Federal Bar Council Quarterly

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From the President

Our Future

By David R. Schaefer

I write this column just days before the end of my two-year term as president of the Federal Bar Council. This is my attempt to leave our members and leaders with a few thoughts about the future of the Federal Bar Council.

The Federal Bar Council is a unique association, with a very clear mission. We exist to improve the quality of lawyering and scholarship among our members, and to foster collegiality between the members of the bar who practice before the courts of the Second Circuit and between those members and the judges of those courts. We further this mission by bringing together the bench and bar for some truly fantastic programs highlighted by our Winter Bench & Bar Conference, our Fall Retreat, our Thanksgiving Day Luncheon, our Law Day Dinner, and our exceptional educational programs. We have many devoted members who serve on committees that make a huge contribution to the Federal Bar Council, including our Public Service Committee, Second Circuit Courts Committee, First Decade Committee, and many others.

We create an environment where our members can learn together and discuss controversial issues with each other in a respectful manner. While this happens in many settings during the year, the *Federal Bar Council Quarterly* is a wonderful example of how we have articles which explore controversial issues by opinionated writers in a respectful way that makes us all proud to be lawyers and members of the Federal Bar Council.

An Independent Judiciary

While our programs are critical to carrying out the mission of the Federal Bar Council, it is clear to me that the Federal Bar Council must be more than a planner of social programs and continuing legal education. We must always be ready and willing to take action to defend the independence of the federal judiciary and the importance of the rule of law. This may take the form of publicly defending a judge who is unfairly criticized when that judge cannot appropriately defend herself or himself. It requires us to speak up when those in power seek to undermine the rule of law and the independence of the federal judiciary to achieve their political ends. During my term, we had the need to do this twice – once when the president attacked the federal judiciary by referring to a federal judge who issued a decision the president did not like as a "so-called judge." In that situation, we issued a public statement condemning such actions and defending the independence of the judiciary. On another occasion at our Law Day Dinner, we made it clear that the president's Law Day message attacking the independence of the federal judiciary did not reflect the views and values of the Federal Bar Council.

Hopefully the need for speaking out and standing up for the independence of the federal judiciary and the rule of law will not happen often. When the need does arise, it is critical that the Federal Bar Council be able to speak up and be heard on such an important matter.

Civility

Our mission of supporting collegiality among the bench and bar and supporting the courts of the Second Circuit by necessity requires civility. In my view, civility of the bench and bar is critical to maintaining the public's respect for its governmental institutions. There can be no collegiality without civility.

This has come into greater focus to me because of the willingness of some of our political leaders to debase those who disagree with them, whether it is their colleagues in elected positions or members of other branches of the government. When this involves uncivil attacks on the federal ju-

diciary, or attacks are by a member of the federal judiciary, they undermine respect for the federal judiciary.

Hopefully the period we have just been through is an aberration, but I am not so sure. Many barriers which insure decency, respect for those who may disagree with you, and working with those who you may disagree with to pursue justice fairly on behalf of all have been challenged, ignored, and ridiculed. The Federal Bar Council must be vigilant and continue to support the courts and judges of the Second Circuit through efforts to encourage collegiality, civility, and excellence in the practice of law before the courts in that circuit. If we shy away from this responsibility, no number of social functions will achieve our critical mission.

My Gratitude

As I complete my term as president, I must express my extreme gratitude to the judges of the Second Circuit who have worked with the Federal Bar Council and participated in our many programs. I could not have asked for more support and cooperation than has been provided to us under my tenure by Chief Judge Katzmann and Chief Judges McMahon, Irizarry, Hall, Suddaby, Geraci, and Reiss. I also want to thank the superb staff of the Federal Bar Council, led by our executive director, Anna DeNicola. Having had the pleasure of hiring Anna and working with her for the last year and a half, I appreciate the critical role that Anna and the others on our staff play in permitting me and our other dedicated officers and board members to do the hard work to further the mission of the Federal Bar Council while continuing to do our day job as practicing attorneys.

From the Editor

What's the Story with Bar Associations?

By Bennette D. Kramer

Bar associations are losing membership and accompanying revenue. Sixty-two bar associations in the United States are experiencing flat or declining membership. In response, bar associations are taking what appear to be radical steps to save money or attract members: the American Bar Association is lowering dues and cutting its executive director's compensation; the New York City Bar Association has announced that it will be offering free CLE and has hired a caterer to make the association's building more attractive as an event venue; the New York State Bar Association is marketing its building as an event venue; the New York County Bar Association has hired consultants to sell its landmarked building; and the Brooklyn Bar Association reportedly is planning to mortgage its building if it cannot otherwise raise money.

The Causes

Each of these bar associations has unique problems but they all come from changes in the legal profession and the people in it. Generally, the problems of slipping revenues and membership arise from several factors.

First, since the Great Recession, fewer firms have been paying bar dues, which leaves individual lawyers with the choice of paying the dues themselves or forgoing bar membership.

Second, the internet provides networking opportunities and CLE programs that bar associations also provide.

Third, traditional bar associations such as the ABA, the New York State Bar Association, and the City Bar are facing increased competition from specialized bar associations that focus on gender, ethnicity, practice area, religion, sexual orientation, or client base.

Fourth, digital advances have changed the practice of law and some bar associations have not kept up.

Fifth, many younger associates choose family responsibilities

over bar association activities.

And, sixth, within law firms, there has been an emphasis on billing, so that firms no longer encourage bar association activities.

The ABA has been severely impacted by these changes. Lawyers used to belong to the ABA as a professional obligation, and firms paid the dues. Now, some are saying that the ABA is no longer relevant to the professional lives of the majority of practicing lawyers, and that it has failed to live up to its core goals: serve its members, improve the legal profession, eliminate bias and advance diversity, and advance the rule of law. In fiscal year 2017, the ABA had 194,000 dues-paying members, which was only 14.4 percent of the 1,340,000 lawyers in the United States. It has lost 56,000 members in the last decade. Revenues from membership dues have declined from $84 million in 2009 to $68.7 million in 2017 as fewer lawyers have joined the ABA. The ABA operated at a loss for the past three fiscal years. To add insult to injury, the ABA is dealing with the aftermath of the discovery that a non-managerial employee had embezzled $1.3 million between 2010 and 2017.

In reaction to its shrinking revenue, the ABA reduced staff, including layoffs in 2010 and 2017, followed by a six percent overall reduction in the size of the workforce in the spring of 2018. However, at the same time, the ABA steadily increased its executive director's salary from $687,000 in 2011 to $1.25 million in 2016, which caused some controversy. In response the ABA backtracked by reducing the executive director's salary to $1.17 million in 2017.

At its annual meeting, the ABA House of Delegates voted to reduce membership dues and fees beginning with fiscal year 2020, which starts on September 1, 2019, reduce the executive director's salary, and implement other significant cost reductions. The ABA Standing Committee on Membership has recommended that (1) the association implement technology upgrades to its membership, financial, and reporting systems; (2) streamline marketing; and (3) allocate additional monies to the marketing budget to improve the perception of the ABA brand.

Declining or Flat Membership

The problems of the ABA are more severe than those of other bar associations, but many of them are facing the same challenges – declining or flat membership with a parallel decline in revenue. The City Bar's membership numbers are flat. In order to retain members and encourage additional lawyers to become members, the City Bar is planning to offer free or reduced cost CLE programs for young members. It also has hired a caterer so that it can open its building for weekend events. The City Bar is not planning on selling its building.

The New York State Bar Association also says that its building is not for sale, but it has had a decline in membership from 74,075 in 2007 to 69,367 in 2017. It has restructured its staff to save money and be more efficient. It is also marketing its building as an event venue.

The Brooklyn Bar Association was reported by the *New York Law Journal* on September 4 to be in financial trouble. It has discussed raising capital by obtaining a mortgage or line of credit. If that is not feasible, it plans to seek donations from its leadership.

Recently, the New York County Bar announced that it was interested in selling its landmark building on Vesey Street. The reasons it gave was that it did not need as much space because the library has been mostly digitalized, and it is focusing on technology and flexible space. There also were reports that because the walls are very thick, it is impossible to set up a Wi-Fi network in the building.

