

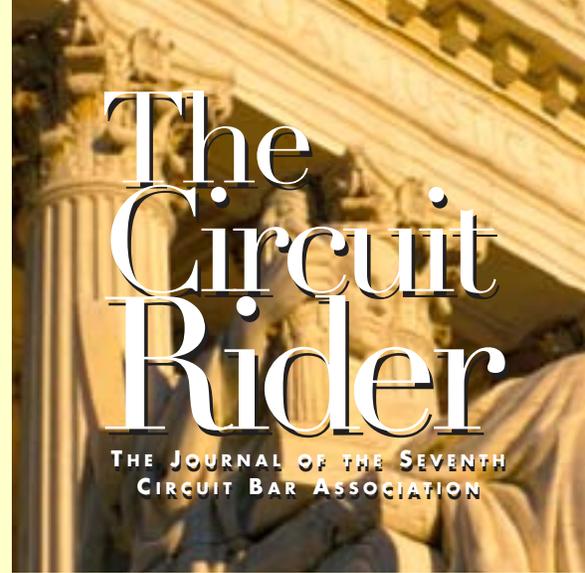
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Featured In This Issue

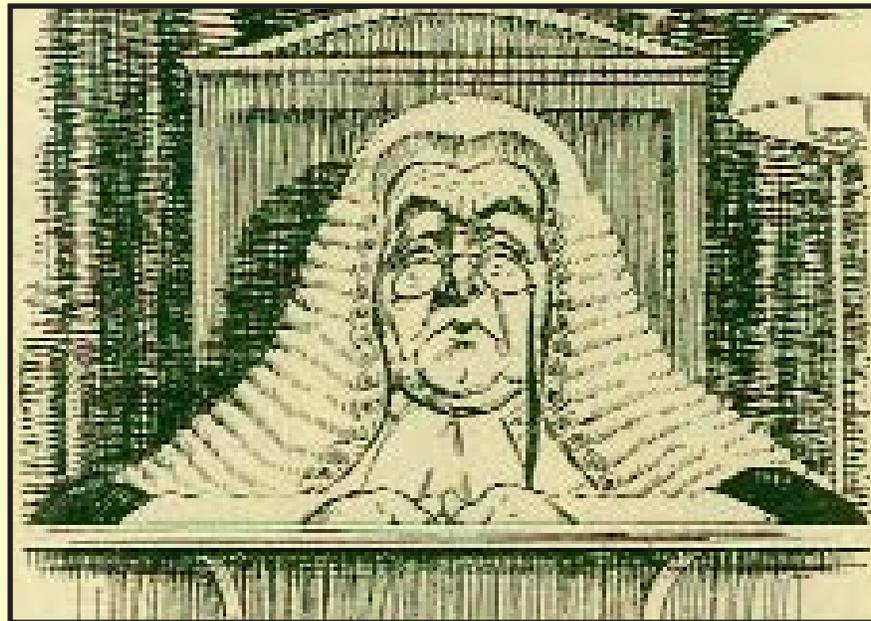
Collins Fitzpatrick's Interview of Judge Richard Cudahy, By Jeffrey Cole

Expert Testimony - A Cautionary Tale, By Gregory J. Scandaglia & Therese L. Tully

Michael Pope Honored by Northwestern University School of Law



Excellence & Experts





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Letter from the President

President William E. Duffin
Godfrey & Kahn, S.C.



“It’s a matter of principle.”

Countless times we’ve heard clients utter that line as the explanation for refusing to settle disputes. No matter how small the amount in dispute, no matter how time-consuming either pursuing or defending the lawsuit is going to be, no matter how realistic a budget you prepare, there are still folks out there who believe that lawsuits are about determining who is right and who is wrong. About vindication in what you believe. About justice.

They are usually people who have not been through litigation before.

For those experienced in the litigation process, they understand that it’s not about “principle,” but rather about “principal.” The uninitiated who proclaim that they did nothing wrong, and who are incredulous that anyone suggest that they nevertheless should pay some money to the other side to bring an end to the lawsuit, are quickly brought to their knees once they receive a few invoices from their lawyers. They soon realize that the price of proving you are right, that you did nothing wrong – the price of justice – is too high to pay. It’s less expensive to settle and move on, no matter how dissatisfied such an approach might be.

The single biggest challenge facing the legal system today is the skyrocketing cost of civil litigation.

The entire debate over e-discovery – how much is too much, and who should pay – is simply a subset of the larger problem: justice is simply not available to those who cannot afford the price of admission. Plaintiffs often must choose between (a) spending as much or more in attorneys fees than is in dispute to pursue legitimate claims, and (b) simply letting the defendant “get away with it.” Defendants often have to decide whether to spend far more defending baseless claims than the case could be settled for, or simply paying the plaintiff something to put an end to the lawsuit.

Parties can go through an entire mediation and barely touch on the merits. The entire discussion is often focused on the cost to pursue or defend the lawsuit. The merits are only peripherally relevant.

Many lawyers blame the expansive scope of discovery (especially e-discovery) for the rising cost of litigation. They point to judges who won’t reign in those who litigate cases with no sense of proportionality for what is at stake. But lawyers must accept much of the blame. Large law firms charge clients \$200 or more per hour for lawyers right out of law school, and multiples of that for anyone with experience. Moreover, if discovery is careening out of control, it is lawyers that are driving the bus.

In May of this year, representatives from the judiciary, bar and academia attended a conference at Duke Law School sponsored by the Judicial Conference Advisory Committee for Civil Rules to discuss the rising costs of litigation. Part of the impetus for the conference was the near-consensus belief that outcomes in litigation were driven more by litigation costs than by the merits of the case. Many possible solutions were discussed, including amending the Federal Rules of Civil Procedure and increased judicial involvement in managing discovery.

The problem includes but is not limited to large, complex cases. To be sure, those cases can result in seven-figure legal fees, or more. But the problem applies to small cases as well, where the cost to defend (or prosecute) the lawsuit far exceeds the amount in dispute. If a company is accused of discriminating against a former employee based on age, race, gender, etc., and the case can be settled for one year’s salary, say \$30,000, is it wise to fight the battle, recognizing that legal fees will go zinging by that number before discovery is barely off the ground? How relevant are the merits to that decision?

There are no simple, quick solutions to this very real problem. The Duke conference, to the extent it has focused attention on the issue and recognizes the need to explore solutions, is a step – albeit a small one – in the right direction. The bench and the bar need to continue to give serious thought to how to improve the system. The cost to litigate ought not be the driving force behind what lawsuits are brought and how they are resolved.

Rule 1 of the Federal Rules of Civil Procedure provides that the rules are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” That stated purpose is not being realized. We need to do what is necessary to see to it that it is.



COLLINS FITZPATRICK'S INTERVIEW OF JUDGE **Richard Cudahy**

*Introduction by Jeffrey Cole **

In 1960, Harlan B. Phillips published an extraordinary book, *Felix Frankfurter Reminisces*. The book was a 300-page compilation of recorded interviews Phillips had with Justice Frankfurter that began in 1953 when Phillips was a member of Columbia University's Oral History Research Office. The interview was part of an archival endeavor designed to gather tape-recorded interviews for use by future scholars. The thought behind the project was to make available the kind of material that is not available in any other form and which, by its very nature, cannot be reconstructed by some future biographer.

Collins Fitzpatrick, the Circuit Executive of the United States Court of Appeals for the Seventh Circuit, has attempted to do much the same thing with the judges in the Seventh Circuit, both district and appellate. In the November 2006 edition of the *Circuit Rider*, he wrote about the oral history program that he created. The project began with then Chief Judge Luther Swygert's assistance. The idea was to collect information about the judges in the Seventh Circuit, both district and appellate, which it was hoped one day would form the nucleus of a sequel to Raymon Solomon's *History of the Seventh Circuit, 1891 - 1941*.

As part of Collins' oral history project, he interviewed Richard Cudahy, who was appointed to the Seventh Circuit in 1979 by President Carter. Born in Milwaukee, Judge Cudahy is a 1948 graduate of West Point, who, after serving in the Army Air Corps, went on to Yale Law School and then to a coveted clerkship on the Second Circuit with Charles Clark. He was at the State Department in the mid-50s and in private practice in Chicago until 1960 when he took over Patrick Cudahy, Inc., the Wisconsin meat-packing company founded by his father. Active in politics and Chairman of the Democratic Party in Wisconsin, he was as a member and chairman of the Wisconsin Public Service Commission, a lawyer in private practice, a lecturer at Marquette University Law School, a visiting professor of law at the University of Wisconsin Law School, and was a lecturer at the George Washington University Law School before he came to the Court.

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**Jeffrey Cole is a United States Magistrate Judge in Chicago and is the Editor-in-Chief of the Circuit Rider.*



Interview of: Judge Richard Cudahy

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But these are impersonal statistics that do not begin to tell the story. As with Dr. Phillips' interview of Justice Frankfurter, only reading the interview in its entirety can convey those qualities that make the Judge so interesting and, it can fairly be said, so inspirational a person. The interview spanned 150 typed pages. Obviously, something had to be excluded as a concession to space limitations. But what to take out. The Judge's life was so varied and so interesting and in his youth, so challenging, that editing was difficult. What was taken out was as compelling as what was left in. But even in the abridged version that follows, the remarkable story of Judge Cudahy's life vividly emerges through his spontaneous, fascinating and refreshingly candid recollections. At the end of the interview, in response to Collins' question, "What makes you tick?" Judge Cudahy spoke openly of the need for recognition in all of us and went on to say, "I don't know if I have an abnormal need for fame or recognition, but I like to think that I have contributed something to the world that didn't happen before I got there." As you will see, this was not a vain hope. Judge Cudahy has indeed lived a life full of achievement and rich in contributions to the Nation.

Q. Judge Cudahy, why don't you tell me a little bit about the history of the Cudahys.

A. Well, I can do a little better about distant maternal relatives than on my father's side. My father's family, the Cudahys, came from Ireland. They came over to this country in 1850 from Callen in the County of Kilkenny. My great-grandfather was married to a woman whose father was a potter in the town. My great-grandfather took a job in a nursery in Milwaukee. And the boys, you know, went to grade school. I don't think any of them went to high school. They started working pretty young at age 13 or 14. In those days the packinghouse business was one of the big businesses in the area. The industries that were the biggest ones in that era, the 1850s, were agricultural processing, grain milling, meatpacking and leather. There were some big tanneries in Milwaukee. That was what primarily the local industry consisted of. One of the big packing houses was owned by a fellow named

John Plankinton, who was an Englishman. He had, I think, what was one of the biggest packing houses in the Midwest at the time and Philip D. Armour became his partner.

And of course the Civil War came along, and none of the Irish (at least none of my Irish forefathers in Milwaukee) participated in the Civil War as soldiers. With mother's family there was a lot of participation in the Civil War. But Armour, as the Civil War was winding down, made a lot of money selling salt pork short.

Then Armour decided to go to Chicago to start a business of his own, and, of course, Chicago was becoming the rail center of the country and was the logical place for a packing outfit to be built. He took my grandfather's oldest brother, Michael – who at that time had become his general manager of his business – to Chicago to help him start a business down there. In about the early 1870s, they started what became Armour & Co., which of course became one of the biggest meatpacking operations in the world. I am not sure of the details of this, but Michael brought his brother, Edward, who was a younger brother, I think he was born in the United States actually, to Chicago, and I guess Edward had some role in the Armour Company, and then he got into some things of his own and somewhere along the way he managed to do something for Loyola University, and so they named their library after him. People used to ask me what was the story of the Cudahy Library at Loyola University. I didn't really know until I did a little research and found out that that was Edward's work, and as a matter of fact a Jesuit wrote a biography of Edward called, *The Education of Edward Cudahy*. I have a copy of it.

Michael was with Armour and acted as his general manager in the Chicago business. Then, Michael decided that he wanted to go into business for himself. It is interesting to note how such new enterprises were sort of set up as partnerships with one partner as the active one and the other essentially furnishing financing. Well Michael Cudahy decided to set up a new business with Armour as his partner. Michael wanted to go out to Omaha, which was a rising livestock center at the time and start his company.

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His company was originally known as Armour/Cudahy in Omaha, because I think Armour was supplying most of the funds. That developed into what became the Cudahy Packing Company, which also came to be a very large national concern.

Meanwhile, Patrick, who was still in Milwaukee, had become Plankinton's general manager and he was running Plankinton's plant, which was then located in the Menominee Valley in Milwaukee. But finally old man Plankinton died, and his son took over the business, and, as is frequently the case, the manager who worked for the old man didn't get along too well with the son. So the son and my grandfather split up, and I think Patrick rented facilities from Plankinton for about four years and he carried on his own business there. Then he decided to move his business out into the countryside. He had in mind actually that he was going to get all the other packers in the Menominee Valley to move out to where he did so they would have a new packing center. He picked out a spot on the Chicago Northwestern Railroad which was then just farm country. But it was the highest point on the railroad between Chicago and Milwaukee. His brother John, who was a trader or speculator on the Chicago Board of Trade and had a pretty good amount of money, was supposed to finance the deal.

So the move was scheduled for 1893. There was a big panic in the country at that time and John lost all his money. So the two brothers were in a kind of a bind for money but apparently Patrick was persuasive enough to cajole some bankers around the area into furnishing enough funds to build this plant out in this place. I think this stop on the Chicago Northwestern Railroad was called Buckhorn. But the town that grew up there, around this plant, they gave the name Cudahy to. That is still the name of the city there. Patrick ran his meatpacking business out there. That was called Cudahy Brothers Company and that was his only location. The Cudahy Packing Company in Omaha that his older brother started, developed facilities all over the country. They were pretty much a national organization. Patrick's plant facilities were pretty much confined to the location I have described. His business consisted mainly of shipping to Liverpool cured meat; that is pork that was cured with salt.

I'll switch over to my mother's family, which was, I think, entirely different. The difference later led to some very serious problems, but I'll get to those later. My maternal grandmother was a fabulous character. The family name was Bean, which was apparently an Anglicization of MacBain. Four sons fought in the Civil War. They originally lived in Waukesha, Wisconsin, but came from New England.

Michael, my father was born in 1886, went to Miss Dousman's School, which was a private elementary school in Milwaukee, and then he went to West Division High School which was a public school, which is, as far as I know, still in existence. He graduated I think when he was only 16 years old, which shows that he had a fairly good facility with the books himself. Then he went to the University of Wisconsin and got a degree in business. He never had any use for business school [laughing], but he majored in business since he was supposed to be going into business. But his view of business school was negative. He thought law schools were just wonderful and really taught you how to think, and business schools just gave you a lot of information which was obsolete by the time you ever got around to applying it.

Q. Democratic politics in Milwaukee were linked to the *Lady Elgin* ship that went down in Lake Michigan and took a lot of the Irish political leadership in Milwaukee with it. That occurred after the Civil War. Were the Cudahys active in Democratic politics in Milwaukee?

Well, John, who was my father's brother, became very active in politics. Yes, he was a lawyer and then became Minister to Poland and he was a diplomat. He wrote some books. He ran for Lieutenant Governor of Wisconsin around 1919. But they both served in World War I. After the War was over, they came home. Patrick died suddenly of a heart attack in 1919. This is apparently when my father and mother first began to get interested in each other. My father, Michael, was sort of wealthy and dashing. My mother, Alice, was beautiful and intelligent and she came from an old family.

