant circuit," said Edwin Darden, senior staff attorney for the National School Boards Association.

Darden applauded the decision because he said it lets school boards determine for themselves how to achieve diversity and improve cultural education.

The fate of the Urban-Suburban program, which enrolls about 600 city students and a few dozen suburban students, remains unclear.

Officials had stopped accepting new students pending the outcome of the case. Judge Roger J. Miner, in his dissent of the 2nd Circuit ruling, called the program a "total failure," and Judge Fred I. Parker, who agreed with Straub, nonetheless said in his opinion that the "entire program may fail as being unconstitutional."

BOCES officials will meet this month to discuss the decision, Coomer said.
Dear Roger,

Thank you for your most kind letter. Mary and I just got back from the Cape to our new home in Garden City, Long Island. I start the new job next week and look forward with great enthusiasm. The students will re-energize me and I'll find a few good/oustanding ones to tender unto you. Thanks again and all the best.

Joe

July 24, 2000
The U.S. Supreme Court has left the issue of physician-assisted suicide up to the states. Now the question is how law and society will deal with the debate.

Demonstrators in Michigan seek prosecution of Dr. Jack Kevorkian for assisted suicide.

by ALEXANDRA DYLAN LOWE
one of the six terminally ill patients who challenged New York and Washington state laws prohibiting physician-assisted suicide lived long enough to know how the U.S. Supreme Court ruled in their cases.

But the legacy of those cases promises to be long-lasting and profound. Out of the growing debate following the June 26 ruling in Vacco v. Quill, No. 95-1858, and Washington v. Glucksberg, No. 96-110, may come a more sensitive, responsive approach to the needs of terminally ill patients as they approach death.

Setting policy everyone can live with will not be easy, however, because the issue of physician-assisted suicide—and the larger question of how much control individuals have in determining the time and manner of their death—is engendering as much divisiveness as any societal issue in recent decades.

A 69-year-old retired pediatrician from Washington state, known in her case as Dr. Jane Roe, personified the doomed patients who joined physicians in seeking to overturn statutes that prohibit doctors from helping patients end their own lives when in the final throes of terminal disease. Three of the patients had AIDS, another emphysema and one other, like Roe, cancer.

Roe fought her disease for years until it finally spread throughout her body. She spent her final months in a hospice, bedridden and in constant pain. Her legs were swollen and her vision impaired, and she suffered from nausea, vomiting and incontinence.

To end her misery, Roe wanted to die. A Washington statute, however, made it a felony for her doctor to prescribe drugs to help Roe end her life.

In two related decisions upholding the New York and Washington statutes, the Supreme Court ruled that individuals have no constitutional right to assistance in committing suicide. At the same time, the Court did not foreclose legalization of physician-assisted suicide as a matter of state law. And in his opinion for the Court, Chief Justice William H. Rehnquist encouraged a continuing "earnest and profound debate" on physician-assisted suicide.

Indeed, a contentious and emotional clamor over physician-assisted suicide already is shifting to state legislatures. And neither side in this debate shows any sign of shying away from confrontation.

At the same time, however, the ruling puts new emphasis on the issue of how medicine, the law and society meet the needs of the dying. "The silver lining in this whole debate," says Dr. Marcia Angell, executive editor of the New England Journal of Medicine, "is the effect it has had in turning our attention to how to take care of dying people."

Circuits' Overturning of State Bans

In a remarkable legal double play, proponents of physician-assisted suicide had scored dramatic victories in the federal appeals courts for the 2nd and 9th circuits.

In Compassion in Dying v. Washington, 79 F.3d 790 (1996), an en banc panel of the 9th U.S. Circuit Court of Appeals based in San Francisco ruled 8-3 that physician-assisted suicide, like abortion, is an intimate personal choice protected by the due process clause of the 14th Amendment.

"A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced ... to a childlike state of helplessness, diapered, sedated, incontinent," Judge Stephen Reinhardt wrote for the panel majority.

"Those who believe strongly that death must come without physician assistance are free to follow that creed," he stated. "They are not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ from their own to die painful, protracted, and agonizing deaths."

In contrast, the 2nd Circuit based in New York City struck down New York's assisted suicide ban on equal protection grounds, pointing out that state law permits patients to refuse medical treatment and to direct their physicians to remove all artificial life support, thereby hastening their deaths.

"Withdrawal of life support requires physicians or those acting at their direction physically to remove equipment and, often, to administer palliative drugs which may themselves contribute to death," Judge Roger J. Miner wrote for a unanimous three-judge panel. "The ending of life by these means is nothing more nor less than assisted suicide."

In a withering rejection of the state's argument that its interests justified a ban, Miner wrote, "What business is it of the state to require the continuation of agony when the result is imminent and inevitable?"