The Council's Situation

I spoke to the Federal Bar Council's president, David Schaefer, to get a sense of how the Federal Bar Council compares to the bar associations discussed above. He stated that the Federal Bar Council has not experienced a significant drop in membership, but that membership has not grown as we would like it to. The Federal Bar Council is financially stable, but it would be wise to pay attention to the trends affecting many bar associations, which might begin to impact the Federal Bar Council if we do not address their causes.

Schaefer stated that it is especially critical to the future of the Federal Bar Council to make sure its programming and activities maximize its ability to attract federal practitioners in their early years of practice. The Federal Bar Council is looking forward to working with law firms that have been leaders in our bar to encourage new lawyers to enhance their careers by becoming involved in the Federal Bar Council. Equally important, according to Schaefer, is to reach out to lawyers in small firms, public service, and non-profits to facilitate their engagement with the Federal Bar Council.

Schaefer believes that the Federal Bar Council's special relationship with the judiciary in the Second Circuit attracts new members and causes current members to remain involved. Scott Morvillo, the new membership chair, agrees. The Federal Bar Council's annual slate of CLE programs and special events provide many opportunities for lawyers and judges to work collaboratively and interact outside the courtroom – something our members find increasingly valuable. The Fall Retreat and Winter Bench & Bar Conference offer an opportunity for Federal Bar Council members to deepen social and business connections. Some relationships, begun at the conferences, last for many years. The Thanksgiving Luncheon and Law Day Dinner, coupled with a host of additional smaller receptions and events, offer additional networking opportunities by bringing our membership together in one room several times a year.

That is not to say that the Federal Bar Council does not need to bring in new members every year. Members retire or leave big firms or simply change direction. These members need to be replaced. The Federal Bar Council is always interested in recruiting younger members who will keep the Federal Bar Council strong in the future and looking at creative ways to grow membership.

Morvillo pointed out that the size of the Federal Bar Council, at around 3,000 members, enables the organization to focus on the Second Circuit courts. It is better able to adjust to changing times than the ABA with 194,000 members or the New York City Bar with 24,000 members. The Federal Bar Council is positioned to work with its members to meet the changing needs of the profession. For example, the CLE topics for the Winter Bench & Bar Conference are selected by a large planning committee that meets to propose topics and then votes on the topics to present. The result is a varied selection of subjects reflecting the interests of the members.

Morvillo is new as membership chair, but he already is planning ways to make a case to

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newer lawyers about the value of bar association participation. The Federal Bar Council's free memberships for federal law clerks and its active First Decade Committee provide an avenue for lawyers in their early years of practice to have meaningful (and affordable) involvement in the organization.

Author's Note: Some of the data about the ABA came from a series of articles on Law360 written by Aebra Coe. Also, those interested in volunteering with the Federal Pro Se Legal Assistance Project, which I discussed in my prior column for the *Federal Bar Council Quarterly*, should contact Mark Pincus at mark@pincus-law.com.

In the Courts

Chatting with Judge Sannes

By Brian M. Feldman

In 2004, The Bar and Grill Singers released their first album of musical legal satire, "A Time to Grill." One song on the album traveled quickly through certain legal circles, especially for those of us who happened to be clerking in the 2004 term. Officially titled, "Appointed Forever," the song, known unofficially as "The Judge Song," was set to the tune of The Turtles' "Happy Together." The lyrics were hyperbolic and outrageous yet resonated with sufficient truth that many lawyers (not this author, of course) found them hilarious. The song asked listeners to "imagine me as God, I do," and, in the nature of Schoolhouse Rock, recounted a constitutionally inscribed pathway to power: "Anointed by the president / A revelation told that I was heaven sent / And Congress in their wisdom granted their consent / Appointed forever!" Other lyrics helpfully explained, "I'm a federal judge and I'm smarter than you / For all my life!"

Ten years later, on May 8, 2014, President Barack Obama nominated Brenda Kay Sannes to the position of U.S. District Judge for the Northern District of New York to the seat vacated by Judge Norman Mordue. The Senate, by a vote of 96-0, granted its consent on November 20, 2014. The next day, Judge Sannes received her commission, and she was sworn in on December 4, 2014.

True to the song, Judge Sannes was nominated and confirmed as described by The Bar and Grill Singers and is smarter than we litigators who appear before her. Yet because of how humble Judge Sannes is, her clerks may not get the joke in the "The Judge Song."

Billings Born

Her humility may be rooted in her upbringing. Judge Sannes was born in Billings, Montana, the oldest of three. Judge Sannes majored in English at Carleton College. After graduating magna cum laude in 1980, and taking advantage of reciprocal state tuition rates, she enrolled at the University of Wisconsin Law School. In 1983, she graduated from law school, again magna cum laude, as well as Order of the Coif, a law review editor, and the recipient of a series of book awards.

Judge Sannes clerked for Circuit Judge Joseph Jerome Farris of the U.S. Court of Appeals for the Ninth Circuit, who became a lifelong mentor and friend. Judge Sannes not only appreciates the personal connection she forged with Judge Farris – who officiated at Judge Sannes' marriage to her husband – but also credits Judge Farris for the substantial impact he has had on shaping Judge Sannes' own approach to the bench. Judge Sannes was impressed with Judge Farris' emphasis on common sense and his commitment to timely decision-making. Judge Sannes took both to heart. Judge Sannes is pragmatic in her approach to the law and strives to get her decisions out in a timely fashion.

Judge Sannes came to the bench with a background in both criminal and civil litigation and with years spent writing appellate

briefs. The judge's first job after her clerkship was as a litigation associate in Los Angeles. Over four years at Wyman, Bautzer, Christensen, Kuchel & Silbert, the judge handled general commercial litigation, as well as entertainment law cases. She also got a taste for criminal law, doing white collar work in her fourth year.

A Prosecutor

A prosecutor she ran into that year recommended that she try her hand as a federal prosecutor, and Judge Sannes took the advice. In 1988, she joined the Office of the U.S. Attorney for the Central District of California, in Los Angeles. She worked as an Assistant U.S. Attorney, in both Los Angeles and Syracuse, over the course of the next 26 years. In the last nine of those years, Judge Sannes was the chief of the Northern District's appellate division, handling both criminal and civil appeals.

Judge Sannes loved her time as a federal prosecutor. She served in Los Angeles from 1988 through 1994. During that time, she tried 11 jury trials and served as a deputy supervisor in narcotics. The judge loved the office's teamwork. One of her colleagues during that period, Debra Wong Yang, was appointed U.S. Attorney in Los Angeles in May 2002 by President George W. Bush, and even though Judge Sannes had been away from Los Angeles for the better part of a decade at that point, she returned for a two-year detail, from 2003-2005, holding the position of High Intensity Drug Trafficking Coordinator, focusing on antiterrorism work in the Central District of California.

Judge Brenda Kay Sannes

Except for that two-year period, Judge Sannes served in the U.S. Attorney's office in Syracuse from 1995 through her elevation to the bench. She found the Northern District welcoming, civil, and conciliatory. Judge Sannes held the chief appellate position from 2005 through 2014, and she managed the Syracuse office from 2010 through 2014. In both roles, she worked on both criminal and civil cases.

As the head of the appellate practice at the Northern District, Judge Sannes secured affirmations in a series of cases testing the constitutionality of the Sex Offender Registration and Notification Act ("SORNA"), including in *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010), before the U.S. Supreme Court weighed in on the issues in *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013), and *Nichols v. United States*, 136 S. Ct. 1113 (2016). The judge won over then-Circuit Judge Sotomayor with a good faith argument to avoid suppression of evidence seized without probable cause in *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008). Similarly, in *United States v. Rosa*, 626 F.3d 56 (2d Cir. 2010), *reh'g denied*, 634 F.3d 639 (2d Cir. 2011), Judge Sannes again convinced the Second Circuit that good faith grounds appropriately prevented the ex-

clusion of child pornography evidence seized with a facially invalid warrant. And, in *United States v. Wilson*, 699 F.3d 235 (2d Cir. 2012), Judge Sannes obtained reversal of a suppression holding, convincing the Second Circuit that an agency's policy violation should not spoil an otherwise proper Fourth Amendment stop.

As the head of the appellate practice at the Northern District, Judge Sannes secured affirmations in a series of cases testing the constitutionality of the Sex Offender Registration and Notification Act.

