Federally Speaking

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by Barry J. Lipson

The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column* Federally Speaking.** ***The views expressed are those of the author or the persons they are attributed to and are not necessarily the views of the FBA or ACBA.

LIBERTY'S CORNER

SAFE AND FREE FOR "U" AND ME! In the October 2002 ***Federally Speaking*** column we reported that "so far" George Washington Law Professor Jeffrey Rosen has given American Society, though not the current **Administration,** a passing grade in protecting our liberty. "So far," he advised, "in the face of great stress, the system has worked relatively well. The **Executive Branch** tried to increase its own authority across the board, but the **Courts** and **Congress** are insisting on a more reasoned balance between liberty and security." The **American Civil Liberties Union (ACLU)**, however, is concerned with what it characterizes as the **Administration's "'Just Say No' policy — no judicial review, no counsel, no public disclosure, no open hearings, essentially no due process"** (emphasis added). It believes that without a broad grass roots involvement, these ongoing "anti-liberties" actions of the **Executive Branch** will seriously erode our hard won liberties. Therefore, the **ACLU** has launched nationally "**Keep America Safe and Free, The ACLU Campaign to Defend the Constitution,**" with an initial funding of $3.5 million. This campaign will focus on keeping the "American people [informed] of actions taken by the **Administration** and **Congress** that have the effect of unnecessarily restricting **free speech**, withholding **due process**, or challenging the **right of judicial review**," including, for the first time in it's over eighty-year history, airing TV "infomercials," these showing the **Attorney General** re-writing and cutting-up the **Constitution** to implement the Administrations "**Just Say No**" policies. This campaign will also monitor the implementation of the **USA Patriot Act;** file civil liberties lawsuits in state and **federal courts**; lobby local and state jurisdictions in specific areas of civil liberties; and organize pro-civil liberties activities at the grass-roots level. Why? It would seem obvious! To do it's perceived job of safeguarding your liberties, while being mindful of your safety, and while helping you to realize that you are the "**U**" in **ACLU**. That it is ***your*** liberties that are at stake! (See also ***"Outer Limits?"*** in the ***Federally Speaking*** Extra Issue of November 29, 2002.)

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FOOTNOTED IN MOUTH DESEASE! What if any action should be taken against an **Officer of the Court** who maligns a Court or a member of a Court in a filed or published document? For instance, what about writing: 1) "Seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members;" or that a justice's views are "irrational" and "cannot be taken seriously?" 2) That a study "discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases?" 3) That an "opinion is so factually and legally inaccurate that one is left to wonder whether the

court of appeals was determined to find for appellee" and "said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)?" 4) Any of the many sharply barbed and gory attacks by **Officers of the Court** and **Members of the Bar** on various **U.S. Supreme Court** decisions, including ***Brown v. Board of Education,*** 347 U.S. 483 (1954) and ***Bush v. Gore,*** 531 U.S. 98 (2000)? Are these instances of constitutionally protected **First Amendment** free speech "within the broad range of protected fair commentary on a matter of public interest," and/or merely forms of "rhetorical hyperbole incapable of being proved true or false," as dissenting Indiana Supreme Court Justices Frank Sullivan Jr. and Theodore Boehm found in ***In Re Wilkins,*** **Case No. 49S00-0005-DI-341** (October 29, 2002), with regard to one of these instances; or would these be "scurrilous and intemperate attack[s] on the integrity of the court" (***Michigan Mutual Insurance Company v. Sports Inc***., 706 N.E.2d 555 (Ind. 1999)), mandating sanctions against the offending individuals? For your information, the first are examples of the comments of **U.S. Supreme Court** Justice Antonin Scalia in his published opinions in ***Atkins v. Virginia,*** __U.S.__, 122 S.Ct. 2242 (2002) (death penalty), and in ***Webster v. Reproductive Health Services,*** 492 U.S. 490 (1989) (referring to fellow Justice Sandra Day O'Connor), respectively. The second is a report of a judicial survey appearing in the regular November 2002 ***Federally Speaking*** column. The third is the "scurrilous and intemperate" or, perhaps, **constitutionally** protected, footnote of Michael Wilkins, Esq. from ***Michigan Mutual, supra***, sanctions for which were affirmed 3-2 ***In Re Wilkins***, under the Indiana version of ABA Model Rule of Professional Conduct 8.2. And the last is what Justice Boehm found this offending footnote to be similar to in his ***Wilkins*** dissent. Then, too, should Justice Robert Rucker, a member of both the majority in ***Wilkins*** and the lower court panel Wilkins chastised, have also participated at the higher level? If the Indiana Supreme Court does not reconsider, the **First Amendment** protected speech issue may yet reach the **U.S. Supreme Court,** which has already "made it clear that 'disciplinary rules governing the legal profession cannot punish activity protected by the **First Amendment**.' ***Gentile v. State Bar of Nev.***, 501 U.S. 1030, 1054 (1991)" (**Wilkins dissents, supra**). One wonders as to the affect of Justice Scalia's utterances then, or who after the dust clears will have one's foot in one's mouth.