Appeal to the Supreme Court in either case was also inevitable.

Joining forces with religious and anti-abortion groups in support of bans on physician-assisted suicide were the American Medical Association and 45 other medical or health care organizations. On the other side were the American Civil Liberties

Dr. Timothy Quill says assisted suicide, though widely banned, remains a pervasive, secret practice.

Alexandra Dylan Lowe, a lawyer, is a legal affairs writer living in Dobbs Ferry, N.Y.
Union, the Hemlock Society, gay and abortion rights activists, and a variety of ad hoc coalitions.

The Supreme Court’s 9-0 decision (with five concurrences) was just as stunning as the appellate rulings it overturned, but quite a bit more enigmatic.

Dissecting the Decision

Rejecting the due process analysis propounded by the 9th Circuit in Glucksberg, Chief Justice Rehnquist, who wrote for the Court in both cases, pointed out that assisted suicide is a crime in the overwhelming majority of states. He also noted that the president had recently signed into law the Federal Assisted Suicide Funding Restriction Act, 42 U.S.C. § 14401 et seq.

"We are confronted," he wrote, "with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."

The lower courts, Rehnquist ruled, had misread the Court’s 1990 decision in Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, which upheld a patient’s right to refuse unwanted medical treatment. "A physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends ... only to respect his patient's wishes and to cease doing useless and futile or degrading things to the patient [who] no longer stands to benefit from them."

"The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten ... death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. "A doctor who assists a suicide, however, 'must, necessarily and indubitably, intend primarily that the patient be made dead,'" Rehnquist continued.

Significantly, however, the Supreme Court did not foreclose the possibility that physician-assisted suicide could be legalized and regulated at the state level. "Throughout the nation," Rehnquist wrote, "Americans are engaged in an earnest and profound debate about the morality, legality, and practicability of physician-assisted suicide.

Our holding permits this debate to continue, as it should in a democratic society."

Legal scholars quickly began to pore over Court holdings in other cases raising due process or equal protection issues. But the decision's immediate impact stems from two somewhat divergent ideas expressed by the Court: That there is no constitutional right to physician assistance to hasten one’s death, and that the resolution may ultimately lie in changing medical policies toward...
treat pain in the terminally ill.

The ensuing debate could well match, or even exceed, the intensity and fervor over abortion issues.

**Gauging the Public’s View**

Polls suggest that more than half the public, as well as many doctors, favor legalizing physician-assisted suicide. But opposition from religious groups and medical associations has stalled numerous state bills aimed at easing restrictions.

"Just as state abortion laws tend to be more conservative than the general public, I think you'll see the same thing here," says Michael C. Dorf, a constitutional law professor at Columbia University School of Law. "A determined minority is often more effective at securing legislation than a diffuse majority."

Oregon voters, however, seem to be very closely split on the assisted suicide issue. A 1994 ballot initiative allowing doctors to prescribe drugs that patients with an estimated six months or less to live could use to end their lives was approved by just 51 percent.

Due to ongoing court challenges that may themselves reach the U.S. Supreme Court, the Oregon Death With Dignity Act has yet to go into effect. Moreover, the Legislature voted in June to place a repeal of the law on the November ballot.

The Oregon statute already has helped frame much of the national debate on physician-assisted suicide. The first law of its kind in the United States, the measure contains the sorts of regulatory safeguards that many legalization advocates support.

In particular, the statute would require a terminally ill patient to follow a series of steps, including examination by a second physician and, possibly, a psychiatric specialist, before being allowed to receive medical assistance in ending his or her life. There also must be documentation that the patient is acting voluntarily.

Proponents of assisted suicide such as Alan Meisel of the University of Pittsburgh School of Law say legislation can protect patients who are under duress to hasten death.

"I would want to have a fairly general statute that says that patients should be competent, patients should be informed of their various

---

**Taking Better Care of the Dying**

The Supreme Court’s decisions on physician-assisted suicide carry important implications for how medicine seeks to relieve dying patients of pain and suffering.

Although it ruled that there is no constitutional right to physician-assisted suicide, the Court in effect endorsed the medical principle of "double effect," a centuries-old ethical doctrine holding that an action having two effects—a good one that is intended and a harmful one that is foreseen—is permissible if the actor intends only the good effect.

Bioethicists have invoked that principle in recent years to justify using high doses of morphine to control terminally ill patients’ pain, even though increasing dosages will eventually kill the patient.

A huge obstacle to adequate pain management in dying patients has been doctors' "inchoate, instinctive fear of prosecution for homicide," says Nancy Dubler, director of the bioethics division at Montefiore Medical Center and the Albert Einstein College of Medicine in New York City.