Confirmation

Senator Schumer aptly captured Judge Sannes' qualifications at the Senate Judiciary Committee hearing on her nomination. He praised her excellence, noting that "her work as head of the appellate division [in the Northern District] has earned her the respect and accolades of judges all over the Second Circuit." And he praised her moderation. As he put it: "Talk to anyone who has practiced law with her, or judges whom she has appeared before, or even counsel who have been on opposing sides of cases from her. They will tell you that she is unerringly fair, listens intently, makes reasonable decisions, and presents only the most solid of arguments in her cases."

Unlike the federal district judge imagined in the song "Appointed Forever," who demands to be treated "as royalty" and claims to be "[a]ll knowing and omnipotent," Judge Sannes is down-to-earth, humble, and open-minded. She hears oral argument on significant motions and genuinely believes that good oral advocates have the ability to change her preliminary views of a case. Even her goals on the bench are selfless: to serve litigants more quickly and to provide more opportunities for parties to be heard.

Pro Bono

Along those same lines, her advice to lawyers appearing in the district is to volunteer for pro bono work. In the Northern District of New York, prisoner civil rights cases often get assigned when they are trial ready. Although every attorney in the district is required to participate in pro bono work, anyone can volunteer – and get a place earlier in the line – by contacting the court clerk. Judge Sannes already has tried a good number of pro bono prisoner cases and believes that they present an excellent opportunity to serve the public and get valuable trial experience. For those worried about their facility with prisoner civil rights claims, the Northern District of New York Federal Court Bar Association even offers annual Section 1983 training. Judge Sannes urges lawyers to volunteer for these trials.

Judge Sannes genuinely cares about ensuring quality representation for inmates. She views herself as a servant of the law and litigants, not "as God," as The Bar and Grill Singers portrayed district judges.

In the Courts

Pro Se Litigation in the Southern District of New York

By Joseph Marutollo

Pro se litigation comprises a substantial part of the docket in the Southern District of New York. The *Federal Bar Council Quarterly* recently met with Margaret A. Malloy, chief counsel of the Office of Pro Se Litigation for the Southern District of New York, and Robyn Tarnofsky,

director of the New York Legal Assistance Group ("NYLAG") Legal Clinic for Pro Se Litigants in the Southern District of New York, to learn more about this area of litigation. As discussed below, these separate offices serve a variety of roles for the court and for pro se litigants.

The Office of Pro Se Litigation

Before becoming chief counsel at the Office of Pro Se Litigation six years ago, Malloy was a senior trial attorney at the Equal Employment Opportunity Commission from 2006 through 2012. She previously served as an associate at Gladstein, Reif & Meginniss, LLP, from 2000 through 2006. Malloy received a law degree from Columbia Law School, a master's degree from the University of Minnesota, and an undergraduate degree from Cornell University. She also served as a law clerk to Judge Denise L. Cote of the Southern District of New York.

As chief counsel, Malloy oversees an office of roughly eight full-time attorneys who are responsible for screening all civil pro se cases. The work that these attorneys confront is daunting, because civil pro se cases make up approximately 25 percent of the Southern District's civil docket. These cases cover a wide range of topics including, among other matters, civil rights law, employment law, immigration law, and prisoner litigation. The attorneys working in this office draft memoranda and orders for the judges assigned to those cases involving pro se litigants. They also provide general advice and input to the court on the management of pro se litigation.

Malloy also manages the court's pro bono program, coordinating training, events, and placing cases with pro bono counsel. Since 2014, the office has placed approximately 70 "discovery" cases with pro bono law firm associates; in these types of cases, the pro bono associates assist the pro se litigants during certain phases of discovery. For instance, associates taking these "discovery" cases would conduct depositions of witnesses or defend the pro se plaintiff's deposition. During that same period, the office placed hundreds of cases with pro bono counsel for mediation and employment-based litigation. Pro bono counsel also routinely work at trials on behalf of formerly pro se litigants, particularly in the fast-developing prisoner litigation arena.

NYLAG's Legal Clinic for Pro Se Litigants

Tarnofsky has served as director of the NYLAG Legal Clinic for Pro Se Litigants in the Southern District since 2016. Prior to joining NYLAG, Tarnofsky worked at Paul, Weiss, Rifkin, Wharton & Garrision LLP, where she was a litigation partner from 2004 through 2016. She graduated *cum laude* from Harvard Law School, where she was an executive editor of the law review. She received her undergraduate degree *summa cum laude* from Yale University, where she was a member of Phi Beta Kappa.

Pro se litigation comprises a substantial part of the docket in the Southern District of New York.

Tarnofsky also served as a law clerk to Judge Sandra L. Lynch of the U.S. Court of Appeals for the First Circuit, and to Judge Edward R. Korman of the U.S. District Court for the Eastern District of New York. Tarnofsky fell in love with commercial litigation while at Paul Weiss, but decided to move to the NYLAG Legal Clinic two years ago, where she currently counsels pro se litigants in a wide range of matters, including civil rights, labor and employment, and intellectual property cases.

Tarnofsky explained that the NYLAG Legal Clinic is open daily, with about four to five pro se litigants visiting per day. The clinic staff includes two full-time attorneys and two full-time paralegals, plus volunteers (often up to seven lawyers or law students at a given time). The NYLAG Legal Clinic is an "advice clinic"; the attorneys and law students who work in the clinic usually do not represent the pro se litigants in any capacity, except for certain limited circumstances, such as for purposes of settlement or mediation.

As director, Tarnofsky collaborates on drafting guides, templates, and fact sheets for pro se litigants, and coordinates with other organizations and members of the private bar to secure limited scope and full representation for pro se litigants. Tarnofsky helped to start a popular deposition program at the NYLAG Legal Clinic, where pro bono law firm associates assist pro se litigants at their depositions. She noted that the deposition program aims to assist different facets of the Southern District: the program assists pro se litigants by helping them navigate the deposition process; assists the law firm associates by providing them training and experience in conducting or defending depositions; and assists the court as the law firm associates' involvement in the deposition process often can help in the resolution of the litigation. Indeed, Tarnofsky noted that although law firm associates' work usually is limited to depositions, a number of associates often have "stayed on" their respective cases afterwards, with some even continuing through the trial phase of the case.

Pro Bono Opportunities

To learn more about these programs, go to the court's website at http://nysd.uscourts.gov/pro_bono.php. Emails can also be sent to pro_bono@nysd.uscourts.gov. The NYLAG Pro Bono Clinic website, http://www.nysd.uscourts.gov/prose?clinic, also provides useful information.

Intellectual Property Update

Protection of Trade Secrets by Law Firms

By Peter J. Toren

In recent years, companies have increasingly relied for a variety of reasons on trade secrets protections for their valuable proprietary information. Indeed, there is now a federal cause of action for theft of trade secrets under the Defend Trade Secrets Act of 2016 ("DTSA"). Thus, federal law now recognizes that protection of trade secrets is on par with patents, copyright, and trademark protection. Further, federal and state laws increasingly recognize that trade secrets cover an almost unlimited swath of information, from complex technology to simple customer lists.

Most law firms, however, have overlooked that some of their own information, especially relating to their business operations, may qualify as a trade secret and have failed to take steps to protect this information.

In what may be a first, a Texas law firm recently filed a complaint against three attorneys, their law firms, and a marketing agent alleging, among other things, that the defendants engaged in a scheme to misappropriate the firm's trade secrets and to use those to solicit the firm's clients. In the complaint, Michael Pohl and his firm (together, "Pohl") alleged, in part, that a marketing firm hired by Pohl gained access to certain trade secrets which it then provided to the defendant attorneys who used the trade secrets to solicit Pohl's clients in violation of the Texas Uniform Trade Secrets Act.

Law Firm Trade Secrets

Putting aside that lawyers and law firms already are under an ethical obligation to maintain the confidence of client communications, there is nothing to prevent law firm information relating to other firm matters from qualifying as a trade secret so long as the firm takes "reasonable measures" to protect it.

In general, under both the DTSA and the Uniform Trade Secrets Act ("UTSA"), which virtually every state has adopted in some form, there are three elements to a trade secret:

(1) information that is non-public;
(2) reasonable measures taken to protect that information; and
(3) the information derives inde-

pendent economic value from not being publicly known.