They got engaged, but then the engagement was broken off by him because she got quite critical of his not wearing the right kind of clothes. Of course, as you point out, she was an Episcopalian and he was a Roman Catholic and even more significantly she was a divorced woman.

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Interview of: Judge Richard Cudahy

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We are talking about an era when Catholics were not permitted to marry divorced people. I think that there was a lot of talk. They were talking about getting married and they couldn't figure out how they could have a church wedding. I don't know what steps they went through to try to get around the rules at the time. Subsequently they apparently made a trip to Rome to try to do something about it but that didn't work out either.

Then they were both out on a private yacht on the Great Lakes, which belonged to the owners of the Schlitz Brewery, which had just been shut down by Prohibition. They thought, to hell with it all – let's get married. So they got off the boat at Sault St.-Marie, and they were married by the justice of the peace in Sault St.-Marie, Michigan – or Canada. My parents lived with my Aunt Gertrude for a short time after they were married. Then they bought this house on College Avenue, which is now the south boundary of the airport in Milwaukee. They had a 70-acre tract of woods with a little farmland. The house was about two miles from my father's plant, so they bought this property and lived in this farmhouse that is still standing.

According to the accounts that I came upon later, one of the major sources of trouble, at least according to my Dad, was that Mother was constantly criticizing him for all manner of things. He left her permanently when I was three which was 1929. Greta, who was a nurse, came pretty early in my life. She didn't get on very well with my Mother either. Mother apparently had emotional problems. I'm not sure when they started or how severe they were, but that comes into the picture a little bit later, particularly after my birth.

Q. Did the Crash of 1929 have any effect on things?

A. My Dad was quite fortunate in the Crash because he had most of his money invested in his meatpacking business and meatpacking was one industry that survived the Depression. In fact it was almost the only place to get a job for a while. So he didn't suffer badly from the Crash, but, particularly when this divorce became a public dispute, the fact that the country was in a depression just added I think a dimension to the

situation. The public was scornful about the whole business. They thought here are these rich folks. They've got all this money but they can't get along together and here we are starving to death. Why can't they do better with their lives? It made the whole mess into a bigger story. But that's only an indirect effect of the Depression.

Q. What impact did your parents' conflict have on you as a kid?

A. Well we're still finding that out today. This is something you don't realize, but it's really at the heart of everything. The child is the focus of this controversy and, it may seem strange, but I think that creates a lot of feelings of guilt in the kid, who feels guilty over what has happened and that, but for

him, this wouldn't have happened. That seems like a twisted way of looking at it to an adult but it's probably the way it comes across to a kid. You never know how these things are going to affect you, but the unarguable reality is that they do. And of course, you have these mixed feelings of loyalty and disloyalty. If you're loyal to one parent, you're disloyal to the other. I mean, it's a sort of a no-win proposition.

My first encounter with the judiciary, actually, occurred at this time. The judge who heard this divorce case decided that he wanted to meet me since I was the main bone of contention because each parent wanted me to live with them. So he made arrangements to come and visit,

just to come and talk to me just to see what I was like. So Mother, in her overt way, said to me, "Well, you know, when Judge Ahrens comes over to talk to you, you ought to tell him that you want to be with me, not with your father." She was pretty direct about it. And you know, that seems like a terrible error. Any child psychologist would say that's a terrible thing to do, but at this point I'm not sure that I find it so bad. I mean, at least you know what the woman is thinking.

Well, the long and the short of it is, he won and she lost. I mean this divorce trial was really a trial of her. Was she a good wife? Was she a good mother? Was she entitled to a divorce? Was she entitled to bring up her son? She got negative answers to all those questions.





Interview of: Judge Richard Cudahy

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Q. It's also a trial of power, too. Your Dad's a fairly powerful person.

A. Yes, and she talked about that. I mean, she'd talk about, with all the money he's got, he could do any thing he pleased, and who am I. I'm just being crushed under this juggernaut. That's how she felt about the whole thing. I think my attitudes of life probably reflect that experience. I am painfully aware that the weak party can get crushed under the wheels of the strong one. It produces a certain amount of sympathy for the weak as opposed to the powerful. I'm not a psychoanalyst, but I think that a lot of my attitudes, emotional attitudes, I got from Mother. She took an appeal of the case and lost.

Q. So, you are with your dad from age eight and you're going to the public schools?

A. I am going to the private school and he kept me there. That was very wise I think. The continuity. It's now the University School, but it was Milwaukee Country Day School in those days. I did well in school. School was sort of my salvation in a way. Just the business of studying and learning things was a great stabilizer, and to this day it is, even, I think, when I'm reading briefs. This is stability. And so school became a pretty big thing for me at that stage of my life because it seemed to me to be the one regular activity that I seemed to have a lot of facility at and that kept things in one place for me. There wasn't as much uncertainty in school as there was about a lot of other things in life. So I think I became dependent upon it to some extent to occupy my mind. And I think that persists into later life with me. I think that, for instance, this senior judge business is pretty good for me. I sort of have to have something assigned and then accomplish it and presumably accomplish it competently to keep me in good shape.

During my second year in high school, my father started talking to me about going away to boarding school for a couple years. He wanted me to go to Canterbury School, which is a lay Catholic school, which is still doing business. Among other things he said to me, "You've never been to a Catholic school so I think you ought to go to one at some point in your life," which sounded reasonable to me. Actually religion was a bone of

contention earlier on, but my father won that battle fairly early, I guess. In fact, I think that it was sort of agreed or the judge said it was appropriate or it just happened that I became a Catholic. This was when I was eight years old or something like that and I do think there was some sort of court decision on this. I went to Catholic church consistently and didn't go anywhere else. My father and one of his friends took me off and had me baptized in the Catholic church unbeknownst to Mother at the time. So at that point it was still a bone of contention, but it was sort of settled that I would be a Catholic a little bit later on. This reminds me of Henry IV of France, who was a Protestant but converted to Catholicism, saying, "Paris is worth a Mass."



So I got ready to go to Canterbury School in New Milford, Connecticut. This was in 1941. We were on the verge of war. The guy who was the founder of the place was a very dominant figure with big bushy eyebrows and a personality to go with it. He ran the place with an iron hand. At his suggestion, I got involved with the school newspaper writing editorials. Dr. Hume usually sat me down and told me what the editorial was going to be about and what I was going to say pretty much (laughing). Then I'd write the editorial.

Q. Did your Mom or Dad come out to the school other than at graduation, before graduation for parents weekend or mother's weekend, or something?

A. Well, my father did; my mother died of breast cancer the first year I was there. I was 16 years old. I was saddened by her death, but I think it was fortunate that she didn't live any longer because she was having such a difficult life on so many levels. After that I went back to school and, interestingly enough, after she died, I became much more concerned about how well I was doing in school academically. I became almost obsessed by that concern, which I assume may have had something to do with her death, and this was sort of my reaction to it. There were other reactions, mostly of a compulsive nature, driven by the grief that didn't come out directly.

As I got nearer to graduating from the Canterbury School in 1943, the prospect of military service was looming. I got admitted to Yale but I passed it up for some reason or other. That summer I was out in the country and helped harvest the pea crop and I decided that fall to go to Northwestern University with a friend of mine who was going there and we were going to room together.

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Interview of: Judge Richard Cudahy

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There was another classmate of mine who was going to West Point. I got the idea that I might like to go there. I was greatly interested in military history. So I applied to get an appointment. I applied to both Wisconsin senators and the only thing they did to select people was to give them a competitive Civil Service Exam, which was sort of the Wisconsin tradition. So I took the exam and lo and behold I got the highest grade of the hundred or so applicants, and I got the appointment. I don't think that any of the people making the appointment had ever laid eyes on me. I don't think that's a very sound way to appoint people to West Point, but as I have said many times since, that way nobody could accuse you of favoritism. So I actually could have gone there in 1943, at age 17, but I got cold feet. I decided, no I don't think I want to do this. I had kind of marginal eyesight, so I just let nature take its course. I didn't pass the physical and that was the end of that. So here I was going to Northwestern and living with this friend of mine who was 4-F. At some point in this fall of 1943, I guess it was, he started talking to me about what a terrific opportunity I had missed by not taking this appointment to West Point. As luck would have it, I began to be persuaded by this. I thought, gee, maybe I should have done it. I have always been vulnerable to persuasion along those lines. So I applied for another appointment, and I again got the highest score on the exam. So I guess I proved I was smart enough, but I don't think that was all that one really needed to become a cadet candidate. So I went there. Meanwhile I had signed up for this aviation cadet program, a sort of reserve program. So when I turned 18, and they called me up to the reserve program, I went down to Shepard Field, Texas. Then I got called to go to a West Point preparatory school at Lafayette College in Pennsylvania. I was there for a month or two. And then, there I was going to West Point, which is an interesting experience.

When you hit the place, it totally stuns you. I mean, immediately all these people are descending upon you to correct all your faults and you are a lowly plebe, and you have got to learn all this poop, and you have got to turn square corners and all of a sudden you are low man on the totem pole and everybody is telling you you are doing everything wrong. To me this was a stunning experience. That is a total understatement. It is a demoralizing experience, and I think it is to most people actually. You just sort of lose touch with yourself to some extent.

So that went on in what they called Beast Barracks which is the first six weeks. That is supposed to smash you into a state in which you are malleable enough to be made into a new person virtually. That's the theory anyway. I survived that. Then we went to maneuvers at Pine Camp in northern New York State. Then we got down to the academic part of the program. But, as far as discipline was concerned, it was more of the same, a lot of it. I was certainly not very happy, at that stage of the game. I wondered very seriously whether I had gotten myself into the wrong line of work. (laughing)

Q. Was West Point, during the War, a four-year program?

A. No, there really isn't. I do however find myself reading a lot No. It was only three when I went in. They had shortened it. It was four when I came out, but only three when I went in. I got extended for a year which came as a terrible blow to me at the time. I ended up having to stay a year longer than I thought I was going to have to stay.

Q. It was extended in spite of what you wanted.

A. Yes, they said they did it based on maturity, but that just meant age. You know, the older fellows all got three years, and the younger ones four. Of course, if you volunteered for the four years they would give it to you, but I don't know how many people did that. Otherwise, it was done just by age. So, that experience I'm sure matured me, and I learned a lot of things there. However, disillusion increased the more I stayed there. The longer I stayed there, the more I was persuaded that I was not going to stick with this the rest of my life. I was successful there academically but I didn't set any records in any other activity. I was Managing Editor of the cadet magazine and co-author of the class play.

Q. I think there were requirements of playing a sport, weren't there?

No secrets here. I generally pick up the appellant's brief, check Oh, sure, we all did that, a lot of sports. Well, we did a little bit of everything, you know. We played a little lacrosse, and played football, soccer, and swimming and I don't know what all else. This was all intramural stuff. We always had athletic activity going on. The only Academy team I got on was the plebe rifle team which was one of the activities that they had there. One of the benefits of being on a team in your plebe year was you could sit at the team table in the dining hall. You didn't have to go to your company table where you get hazed.

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When I got through two years, they announced that they were going to have to extend half the class to a four-year schedule and they did it on the basis of your age. That came to me as a severe blow. I thought, “Oh God, that’s adding insult to injury. Now I’ve got to hang in here for another year.” I was quite active. I was the managing editor of the cadet magazine, *The Pointer*; and I wrote a lot of stuff for that. I wrote various things, a lot of satirical stuff. That was something that I seemed to like to do and I did a lot of it there.

Q. You are at West Point during World War II and you are missing the war.

A. I started there in ‘44, so the war had pretty well turned by that point. This was after D-Day. But of course nobody knew how long the War in the Pacific would go on. Then the atomic bomb was dropped, and that brought things to a halt.

Q. Was there concern among your fellow students that they really wanted to be out there fighting the Germans or the Japanese and not studying at West Point?

A. Well, I think that was a problem with all of us in one form or another. But, of course, at the time you’re talking about, nobody knew how long things were going on and then all of a sudden they ended. So I think that there was a certain amount of disappointment about that, but there wasn’t much that anybody could do about it.

Q. If you didn’t like West Point, why did you stay?

A. I think that the war played a part in my thinking on that subject, which may or may not have been very mature. I was concerned that, if you go to West Point and you stay there until the war is over and then you quit, then it does look as if you’re trying to avoid the war, right? At least, that certainly was an influential factor with me. I thought once I got into this thing, I had better see it through. In retrospect knowing what I know

now about the world, I don’t think I would have made that decision the same way, but that’s the way it was.

Anyway it got to be time to graduate, and they have what they call the 100th Night Show, which is supposed to be 100 days before graduation. This is sort of a typical college humor kind of musical thing, and I was one of the co-authors of that with a couple of other people, one of whom passed away and the other one became a member of the faculty at West Point and is still there.

Q. What did you do after graduation?

A. We had about three months off before we had to report for duty as I recall. We had to select a branch of the service. I had a close friend there who shared a lot in common with me who said I ought to pick the Air Force Administration because, in that case, we could pick the same place to go to and be together, and I went along with that. I went out to Spokane, Washington, with the Strategic Air Command and got very well acquainted with a family in Spokane. It was a significant experience for me. I had a sense that this was what a real family was like. I thought that I have never lived in this kind of environment before, and I really had that understanding of

things. I think I learned a lot from that association, I think probably more than from anything else that happened while I was out there.

One thing that did happen though, was that I got involved in legal matters in a way that suggested that I ought to try to go to law school. I got assigned for part of my experience to the base legal office. In those days you didn’t have to have a law degree to try most court martials. I started out to defend soldiers being tried by court martial and was so successful that they made me a prosecutor. My first case as defense counsel involved a guard at the guard house who was charged with suffering a prisoner to escape. I got him off by showing that his superiors were really more at fault than he. I also prosecuted a soldier who claimed family allowance when he wasn’t married. His story was that he was drunk and his “wife” told him that he had married her when this really hadn’t happened.

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When I asked him what he had thought when she told him they had got married, he said, “Well I said I wish I’d been sober.” I remember those things, because I found I had a real talent for them and was intensely interested in them.

Q. Did you have an interest in going to law school before you got that assignment?

A. Yes. We had a course in military law at West Point, so I was exposed to it to some extent there. But after some real experience, I began to think a little more rationally about what things I liked to do and what things I was good at. It seemed to me that the law was something that made a certain amount of sense. I wasn’t exclusively on that track at that point, but it seemed to me that this was certainly something that I ought to consider very seriously doing if I got a chance to do it.

Q. But you didn’t want to make a career of the military.

A. No, I decided that after I had been at West Point not more than a year. Although when I entered West Point, I can say honestly that a military career is what I had in mind. It seems a little unrealistic at this stage of the game, but that’s the way it was. I always was envious of people who, early in life, decided that this was what they were going to do and they stuck to it and that’s what they did. I suppose that a question that might be asked is, “Why didn’t you want to follow in your father’s footsteps and go into the meatpacking business?” Well, I had no desire to do that, and I’m not sure why that was the case, but I just didn’t want to do it.

Q. Well, you had worked at the meatpacking plant.

A. I had nothing against the industry as such. I spent ten years of my life in it as a matter of fact and enjoyed them. I did some important things, but it was something that I did not see myself doing as a career option. Maybe I was following in my father’s pattern. He decided that he wanted to go to law school but his father vetoed the idea.