Chief Justice William H. Rehnquist's discussion of double effect in *Vacco v. Quill* makes it clear, Dubler contends, that the principle will shield doctors who "until now have very, very strongly insisted that they could not give patients sufficient medication to control their pain if that might hasten death."

George Annas, chair of the health law department at Boston University’s School of Public Health, maintains that, as long as a doctor prescribes a drug for a legitimate medical purpose, the doctor has done nothing illegal even if the patient uses the drug to hasten death. "It's like surgery," he says. "[W]e don't call those deaths homicides because the doctors didn't intend to kill their patients, although they risked their death. If you're a physician, you can risk your patient's suicide as long as you don't intend their suicide."

On another level, many in the medical community acknowledge that the assisted-suicide debate has been fueled in part by the despair of patients for whom modern medicine has prolonged the physical agony of dying.

Just three weeks before the Court's June ruling on physician-assisted suicide, the Institute of Medicine at the National Academy of Science released a two-volume report, *Approaching Death: Improving Care at the End of Life.* The report identifies the undertreatment of pain and the aggressive use of "infectious and intrusive [medical procedures that] may prolong and even dishonor the period of dying" as the twin problems of end-of-life care.

But change is imminent. Spurred by such efforts as the Robert Wood Johnson Foundation’s Last Acts initiative and the Project on Death in America sponsored by the Open Society Institute of the Soros Foundation in New York City, the profession is taking steps to require young doctors to train in hospices, to test knowledge of aggressive pain management therapies, to develop a Medicare billing code for hospital-based palliative care, and to develop new mandatory accreditation standards for assessing and treating pain at the end of life.

Annas says lawyers can play a key role in insisting that these well-meaning medical initiatives translate into better care. "Large numbers of physicians seem unconcerned with the pain their patients are needlessly and predictably suffering," to the extent that it constitutes "systematic patient abuse," he says. "Medical licensing boards must make it clear ... that painful deaths are presumptively ones that are incompetently managed and should result in license suspension or revocation in the absence of a satisfactory justification."

Annas adds that medical malpractice lawsuits should be brought against large health plans and hospitals that fail to provide adequate pain management services. "Five justices ... went out of their way to suggest that palliative care may be a constitutional right," he says. Furthermore, "It's required by medical ethics and by good medical care standards."
treatment options, and their decision should be voluntary," Meisel says. "I would then recommend delegating the regulatory details to a state agency, like the state health department," which could address waiting periods, second opinions and the extent to which patients' families should be involved, he adds.

But opponents of legalizing assisted suicide assert that, once such a right is recognized, it will be difficult to contain.

"What about people who are paraplegic or stroke victims who will have to suffer for 20 years?" says Professor Yale Kamisar of the University of Michigan Law School in Ann Arbor. "Wouldn't they have an even more compelling case than those who are terminally ill? What about patients who are incompetent? What about patients in the early stages of Alzheimer's?"

**Dealing with Death in Secret**

It is widely recognized that physician-assisted suicide occurs across the United States, even though the practice is banned by statute in 38 states and criminalized by common law in nine others. This underground approach to easing the suffering of the terminally ill is likely to continue until some formal policy consensus emerges.

"The real problem with a secret practice as pervasive as this," says Dr. Timothy E. Quill, one of the named plaintiffs who challenged New York's statutory ban, "is that there is no second opinion, no discussion." In contrast, "When we stop life support, we get our best minds together, we get a number of consultations to make sure that no stone has been unturned."

One of the values of open discussion of assisted suicide "is to make sure that doctors know exactly what's being asked for," continues Quill, a primary care internist and professor at the University of Rochester School of Medicine and Dentistry. "Safeguards are very important. Is the patient depressed? Is the patient competent? Is the patient getting adequate palliative care?"

If assisted suicide were a legal option, says Connie Holden, a nurse and executive director of the Hospice of Boulder County in Boulder, Colo., "The discussion would take place out in the open, and the doctor could acknowledge the patient's fears. Addressing the reasons for the patient's request might in fact thwart the patient's interest in suicide."

Holden cites studies indicating that some terminally ill patients contemplate suicide because of the feared loss of control often associated with the progression of many terminal diseases. As a result, she says, many act to take their own lives "long before they are disabled by their disease, and often before all possible palliative options have been fully explored."

She maintains that terminally ill patients who have stockpiled a stash of sleeping pills may actually live longer, their will to live sustained by the knowledge that if their pain becomes unbearable, they have a remedy.

There is another problem with an underground approach to assisted suicide, says Kathryn L. Tucker of Seattle's Perkins Coie law firm, who represented the parties challenging the Washington statute in Glucksberg. "You can't be sure that your doctor will care enough about you to incur the personal risk" of facilitating death, she says. "If you can't find access to a Dr. Quill, what are your options? Back-alley providers? Self-help? Family members?"