Further, there is virtually no limitation on the type of information that qualifies as a trade secret so long as it meets this definition, and it may include "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes."

In short, law firms possess valuable and confidential information that may be protectable as a trade secret, including the identity of current and prospective clients, fee agreements, non-public legal forms, and marketing information.

How Firms Can Protect Trade Secrets

It almost goes without saying that the first step for law firms to protect certain internal information as a trade secret is to identify the type of information that could qualify as a trade secret. In general, this would include non-public information that is unrelated to a client's information.

Next, firms should develop a trade secret protection program that ensures that the firm has adopted reasonable measures to protect the information that it has identified as a potential trade secret. The "reasonable measure" requirement focuses primarily on the actions of the owner and on the economic circumstances surrounding the particular industry and is a question of fact. The extent of the owner's security measures need not be absolute, but must be reasonable under the totality of the circumstances depending on the facts of the specific case.

Most law firms, however, have overlooked that some of their own information, especially relating to their business operations, may qualify as a trade secret and have failed to take steps to protect this information.

Perhaps the single most important factor in a successful trade secret protection program involves taking steps to create a culture in which employees, in this case, attorneys and support staff, understand the value of protecting information as a trade secret. It is critically important that all personnel understand that the protection of the information is important to the continued economic success of the firm and that they must follow the steps that the firm has instituted. It may be extremely difficult to change how people think about this issue, but without the "buy-in" of the attorneys and staff, the program is bound to fail.

Law firms also should revise their employee handbooks to include a section on protecting confidential information and trade secrets. In addition, as part of the process for new hires, whether attorneys or support staff, human resources staff should provide specific instructions on the importance of protecting trade secrets. Similarly, firms should conduct exit interviews with departing employees that includes an admonition that they still are under a continuing obligation to maintain the secrecy of firm information.

Law firms also should consider marking all internal documents that contain confidential information or trade secrets as "confidential," which will put recipients of the information on notice that the information is confidential and will help to establish an obligation under the common law of confidentiality. For example, pitch books or other general presentations to clients should be marked as "confidential."

Computer Security

Even apart from trade secret considerations, it is critically important for law firms to have robust computer security protocols. It is not enough to require the use of secure passwords, but firms should require that the passwords be changed on a regular basis and the sharing of passwords should not be permitted. Further, all computers must

be switched off at the end of the day regardless of the seniority of the partner or how late the attorney works.

Finally, another very important measure, as illustrated by the *Pohl* case, is to require outside vendors to sign confidentiality agreements. This is an especially important requirement when sharing information with vendors, such as marketing specialists, who work for many firms and are in a position to share what they learned from one firm with another firm client.

Cases addressing what constitutes a "reasonable measure" are legion, and the issue of whether the trade secret owner has taken "reasonable measures" often becomes the central issue of the case, since there are always more security measures that could have been taken. However, just because there is some measure that plaintiffs could have done does not mean that the efforts were unreasonable under the circumstances. In short, the more steps that law firms institute to protect their confidential and proprietary information, the more likely that a court will find that the sum total of such measures is reasonable.

Editors' Note: The author is an attorney in Washington, D.C., where he specializes in the protection of intellectual property rights, including trade secrets. Before entering private practice, he was a federal prosecutor with the Computer Crime and Intellectual Property Section of the Justice Department.

Oh Canada

Internment of "Aliens" Here and There

By Steven Flanders

In the course of a train trip across Canada two years ago, my wife and I made a stopover in Jasper National Park that included an unexpected encounter. On a trail along the beautiful Athabasca River we happened upon an informative plaque that commemorates the 1914-1920 internment there of Canadians of Ukrainian descent under the War Measures Act of 1914. Those interned at that camp and others were effectively forced labor, engaged in various construction projects for Jasper National Park and Banff and elsewhere. We were astonished. Like most Americans (and, one would think, most Canadians), we had imagined that the 1942-44 internment of Japanese-Americans was a unique blot upon the history of our continent.

Korematsu

Readers of the *Federal Bar Council Quarterly* may remember the excellent account by Evan Stewart in the Sept./Oct./Nov. 2016 issue concerning the *Korematsu* case and the events that led to it. In brief summary, they are as follows. On February 19, 1942, two months after Pearl Harbor, President Franklin D. Roosevelt signed Executive Order 9066, authorizing the Secretary of War and various military authorities to take such steps as they deemed advisable concerning restrictions on civilians in each "Military Area." Describing this order as a "tar baby" that the president evidently tried to distance himself from, Stewart noted several features of the order that are not widely known or recognized. It did not specify race or national origin, and thereby was evidently not clearly directed specifically at Japanese-Americans. Thus, there could have ensued a mass roundup of persons of German or Italian descent, potentially a Herculean task, although this was not done. And the open-ended language of the order left unstated the remedy, camps or otherwise.

Fred Korematsu's legal attack on his detention ended with a 6-3 Supreme Court decision affirming the constitutionality of Executive Order 9066 and the subsequent statute that created a crime to violate it. This unhappy history reveals feet of clay of many otherwise distinguished figures. Most notably, the *Korematsu* majority opinion, written by Justice

Black, was joined by Chief Justice Stone and Justices Douglas, Frankfurter, Reed, and Rutledge. The three dissenting opinions, all of which read well today, include Justice Jackson's well-known declaration that in approving this claim to extraordinary powers in wartime the Court placed before us "a loaded gun" available to any authority that could make a plausible claim of urgent need in wartime.

Enforcement of the orders and military proclamations that undergirded the internment program was highly variable from one place to another, apparently in response mostly to local perceptions and politics. The vast majority of the more than 120,000 Japanese-Americans interned came from the three West Coast states. Notably, however, enforcement was least in the one place where the supposed threat of sabotage or spying might have seemed most plausible, namely Hawaii. But the then-territory where the Pearl Harbor attack actually had occurred, home then and now to a large concentration of military facilities and where nearly one-third of the population was of Japanese descent at least in part, was largely spared. This seems an odd confirmation of the notion that there is safety in numbers. At the opposite extreme was California, led by civil rights icon-to-be Earl Warren, who was serving as the state's elected attorney general. He proclaimed, "I have come to the conclusion that the Japanese situation, as it exists today, may well be the Achilles Heel of the entire civil defense effort. Unless something is done it may bring about a repetition of Pearl Harbor." The efforts of Lieutenant General John DeWitt of the Western Defenses Command, including forced transportation of Japanese-Americans to remote places in the interior (Stewart referred to them as "concentration camps"), went forward unimpeded.

Canada

I have not found direct evidence that the Canadian roundup of persons of Ukrainian descent was an explicit model for the roundups under Executive Order 9066, but one wonders. (And I wonder also if there may be other examples in Western democracies of round-ups of civilians deemed by their national origin to constitute a wartime threat.) Although the Ukrainian-Canadian population was (and is) concentrated in the three "Prairie Provinces" of Manitoba, Saskatchewan, and Alberta, the 24 detention centers extended across the continent, from British Columbia to Nova Scotia. Notably, the concentration of persons from Ukraine in the prairies was a direct result of recent government policy. Immigration was invited after 1891 to populate the vast and empty prairies with persons with agricultural skills honed in relatively harsh climates. The effort was successful: Approximately 170,000 persons emigrated to Canada from Ukraine between 1891 and 1914, and Ukrainians today constitute the third-largest ethnic group in Canada. Ukraine in 1914 was mostly in the Russian Empire, but a large proportion of those who came to Canada hailed from portions of Ukraine that were part of the Hapsburg Empire. Both populations had their problems as a perceived security threat. Canada, as part of the British Empire, was of course directly at war with the Austro-Hungarian monarchy, so as to that group the perception of a security threat was roughly parallel to that decades later in the United States. The newspapers of the smaller group with roots in the Russian Empire actively cheered the German war effort, in the hope that a Russian defeat could allow creation of an independent Ukraine. (Who, one may wonder, among the Canadian authorities was reading and understanding newspapers published in Ukrainian, which uses the Cyrillic alphabet?)