Q. As far as West Point is concerned, you had four great-uncles in the military?

A. Yes, I had quite a few military people in the family, including my uncle John. I always thought of him as being a little bit military because he was in the Archangel Campaign in Russia. I had a lot of romantic ideas. I guess kids that age have been known to have them. I was a great admirer of Winston Churchill, and he was a big part of history in those years. I read his *History of the First World War* when I was still in high school, or just out of high school, which is a pretty monumental work. So I was certainly interested in military history and military things but that is not a very good reason to become a career Army officer. That’s my view at this stage of the game. But at the time it seemed like an important, logical thing to do. As I have said, living with this fellow at Northwestern University who kept telling me what an opportunity I was missing swayed me a lot. I am pretty vulnerable to arguments of that sort. I have been all my life and probably still am. I also think that this was one of the irrationalities coming out of my early life.

I spent those four years in the Air Force. The Korean War came along in the course of those years. My units sometimes were going overseas but I was never stationed over there. I went to various places on a temporary basis. I served my time and then got out. I could go on at length about those years, but I think I have mentioned what was most important for the future. I had taken the Law School Aptitude Test when I was in Spokane. I had taken it at the University of Idaho in Moscow, Idaho, in 1949. I did very well on that so that didn’t discourage me from pursuing the law. After I got out of the service, my father took me to meet Dean Swietlik at Marquette Law School, whom he knew quite well and worked with on some projects. I remember talking to him about where would be a good place to go to law school and he unequivocally recommended Yale Law School. He said that was a great place and that you would really get something out of that if you could get in. So I applied and got in. It required a certain amount of adjustment for me, because obviously Yale Law School and West Point are pretty far apart in many regards. Adjusting to the law school regimen was not something that just came automatically. I had to work at it a little bit, but I don’t know that what I did when I was at law school was terrifically unusual. I qualified for law review but I didn’t really pursue the law review. I took up a different program for teaching legal writing and research, which was essentially an alternative thing to do. They only had one law review in those days and now they have about five, I think. So does Harvard as a matter of fact.



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Q. How did you do at Yale?

A. I did very well in law school, and I made the Order of the Coif and I enjoyed law school. I met my first wife while I was in first year. We didn't get married until after I had clerked for a year. She died 30 years ago this year. Five of our children are still with us. We were talking about her at Thanksgiving. The children were home, and I asked for a Mass in her memory. Then we spent a little time talking about her. A couple of the girls were so moved that they burst into tears again after 30 years.

She was really a terrific person. I have been extraordinarily blessed. I mean, I have been blessed with two women as wives who are terrific. I can't imagine being married to anybody who could be any better than the two I've been married to. Everybody may deserve one, but very few people deserve two. You're fortunate if you only get to have one. We got married down in New Jersey, and she always said she would live anywhere that I wanted to live except New York City. She didn't want to live in New York City. (laughing). That was her only specification.

I clerked for Judge Clark in the Second Circuit a year before we were married. I must say that getting married was a sort of a traumatic experience for me. I didn't rush into it with great confidence, aplomb. I had to work my way into it with some difficulty which I guess is not surprising, (laughing) considering the background that you have heard. I always regarded it as kind of a risky business.

Q. Tell us about Judge Clark.

A. He was the former Dean of the Yale Law School, and I really enjoyed that year with him and learned a hell of a lot. I held him in the highest regard. I never thought of being a judge until I worked for Clark. When I worked for him, it occurred to me, gee, this is a wonderful job. I would like to do this if I ever got a chance to, and then I promptly forgot about it. But that certainly occurred to me then. My father used to say Judge Clark was like a Connecticut farmer. That wasn't too far off. I mean he was kind of a blunt, straight-to-the-point kind of guy. His son Eli had been in the war and he was a professor at Yale Law School. I had him in school. I really got a lot out of Clark. I think he was a very sound and courageous jurist. He always did what he thought

he ought to do. Of course, those were the days when I clerked for him in 1955 that was not quite at the height, but just after the height, of the Communist-McCarthy business. Concern about communism was at a high point.

An interesting sidelight was that, back in 1950, Harold Medina had been a district court judge in the Southern District of New York and had presided over this trial of the leadership of the Communist Party. They were charged with conspiring to overthrow the government. Their lawyers made quite a scene by constantly provoking the judge and saying things that were insulting to the judge and sort of carrying on a sideshow.

Q. Were they baiting the judge?

A. They were baiting the judge, yes. When the trial was over, Medina called them all up in front of the bench and sentenced them all to six months in jail or three months or whatever it was for contempt. Of course, he cut corners by doing that, because this was not something that was happening then in his presence. He didn't find them in contempt at the moment they were in contempt. He waited until afterward when he should have had some kind of a hearing to decide whether they were in contempt and to give them a chance to respond. The case came up on appeal to the Second Circuit, and Clark and Jerome Frank were on the panel. I don't recall who the third judge was. Two of them, Frank and the other judge, decided to affirm the contempt conviction even though it was somewhat improper. Clark wrote a dissent saying that he didn't think Medina did the right thing and he was at sort of at odds with Frank. I think personality-wise they probably clashed. Frank was a great believer in jury trials. He actually wrote a book on that subject. Clark sort of invented summary judgment.

Well anyway, Clark dissented and said some fairly harsh things about Medina and the case then went to the Supreme Court. I think it was eventually affirmed by the Supreme Court. Subsequent to that Medina got appointed to the Second Circuit when I was there. He and Clark got along like bandits. They seemed to get along just fine. Clark was always very supportive of Medina, mainly because Medina got his work done on time. Harold apparently didn't hold it against Clark that he had dissented in this famous case.

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There were several cases where Clark and Frank clashed on that issue. Judge Clark said to me, among other things about Judge Frank, that he had sort of wilted under pressure when he went along with this affirmance of Medina's holding the Communists in contempt. He said that Frank just felt the heat too much from the passions of the day.

Q. Was Clark affected when the Supreme Court rendered their decision affirming?

A. Well, of course that was before my time. He wasn't ever much concerned with that, I don't think. He was just being a little critical of Frank because he thought that Frank in reality probably agreed with him but didn't want to be seen as supportive of the Communists. He mentioned, among other things, that Frank was Jewish and, therefore, he might feel more sensitive about being accused of being pro-Communist. So anyway, that was just a little sidelight on that matter.

But, Clark enjoyed being Chief. I guess the Chief before him was Learned Hand, because Learned Hand was still around the place. He had taken senior status not long before that. He was writing a book when I met him. Learned Hand is such a famous guy that he might be a hard act to follow, I suppose. But Clark was appointed to the bench in 1939 and he was one of those who were mentioned as possible appointments to the Supreme Court in the late Thirties. He was Dean of the Yale Law School when a lot of prominent people like William O. Douglas, Abe Fortas, Hamilton, and Thurman Arnold and other pretty famous types had been on its faculty. Clark was sort of the mentor of all these people so it was thought he'd be a logical Supreme Court appointment. He was perhaps disappointed by that, but he never talked about it. He seemed to be pretty comfortable.

When I got through with my clerkship, which was a great experience, I wasn't sure what I wanted to do next. I guess I wanted to go down to Washington and do something down there. I was interviewed by Thurman Arnold, who had been a judge on the D.C. Circuit, but who at that time had become a founder of the firm Arnold, Fortas and Porter, later Arnold and Porter. I remember going around to see him. I had applied for a job there, but I eventually decided to go to the State Department. The Legal Adviser of the State Department would seem to me

to be an interesting place to go so I went there. I was then married to Ann Featherston, and we lived in Washington. That didn't really work out too well because they seemed to have recruited a lot of good people there, but they didn't seem to know exactly what they wanted them to do. I had a feeling that the place wasn't very well organized. I was assigned to the Middle East-Africa Section and, among other things, wrote a memorandum on the Right of Innocent Passage through the Straits of Tiran into the Gulf of Aqaba, which involved a major international issue of the day, because Egypt was blocking Israeli shipping.

So I was there in the Legal Adviser's Office, and they weren't using me very effectively, I didn't think. So I started looking around, and I decided to come back home or close to home. I looked around in both Milwaukee and Chicago, and I got a number of offers from firms including Foley & Lardner, and I got an offer from Sidley & Austin, and from Isham, Lincoln and Beale. I eventually decided to go with Isham because, among other things, I had some relatives in Chicago who knew them pretty well and were really pretty enthusiastic about them. I liked them as well. So there I was.

Q. Why did you go to Chicago when you were from Milwaukee?

A. I think the childhood history I related to you influenced me to some extent. I just really didn't want to plop my family down in that kind of milieu where all that painful stuff had gone on. I sort of wanted to make a clean break of it, to some extent. So we bought a house in Northfield and I was taking the train down to work and that's where I got into utility work. Because, with law firms, as everybody knows, whatever your interests may be, you usually end up doing what has to be done. In their case they had to have somebody get into the agency work, regulatory work, because they represented among others Commonwealth Edison. So I was doing a lot of that work. I did a lot of other things, too. I wasn't confined to that by any means. But I did quite a lot of it and I got interested in it. I worked with Arthur Gehr, who was one of the earlier experts in nuclear power. He was the partner immediately above me, and above him was Charlie Bane, who at one time was nominated to our court. He got dropped before they ever got around to confirming him, because he had some tax problems. I guess there was also some incident at his apartment house that put him in doubt. Charlie Bane was mentioned for the position that John Paul Stevens got on the Court of Appeals. But eventually he retired and moved to Florida.

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When the firm went down the drain as it did in 1987 – you know they merged with Don Reuben’s firm, and that didn’t work. Both firms just kind of disappeared from the map. Charlie was living in Florida and the pension fund for the firm disappeared at the same time. He sued some of the partners that were still there. The suit got thrown out and was affirmed on appeal so he didn’t get anything on that. But he was a guy of very outstanding ability. I don’t know how other things would have worked out with him, but he certainly was smart and knew his stuff.

Q. How did you like litigation? We’ve already talked about how you were kind of shy. You don’t think of trial lawyers as being very shy.

A. No, you don’t. I liked the litigation that I got involved in. I got my start trying court martials in the Air Force. I loved the strategy of the thing. I don’t know if I would have been a great trial lawyer if I had stuck to that line of work. It was not something that I saw myself as uniquely qualified to do. But I didn’t mind walking into a courtroom and doing what has to be done. I had friends who wanted only to be a trial lawyer. But, as we all know, life sometimes rewards us by denying our wishes or penalizes us by giving us what we hoped we would get.

Q. When you were still in Washington, your father was taken ill. Did he discuss it with you?

A. No. Not really. This was when I was at the State Department. He had some problem with ulcers. I remember talking to him on the phone and I said, you know, if you need me to help with the business, I’ll be glad to come back any time and do what I can. He sort of said something about, I don’t know if you could stand up to labor negotiations or something like that. This certainly didn’t please me at the time, but as things worked out it could be forgiven. Not too much later, I did come back to the area to practice law. I was in Chicago and my father sort of stepped out as head of the company, and a fellow named Hansel Holcomb was brought in to run it. He had a lot of experience with Armour & Company. He had been in charge of plants down in Argentina among other things. So he came in to run things and he was an

expansionist. He proceeded to hire a bunch of salesmen in various parts of the country and try to increase his volume sales. Well the meatpacking business is such—the margins are so thin – that getting more volume isn’t really going to do you much good unless it’s profitable. The results were the company began to decline. I had been talking to my father about the need for having a good financial guy to keep track of where Mr. Holcomb was going. Through some utility work that I had been doing, I had been in touch with Arthur Andersen who were then the auditors and accountants for Commonwealth Edison and I had made the acquaintance of Anderson’s managing partner in Chicago and he came up with a fellow named Charlie Watson and he was hired as financial VP. He didn’t know anything about the meatpacking business but he was a pretty talented accountant. But, my father was undecided about Holcomb. Then my father got sick again with bleeding ulcers and was told that he had to quit worrying about the business and move on and do other things. So, lo and behold that’s how I got into the business, sort of as a matter of necessity at the time. I first started commuting up there and then we finally moved up in about 1961. I went into the meatpacking business, but I tried to keep my finger in the law. Pretty much, almost simultaneously, I started part-time teaching at Marquette.

Q. What did you teach there?

A. Well I taught the law of sales, which they thought was in line with what I was doing. Commercial law, that kind of thing. I enjoyed it. I like any kind of a code subject. It is sort of like playing chess. Anyway, I got into the meatpacking business with Charlie Watson whom I sort of regarded as my partner, because he obviously knew a lot of things that I didn’t know. The thing that I moved into more than anything else was labor negotiations – the very thing my father had suggested that I wouldn’t be any good at when I offered to come home when he got sick. First I employed this industrial engineering firm whose analysis was that there were just too many people working, too many people all over the place, too many people in the plant and there were too many people in sales for the amount for the volume of business that was being done. There was an incentive system in the plant. I won’t go into all the gory details of that but it is an interesting exercise if you study it. The basic mistake they were making there and I think my father was involved in this to some extent was that there was more concern about people making too much money than about the number of people that were earning it.

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Well this was, of course, a challenging situation insofar as I was eventually moving geographically from Chicago to Milwaukee but I was also moving from the work area in which I was supposedly trained, namely the practice of law, to the conduct of a business, which I knew something about but in which I had really never taken any formal instruction. And there were a lot of problems with the business, evidenced by the fact that it was not making any money, in fact was losing money, at the time.

Q. What were the years that you were really in management at the company?

A. Nineteen Sixty-One to 'Seventy-One. Ten years.

Q. What kind of an adjustment was that for the family in moving from Chicago to Milwaukee?

A. Well, our kids were very young (our oldest child was born in 1958, so he was only three years old). And so most of our kids were born in Milwaukee. My wife, Ann, really liked Milwaukee; in fact, unfortunately, she died prematurely later on in the early 70s. And I wanted to add this personal note: Our first child was born in 1958, and in 1959 she developed breast cancer. She was then 28 years old. At the time, of course, it was a terrible shock, and it was a particular shock to her, because it had been her aspiration to have a lot of children. She talked about that quite a lot, and, the question arose should she have any more children. Her father was a physician, and she consulted him about that, and he proceeded to send letters to various of the major well-known cancer centers in the country – clinics that were associated with cancer, to get their thinking on this subject, and, as you might imagine, there were a variety of opinions about it. But there were enough opinions from places that he regarded as authoritative who said it would be all right to have more children, so we proceeded to have some more. We had 5 children together actually. But she liked Milwaukee, and she liked the people, with whom she associated there, and I think she thought she was getting good medical care, which was important. So, there wasn't any big problem of adjusting the family to the city.

Q. Where did you live in Milwaukee?

A. Well, we originally lived in the city of Milwaukee on the east side across from Lake Park. Later on, I was offered a visiting professorship in Madison at the law school there, and I moved to Madison, but I only stayed there for a year and then we moved back again and lived in a house in Shorewood outside of Milwaukee.