Still, opponents of assisted suicide fear that an option to die would evolve for some into a duty to die.

"My greatest fear about assisted suicide is the duty-to-die problem," says Michael McConnell, a constitutional law professor at the University of Utah College of Law in Salt Lake City, who authored an amicus brief in the assisted suicide cases on behalf of Sen. Orrin Hatch, R-Utah, and Reps. Henry J. Hyde, R-Ill., and Charles Canady, R-Fla.

"The harsh reality is that a more expeditious death for terminally ill patients would often serve the interests of others, especially in this era of managed care and exploding medical costs," McConnell observes. "One blessing of the current law is that it relieves the elderly and the infirm of the need to justify their continued existence."

It is the insidious nature of coercion that concerns Dennis C. Vacco, the New York attorney general. "If coercion takes place, it's virtually undetectable," he says. "Even if it's detected, by then it's too late."

Two ABA entities are voicing similar concerns in opposing legislation that permits assisted suicide. A resolution of the commissions on Legal Problems of the Elderly, and Mental and Physical Disability Law was expected to come before the policy-making House of Delegates in August.

The commissions' report contends that the image of the typical terminally ill patient as "an independent, capable person thoughtfully evaluating his or her options, unaffected by biased third parties... is so far from experience of dying as to be fanciful. Dying persons are often very weak, prone to strong emotions, and vulnerable to the suggestions, expectations, and guidance of others. ... Pressure or encouragement from family, friends, and caregivers may cloud or overwhelm the patient's independent judgment and... amount to inappropriate coercion."

The House of Delegates was also expected to consider a recommendation by the Beverly Hills Bar Association supporting California legislation to allow physician-assisted suicide with appropriate safeguards.

Clearly, the assisted suicide debate has caused many Americans to think about matters on which few of us choose to dwell. But by formulating policies responsive to end-of-life concerns, we can bring comfort to the living as well as the dying.
November 12, 2000

Dear Roger,

Many thanks for your kind note. Thank heavens, I’m doing fine! Luckily, I didn’t have the kind of travail you did — I ended up with three angioplasty stents. Now, I’m participating in the hospital’s cardiac rehab program. Cynthia, meanwhile, is enrolled in a nearby fitness and exercise program — so, three times each week, we are off doing our concurrent exercise regimen.

Hope all goes well. Best to you and Jackie.

Sincerely,

Larry
Dear Judge Miner:

Thank you for speaking to the Legislative Drafting class on Tuesday, November 21st. We all very much enjoyed Your Honor’s presentation, which was perfectly suited to the course. During the semester, we covered many of the topics you discussed – but through your presentation, the students saw that there were real consequences to statutory interpretation, and that judges are challenged at times to divine the meaning of a statute.

It was very nice for Your Honor to take time out of your busy schedule for our class. Thank you again.

Respectfully yours,

[Signature]

[Name]

November 30, 2000
TO: JMW, ALK, DJ, PNL, GC, JAC, FIP, RSP, CJS, RDS, SS, RAK
WF, JLO, EVG, TJM, JON, RJC, RKW, JMcL

RE: Absence from Chambers

MEMORANDUM OF RJM

Jackie and I expect to depart for the West Coast on December 28 to begin our long-anticipated World Cruise. We are scheduled to return sometime in mid-May, 2001, after stopping at fifty ports in twenty-seven countries. Although we have a specific itinerary, available to all colleagues upon request, our only certain address will be "The Four Winds and the Seven Seas."

While I am away, I expect to be in touch with chambers on a regular basis by phone, fax and/or Fed Ex. E-mail also is a possibility, as yet unexplored. Except during some brief overland travels (e.g., Mandalay, Angkor Wat, Luxor), my chambers will know how to reach me in case of emergency. In view of the foregoing, I shall not be able to respond to memos and proposed opinions with my customary alacrity.

As to any applications addressed to judgments, orders or decisions in cases in which I already have participated as a panel member, I authorize my panel colleagues to make such dispositions as they see fit, if they are in agreement. Disagreements should, of course, be communicated to chambers, and I will vote as soon as possible. By the time of my departure, all opinions heretofore assigned to me will have been filed or circulated. My next sitting is scheduled for the week of June 25, 2001.

My Clerks will be available during most of my absence to help any colleague who may request their assistance. If there are no "takers," the Clerks' services will be offered to the Staff Attorneys' Office. Requests should be directed to my Chambers Administrator, Shirley Hicks, who will coordinate the Clerks' schedules and, as usual, take care of everything else necessary for the efficient management of chambers business.

Au revoir.