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The internment program was smaller than its later counterpart in the United States, but it was ac-

companied by a rigorous registration system that required "enemy aliens" (including many Canadian citizens) to report regularly to the police. And their freedom of movement and of speech was curtailed. The account in the *Canadian Encyclopedia* places the total camp population at 8,579. Of this number, many were "paroled" in 1916-17, especially to do farm work under close supervision in response to a critical labor shortage. Other parolees were sent as paid workers to railway gangs and mines. Conditions were notoriously bad in certain camps. The one in Kapuskasing in remote northern Ontario experienced a riot and strike in 1916 that was only put down with the arrival of 300 soldiers. It is interesting that these were called "concentration camps" at the time – no mincing of words here!

Though the camp population was reduced by the parole programs, several camps continued in operation well past the end of the war. Canada suffered considerable anti-immigrant agitation following the Russian Revolution, roughly parallel to the "Red Scare" south of the border. And there were calls by some members of Parliament and other officials for mass deportations. Two of the camps were only closed in 1920.

In recent years, Canada has made an effort to recognize and redress some of the evils of the internment program. Trilingual plaques and accompanying ceremonies have appeared at many locations. The national human rights museum in Winnipeg takes notice. But the effort came too late for any counterpart to the U.S. restitution program – the last survivors of the intern program died in 1991 and 1992, and they were very young children when interned (one was born in a camp).

We in this country are not unique in this perversion of our democratic ideals.

Legal History

Chappaquiddick: Did The Justice System Work?

By C. Evan Stewart

Many trees have died since July 18-19, 1969, quite a few of them devoted to exploring what really happened when Mary Jo Kopechne perished in Senator Edward Moore Kennedy's Oldsmobile Delmont 88 when it drove off Dike Bridge and was submerged in Poucha Pond on Chappaquiddick Island, in Edgartown, Massachusetts. That accident occurred during the latter stages of a party on Chappaquiddick for six "Boiler Room girls" (young women who worked on Robert Kennedy's 1968 presidential campaign) and six middle-aged men, five of whom were married (including Kennedy). Most of the reporting has been devoted to Kennedy's two accounts – his volunteered account on the morning of July 19 to the local police chief, and his July 25 televised statement (authored by his brother's principal speechwriter, Theodore Sorensen). Those two accounts are in material disagreement; furthermore, both have been shown – by countless analysts – to be false and misleading on numerous key points.

This article will not relitigate that well-trod ground. Rather, the focus will be on how well the justice system handled what has been called the "most famous traffic fatality of the [Twentieth] century."

The Police Investigation

The only real "evidence" uncovered by the Edgartown police (which had jurisdiction over the investigation) was the account proffered by Kennedy himself to the police about one hour after he first reported the incident (nine to 10 hours after it occurred). It was handwritten by his friend Paul Markham (a former U.S. Attorney for Massachusetts and a participant in the prior evening's party), and its text is as follows:

> On July 18, 1969, at approximately 11:15 p.m. in Chap-

paquiddick, Martha's Vineyard, Mass., I was driving my car on Main Street on my way to get the ferry back to Edgartown. I was unfamiliar with the road and turned onto Dike Road instead of bearing hard left on Main Street. After proceeding for approximately one half mile on Dike Road, I descended a hill and came upon a narrow bridge. The car went off the side of the bridge. There was one passenger with me, one Miss Mary _____, a former secretary of my brother, Senator Robert Kennedy. The car turned over and sank into the water and landed with the roof resting on the bottom. I attempted to open the door and the window of the car but have no recollection of how I got out of the car. I came to the surface and then repeatedly dove down to the car in an attempt to see if the passenger was still in the car. I was unsuccessful in the attempt. I was exhausted and in a state of shock. I recall walking back, to where my friends were eating. There was a car parked in front of the cottage, and I climbed into the back seat. I then asked for someone to bring me back to Edgartown. I remember walking around for a period of time and then going back to my hotel room. When I fully realized what had happened this morning, I immediately contacted the police.

The victim's name was left blank because neither Kennedy nor Markham knew how to spell her last name. At no time thereafter did Kennedy provide any other information to the police; and he refused to answer any questions. The five remaining single women at the party were whisked off the island on July 19 before the police knew they had ever been at the party (or that there had even been a party). None of the four other married men who attended the party – besides Kennedy – (including Markham and Kennedy's cousin, Joseph Gargan) was questioned; the sixth man at the party – Kennedy's aide and often chauffer, John Crimmins – later offered a conclusory, tersely written statement that moved the evidentiary needle not one whit. Kopechne's body was flown off the island to Pennsylvania by another Kennedy aide on July 20 (he had been directed to do so on July 19, *before* Kennedy notified the police of his involvement); there had been only a cursory review of her body, with no autopsy or official statement as to the cause of death.

For multiple reasons – including the fact that nine or 10 hours had passed since the incident, and that Kennedy seemed uninjured, was perfectly calm, and in full command of his faculties on the morning of July 19 – the senator was not subjected to any testing for alcohol. Nonetheless, it was later established that he had had numerous cocktails in the latter part of the afternoon of the 18th (along with a beer or two – all before the party), that he had (at least) several more drinks at the party, and it was widely known (in Washington circles) that he had had a serious drinking problem since his brother's 1968 assassination. Also unknown to the police was the fact that the small house on the island where the party took place had been stocked with three half-gallon bottles of vodka, four fifths of scotch, two bottles of rum, and two cases of beer (and two of the men present – Crimmins and Gargan – drank no alcohol that night); all evidence of what was in the house was quickly vacuumed up on July 19 by Kennedy aides. Finally, Kopechne – known as a very moderate drinker – was found (after nine or 10 hours of being submerged in cold salt water and then several more hours after having been removed from the car) to have had an alcohol content in her blood of 0.09 – the equivalent of having had five or six drinks in the hour before her death (i.e., she was "legally drunk"). None of the foregoing played any part in the police investigation.

Then there was the question of liability. Under Massachusetts law, "[a]ny person who wantonly or in a reckless or grossly negligent manner did that which resulted in the death of a human being was guilty of manslaughter, although he did not contemplate such a result." In meeting that standard, besides factoring in whether Kennedy was impaired when he drove off the bridge (which went unexplored), another key question would have been to determine how fast the

car was going when it drove off the bridge. The police, however, made no effort to answer that question. Then there was the issue of Kennedy's driving history. Two facts complicated that subject: First, his driver's license had expired; and second, Kennedy had at least three reckless driving convictions in Virginia (and two other Virginia charges for driving without a license). The local authorities judged the former fact (when it was belatedly brought to their attention) of no importance; as to the latter fact(s), the police were (and remained) unaware.

A Deal and Then a Plea

Based upon the "investigation," the local police and special prosecutor for the county concluded that there was "no criminal negligence" on Kennedy's part, nor was there any evidence "to indicate excessive speed or reckless driving." But what about the inescapable matters of Kennedy's leaving the scene of the accident (after causing a death) and not reporting it until nine or 10 hours later? The police chief felt compelled to file a misdemeanor application, charging the senator with that crime; the statute provided a sentence of two months to two years (with a mandatory 20 days in jail).

A few days later the local prosecutor met with Kennedy's lawyers to discuss a deal. Kennedy's team asked, if he pleaded guilty, what would the local prosecutor recommend to the judge in the way of a penalty. The response was "for any first offender," it would be a suspended sentence. (That, of course, posed a problem given Kennedy's Virginia offenses.) Would the judge go along? The local prosecutor could not make any such representation. The Kennedy team, without authority to commit to anything, said they had to go back and check with the people "calling the shots."

The dangers in not taking a guilty plea were significant: (i) a public trial; (ii) a presentation of evidence; (iii) party attendees could be subpoenaed to testify; (iv) Deputy Sheriff Christopher ("Huck") Look would undoubtedly be a witness, and he posed great problems for central tenets of Kennedy's story – he had seen Kennedy's car (with a man and woman in the front seat) at *12:45 a.m.* on July 19 / Look, in his police uniform, had stopped his car and walked to within 20 to 30 feet of the Kennedy car, which had also stopped; but it then turned quickly on to Dike Road and drove away at a fast speed / Look also would testify that the male driver appeared "lost" and "confused"; (v) Kennedy would be subject to cross-examination; and (vi) based upon what transpired at such a trial, evidence sufficient to justify a manslaughter charge might well be developed. And as the Kennedy camp contemplated those items, the public and media pressure for the senator to make some statement as to what happened had reached a mega-boiling point (since the accident, Kennedy had holed up, incommunicado, at his family's Hyannisport compound with a bevy of advisors trying to figure out what to do). Ultimately, those two conflicting considerations won out, and Kennedy's legal team met again with the local authorities to seal the deal: Kennedy would agree to waive a hearing, plead guilty to leaving the scene, and a suspended sentence would be jointly proposed to the judge.