Q. You got a professorship over at UW while still managing the company.

A. Yes, so I'm doing both, and before that I taught at Marquette Law School. And it was not too difficult to teach at Wisconsin, because, once we got our strategy decided on, I could just delegate a lot of everyday matters to Watson, because he and I worked very closely together and saw things in the same light and things were going along well and I could do outside things. I was President of the Milwaukee Urban League and a member of the Harbor Commission and got into politics during this period when I moved back from the Chicago area. I'd been quite active in Democratic politics in the period I was living in Northfield, outside Chicago. I got involved in the Democratic scheme of things there, at a pretty low level. I was delivering leaflets and things of that sort, opening and closing polls and whatnot. But I had always been interested in politics and I got involved there. Of course, that was the year that John Kennedy was elected President, so it was a very exciting time, and I was strongly involved in his efforts. I went to his inauguration then, and that's about the same time that I moved to Milwaukee, and I continued my involvement in politics there. And I was very useful, I think, to the Democratic scheme of things in Milwaukee, because I was head of a relatively big company, and there weren't too many heads of big companies involved in Democratic politics, so I could help promote political and fund-raising activities like big political dinners and whatnot. In fact, John Kennedy visited Milwaukee in 1962 right after the Cuban missile crisis, and they had a big political dinner of which I was the co-chairman, and I remember my wife being so thrilled because he held her hand at the dinner. She always said, well, that's it; I'm never going to get my hand washed. She was a big fan of his. Well, anyway, then of course he was assassinated the following year.

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I was also involved in a lot of civic things and was head of what they call the International Institute, which was concerned with immigrants and foreign cultures. I continued teaching at Marquette Law School. I got a lot of exposure in the community and in the political arena. I got involved in the campaigns of Senator Proxmire, who became a good friend of mine, and I became the chairman of his committee that officially sponsored all his campaign activities. I was called his campaign manager in 1970 and as such, had to raise the campaign funds. But you were not really in charge of strategy. He was pretty good about following his own strategy. Anyway, then I was the Chairman of the Democratic Party of Wisconsin in 1967 and 68, which was a rather turbulent era, anyway, in Democratic politics. And that was, of course, when the Wisconsin presidential primary was very important, and that was where Lyndon Johnson finally met his demise and withdrew from running for President in the spring of 1968 over Viet Nam. As the Chairman of the Democratic Party at that time, I was deeply involved in all those events and went as a delegate to the 1968 National Convention.

Q. What did you teach at the University of Wisconsin Law School?

A. Sales and commercial law. Also antitrust law, and trademarks, and a variety of other things. I might add that, when I was teaching at Marquette, I became acquainted with Bob O'Connell, another professor, who went to Mississippi in the summer of 1964 sponsored by the President's Committee for Civil Rights under Law to represent members of the clergy who had gone to Mississippi in large numbers in 1964 to promote civil rights. I visited him there and had some unforgettable experiences visiting civil rights workers who had ended up in jail and similar experiences typical of the bitter conflict in Mississippi. Those were dangerous conditions.

And, as the '60s wore on, I got some sort of role in a friend Dudley Godfrey's law firm. I say "some sort of role," as it was never too well defined, because it was obvious that my time was very limited, but I did do some things there and was of some use. And in 1968, as I said, I was the Chairman of the Democratic Party, and Bronson LaFollette was running for

Governor in '68, and Wisconsin was still on two-year terms for Governor then, about the last year that that was the case, and a friend of mine whose name was Malloy, who later became a judge in Kenosha, was talking to me about—trying to persuade me—that I ought to run for Attorney General, because I think he thought that Bronson needed support of other people on the ticket. And I think also that he was not too taken with the other fellow who was running for Attorney General as a Democrat. There was a big primary before the general election. So, for some reason, I agreed to run for Attorney General. I say "for some reason;" one never quite knows how these things happen, but, so I got involved in that campaign, and my principal

opponent supposedly was this fellow that Malloy knew who was from Racine, and there were four people who actually ran in the primary. And I won the primary.

I often have said that primary elections aren't very much fun. I think general elections are a lot nicer events than primary elections, mainly because you know who's for you and who's against you pretty much in the general election. In the primary election, you haven't got the foggiest notion. Some people tell you they're for you, but they aren't; and other people don't tell you and you just don't know who's on your side. When you walk into a bar in the general election, you can tell who's for you and who's against you.

Well, I was also that year a delegate to the Democratic National Convention in Chicago, which was an event of some note, and we all went down there and went

through all the activities around the convention hall, and I took Rick. Of course, Ann went down with me, my wife. Rick was then ten years old, and so we came down to the convention hall when it was down at the place in the stockyards – the Amphitheater, the International Amphitheater, that's where they had it. He came down, and I entrusted him to a fellow from upstate Wisconsin who was a county chairman up there, who was sitting in the gallery. The first night's session ran on until 3 a.m. so Rick at some point went to sleep. And, when I finally recovered him, he was out lying asleep on the seat of a bus that was to take the delegation back to the hotel. We had all the events in the convention hall like Governor Ribicoff saying something nasty to Daley. And there was all this tension in the Wisconsin delegation which was, 80% McCarthy, although I was there as a Humphrey delegate, because I had been elected from one of the congressional districts in Milwaukee. Those were exciting times.

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Meanwhile, I was running for Attorney General, and part of the time I was still Party Chairman, but somebody raised a ruckus about it – that I shouldn't be Party Chairman if I was also running for office – so I had to quit being Party Chairman. I rather enjoyed that experience as Party Chairman. It seemed to suit me, and I was pretty good at getting along with various factions and pouring oil on the troubled waters that were usually troubled.

Q. It was through politics that you met Tom Fairchild?

A. Well, yes. I never think of Tom as being slotted in particular with one of the several wings of the Party as it was then. He was certainly well known and was a pioneer. He ran for state office and was elected long before Gaylord Nelson ever got elected.

Q. Fairchild is with Jim Doyle, Sr., and Chief Justice Willkie.

A. Yes, right. I knew Willkie very well. I'll tell you a story about Willkie. I think he was the Chief Justice at the time that the Wisconsin Supreme Court had the *Tropic of Cancer* case. And the Wisconsin Supreme Court held that it wasn't obscene in about 1963 or thereabouts, and that became a huge political issue at the time. And there were efforts to defeat the various justices who had voted the wrong way on that issue, one of whom was Horace Willkie. So the lawyers – I think it was the lawyers in general – a lot of leading lawyers, felt that it would be a bad thing to have various justices defeated on that issue, so they organized fund-raising activities to support advertising in favor of these judges when they came up for approval at the polls, and Willkie was the first one. So somebody called me up from Madison and said, "Oh gee, we've got to organize a big fund raiser for Willkie," so I got involved in that, and they made me the chairman or something. Willkie was very popular in the Madison area and well-known there, so he survived by I think it was 100,000 votes. And there was a guy named Howard Boyle, who was on the other side, he was running, trying to get *on* the Supreme Court, and strongly supported in Catholic circles by the Christian Mothers, I think, and some other organizations that were handing out excerpts of *Tropic of Cancer* at Catholic churches and so on as part of that campaign.

In any event, I lost my campaign for Attorney General, against Robert Warren in 1968.

Q. Were you ever interested in running for office again? Or for any other office?

A. No. I think that's the short answer. Although, I can say it was a very politically active period, and a very interesting one, and one that I am glad I lived through and did some of the things I did. Because I think I learned a lot. I think that my happiest memories politically of that period were of being Party Chairman. After that, I think it was about the beginning of '69, Charlie Watson told me that his wife wanted to move back to Texas (they were from Texas). So he wasn't saying he was going to leave right off the bat, but he was going to move to Texas at some point in the not too distant future. So I began to think about what was going to happen to our company. This happened just before my Dad died in 1970. I really enjoyed what I had done with this company because I think I had been fairly successful at restoring it to health. But I really didn't have any aspirations to expand it and whether I would do equally well with promoting it into a much bigger business was something I didn't really know too much about.

So, eventually, after some thought, I decided that I am going to seriously look for a buyer for this business. While the negotiations were going on, we were just making a huge amount of money. I mean it was just incredible. I've got to put in a little something here about labor negotiations in this situation, because, when I came into the picture, the packing house workers union had organized the plant back during World War II. It was headed up by a guy named Ralph Feldstein, who was a lawyer from St. Paul, Minnesota, I think. He had organized the thing way back then, but this union wasn't doing very well because they had all these members in Chicago and plants closed. They eventually merged with the meat cutters, which is an AFL unit. Of course we wanted to negotiate with them about the labor standards which I have indicated to you had something to do with compensation. We had a pretty good relationship. I found this very congenial work and I had my own way of doing it, I think. But I enjoyed it. I enjoyed the process of negotiating labor contracts. I think I scared my labor lawyer who was the guy who negotiated all the contracts. He was a pretty conventional sort and took on the labor unions, and there were a bunch of negotiations. I remember, when we were starting out, we were having lunch in this restaurant, and the labor people were sitting at one table and we were sitting at another table.

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At some point I got up and walked over and sat down with the labor group so we could talk and the labor lawyer was horrified. I think he thought I was about to give away the store or something.

My view of labor negotiations, or any other kind of negotiations, is different people do it different ways. Some people are, I think, out to terrify the other side, and all they do is spend their time proving how tough they are. Other people are of a different ilk and carry on in a different fashion. Some of them can be successful in one way and some of them can be successful in other ways, but, I think, if you stick to your own way of doing things, you will be all right. I think I was quite successful in the labor negotiations. The guy who was the head of our local was, I think, a pretty decent guy and had a good head on his shoulders. I knew all the bargaining committee. We put in a pension plan, and of course now in this day and age all the pension plans have disappeared unless you are working for the government, so we are back to square one, and God knows what's ever going to happen with that. And of course we negotiated medical benefits, and I've certainly been interested in the case law that has developed now where you can throw out the pension and medical benefits, as well you know, and do all these things which to my way of thinking, looking back the way they were 30 or 40 years ago, seemed pretty incredible. So times do change. I don't think I would have wanted to stay in this industry, because 20 years after I got out of it, most of it involved cutting wages, breaking labor contracts and all that kind of thing. If that's your cup of tea, that's fine, but some people can do well and survive but it's not my cup of tea. Anyway, we finally made a deal with Buddy Cook of Bluebird and sold him the company. There was a labor negotiation going on while he took over. He of course thought he was going to do a better job at that than a soft touch like me so he told Watson and me, the day that we closed the deal, that he didn't want us on the property. We had to get off the property. That was the kind of guy he was.

Q. So, you sell the business and then you have to figure out what you're going to do.

A. Right. Well for a while I had the Proxmire campaign and things like that. Dudley Godfrey sort of – I remember his saying to me one time, “Well, now you'd better figure out where you're going from here.” He brought that to my

attention in a forceful way. Well I joined his law firm is what I did. I was not overly happy there, I didn't think. I was trying to develop some of my own business and things weren't going too well. I got a call from the guy who was sort of Governor Pat Lucey's main lieutenant saying that they were looking for somebody who they could ask to serve on the Wisconsin Public Service Commission, and could I recommend someone. So I thought it over and I thought, well, maybe I'd like to do that for a while. So I called them back and said, “How about me?” So they were very happy to go with me. Shortly after that I won a big case at the law firm, and then I thought, well God maybe I made the wrong move here. I won some kind of a big matter before Myron Gordon, something to do with an injunction against a company that had food franchises. Anyway I went on to the Public Service Commission and, of course, that proved to be a pretty good deal because this was getting into a period when energy and utilities and communications and all this kind of thing were developing huge problems and presenting big challenges, environmental being one of them, obviously. So it became a pretty important job. When I first went in, I wasn't even the Chairman of the thing but became the chairman.

Q. Was that a governmental appointment?

A. Gubernatorial. And I had some very interesting experiences there. I met some real pioneers, and did important things. And of course I had some background in it. I had been practicing law in this area for some years before that so I knew what it was all about.

Q. How long were you on the Public Service Commission?

A. About three years. Then I got a call from one of my old partners at Isham, Lincoln and Beale. He said they were going to start an office in Washington and they would like me to take on that project. Well I thought about it. My wife Ann had died; she had a recurrence of cancer in 1971 just before I went on the Commission. We were at a conference in Holland about various economic matters when Anne detected some metastasis of her cancer.

Q. This is about twelve years and 4 kids after . . .

A. About 13 years after that. Rick was born in '58. She had the first operation in '59, and this is a little personal note: not too long after that, she asked me if I would give up drinking, because I had a bit of a drinking problem I think at that point in life.

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Q. The Irish genetic disease?

A. She asked me if – you know, here she was in danger of cancer and I might have to carry on without her, and she didn't want to think of me as having a drinking problem – so I gave it up. That's been probably one of the most important things that ever happened to me. I don't know what would have happened if it hadn't happened. We'll never know, it just occurred to me.

Q. Did you quit cold turkey?

A. Haven't had a drink since that day.

Well, we did everything we could, and by the end of '73, it must have been, she was in really bad shape. And I didn't think she was going to survive at that point. But she went into the hospital and she got in a very surprising remission. While she was in the hospital, she met Janet, who became my second wife, who was working in the hospital as a resident or an intern or something, I don't know. They became very good friends. Ann who, incidentally, was a registered nurse, came out of the hospital and she was all right into the summer. Then she began to decline again in the fall, and that was the downturn to the end. She survived that fall and she died in November of '74.

Q. So Rick was 16?

A. He was 16, and Michaela was 5. So, meanwhile, after that, my former partner made this offer to me about moving to Washington. I thought about it, and, of course, from the family point of view, it seemed like a very difficult thing to do. My wife has just died, and I have the five children to be concerned about. I'll tell you I didn't know how I was going to do that. Well, it turned out, perhaps mistakenly, I assumed I could handle that all right. So in '76---

Q. At this point, are you at Isham?

A. Well, I'm not there yet. I'm still at the Wisconsin Public Service Commission. I would join them when I went to Washington. When I first started out, I was going to go down there for a certain number of days a week, three days a week or some such thing. When I started, I didn't plan on moving until the following summer. Well I got down there and then, of course, it struck me what a difficult situation I had put myself in. Meanwhile, Janet's

husband died, actually before Ann died, the summer before she died. There was a doctor who was taking care of Ann, who at some point invited the two of us, Janet and me, out to dinner and I think he was trying to promote something there.

Q. The matchmaker, right? The widow and widower. I understand.

A. In fact in subsequent years and I never got any proof, but I had some suspicion that maybe Ann, as she was dying, might have suggested to him that this might be a way to go. These things do happen. So he took quite an interest in it. But after that dinner we didn't see each other again, I don't think, for another year.

Q. How are you handling working the job and raising the kids?

A. I am still at the Public Service Commission for a year. Well, I am commuting to Madison but I have got a housekeeper and I am not going there every day. It's only about an hour and a half drive so you can get back in the evening. I wasn't staying overnight and would just drive back to be with the kids. But then, of course, I went to Washington so that became a whole huge problem. But at some point after I had been there a couple months, Janet and I had now become quite close and so she decided with my approval that she would move into my house where the kids were. Of course, she was still a Resident, I guess, at the hospital in Milwaukee. So she moved into the house and sort of took over the kids. And when she did that, my reaction was, by God, this woman has got my interests at heart so I am going to seriously think about getting married. So, eventually, we decided to do that, and she and the kids came down to Washington, and we got married down there, and have been married ever since.