At 8:58 a.m. on Monday July 25, Kennedy and his legal team sat in Judge James Boyle's Edgartown courtroom. The charge of leaving the scene was read aloud and Kennedy was asked: "How do you plead? Guilty or not guilty?" With more than a little difficulty, Kennedy was able to offer a whispering "guilty." Then, after a summary of the "evidence," Judge Boyle asked if the defendant had made a "deliberate effort" to conceal his identity. The police chief answered: "Not to my knowledge, your honor." Kennedy (who had spent nine to 10 hours after the accident concealing his culpability) offered no response. Both sets of lawyers then proposed a suspended sentence. Before ruling, Judge Boyle asked whether there was any prior "record." When told there was "none" (which was not true), Judge Boyle agreed to a suspended sentence, "[c]onsidering the unblemished record of the defendant and insofar as the Commonwealth represents that this is not a case where he was really trying to conceal his identity."

And with that seeming to end his legal problems, Kennedy went

on national television that night to read the Sorensen speech. It saved his political career with the Massachusetts voters; but it also served to exacerbate the many inexplicable, unanswered questions that remained regarding the death of Kopechne and his own conduct.

Based upon the "investigation," the local police and special prosecutor for the county concluded that there was "no criminal negligence" on Kennedy's part, nor was there any evidence "to indicate excessive speed or reckless driving."

The Inquest

Kennedy's legal problems were not in fact over, however, because another prosecutor, the district attorney for the Southern District of Massachusetts, Edward Dinis, also had jurisdiction. And on the same day Kennedy returned to the Senate (July 31), Dinis requested an inquest into Kopechne's death. On August 8, Judge Boyle agreed to that request, setting the inquest to take place on September 3. Fearing the public nature of an inquest (and the potential for such a proceeding exposing Kennedy to a charge of manslaughter), Kennedy's legal team petitioned the Massachusetts Supreme Judicial Court on September 2 for a temporary restraining order to stop the inquest. On October 30, the court not only ordered the press and public be barred from the inquest (because of all the publicity that had already accompanied the accident, further media coverage might "make it difficult, if not impossible,… to insure a defendant a fair trial in any criminal proceedings which may follow"), it also inexplicably ordered that the entire record from such a proceeding be impounded until *after* any prosecution of Kennedy's conduct could be undertaken. With those guidelines, Judge Boyle re-scheduled the inquest to begin on January 5, 1970.

While the injunction petition was pending, Dinis brought on his own petition (in Pennsylvania), seeking the exhumation and autopsy of Kopechne's body (citing evidence of blood on her body and clothing). Mr. and Mrs. Kopechne (after allegedly receiving counseling from an old Kennedy family friend, Cardinal Cushing) judicially intervened and opposed the disturbance of their daughter's body. On October 20-21, a Wilkes-Barre judge held a hearing on the petition. Notwithstanding testimony from witnesses (including a Kopechne expert) that Kopechne was alive and breathing for some period while trapped in the car underwater (which could have supported the notion that Kopechne suffocated, as opposed to having drowned), the judge on December 1 ruled that there was "[n]o evidence [that] anything other than drowning had caused the death of Mary Jo Kopechne." As such, there would be no exhumation and autopsy of her body.

Before the inquest could begin, yet another odd thing happened: the lead detective for the district attorney's office contacted and later met twice with key Kennedy advisors to give them detailed "heads-ups" about what evidence and testimony the district attorney intended to put on at the inquest. The detective (Bernie Flynn) wanted to help the senator (who he thought not only had clearly lied in his television speech, but had also been "in the bag" when he was driving on the night of July 18-19): "My main purpose is, I don't want Ted Kennedy to get caught in a big lie that could really make him go down the drain." Risking his entire professional career to have the senator (and the Kennedy machine) owe him one, Flynn did his best to put the Kennedy advisors' "mind[s] at ease that there weren't going to be any surprises [at the inquest]. And they seemed to like that."

On January 5, contrary to the order of witnesses proposed by Dinis, Judge Boyle required that the senator testify first. Kennedy, under oath, was then allowed to present essentially a rambling monologue that tried to accommodate as best he could his two prior (inconsistent) versions, anticipate Look's (and others') testimony (based upon Flynn's "heads-ups"), refute any notion that he was not "absolutely so-

ber" at the time of the accident, and negate any suggestion that he was driving recklessly (Kennedy swore he was driving at 20 miles per hour). Dinis – a Democrat, who was running for re-election that year, and thus understood well the dangers of taking on Kennedy – allowed the senator to bob and weave, not answering and/or filibustering different questions. When he thought he could, Kennedy flat out lied (for example, he keyed the time of when he asked Gargan and Markham to help him rescue Kopechne to a clock in a rental car back at the party house; *The Boston Globe* later proved the car had no clock). When asked about his numerous telephone calls on the morning of the 19th (before he notified the police of his involvement), he dissembled, with good reason – one of the calls was to his mistress in Florida. When Dinis tried to impeach Kennedy's testimony with his volunteered statement to the police on the 19th, Judge Boyle stopped him (the statement "speak[s] for itself"), and when Dinis pursued it further with leading questions, the judge pronounced: "There is no cross-examination in this inquest!" After three hours, the senator walked out of the courthouse "satisfied I responded in the most complete way possible to all the questions put to me by the judge and the district attorney."

Now all the Kennedy team had to worry about was the other 25 listed witnesses. The party participants – even with enormous coaching, and their lawyers paid for by Kennedy – did not do such a great job. But Dinis and Judge Boyle did not do much in identifying various holes or inconsistencies in their stories and drilling down on them. For example, Ray LaRosa (a Kennedy campaign worker) confirmed that he and two of the "Boiler Room" girls (while doing a "conga line" in the middle of the main street after midnight) had interacted with Huck Look driving *from* the direction of the ferry (right after Look had seen Kennedy's car), and just before meeting up with Look, LaRosa and the women had been passed by another car heading *toward* the ferry (i.e., where Look had just seen it). Notwithstanding this obvious bombshell to Kennedy's time-line and version of events, neither Dinis nor Boyle pursued it.

Another Kennedy aide, Charles Trotter, also made a hash out of Kennedy's time-line. And this had a significant personal consequence to him. Trotter – a married man – had taken two extended midnight "walks" with one of the "Boiler Room" girls; by this testimony, Kennedy's walk back from the accident to seek help from Gargan and Markham would have had him meeting up with them on at least one of their "walks." This hole in Kennedy's story went unpursued.

Gargan and Markham did their best to follow the televised Kennedy version of events (which had, among other things, revealed for the first time that Kennedy enlisted their help after the accident and they had made repeated attempts to save Kopechne). Unfortunately, the two men (neither of whom could claim "shock" etc.) were not pressed on why they had not summoned help, or (as officers of the court) had not reported the accident at once. Both dissembled about the extent of Kennedy's drinking. And Gargan was never asked whether a frantic Kennedy had discussed that night offering up alternative explanation(s) for the accident – which he had: e.g., Kopechne was driving alone in the car (Gargan was prepared to answer – if asked – that "that was discussed, but not acted upon."). Nor was either man asked in detail about what happened when they confronted a calm and unconcerned Kennedy at 8:00 a.m. on the 19th, and why it had taken the senator almost an additional two hours to report the accident.

As for the witnesses who interacted with a calm and dressed-for-yachting Kennedy the morning of the 19th, the district attorney did not develop a full record. For example, the man who spent 30 minutes with the senator was not questioned on several key matters he told investigators. Another man who had witnessed Kennedy's serious imbibing the afternoon before was not even called to testify. When the "Boiler Room" girls testified, their performances were so unpersuasive that Judge Boyle took over much of the questioning, with numerous sarcastic and pointed inquiries that reflected frustration at their seemingly collusive testimony.