Q. Did you testify at all or lobby on the Hill in connection with the big case that developed involving Central and Southwest, and the need for it to transmit power interstate into Texas, thereby putting Texas electric transmission under Federal jurisdiction?

A. Oh, yes, I did just about everything. I was a man Friday in that case. I was sort of supervising the whole thing at the end. I lobbied Dick Arnold, who later became a judge, when he was working for Senator Bumpers from Arkansas. My daughter was a good friend of Bumpers' daughter in school. I did a lot of that and then Central and South West came up with some professional lobbyists.

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We did a lot of legal work and drafting and subsequently supported a bill and part of the process was providing legislative history. So I know where legislative history comes from. I have manufactured my fair share.

Let's see what other things. Well I argued some matters coming out of this case. We took an appeal from the Federal Power Commission to the D.C. Circuit. I argued that and, as I recall, got it remanded. I got involved with these antitrust cases. I argued in the Texas Commission. I talked to a lot of people representing the rural electric co-ops and of course we were on the side of the angels. We weren't on the side of Texas but we were advocating appropriate interconnection of the electrical system. So anyway I got appointed to the court while this big case was still going on. It was settled after I left the picture. They agreed to put in some direct current connection between Texas and Louisiana. I don't know if they ever put it in or not but I think they did. It was a lot of fun and it gave us a hell of a lot of work to do and it was a damned good thing to have a Washington office.

Q. So when did you get the call about the potential for the judgeship?

A. Well I was down there and living in Maryland. I had actually been offered an appointment to the Wisconsin Supreme Court before I left Wisconsin, but I didn't accept it. Then they started talking about adding judges to the federal courts, that was in this period.

Q. Why didn't you take the Wisconsin Supreme Court?

A. Well, that is a good question. My life was sort of in turmoil at the time. My wife had died, and I thought that you don't have the security there that you have with a federal judgeship. I just decided I couldn't do it at that time. Then they started talking about federal judgeships and I heard from a friend of mine that they were going to create a new judgeship for Wisconsin. Well, first of all, I didn't know whether the fact that I was not then living in Wisconsin would disqualify me from consideration. That was my first thought. Well, then I discovered that that probably wasn't the case so that is when I indicated pretty forcefully that yes, I would be very much interested in that, as I had been thinking along those lines. Of course when they have a new

administration in office, everybody starts thinking about what kind of jobs they can get. I once said, well if I were going to take a government job I would want to be a judge on the appellate court. Not knowing whether I had a chance of ever getting to be one, I had said that to a number of people. So when this thing opened up I put my name in right off the bat and then they set up this selection commission. It was called that at the time, that had people from all three states that were supposed to interview all the applicants.

Q. Now how were the members of that selected initially?

A. Well nobody ever knew the answer to that question. There wasn't any formal process that I know of. It just ended up that way. They were a pretty mixed bunch. So I don't know on what theory they were appointed. I mean, Justin Stanley, whom I knew pretty well, was the chairman of the thing.

Q. He had been President of the ABA.

A. He was President of the ABA. He had been a partner and he hired me at Isham, Lincoln and Beale. He was the hiring partner so he knew quite a bit about me. He was the chairman of that thing and Sarah Barker was on it.

Q. Well she had worked on the Hill for Senator Percy.

A. Percy, that's right. There was a fellow from Madison – Gordon Sinykin. I can't remember all of them. Anyway you had to be interviewed by them and they interviewed me in Madison. I think they had the whole committee there. The competition – I think the main potential competitor was Shirley Abramson. I think that, if she had actually been a competitor, I would have lost because it seemed to me that Griffin Bell, the Attorney General, was always trying to get her to run.

Q. Then she wasn't on the Wisconsin Supreme Court at that time.

A. No, she was on the Supreme Court. She had just been appointed. But they were trying to get her to run because she was a woman, among other things, and Griffin Bell was always anxious for her to put her name in. I am just speculating, but she never wanted to do it as far as I know. But Frank Remington from Madison was one of the leading candidates and Dick Cates from Madison who was known as a Watergate prosecutor.

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There were five people in the finals so in due course I had very strong support from Senator Proxmire. Senator Nelson remained neutral because, at least he told me, Cates was a partner of Johnny Lawton who was the former partner of Gaylord Nelson. It came out this way, much to my gratification, I must say. Because, even though I didn't think about it that much in my life after being a law clerk, I thought about it once in a while, but it definitely was something that I really wanted to do and I just didn't have any doubts about that I wanted to do it. I was on my way driving into Abilene, Texas, and I got word that I was nominated. So that's how that happened.

Q. Were you ever interviewed, or did you meet President Carter or the Attorney General, who was at that time Griffin Bell?

A. Yes. I had endorsed President Carter in connection with the Wisconsin Primary although I didn't have much to do with him personally. I met him when I was in Washington and had some discussions with Charles Kirbo who was one of his close advisors. I guess I probably had met Griffin Bell somewhere along the road. I was pretty active in the American Bar Association at that juncture. I must say that, when I was up for consideration for this job, I certainly talked to practically anybody of any consequence that I could think of in the state of Wisconsin in the political arena, including members of the Republican Party. My contacts were not exclusively Democratic. But there were a lot of Democrats obviously and I was gratified to find out that a lot of them seemed to like me. I have never been very bashful about saying that I didn't have any hesitation about getting into the political arena when it came to becoming a judge. I never apologized for that. Some people seem to feel that that is a reflection on their capabilities, but I have never felt that way about it. Political ability is something that you are well advised to have a little bit of in this kind of situation. Anyway that is the story of becoming a judge.

Of course, then, I had to move the family back again although I didn't move them to Milwaukee – I think partly, at least, because of the custom. There was some rule or something in the court that everybody had to live in the Chicago area. I had no personal objection to that. I felt that might work out better for me anyway,

mainly because, as I indicated earlier, I had a somewhat difficult childhood in Milwaukee. For some reason I think people that have had those experiences would rather do their own thing somewhere else in life and not in exactly the same place. At least I have found that true of a lot of people whom I have known. I thought: I have always had relatives there in Winnetka, and thought it was a very pleasant place and I was not averse to living there. So that is where I moved. Janet didn't have any strong feelings about it either. She went to medical school in Milwaukee so she likes Milwaukee, but she just wanted to be able to find some sort of medical practice that she could fit into and she was able to do that. So I stayed in Washington up until that time.

Q. What are the changes that you have seen in the court in your years on it?



A. Well, of course, the most obvious one is, when I went on the court it was, at least to outward appearance, ideologically not necessarily liberal but leaning in that direction. It certainly had a bigger representation of not just only those appointed by Democrats but people with some apparently more liberal inclinations and over the years has gradually moved to the right, with some interruptions, obviously. But, on the whole, the jurisprudence and the whole politics of the country has moved in the same direction, so that the posture, the locale of the federal courts in the general scenery of the country, has changed over the years. I mean the federal courts are now no longer innovating new

types of freedoms and protections and so forth so much as they are moving in the other direction and that has been reflected in this circuit and others. The role of the judge, I think, in the general picture of things is somewhat different than what I would have expected it to be when I was first appointed. The law is not being handed down by Earl Warren or Bill Brennan or others of that sort as 40 years ago but by people with a different outlook. That has been an obvious change. Specifically one can pick out things like criminal sentencing and various other specific aspects of the law that have changed remarkably since I have been on the court. Procedurally some things have changed, but not in any remarkable way, I don't think.

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Q. Well, procedurally, in my view, jurisdiction has become a huge gatekeeper both at the trial court level as well as the appellate court level, and that didn't exist in the past.

A. That's a good thing to mention. I mean that is generally ascribed to ideological conservatism, which is more concerned with questions of jurisdiction on the grounds of, I guess, that federal courts have limited jurisdiction and we don't want them exceeding their powers. We want them confined to their proper jurisdiction. Yes that certainly has been a change. I can think of a lot of changes but not of that caliber, that magnitude. I ought to mention, I think, that once things change, you forget about how they were before they changed. It is hard to remember what all the changes have been.

Q. Well, procedurally, in my view, jurisdiction has become I think you may recognize it and it is hard to do this without going back and looking at the statistics, but I think it became very hard to appoint counsel after being very much that we did appoint counsel for the court of appeals in a lot of cases. Before we went to the view that we weren't going to appoint counsel except in a few cases, and now I think that we have shifted back somewhere where we are appointing more counsel.

A. I think you are right. I think I have noticed that. Of course, I don't have as broad a view as you do of things of that sort. I don't see a big enough sample of cases where counsel are requested but I think you are right and I think that on this ideological business, there is always the tendency to move new people into the picture, to shift, and then over time the pendulum begins to swing back toward the middle. I notice that tendency in the courts with the frequency of en bancs and any number of things. There is always a tendency to seek out the middle.

Here's a purely mechanical thing: what is the status of the bench memo? Now this may just be my own practice, but I have found that bench memos over the years, having started out as relatively brief, summary kinds of documents, now are lengthy, detailed. All the law clerks seem to think that that is what you want. And, of course, you see probably the most radical form of that out in the Ninth Circuit. There they have these joint communal bench memos that are prepared by someone other than your own

staff and where 20 pages is relatively short. You get them 50 pages. I don't know what that indicates, but it is just a changing custom as I would see it.

I don't think there's nearly as much socializing now as there was when I first came on the court. Now that was partly I think a function of Tom Fairchild and his wife, who really promoted parties and cocktail hours and stuff like that, for judges to get together.

Q. I think he picked up on that from Luther Swygert, who treated the court as a family. Picnics at Judge Knoch's farm in the summer and things like that.

A. Yes, there just hasn't been much of that done in the successive years. We have a court that operates on a daily schedule, pretty much. and all these other or 90% of these other circuits operate on a weekly schedule so they tend to some extent to focus social events on the week for the sitting. They have parties and one thing or another during that week. We don't have a similar way of operating so we can't operate quite the same way.

Q. You were a law clerk, hired law clerks and have seen changes in the law clerk hiring process. Why don't you talk a little bit about that.

A. Well, of course, over time we have gone through many processes, but we've been on a pretty much settled track here in the last five years. My own experience with it is I don't depend as much as I used to on professorial recommendations or calling up people I know in the law schools and asking people for advice. I pretty much just go through the paper and find out who looks interesting and invite them in for an interview.

Q. You have seen a change in the court from the days when we got some big drug cases but not many and now we get a lot of drug cases and a lot of gun cases, what I call street crime cases, as opposed to large enterprises. Maybe you can comment about that.

A. Well the statistics may indicate that sort of change, but I think what impresses me the most is what little change there seems to be in the drug picture. I have the sense that I am doing about the same thing that I did 28 years ago or whenever I started hearing drug cases. It is very hard to detect any change in the drug culture of any sort.

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I find that a little discouraging but there may be more encouraging factors. We may have gotten the better of the big enterprises and got down to the little guys but I just have a hard time seeing that. I don't know.

Q. You mean we may not be winning the drug war? Isn't that what you are saying?

A. Well I certainly wouldn't disagree with that observation. But I really wish I knew a little more about it. I see the ultimate end of the process when somebody goes to jail, that is about where I am. But I don't see what is making it more or less attractive or feasible or whatever the proper adjective is to measure attraction to the drug situation. I don't know what all the forces are that are at work. I have the feeling that very few forces either for good or evil are changing in any sort of systematic way. There are just as many people with the need or desire to consume drugs and demand is certainly unabated. I guess that is why nothing else will change with it as theoretically it should. Drugs may be coming through Mexico when they used to go through the Caribbean and all of that. That may all be true but I don't really know. Have read that but I don't see how it makes any difference. Does it? I don't know.

Q. Have you noticed a decline in large corporation contract litigation?

A. Well, yes, I have, and I attribute that to the prevalence of arbitration; most of those matters are arbitrated rather than litigated, based on nothing but my own speculation. I think I do see the tendency. There's been less private litigation, what I call private litigation, I think, than there used to be.

Q. What can you tell me about some of the deceased members of the court of appeals, like Wilbur Pell.

A. Well, he was a friend, and of course he was a man of very strong [laughing] views about a lot of things, most of his views being what I would say very conservative, but he was a very friendly man, one of the most friendly people that I have run into here. And I will tell you my first impression of Wilbur. When I was first appointed to this court, I was invited to speak

at one of the local law schools. I got up to speak to them and there sitting in the front row was Wilbur Pell and his wife and that really made an impression on me. I thought, golly, these people are really trying to be friendly and trying to reach out and indicate an interest in the people who are coming on their court. I guess it made a good impression on me because I never found much to contradict that. Wilbur had a lot of friends; he left a lot of friends behind.

Q. How about Luther Swygert?

A. Well, Luther, of course, was, I thought, a close friend of mine, and I shared a lot of things with Luther that I haven't ever shared with anybody else. And of course he got me into the habit of going to the Abbey of Gethsemani which I sort of regarded as my obligation in later years to carry on Luther's tradition in that regard because I thought of him in the best kind of way in that setting. He just was loved by some of those monks who were buddies of his. I shared Luther's instincts about a lot of things and it was a real pleasure to know him. He was in the business of the judiciary. There aren't many people who can really become your friend as a judge. It's sort of an every man for himself business. People tend to have their own little empires and they don't share things readily. They seem to like to talk to each other on paper rather than in person. But Luther was in every sense of the word a real friend. I just admired the man. I liked the way he thought and I learned a lot from him.

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Q. One of your compatriots on those retreats was Harlington Wood.

A. Exactly. The first one that I ever went on was with the two of them. And the reason for that was that Luther had fallen down there and we were both friends of his so we thought we should go down and make sure he didn't fall again. That was a wonderful experience. Now Harlington never went back. I think there was a sort of a barrier in his mind that I am just speculating about and don't really know.

Q. How about Tom Fairchild?

A. Well now I always have had friendly relations with Tom Fairchild. I never had the degree of intimacy with him that I had with Luther Swygert. I always felt Tom Fairchild was a very perceptive man, I think, and very concerned about people's feelings, but there was a degree of remoteness about him, I always thought. He was not inclined to be anybody's buddy, and maybe that's the wrong impression. When you listened at the memorial service to his law clerks you would think that he was sort of an old buddy that hangs around the bar or something. I never had that impression of him at all. I thought he kept a certain distance. Maybe he felt that was appropriate to the judiciary, because he was certainly in my opinion the judge of judges, right out of the book. I admired him and certainly agreed with a lot of his thinking, but my relations with him never approached anywhere near the intimacy, for instance, that I had with Luther Swygert. I would always see Tom Fairchild as a judge rather than a politician and when I would see Luther, he had a lot of the politician in him I thought.

Q. Luther loved to talk politics.

A. Yes, he knew a lot of stories about politics and that is why I think he probably saw a lot of religion in political terms. There were contending forces and you did this and you did that. It didn't involve anything very profound. It was just sort of a superficial thing.

Q. Judge Dan Manion and you are also friendly.

A. I think Dan Manion is less wrapped up in his own ego than are 98% of the people in this business. He is not fixated on Dan Manion which makes him exceptional among judges. I have made this observation to a lot of people and I really do think he is a nice guy for that reason. I remember when he had his portrait presented or something and he came up with this guy from Notre Dame, Robert Rice, I think it was, who talked about his father. He didn't talk about Dan. I think Dan sort of sees himself as carrying on his father's tradition in life.

Q. Did Bob Sprecher pass away before you came on the court or was it after.

A. After. He was certainly a very solid, knowledgeable jurist and a very kind, decent human being. I just didn't know him well enough to pontificate about his personal qualities. I think everybody liked Bob Sprecher and as far as I can make out he didn't have any enemies.

Q. That is correct.

Q. You have done a lot of writing over the years, particularly on utility regulations for the law reviews and other journals. You obviously like to write academically.

A. Yes, I do. I wish I had done more writing because I have always got ideas about things that I want to write about and sooner or later I get around to writing about them. I guess I got into the regulatory scheme of things because I have practiced a lot of law in that area. I got involved in the American Bar Association sections that are active in those areas so I just knew something about it so I did a lot of writing about it. Of course, nowadays energy has become such a big issue in the world that it is not a bad thing to be interested in.

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Q. You have done some teaching work, I think, with the DePaul law school International Human Rights Law Institute group, and tell us a little bit about that.

A. Well, I have done a fair amount of teaching over the years in various fields. I have done some in that field and I have done some in regulation, and I have done some in energy, and some in – God knows what – antitrust and so forth. I am not teaching much currently, and I think, to be absolutely frank about it, I don't really enjoy teaching that much. I like having students and a lot of things about it, but I never thought I was really a great teacher and I just haven't fallen in love with it. I think I would spend my time more fruitfully writing than I would teaching. But that's just a frank appraisal of myself and my own inclinations. But I like ideas. I guess teaching and writing and all this is a form of intellectualism of one sort or another and I certainly enjoy that.

I remember when I first started out as a judge the thing that struck me favorably right off the bat was the variety of subject matters which came before the court.

Q. Dick let me ask you this last question: What motivates you?

A. Well that is always a good question. My wife says that I like fame, that I want to be recognized, and I think that's true. I mean, now, that's not the most noble motivation I could conceive of I suppose, but I think I do have it. I think I appreciate recognition, and I don't know if I have an abnormal need for fame or recognition, but I like to think that I have contributed something to the world that didn't happen before I got there. That's not a very profound answer to the question. We all have mixed motivations for a lot of things, but I would think that would probably be a fairly common motivation even in the judiciary where they write opinions that a lot of people read, make statements that are quoted, and they want somebody to know that they have been there and that they did something, accomplished something. But I suppose there are many who crave recognition more than I do. That is about the best answer I can give you off the top of my head.

Upcoming Board of Governors' Meeting

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year's conference. Upcoming meetings will be held on:

Saturday, December 4, 2010

Saturday, March 5, 2011

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM



EXPERT TESTIMONY . . .
A Cautionary Tale

By Gregory J. Scandaglia & Therese L. Tully *

It is not an understatement to say that there is scarcely a case that goes to trial of any complexity in which experts do not testify on both sides. *See Richman v. Sheahan*, 415 F.Supp.2d 929, 931 (N.D.Ill. 2006). “The demand for expert testimony by litigants has become insatiable. In response, an astounding number of ‘expert’ consultants and professional witnesses in virtually every field of human endeavor have arrived on the scene. Their proliferation, to borrow Justice Cardozo’s felicitous phrase, ‘would make Malthus stand aghast.’ *The Growth of the Law*, 4 (1924).” *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 372 F.Supp.2d 1104, 1106 (N.D.Ill. 2005). Case after case, however, has lamented the apparent willingness of experts to say whatever the party hiring them desires. *See Richman v. Sheahan*, 415 F.Supp.2d 929, 931 (N.D.Ill. 2006)(collecting cases). Judge Posner has lamented that all too often, experts are “ ‘the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face that cannot now be proved by some so-called experts.’” *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 382 (7th Cir.1986).

This malleability manifests itself in many ways, not the least of which is the expert’s willingness to fill factual and evidentiary holes in the case in which they are testifying with testimony that goes beyond their expertise, with the obvious and attendant risk that the greater the likelihood that the testimony will be stricken either because of an inadequate foundation or on relevancy grounds.

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For example, in a recent case, a defendant hotel owner was sued for fraud and breach of contract arising from a non-circumvention agreement signed by the defendant's agent in connection with the defendant's purchase of a luxury hotel. The plaintiff convinced the defendant to sign the agreement by falsely holding itself out as the real estate broker for the hotel with an inside track on the deal. The agreement contained a broad non-circumvention provision which provided that the defendant would not circumvent the plaintiff in any transaction either directly or indirectly. The agreement contained no temporal limitations and did not specifically describe any particular transaction that required plaintiff's inclusion. The defendant claimed that the agreement was an illegal contract because it constituted a broker's agreement and the plaintiff was not a licensed broker. Additionally, the defense argued that the contract was unenforceable because it was obtained through fraud and misrepresentations made by the plaintiff about its background, relationship to the property owner, and experience as a broker.

The plaintiff interpreted its contract as requiring the defendant to include it as a principal in any transaction involving the subject hotel. Despite the fact that the plaintiff had no capital and no experience purchasing hotels, the plaintiff argued that it was going to participate as a principal in the transaction by using the defendant's money to buy the hotel and surrounding land, but transfer only the hotel to the defendant, keeping the land for itself. Thus, the plaintiff argued it was going to be participating in the resort transaction as an owner/principal and not as a broker. The issue of whether the plaintiff was acting as a broker or as a principal was a critical issue in the case because, under applicable California law (and the law of most other states), a party cannot receive compensation for its participation in a real

estate transaction if it acts as an unlicensed broker. Therefore, if the plaintiff was deemed to be acting as a broker, it would not be entitled to any compensation, since it did not have a real estate license. On the other hand, if the plaintiff was acting as a principal, it would not be barred from receiving compensation.

In order to address the fact that the plaintiff had never consummated any transactions, had no hotel acquisition experience and no capital of its own and to rebut the defendant's claim that it was acting as an illegal broker in connection with the proposed real estate transaction, the plaintiff retained an expert, who was, by profession, an appraiser. The expert was initially disclosed as a damages witness. Later in the case, when it became clear that the illegal broker issue posed a serious threat to the plaintiff's case, the expert strayed beyond his core area of expertise to present opinions designed to explain and legitimize the plaintiff's conduct as a purported principal, as well as address shortcomings in the non-circumvention agreement.



Specifically, the expert opined that, despite its lack of experience and capital, the plaintiff was a "project developer" in the acquisition of the subject hotel, and that the plaintiff thereby acted as a principal and not a broker in the hotel transaction. Further he opined that plaintiff's participation in the transaction fulfilled a "common role" in mixed-use resort projects ("project role opinion"). Additionally, the plaintiff's expert tried to compensate for the lack of specificity or temporal limitation in the retention agreement by claiming that the agreement at issue was common in the industry, necessary and legally enforceable. With respect to the plaintiff's damages, the expert opined that, had the plaintiff not been circumvented, it would have owned, developed and then sold eighteen residential units on the property, thereby obtaining \$25.6 million.

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In the end, the expert was over-extended and his testimony and opinions created more problems for the plaintiff than it solved. A discussion of some of the issues presented by this use of expert testimony is provided below.

A. Sticking with the Expert's Core Competency.

Although it may seem elementary to say that experts should not be asked or allowed to opine on topics beyond their expertise, as unforeseen issues develop in a case, experts can be tempted to go beyond their core competency in order to address new evidentiary problems that have arisen. One potential consequence of overextending an expert is the exclusion of the expert's opinions. The exclusion of an expert's opinions may also mean that the opposing party's expert will testify without contradiction. This very risk was aptly demonstrated in the case discussed above, where ultimately, several of the plaintiff's expert opinions were excluded because the expert was asked to provide opinions beyond the scope of his experience and expertise. In order to appreciate how this happened, a review of the relevant Federal Rules of Evidence is helpful.

The starting point in preparing an expert is ensuring compliance with Federal Rule of Evidence 702. Under Federal Rule of Evidence 702, an expert may provide testimony on an issue only if he is "qualified as an expert by knowledge, skill, experience, training, or education" to opine on the specific topic. FED. R. EVID. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993). In the real estate case discussed here, the expert retained by the plaintiff was offered as an expert on a variety of topics, including non-circumvention agreements and the role that the plaintiff proposed to play in the real estate transaction – two of the key areas in the case. Even though the expert did not have first hand experience, training, or education in these areas, he attempted to provide an opinion on both of these issues.

In his non-circumvention agreement opinion, the expert asserted that non-circumvention agreements, like the one in the case, were commonly used in the real estate industry and were legally enforceable. He offered these broad conclusions despite admitting in his deposition that he:

- was not a real estate broker and had never acted as a broker;
- never drafted a non-circumvention agreement;
- never signed a non-circumvention agreement;
- never negotiated the terms of a non-circumvention agreement;
- never worked on a deal which involved a non-circumvention agreement;
- did not know what terms a non-circumvention agreement should include;
- did not typically use non-circumvention agreements in his business as real estate appraiser or consultant; and
- had never previously testified as an expert on non-circumvention agreements.

Indeed, the witness admitted at his deposition that all of his opinions regarding non-circumvention agreements were based solely on information he obtained from several real estate brokers who he interviewed in connection with his retention in the case. None of the brokers that the expert interviewed had been qualified as experts in the litigation, and none of them reviewed the particular non-circumvention agreement at issue in the case.

Despite these gaps in knowledge and experience, the plaintiff's expert nevertheless offered an "expert" opinion on the enforceability and common use of non-circumvention agreements, particularly by principals, in the real estate industry. The expert's second-hand non-circumvention agreement opinions were offered by plaintiff, not because the expert had any particular expertise that would allow him to draw such conclusions, but rather to address gaps in the plaintiff's case and prop up the plaintiff's claims with expert testimony.

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The expert's opinion that plaintiff's alleged role as a "project developer" in the acquisition of the subject hotel was a "legitimate effort to fulfill a common role in such mixed-use resort projects" suffered from the same defects. As an appraiser and a consultant who claimed expertise in marketing and financial analysis, the plaintiff's expert had no training or experience that would render him qualified to provide an expert opinion on the proper characterization of the role that the plaintiff played in the hotel transaction or on the legitimacy of this role. The expert had never been retained to provide such an opinion in the past, nor had he personally participated in any hospitality transactions that would provide him with the requisite training or experience to distinguish principals from brokers.

This kind of overreaching is exactly what Rule 702 and the *Daubert* standard seek to guard against. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court laid the foundation for Federal Rule 702 which was designed to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." See also *United States v. Parra*, 402 F.3d 752, 758 (7th Cir. 2005). It is important to note that the admissibility of all expert opinions are dictated by the *Daubert* standard, regardless of whether the opinion bears on "areas of traditional scientific competence or whether it is founded on engineering principles or other technical or specialized expertise." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000); see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

As the above discussion makes clear, it is critical to ensure that the proffered expert is sufficiently qualified in the relevant field. See *Richman v. Sheahan*, 415 F. Supp. 2d 929, 934 (N.D. Ill. 2006). It is important to keep in mind that an expert may be qualified by "knowledge, skill, experience, training, or education." FED. R. EVID. 702. Thus, significant academic or practical expertise in an area alone is sufficient to qualify a potential witness as an expert. *Kumho Tire*, 526 U.S. at 156; *Smith*, 215 F.3d at 718. Further, when retaining an expert, it is critical to

consider that the expert's testimony will not be admissible unless he is qualified as an expert on the specific issue about which he is being retained to offer testimony. *Ty, Inc. v. Publ'ns Int'l, Ltd.*, No. 99 C 5565, 2004 WL 2359250, at *5 (N.D. Ill. Oct. 19, 2004); *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994).

B. The Risks of Using an Expert to Opine on Too Many Topics.

Another risk that arises when attorneys seek to use an expert too aggressively in a case is the risk that the expert will be asked to opine on issues which are not relevant to the litigation. In order to be admissible, an expert's testimony must be relevant to the issues raised in the litigation. Evidence is considered "relevant" if it has a tendency to make the existence of a fact that is at issue in the lawsuit more or less probable than it would be without the evidence. FED. R. EVID. 401. Evidence that is not relevant is inadmissible. FED. R. EVID. 402.

In the real estate case discussed in this article, the expert's opinions on the roles played by various entities in real estate transactions, the allegedly routine use of non-circumvention agreements in the real estate industry, and the enforceability of non-circumvention agreements were not relevant to any issue in the litigation. The plaintiff's expert was not able to offer any relevant opinions in these areas because he lacked the necessary experience, knowledge or training to testify in these areas. Thus, rather than offering an opinion that would be of value to the jury, the expert was merely offering his view, unsupported by any expertise, of various aspects of the case. Thus, with respect to the expert's project role opinion, the expert's view that there may be several business entities involved in a hospitality project who play different roles did not make it more or less likely that the plaintiff played the role of a broker or a principal in the real estate transaction at issue. Similarly, the expert's view regarding the enforceability of non-circumvention agreements did not make it more or less likely that the particular non-circumvention agreement at issue was enforceable or unenforceable. Without the requisite experience, training, or background, an expert's testimony is not "helpful" to the trier of fact and thus does not pass the test for admissibility under Rule 702. *Sommerfield v. City of Chicago*, 254 F.R.D. 317, 329 (N.D.Ill. 2008).

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These kinds of defects in an expert's opinions often occur when counsel overuses his or her expert – asking the expert to cover too much ground, perhaps under the flawed belief that their case will be stronger if the imprimatur of an expert is affixed to as many topics as possible. Rather than strengthening a case, however, using an expert to provide opinions on topics that are not within his expertise often has the opposite effect. Even if the irrelevant opinions are not excluded outright, the longer an expert is on the stand, opining on topics that are outside his or her expertise, the greater the risk the expert poses to your credibility and the case. Often, the safest course with an expert witness is to obtain the critical testimony and then to get the witness off the stand as quickly as possible. Watching your expert get dissected on cross examination on peripheral issues can be almost too painful to watch. When it comes to experts, less is almost always more.

C. Rule 702 and the Need for a Methodology.

Expert evidence is admissible under Rule 702 only when "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FED. R. EVID. 702; *see also Daubert*, 509 U.S. at 589-90. It is well established that, in order to provide an admissible opinion, an expert must do more than supply a conclusory "bottom line," with no analysis or discussion of the methodology or analysis used to reach the conclusion. *Huey v. United Parcel Serv. Inc.*, 165 F.3d 1084, 1087 (7th Cir. 1999); *Solaia Tech. LLC v. Arvinmeritor, Inc.*, 361 F. Supp. 2d 797, 814 (N.D. Ill. 2005). Naked conclusions offered by experts are routinely stricken because such conclusions do not allow the court to determine whether the standard of admissibility set forth in *Daubert* has been satisfied. *Huey*, 165 F.3d at 1087; *Solaia Tech. LLC*, 361 F. Supp. 2d at 814.

An expert's opinion is rendered inadmissible when the opinion is based on speculation, conjecture, or hypothesis, unsupported

by the facts in the record. *Alover Dist., Inc. v. Kroger Co.*, 513 F.2d 1137, 1141 (7th Cir. 1975); *Robert Billet Promotions, Inc. v. IMI Cornelius, Inc.*, No. 95-1376, 1998 WL 151806, at *4 (E.D. Penn. Apr. 1, 1998). Expert opinions that are premised upon improper factual underpinnings or that are unsupported by the facts in the case are also subject to exclusion. *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 933 (7th Cir. 2003). While an expert is entitled to make assumptions in reaching his conclusions, those assumptions must all be supported by some evidence in the record. *Richman*, 415 F. Supp. 2d at 942.