Deputy Sheriff Look's tes-

timony came in as advertised. And while he could not swear with metaphysical certainty that it was Kennedy's car he interacted with at 12:45 a.m. on July 19, his identification of the type of car and the license plate letters and numbers left little doubt that it was the senator's car (it was later proven with metaphysical certainty, but Dinis decided not to put that evidence into the inquest record). The diver who recovered Kopechne's body from the car was severely limited as to what he was allowed to testify (i.e., that the position of Kopechne's body in the car meant she was gasping into an air bubble at the back of the car; that she did not drown, but suffocated; and that she could have been saved if he (or another professional diver) had been called immediately after the accident).

The inquest ended with a whimper on January 8. Left uncalled as witnesses included (i) the residents of the houses right near the bridge, whose testimony would have directly contradicted Kennedy's (i.e., the existence of house lights being on – which Kennedy denied emphatically); and (ii) a next-door neighbor to the party house, who would have testified to "yelling, music[,] and general sounds of hell-raising" until 1:30 a.m. on the 19th. Upon his return to Washington, Kennedy told reporters: "I'm glad it's over…. I am hopeful now of getting back to the business of the senate." But before that could really be the case, Judge's Boyle's inquest report would have to be factored in.

On February 18, the judge filed his report and the transcript of the inquest under seal with the Edgartown Superior Court clerk. The documents were subsequently brought to the Boston Superior Courthouse for safekeeping. Despite the not-so-perfect inquest's search for the truth, the report contained a number of bombshells, none good for the senator. First, Boyle found that the testimony of the witnesses contained a great number of "inconsistences and contradictions." Second, he placed the accident as "between 11:30 p.m. on July 18 and 1:00 a.m., on July 19" (not resolving the conflict between Kennedy and Look's testimony). Third, he expressly rejected Kennedy's sworn claim that he had mistakenly taken a 90 degree turn on to the dirt road leading to the bridge (and beach beyond): "Kennedy and Kopechne did *not* intend to drive to the ferry slip and his turn onto Dike Road had been intentional." Fourth, that (i) driving at 20 miles per hour (as Kennedy testified to) was "at least negligent and possibly reckless"; (ii) if Kennedy knew of the hazard ahead of him (i.e., the bridge), such driving would constitute criminal intent; (iii) because the senator had twice driven over the bridge earlier on July 18, the judge concluded that it was "probable" that Kennedy knew of the hazard; and (iv) in light of the foregoing, "[t]here is probable cause to believe that…Kennedy operated his motor vehicle negligently…and that such operation appears to have contributed to the death of Mary Jo Kopechne."

Although what Judge Boyle laid out constituted a basis for the issuance of an arrest warrant for manslaughter, he did nothing; in fact, he retired from the bench two days later on February 20. The matter was left on the doorstep of Dinis. Upon Dinis' return to Massachusetts from a vacation abroad, he was stunned ("son of a bitch!") to read Boyle's (still confidential) report. Recognizing he was now between a rock (Boyle's report) and a hard place (prosecuting Kennedy), Dinis froze. He would soon find a group of people who would try to unfreeze him.

The Grand Jury

The grand jury of Dukes County, Massachusetts, had been pursuing Dinis to investigate the accident/death; but it had been persuaded to hold off until after the inquest. On March 17, the grand jury foreman wrote Joseph Tauro, chief justice of the Superior Court, requesting that the panel be reconvened in order to investigate Kopechne's death. Nine days later, Tauro judicially greenlighted the grand jury to convene on April 6 to hear evidence on the matter. Given Boyle's report, this looked like a moment of maximum danger for Kennedy's political career, as well as his liberty.

Fortunately for Kennedy, the case was assigned to Judge Wilfred J. Paquet; he was not only an old-time Democratic machine politician (and Kennedy stalwart), he was also a former cli-

ent of the senator's lawyer. At the outset of their April 6 session, the grand jury heard a 90 minute oration by Paquet about how limited their function was in investigating the matter. And to make that directive crystal clear, he told the jurors they would not be permitted to see any of the inquest materials or Judge Boyle's report. Furthermore, they would not be permitted to subpoena anyone who had testified at the inquest; instead, they would be permitted only to subpoena "other" witnesses and could consider only what the judge or district attorney showed them, or what they knew "personally" about the accident. Compounding the judge's erroneous directions, Dinis told the jurors that there was nothing in the inquest transcripts or Judge Boyle's report that would support any criminal charges against Kennedy.

Faced with these astonishing (and improper) roadblocks, the grand jury called four inconsequential witnesses, who testified for a total of 20 minutes. Thereafter, frustrated, but stymied by Paquet and Dinis, the jurors threw in the towel and were dismissed by the judge.

Kennedy was now truly free from criminal exposure. The inquest record and Boyle's report were subsequently made public on April 29, 1970. And although they caused a media firestorm (and greatly inflamed the grand jurors), Kennedy's stonewall stood firm. As to Boyle's findings, the senator issued a statement: "I reject them." He added: "I plan no further statement on this tragic matter." And for the rest of his life, that is where Kennedy let things stand (e.g., "I've answered all the questions.").

Did the justice system work vis-à-vis Kennedy and Kopechne's death? I will let the reader(s) decide. That said, let me add what Dinis stated long after Kennedy was free from criminal exposure: "There's no question in my mind that the grand jury would have brought an indictment against Ted Kennedy for manslaughter, if I had given them the case."

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Postscripts

- In November 1970, Kennedy was re-elected to the senate (where he served until his death in 2009). Dinis, on the other hand, lost his bid for a fourth term as district attorney. Although he did not think Kennedy had "a direct role" in his defeat, Dinis did ruefully observe: "The girl died. And I got defeated."
- The Massachusetts Motor Vehicles Registry concluded in May 1970 that Kennedy had been speeding and was "at serious fault" for the accident. Nonetheless, it has refused since then to release its report without written authorization from Kennedy (which was never forthcoming during his lifetime). A subsequent analysis of what happened that night by one of the country's leading experts on car accidents concluded that Kennedy's account of his speed (20 miles per hour) was an error. The expert's analysis was that the car was traveling at "a minimum speed outside of 30 mph; it could have been going as fast as 38 mph."
- *The Boston Globe* and *Reader's Digest* have both done significant investigatory reporting on Chappaquiddick, and that excellent work can be accessed via the internet for those who wish a more thorough account of what actually took place in July 1969 and thereafter. The leading (and best) book on the subject is Leo Damore's "Senatorial Privilege: The Chappaquiddick Cover-Up" (Regnery Gateway 1988). *See, also, Spy* magazine (November 1987) ("Experts Decide: Will Teddy Go to Hell?"). The 2017 movie *Chappaquiddick* (Apex Entertainment) is not sympathetic to Senator Kennedy or his conduct; at the same time, it is

not wholly consistent with the known, undisputable facts (let alone in attempting to resolve the innumerable inconsistencies in testimony and disputed facts).

- In response to President Gerald Ford pardoning his predecessor, Richard Nixon, in 1974, Kennedy posed this rhetorical question on the floor of the U.S. Senate: "Do we operate under a system of equal justice under law, or is there one system for the average citizen, and another for the high and mighty?"

Lawyers Who Have Made a Difference

Ed Costikyan

By Pete Eikenberry and Les Fagen

(Pete:) Both Les and I were mentored in our youthful legal careers by the legendary iconic legal and political figure, Ed Costikyan. The three of us crossed paths in about 1985 when Ed was the chair of the Judiciary Committee of the Association of the Bar of the City of New York and we were members. Ed was the proud son of an immigrant Armenian rug dealer. In 1962, as a young lawyer and political activist, Ed had helped destroy the legendary Manhattan Democratic political machine, "Tammany Hall," to become the New York County Democratic leader. He was a joy to encounter, only 5'5" tall, slightly rotund, and always sporting his trademark bowtie. He loved to sing enthusiastically in the City Bar chorus productions, or to share a story, eyes popping joyfully with a puckish grin. He, more than anyone, enjoyed the confidence of all the judges, politicians, and leaders of the bar of New York City. Governors Rockefeller and Mario Cuomo and Mayors Koch and Giuliani (at different times) all appointed Ed to draft special plans or head special commissions, involving, *e.g.*, the decentralization of the city's government, bribery at the city's Parking Violations Bureau, placement of the city's school system under mayoral control, and prevention of scandal.