Finally, an expert may only express opinions that are based on principles that withstand the *Daubert* test. *See Niebur v. Town of Cicero*, 136 F. Supp. 2d 915, 918-19 (N.D. Ill. 2001). Even a highly qualified expert cannot render an admissible opinion unless the opinion was formulated through some recognized method. *Id.*; *see also Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996). The test in *Daubert* is designed in part to ensure that, in reaching his conclusions, the expert utilizes his expertise and a recognized and accepted methodology in reaching his opinions. *See Kumho Tire*, 526 U.S. at 148-52; *Huey*, 165 F.3d at 1087.

In the case discussed here, the expert failed to meet the standards above. To begin with, the expert's conclusory non-circumvention agreement and project role opinions both ran afoul of the requirements outlined in *Daubert*. In his project role opinion, the plaintiff's expert concluded that the plaintiff was not an unlicensed broker but was instead playing the legitimate role of a "project developer." However, the expert did not provide any analysis or facts to support this conclusion or discuss the methodology used to reach this conclusion. In the expert's non-circumvention agreement opinion, he offered the conclusory statement that "[t]he use of a non-circumvention promise, such as the one [the plaintiff] used, was a necessary requirement by [the plaintiff] in order to ensure that its interests were not circumvented by the . . . defendants." Once again, the plaintiff's expert failed to explain the methodology he relied on in reaching this conclusion and failed to supply any analysis or facts that supported it.

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Additionally, the expert's valuation opinions, while logically connected to his experience as an appraiser, were based on unsupported assumptions and improper speculation. Recall that the plaintiff's expert opined that, had the plaintiff been included in the transaction, it would have developed and then sold the eighteen residential units on the resort property, thereby obtaining over \$25 million. Nowhere in the report or the testimony of the expert was there a substantive evaluation of the numerous factors that would have to be successfully overcome to support the development of the property (e.g. financing, permits, market demand). Additionally, the valuation opinions were not grounded in a proper application of any real estate appraisal methodology generally accepted in the industry.

Specifically, the expert's valuation opinions were based on the critical assumptions that: (1) the seller of the hotel was willing to do business with the plaintiff; (2) the defendant would have permitted the plaintiff to use its money in the transaction; and (3) the transaction that the plaintiff claimed it would have been involved in, had it not been circumvented, was in fact a transaction that would have ultimately closed. Additionally, the plaintiff's expert also made the critical assumptions that the plaintiff had the financial ability to develop and build the residential units that would presumably occupy the land and that the plaintiff would be able to get the regulatory approval and construction permits needed to build these units. None of these important assumptions was supported by any evidence in the record. Indeed, the record evidence was to the contrary.

Finally, even the expert's valuation opinions were not the product of an accepted methodology and did not utilize his knowledge.

The plaintiff's expert was a certified appraiser, but did not perform a formal appraisal of the land, the condos or the business opportunity. In preparing his expert report, the expert ignored virtually all of the requirements set forth in Uniform Standards of Professional Appraisal Practice for Real Estate Appraisers ("USPAP") for both appraisals and for consulting assignments. USPAP is promulgated by The Appraisal Foundation – an organization which has been authorized by Congress as the source of appraisal standards and qualifications – and the USPAP guidelines are generally accepted in the appraisal industry as the bible on the proper methodology for conducting appraisals and valuations.



An expert who fails to utilize the methodology recognized as the industry standard faces the risk of having his or her testimony excluded or, perhaps even worse, the risk of being successfully attacked on cross examination. See *Kohler v. C.I.R.*, No. 4621-03, 2006 WL 2059210, at *12-13 (U.S. Tax Ct. July 25, 2006); *Bruno v. Restuccia*, No. 014906C, 2005 WL 705379, at *11 (Mass. Sup. Ct. Feb. 28, 2005).

With respect to his second valuation opinion, the expert claimed that he used the sales comparison approach. While this methodology does exist and is accepted in the appraisal industry, the expert admitted that he did not directly apply the key factors that go into such an analysis, including any analysis of: (1) the size and quality of the units; (2) the units' location on the property; (3) the units' view; (4) the amenities or physical features of the units; (5) zoning requirements; (6) financing terms; (7) motivations of buyers and sellers; and (8) future economic conditions. See THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE Ch. 17 (Mary Elizabeth Geraci ed., 12th ed. 2001.)

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Confronted with these failures during his deposition, the expert acknowledged that his analysis was not meant to be a formal appraisal of valuation but instead a simple, "quick look" assessment of plaintiff's potential damages. In fact, the expert went so far as to admit that one did not need to be an appraiser to perform the mathematical calculation that he was offering. Thus, the expert's valuation opinions were not reached through the proper application of a methodology widely accepted in the appraisal industry and were really not the product of his expertise at all, but rather consisted solely of a set of assumptions about a real estate transaction that never took place and simple calculations that any lay person could duplicate. Although the witness was permitted to testify at trial as to valuation, the cross examination of the expert on some of these failures was perhaps more valuable to the defense than if the opinions had been stricken in their entirety.

D. The Consequences of Improperly Using an Expert Witness.

1. Exclusion of Evidence

As a result of the myriad shortcomings in the plaintiff's expert's opinions discussed above, the court granted a motion to bar several of the expert's opinions. See *Amakua Dev. v. Warner*, 05 C 3082, 2007 WL 2028186, at *16 (N.D. Ill. July 10, 2007). In particular, the court agreed that the expert's "project role" opinion and his opinion regarding the common use of non-circumvention agreements were beyond the scope of the expert's expertise. *Id.* The court also found that the project role opinion and non-circumvention agreement opinions were based on a handful of anecdotes of questionable relevance collected for the purpose of rendering this opinion, rather than on the expert's own experience in the hotel industry. Further, the court concluded that the expert failed to establish why the examples he provided demonstrated in any way that the plaintiff's proposed role in the transaction was a "common" one. *Id.*

The court was also concerned with the fact that during his deposition, the expert admitted that prior to talking to the ten

people he contacted to "educate [him]self about non-circumvention agreements," he did not know whether there was an industry standard non-circumvention agreement, and had never negotiated or drafted such an agreement, nor participated in a real estate transaction involving such an agreement. *Id.* Moreover, the court noted that non-circumvention agreements were not documents that the expert typically used in his business, nor did he have any opinion about what terms needed to be included in a putative non-circumvention agreement. *Id.*

Under these circumstances, the court concluded that the expert's opinions on the plaintiff's claimed role in the real estate project and on the common use of non-circumvention agreements were beyond the scope of the expert's expertise. The court therefore excluded these two opinions. *Id.* In addition, the court barred the plaintiff's expert from offering any testimony about non-circumvention agreements based on his interviews of other people because it was undisputed that the "interviewees" had not been tendered or qualified as experts in this case by the plaintiff, and also, had not actually reviewed the alleged non-circumvention agreement at issue in the case. *Id.* The court held that "a party cannot elide the prerequisites required to qualify such potential expert testimony – i.e., from the interviewees themselves – through the contrivance of having a person simply call the interviewees and then relate what they have told the interviewer." *Id.* For a discussion of the interplay between the hearsay rule and Rule 703, see *Dura Auto. Sys. of Ind. v. CTS Corp.*, 285 F.3d 609, 613-14 (7th Cir. 2002); *Thakore v. Universal Mach. Co. of Pottstown, Inc.*, 670 F.Supp.2d 705 (N.D.Ill. 2009); *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 387 F.Supp.2d 794, 808 (N.D.Ill. 2005).

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As a result of the Court's rulings, the plaintiff was barred from offering any expert testimony regarding the role that the plaintiff played in the transaction and regarding the non-circumvention agreement itself. Thus, the defendant's properly qualified expert went unchallenged in these key areas.

2. Loss of Credibility on Cross Examination

Sometimes, poor planning and decision making in choosing and preparing an expert witness results not in the expert's testimony being barred, but instead – and perhaps worse – in the expert being subject to effective cross examination during trial. An expert's credibility is one of the cornerstones of a case and if his or her credibility is severely damaged during cross examination, it may well spill over into other areas of the case. In the case we have been discussing, the plaintiff's expert made several serious mistakes in connection with his remaining opinions, all of which cost both the expert and the plaintiff dearly on cross examination.

Two serious mistakes made by the plaintiff's expert were the destruction of the notes that he made during his engagement and his attempt to withhold a draft of his expert report. Under Federal Rule of Civil Procedure 26(a)(2)(B), as it existed at the time of the trial and as it currently stands today, the plaintiff was required to produce any drafts of its expert's reports and any notes that its expert took during his engagement. See *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, 2000 WL 1843258, at *9-10 (W.D.N.Y. Nov. 2, 2000). In addition to the obligations plaintiff had to produce these drafts and notes under Rule 26, plaintiff was also obligated to produce these documents under the rider to the deposition notice that was sent to the plaintiff prior to the expert's deposition and under the document requests which sought, among other things, all of the notes and analyses performed by or reports produced by the plaintiff's expert.

Despite its obligations to keep and produce its expert's draft reports and notes, the plaintiff failed to produce any

of these documents in connection with the expert's disclosures under Rule 26. Drafts of the expert's report and his notes were again requested before his deposition. Plaintiff's counsel represented that there were no such notes or drafts. This statement turned out to be untrue.

During the expert's deposition, the expert testified that not only had he created both a draft of his report and a collection of notes – contrary to plaintiff's counsel's assertions – but further, that he had circulated and discussed the draft of his report with both plaintiff's counsel and with the plaintiff's other damages expert, and then modified his report based on those discussions. In his deposition, plaintiff's expert testified that he discarded both his draft and his notes. Drafts of expert reports are particularly important because they can be an invaluable tool in the cross-examination of an opposing expert. See, e.g., *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 74 F.R.D. 594, 595 (D. Conn. 1977); *Hewlett-Packard Co.*, 116 F.R.D. at 536-38. As one court has noted: "discovery of the reports of experts, including [draft] reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of the less favorable opinions expressed at an earlier date." *Quadrini*, 74 F.R.D. at 595.

Under the current federal rules, the destruction of notes or draft reports poses a tremendous risk to any case. The proposed amendment to Rule 26, which would make draft reports and perhaps notes subject to work product protection will reduce the risks that are currently associated with destroying draft reports or notes if it takes effect.¹ However, until that time, the destruction of drafts and notes may be punishable by sanctions, including the exclusion of the expert's testimony. *Hughes Aircraft Co. v. Century Indemnity Co.*, No. 96-55579, 1998 WL 166534, at *7-9 (9th Cir. 1998); *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, No. 00 C 5658, 2004 WL 784799, at *1-4 (N.D. Ill. April 12, 2004).

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¹ On September 15, 2009, the Judicial Conference met and approved the recommendations of the Committee on Rules of Practice and Procedure and approved the proposed changes to Rule 26 and several other federal rules. The rules were then transmitted to the Supreme Court in December with a recommendation that they be approved and transmitted to Congress in accordance with the Rules Enabling Act. The schedule would have the new rules taking effect, if not rejected by the Court or Congress, on December 1, 2010.

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Additionally, an adverse inference instruction may be given at trial. Finally, even if the expert's testimony is not excluded and no adverse inference instruction is given, the expert will undoubtedly be rigorously cross examined on the destruction of the notes or drafts, often with devastating effect.

As a result of the conduct described above, the plaintiff's case was damaged in two important respects. First, the plaintiff's expert admitted during his deposition that he discarded his notes because he was concerned that they may have been a liability for his client. This admission was brought out during the expert's cross examination at trial, seriously impairing the his credibility. Second, faced with the risk of sanctions for destroying both his notes and his draft report, the expert ultimately unearthed a copy of his draft report, after a motion to bar his testimony was filed. The Court compelled both the production of the draft report and required that the expert sit for a second deposition. Production of the draft report revealed that the plaintiff's expert had changed his use of the term "net profits" to the term "net proceeds" or "proceeds" throughout most of his report.

The majority of the claims in the instant case were governed by California law. Under California law, the measure of damages applicable to the sale of an interest in real property is "lost profits" or "loss of net pecuniary gain," because a plaintiff may not recover more than he would have received by full performance. "When loss of profits is a factor in fixing damage[,] the defendant is required to pay the plaintiff only the net profits, not gross profits, or gross selling price." *Olcese v. Davis*, 268 P.2d 175, 177 (Cal. Ct. App. 1954). Net profits are defined as the gains made from sales "after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed." *Resort Video, Ltd. v. Laser Video, Inc.*, 42 Cal. Rptr. 2d 136, 146-48 (Ct. App. 1995);

see also 24 WILLISTON ON CONTRACTS § 64:11 (4th ed. 2007).

At his second deposition, the plaintiff's expert admitted that it was a mistake for him to use the term "net profits" in his draft report because the term "net profits" necessarily meant that all of the relevant expenses had been deducted from the total. The expert's report, however failed to account for most of the relevant expenses. Based on the plaintiff's expert's incorrect use of the term "profit" and his failure to distinguish between gross proceeds and net profits, defendants moved to strike the plaintiff's expert's valuation opinion as unreliable and therefore inadmissible expert testimony, arguing that the expert's meaningless and misleading "lost profits" assessment, would serve no purpose other than to confuse and mislead the jury, to the prejudice of the defendants. See *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 814-815 (N.D. Ill. 2005); *Riach v. Manhattan Design Studio*, No. 00 C 5883, 2001 WL 1143243, at *3 (N.D. Ill. Sept. 25, 2001).



Although the court declined to strike the expert's opinions prior to hearing the testimony, the expert's draft report and his use of the term "net profit" provided excellent opportunities for cross-examination. Despite admitting during his deposition that it was a mistake for him

to use the term "profit" in describing his damages opinions, and admitting that he actually had no opinion about lost profits, only gross proceeds, plaintiff's expert stated on direct examination that he was testifying in order to inform the jury about the net profits that the plaintiff would have earned from the proposed real estate transaction. As a result of this testimony on direct and the admissions made by the expert during his deposition, the cross-examination of the expert was very damaging to the plaintiff's case. This damage could have been avoided by careful preparation of the expert's report and opinions. As it turned out, the best strategy for the plaintiff may have been to skip the expert's testimony all together or, at a minimum, eliminate those opinions that touched upon this inconsistency. While foregoing expert testimony may seem like a drastic decision, it may be necessary and should be seriously considered if the risk of putting the expert on the stand outweighs the likely benefits.

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E. The Challenges of Offering Expert Testimony on Legal Issues.

Expert testimony must assist the jury in understanding the evidence or determining a fact at issue. In the past, experts were prohibited under the rules of evidence from testifying about the "ultimate issue" in a case. Legal scholars like Wigmore and many judges have noted that this rule was unduly restrictive, difficult to apply and served only to deny the trier of fact useful information. *United States v. Scheffer*, 523 U.S. 303, 318-19 (1998) (Kennedy, J., concurring). Rule 704(a) eliminated this prohibition by providing that the "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704(a) does not specifically refer to an "issue of fact" or to an "issue of law." The advisory committee's note points out that Rules 701 (Opinion Testimony by Lay Witnesses), 702 (Testimony by Experts), and 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time), when used in combination, limit the inclusive scope of Rule 704, "[These Rules] . . . stand ready to exclude opinions phrased in terms of inadequately explored legal criteria." FED. R. EVID. 704, advisory committee notes.