Both Les and I were mentored in our youthful legal careers by the legendary iconic legal and political figure, Ed Costikyan.

As a junior associate, I met Ed in 1967 when he was a partner at Paul Weiss, during a dreary trial in the Bronx. Paul Weiss represented a co-defendant to the client represented by my firm, White & Case. Our clients' respective legal positions were so superior to the adversary's that Ed often talked with me during breaks. At the time, I was a volunteer in Senator Bobby Kennedy's New York office, and I was poised to run for Congress in Brooklyn in 1968. I shared a report with Ed that I had done for the senator on Brooklyn politics that caused Ed to reminisce about his then recent experience of becoming "Boss" of the Manhattan Democratic Party. Several years later, upon the recommendation of Laura Hoguet, I was appointed to Ed's City Bar Judiciary Committee.

His book, *Behind Closed Doors* (Harcourt Brace, 1966), gives insight into his thoughts on judicial selection and why he happened to become chair of the Judiciary Committee. Ed felt that "No system of judicial selection with which I am familiar is satisfactory." In commenting about the Citizens Union's and City Bar's Judiciary Committee's involvement in judicial selection, Ed stated that their "brief interviews and hasty reviews of written dossiers led to superficial judgments based upon quick impressions." He further stated that:

> [L]et us disregard the [City] Bar Association's judgment on sitting judges. Every time a sitting judge comes up for re-nomination – with rare exceptions – he is dutifully found to be "highly qualified" and therefore entitled to renomination.
>
> The Bar Association once rated as "highly qualified" one judge before whom I had tried several cases. For fun, I checked with every other

> lawyer I knew who had tried a case before that judge. The decision was unanimous: the Bar Association didn't know what it was talking about….
> [T]he organized bar tends to be dominated by men who know little of the courts. It constitutes a political system unto itself, and its choices are as political, in the bad sense, as any emanating from the political parties….
>
> [T]he legal establishment is wholly insensitive to the governmental importance of representation of all significant community elements on the bench. Negroes and Puerto Ricans with neighborhood law practices do *not* have the breadth of legal experience that Wall Street practice offers. But they have something else…. [Bar associations] tend to discount character and judgment derived from practice and experience other than *law* practice and *law* experience.

Ed had once written to the Judiciary Committee chair to suggest cooperation between it and political leaders in judicial selection. His "letter produced no response."

(Les, a partner in Paul, Weiss, Rifkind, Wharton & Garrison LLP:) More than 30 years ago, when "Eddie" was appointed chair of the Judiciary Committee, he asked me to serve as secretary, a great opportunity for a lawyer still in his 20s. The most important function of the City Bar was (and is) its evaluation of candidates for judicial office, the primary reason why it was founded late in the 19th Century. For generations, candidates for judicial office had been reviewed, not only by the City Bar, but also by the separate bar associations of each of the boroughs where the candidates were to serve. That meant that the Bronx, Queens, Richmond, and Kings County Bar Associations and the New York County Lawyers Association each had separate processes and separate recommendations on candidates. As a result, judicial candidates, the media, and the public were subjected to multiple interviews and evaluations. The organized bar simply did not speak with one voice, and different county political machines had most of the determining power for judicial selection.

Eddie determined to change all that, but it was not easy; the borough bar associations guarded their prerogatives. There had been a level of hostility among the associations over the years and there were suspicions of the "fancy" Manhattan lawyers who appeared to dominate the City Bar. I recall a meeting with the then president of the City Bar, Oscar Ruebhausen, when Eddie outlined his plans. Oscar told him, "Eddie, you are kidding yourself. Efforts to unify the organized bar in this city have failed for decades. You are wasting your time." Nevertheless, in the fall of that year, Eddie and I set out on a number of extraordinary evening journeys to meet with each of the borough bar associations. We travelled to Sutphin Boulevard in Queens, The Grand Concourse in the Bronx, Remsen Street in Brooklyn, and even Richmond Terrace in Staten Island.

Throughout the city, we met in old courthouse conference rooms where Eddie talked with the leading practitioners in each of the boroughs about a unified bar in the judicial review process in the City of New York. (I watched.) The meetings confirmed all that I heard about the political genius of Ed Costikyan. He had charm, tact, horse trading skills, and, of course, his incomparable style and presence. By the time he was through, he had united the organized bar's review of judicial candidates. The City Bar and nearly all of the borough bars agreed to review and recommend judicial candidates with one voice. (That system remains largely in place to this day. Today, the joint bar judiciary committees also review candidates' prospective appointments to the respective federal district courts.)

Travelling those autumn nights – through the streets of the city that Ed loved – to visit one bar association or another, he talked of his vision and hopes for New York on issues such as the administration of the courts, education reform, city governance, and the future of the city. Those rides were among the best moments of my career. T.E. Lawrence commented on his own extraordinary life as follows:

> All men dream, but not equally. Those who dream by night

> in the dusty recesses of their minds, wake in the day to find that it was vanity: but the dreamers of the day are dangerous men, for they may act on their dreams with open eyes, to make them possible.

This Edward N. Costikyan did.

(Pete:) In the mid-80's, by the time that Laura Hoguet (and then I) had joined the Judiciary Committee, Ed had worked out a deal with Mayor Koch regarding appointing magistrates to many of the lower court positions in the city. Koch's Mayor's Committee recommended two candidates to the mayor for each of the Criminal Court and Family Court positions that he appointed. According to Ed, Koch had agreed with Ed on behalf of the City Bar that Koch would not appoint anyone without approval of the Judiciary Committee (which, as Les reports, was later broadened to include the borough committees.) As Laura Hoguet has observed, Ed and Koch had had their differences over the years, but it was to Koch's advantage to be insulated from political pressure to appoint poorly qualified candidates. The mayors since Koch have continued to follow the procedure negotiated by Ed. Since judges appointed to these "lower courts" often move into New York Supreme Court positions, the effect over time upon the quality of the entire court system in the city has been profound.

While a member of Ed's committee, I happened to read the description of the role of the Judiciary Committee in the by-laws of the City Bar. I pointed out to Ed that the committee had an affirmative duty to recruit and encourage lawyers to pursue judicial careers. Thereafter, Ed appointed me to head a subcommittee that included Laura Hoguet and the late dean of St. John's Law School, Mary Daly, to consider how the committee might meet its affirmative mandate. Upon Laura's suggestion, the subcommittee recommended creation of a book for potential judicial candidates on, "How to Become a Judge." Ed liked the idea but also thought that there should be a biannual conference "on how to become a judge."

Thereafter, Ed secured my appointment as chair of a committee responsible for holding such a conference. The committee still exists, and at the conferences on "how to become a judge," such a booklet is circulated. This process has served to demystify how to become a judge. Ed's three innovations – (1) securing the mayor's cooperation to decline to make appointments without Judiciary Committee approval, (2) including the county committees in the Judiciary Committee review process, and (3) holding City Bar conferences to promote more candidates to apply – have led to a much bigger and more diverse pool of candidates for judicial office, substantially less influenced by political considerations. As a result, the quality and diversity of the judiciary has very substantially improved. As Les states, Ed was a dreamer who delivered on his dreams.

In connection with a three-day mediation of a substantial commercial matter, I once retained Ed as a "partial" mediator, to serve with Yale President Bart Giamatti, the impartial mediator, and a law professor. After one day of mediation, Ed advised that the mediation was not going to lead to a settlement, and my clients withdrew from it. (Ed was a very practical guy.) In the car on the return trip from New Haven, I asked Ed why he had never sought to become a judge. Ed told me that while serving as a young lieutenant in Korea, he had, as a court martial officer, had to sentence young men to jail. He said that he never wanted to have to do that again. Unfortunately, Ed's book is out of print. It has fascinating episodes, such as how he was able to maneuver Constance Baker Motley's entry into politics as a New York state senator, and about his part in the compromise that led to a partial seating of the Mississippi Freedom Party delegates at the 1964 Democratic National Convention.

Because of Ed, for over 30 years there has been a fair, thorough, and widely accepted process of evaluation of judicial candidates for appointment or election in New York City, in replacement of the patchwork and largely corrupt system of the generations "before Ed."

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