However, the scope of Rule 704, even when limited by Rules 701, 703, and 403, still allows a broad range of expert testimony into evidence. Ostensibly, under Rule 704, an expert should be allowed to opine on all of the questions of fact that must be resolved by the jury. This observation raises an important question – if the expert witness is permitted to state his opinion on all the questions of fact that the jury must answer in arriving at its ultimate conclusion, why should a court prohibit an expert from stating the legal conclusion that is compelled by his or her answers to the questions of fact? Stated another way, if the expert's answers to factual questions require a certain conclusion, once the appropriate legal standard has been provided by the court, hasn't the expert, in effect, already stated a conclusion of law, even if he has not used legal terminology to articulate his answers?

There are several reasons why expert witnesses are not allowed to testify as to the ultimate legal issues or conclusions in a case. First, allowing an expert witness to testify as to a legal conclusion may cause the jury to give too much weight to the expert's testimony, and the jury may incorrectly infer that it should look to the expert for guidance on the legal principles applicable to the case. *Nieves-Villanueva v. Sato-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997). Second, because the jury is not allowed to decide pure questions of law, expert testimony on the law is not helpful to the jury and thus does not fall within the terms of Federal Rule of Evidence 702, which allows expert testimony only if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Nieves-Villanueva*, 133 F.3d at 100. Thus, Rule 704 does not allow expert opinions containing "legal conclusions," not because they involve an ultimate issue, but because they do not assist the trier of fact, and are thus not "otherwise admissible." *Nieves-Villanueva*, 133 F.3d at 100; *see also Giles v. Rhodes*, No. 94 Civ. 6385, 2000 WL 1425046, at *17-18 (S.D.N.Y. Sept. 27, 2000).

Although the prohibition against expert testimony which constitutes legal conclusions is easily stated, it is often difficult to apply. This difficulty arises in part from the tremendous discretion that courts have in admitting and excluding expert evidence and from the difficulty in drawing a clear distinction between "fact" and "law." *United States v. Parris*, 243 F.3d 286, 288 (6th Cir. 2001). The bar against allowing experts to testify to legal conclusions does not mean that an expert will not be allowed to offer testimony on "legal issues." *Am. Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1461 (7th Cir. 1996). It is appropriate for an expert witness to assist the jury in understanding the facts in evidence, even though reference to those facts may be expressed in legal terms, although each case presents its own set of challenges. *See* discussion in *Richman*, 415 F.Supp.2d at 946, *et seq.*

In *United States v. Buchanan*, the court held that an expert could permissibly testify that a certain weapon had to be registered with the Bureau of Alcohol, Tobacco, and Firearms, concluding that although "unadorned legal conclusions are impermissible . . . courts have allowed the expression of expert opinions on ultimate issues of fact." 787 F.2d 477, 483 (10th Cir. 1986).

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Experts have also been allowed to testify that certain drugs come within a particular statutory classification, *see United States v. Carroll*, 518 F.2d 187, 188 (6th Cir. 1975), and that certain expenses are deductible under the federal tax laws, *see United States v. Fogg*, 652 F.2d 551, 556-57 (5th Cir. 1981). In *Calusinski v. Kruger*, the Seventh Circuit held that an expert witness was not only allowed to explain the proper procedures used by law enforcement officials to restrain arrestees who resist arrest, but also to testify that the defendants' actions were well within established guidelines for use of force by the police. 24 F.3d 931, 937 (7th Cir. 1994).

Expert testimony about legal standards can be proper under Rule 702 if the expert does not attempt to define the applicable law that the jury must apply in exercising its fact-finding function. However, when the purpose of testimony is to direct the jury on the applicable law, the testimony will not be allowed. The key when confronted with this issue is to determine whether the same information can be elicited as a fact, where it would be inadmissible when articulated as a legal conclusion. For example, where a court might exclude an expert's testimony that the plaintiff had been discriminated against because of her national origin, the defendants could ask their expert whether she believed that the plaintiff's national origin motivated the hiring decision. *Torres v. County of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985); *see also Marx & Co. v. The Diner's Club, Inc.*, 550 F.2d 505, 512 (2d Cir. 1977) ("The expert, for example, may tell the jury whether he thinks the method of [securities] trading was normal, but not, in our view, whether it amounted to illegal manipulation under Section 9 of the Securities Exchange Act of 1934.").

The need to assess whether an expert's proposed testimony is admissible in that it addresses factual issues, even though it is phrased in legal terms, frequently arises when dealing with expert testimony in regulated areas. In the case that is the subject of this article, the defendants sought to offer the opinions of an expert who was the former commissioner of the California Department of Real Estate. The expert was prepared to opine that:

- (1) the plaintiff did not perform activities as a principal in the transaction at issue;
- (2) the plaintiff performed activities that rendered it a broker under California real estate industry, custom, and practice, and the California Business and Professions Code ("California B & P Code");
- (3) the plaintiff's activities did not satisfy industry custom and practice or the California B & P Code because the plaintiff was not licensed in California, the plaintiff failed to carry out duties of disclosure and fair dealing owed to the defendants, and plaintiff improperly acted as a dual agent; and
- (4) the California B & P Code provides that individuals and companies cannot be compensated where they fail to satisfy the licensing requirements.

The plaintiff moved to bar these opinions, in part, based on the argument that they constituted improper legal conclusions. In ruling on the plaintiff's motion to bar these opinions, the Court concluded that although some of the opinions were stated as legal conclusions, the same information could be elicited in an admissible format. *Amakua*, 2007 WL 2028186, at *11. For example, the Court concluded that, where the expert opined that particular provisions of California law require a real estate brokerage license in certain situations, the opinion constituted an impermissible legal conclusion, but that similar testimony could be elicited in an admissible way. *Id.*

The Court further concluded that many of the defendant's expert's opinions consisted of factual conclusions that were based on legitimate foundations. *Id.* The Court noted that, although the expert's factual conclusions were stated in terms of the applicable underlying legal principles, the opinions were not improper because if the factual assertions were unmoored from the underlying legal framework, they would be potentially irrelevant and/or misleading. *Id.* For example, the defendant's expert opined on the standards that governed real estate brokers in California, and opined on the kinds of activities that could make one a "broker." *Id.* The Court found that these opinions were admissible because, in assessing whether the plaintiff and its agents were acting like real estate brokers when they entered into the non-circumvention agreement at issue in the case, these factual conclusions might be helpful to the trier of fact. *Id.*

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The Court held that, although the defendant's expert would not be allowed to testify to the ultimate legal conclusion that the plaintiff was acting as an illegal broker when it entered the non-circumvention agreement, he would be allowed to testify as to what activities, in his experience, were brokerage activities and whether the plaintiff's activities were more like that of a broker than of a principal. *Id.*

When dealing with cases involving standards of conduct which are defined by statutes or regulations, courts have allowed experts to testify about: (1) whether conformity to a standard of care "is a factual question, not a legal conclusion," and whether the installation of a pipeline conformed with industry standards and was "safe" (*Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 239-240 (5th Cir. 1983)); (2) the legal standards associated with the proper response to certain prison situations and whether the party satisfied those standards (*Haley v. Gross*, 86 F.3d 630, 645 (7th Cir. 1996)); and (3) professional standards for jailers to follow in cases where a prisoner attempted suicide and whether the conduct of the defendants reflected "deliberate indifference" (*Heflin v. Stewart County Tennessee*, 958 F.2d 709, 715 (6th Cir. 1992)). *See also Kopf v. Skyrn*, 993 F.2d 374, 379 (4th Cir. 1993) (allowing expert to testify as to "prevailing standard of conduct for use of slapjacks"); *United States v. Schatzle*, 901 F.2d 252, 256 (2d Cir. 1990) (allowing expert in excessive force case to testify as to the training Secret Service Agents receive in dealing with assailants); *Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981) (permitting expert in corrections administration to opine on whether failure to review the background of prisoners in making cell assignments amounted to a breach affecting their personal safety); *Am. Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1461 (7th Cir. 1996) (allowing expert testimony on whether lawyer breached standard of care under Indiana malpractice law). In each of these cases, important factual determinations required reference to legal standards, guidelines or regulations.

Thus, under Rules 702 and 704, an expert may testify about applicable professional standards and the defendant's performance in light of those standards. *Richman*, 415 F. Supp. 2d 945; *Amakua*, 2007 WL 2028186, at *11. Where the testimony contains terms that have a distinct and specialized meaning in

the law, which is different from that presented in every day use, the testimony may be deemed a legal conclusion and may be subject to exclusion. However, where the word also has an everyday meaning, the testimony should not be excluded as constituting a legal conclusion. Even if the everyday understanding of a term and its legal meaning are congruent, exclusion is inappropriate where the opinion will not consist of a naked conclusion (i.e., the defendant's conduct was reasonable, was negligent, etc.) but will instead be based on sufficiently explored legal criteria. *Id.* In sum, if an expert witness tries to state an opinion on the current status of the law on a particular subject or to instruct the jury on the law, such testimony will almost always be excluded. Where the expert witness states an opinion that is factual in nature but that incorporates words or phrases with specific legal definitions or references, this kind of testimony will generally be admitted if the court is convinced that the legally defined word can be understood by the jury in a manner that does not depend on the legal definition. Finally, where the expert tries to state, using legal criteria, a conclusion that is essentially the same as the legal conclusion the jury will be asked to reach, the testimony will often be excluded.

Conclusion

Experts are an important and necessary part of many cases and if used properly, they can often provide the margin of victory. However, when misused or overextended, an expert can become a significant liability. As some of the cautionary tales from the case discussed in this article demonstrate, some of the key considerations in utilizing an expert include:

- carefully identifying topics that are suitable for expert testimony;
- choosing an expert with the specific background, training or experience that matches the selected topics on which the expert will opine;
- limiting the opinions of your expert to those supported by his or her expertise;
- avoiding the pitfall of using the expert to compensate for factual or evidentiary deficiencies; and
- resisting the temptation to cover too much ground with your expert.

By keeping these guidelines in mind as you retain and prepare your expert, you will greatly increase your chances of successfully using your expert witness, and consequently, your chances of prevailing at trial or on summary judgment.

Announcements

MICHAEL POPE HONORED BY NORTHWESTERN UNIVERSITY SCHOOL OF LAW



CHICAGO — Michael A. Pope, a partner in McDermott Will & Emery's Chicago Trial Department, was honored recently by Northwestern University School of Law with its Alumni Public Service Award, sponsored by the Student Funded Public Interest Fellowship

Program. Mike was selected for his outstanding contributions to public service and the legal community over the course of his career.

Mike started and still sits on the Board of the Illinois Equal Justice Foundation, which receives funds from the state of Illinois and has made grants of more than \$10 million to pro bono legal service providers and mediation centers throughout the state. Previously, he served for two years as president of the Lawyers Trust Fund of Illinois and was the first president of the Coordinated Advice and Referral Program for Legal Services, a nationally recognized program which coordinates all the legal service providers in Cook County.

He also served as Chair of the Board of Directors of the National Judicial College in Reno, Nevada, and was President

of Lawyers for Civil Justice, a national organization of corporate counsel and defense trial lawyers who work for improvements in the civil justice system. Mike also served as President of the Seventh Circuit Bar Association and of the International Association of Defense Counsel. He is a Fellow in the International Academy of Trial Lawyers, the American College of Trial Lawyers and the International Society of Barristers.

www.mwe.com

Writers Wanted!

The Association publishes The Circuit Rider twice a year. We always are looking for articles on any substantive topic or regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

If you have information you think would be of interest, prepare a paragraph or two and send it via e-mail to: Jeffrey Cole, Editor-in-Chief, at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.

Seventh Circuit Annual Report Summary

By Gino Agnello

The 2009 annual report continues to show the unusual roller coaster statistical trends we have noted in the past few years. Instead of a slow predictable growth we usually see, the regional Courts of Appeal filings shrunk by 5.6% to 57,740 cases nationally. (Down from 61,104 cases in 2008) However, the Seventh Circuit appellate case filings grew 4% (3468 cases) Appeals of administrative agency decisions dropped 26%. Civil appeals fell 2% while Criminal Appeals remained stable. Bankruptcy appeals rose about 3%.

The median time for merit terminations in the Seventh Circuit Court of Appeals is 10.5 months. That time is a bit less than the national average of 12 months. This time lapse is measured from the filing of the notice of appeal to the final disposition in the Appellate court.

The national median time for merit terminations when measured from the filing in the lower court to final disposition in the Court of Appeals is 31.7 months. This is slightly shorter than the same time frame for cases in the Seventh Circuit (32 months) When comparing cases terminated after oral argument versus cases terminated after submission on briefs, the Seventh Circuit continued to hear a very large percentage of oral argument (46%) compared to the national average (28%)

Similarly, the Seventh Circuit's ratio of published to unpublished opinions shows the court publishes a higher percentage of opinions than any other circuit. The national average percentage of published opinions is 16.2 %, whereas the Court of Appeals for the Seventh Circuit's publishes 39% of their opinions.

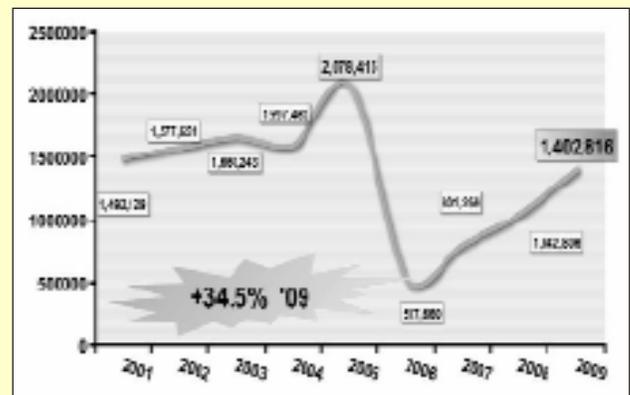
In 2009 the Court of Appeals began to use visiting judges from the Seventh Circuit District Courts. That practice has been very successful and will continue in 2010.

In the nation's district courts, total civil and criminal case filings rose 4% to 353,052 cases. Criminal case filings

increased by 38% (76,655 cases). Civil filings in the Seventh Circuit district courts increased 7.5% (17,191) Criminal case filings rose about 3% to 3035 cases. Filings for immigration cases increased 21%, fraud cases rose 8% and drug cases increased 5%.

Over the last few years the Bankruptcy courts have begun to recover from the large decline in case filings after the passage of the "Bankruptcy Abuse and Prevention Act of 2005" (BAPCPA). 2008 brought a 30% gain in filings. 2009 brought an even larger increase in case filings (34.5%) The filing total was 1,402,816 cases (Fig.1)

Nationally, Bankruptcy case filings grew 45.5% in Chapter 7 and increased 67% in Chapter 11 cases. The Seventh Circuit Bankruptcy Courts registered a 30% gain in total filings.



(Fig. 1)

The courts of the Seventh Circuit remain very busy and productive. Although Appellate case filings are down slightly, all indications are that caseload levels for District and Bankruptcy Courts will continue to increase in 2010. continue to increase in 2009.



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