CORPORATE COUNSELS HEADS UP! From years of corporate counseling it has been a "rule of thumb" that if you want the **Government** to bring a case they won't, and if you don't want the case brought they will! During my **Food, Dug and Cosmetic** days, I vividly remember amassing a case full of vivid "passing off" examples, by a major interstate supermarket chain, of private label groceries with label designs and coloring virtually identical to the brand name products (including those of my client), and shipping this case with a detailed analysis to the **FTC**. The **FTC**, of course, kept the case of groceries, while rejecting the legal case. But times may be a changing! In ***U.S. v. ElcomSoft and Dmitry Sklyarov*** (NDCA, CR-01-20138RMW), discussed in "***Digital Wars And Fair Use,***" below, as stated therein, "Adobe, the producer of the subject 'e-books' … handed the **FBI** the case on a 'cyber-platter'." According to the affidavit in this **Federal Criminal Prosecution** of **FBI** Special Agent Daniel J. O'Connell, assigned to the **FBI's High Tech Squad** at San Jose, California, "Adobe purchased a copy of the ElcomSoft unlocking software over the Internet … Thereafter, ElcomSoft … electronically sent the unlocking key registration code from ElcomSoft [in Russia] to the purchaser (Adobe) in San Jose, California … A review [by Adobe] of the opening screen on the ElcomSoft software purchased showed that a person named Dmitry Sklyarov is identified as being the copyright holder" of this AEBPR unlocking software. "Adobe learned that Dmitry Sklyarov is slated to speak on July 15, 1001 [sic: 2001] at a conference entitled Defcon-9 at Las Vegas Nevada" and advised me that "Sklyarov is scheduled to make a presentation related to the AEBPR software program" there. The **Government** arrested and indicted Sklyarov when he visited the U.S. for this conference. From Adobe's viewpoint, a great result. Adobe was able to drop its civil lawsuit and let the **Government** proceed criminally in its stead. (For another viewpoint, see **Digital Wars And Fair Use** below.) Thus, the bottom line of this "Heads Up" for plaintiff counseling is "it may be worth a shot to seek **Fed** involvement, if available it could be cheaper, harsher and more effective." However, the "Heads Up"

bottom line for defense counseling is more ominous: "**Fed** bullets may be a flying, keep you bottoms low and heads down!"

DIGITAL WARS AND FAIR USE. **The Digital Media Consumers Rights Act of 2002 (DMCRA)** was recently introduced in **Congress** by Representatives Rick Boucher (D-VA) and John Doolittle (D-CA), as a counterattack in the "Digital Media Wars," to preserve the time-honored **Doctrine of Fair Use** in the field of technologically "protected" digital/electronic works, and to permit the circumvention and bypassing of technological protection measure that allegedly have annihilated "fair use" in this battlefield. The aggressor, according to this Bill's proponents, the "Entertainment/Recording Industry," purportedly had such "fair use" outlawed through its massive lobbying campaign, which brought about the 1998 enactment of the **Digital Millennium Copyright Act (DMCA).** "We all employ the **Fair Use Doctrine** in everyday life," advised Rep. Boucher. "From the college student who photocopies a page from a library book for use in writing a report to the newspaper reporter who excerpts materials for a story, to the typical television viewer who records a broadcast program for viewing at a later time. … The **Fair Use Doctrine** was fashioned by the **federal courts** as a means of furthering the vital free expression values that are given constitutional recognition in the **First Amendment**. … It permits limited personal non-commercial use of lawfully acquired **copyrighted** material without the necessity of having to obtain the prior consent of the owner of the **copyright**," such as the use of this quote here, if the Representative's remarks had been **copyrighted**. He further contends that the "unfairness" of this crippling of the **Fair Use Doctrine** has already surfaced in litigation and threatened litigation forays, citing ***Elcomsoft*** and ***Felten***. In ***U.S. v. ElcomSoft and Dmitry Sklyarov*** (see "***Corporate Counsels Heads Up!***," above), a Russian software manufacturing company is being prosecuted before a federal court in the United States" on criminal charges for making software that enables the lawful owner of an electronic book "to make a back-up copy," or which can be used where there is a "malfunction, damage or obsolescence" (exceptions under the DMCA), because the software must circumvent "the technical protection measure guarding access to the text of the electronic book." While Adobe, the producer of the subject "e-books" who handed the **FBI** the case on a "cyber-platter," has abandoned its civil suit, the Government has advised your columnist that it will continue the criminal prosecution in the **U.S. District Court for the Northern District of California** of ElcomSoft (though not of defendant Dmitry Sklyarov, the Russian programmer the Government had arrested and indicted when he visited the U.S., if he continues to cooperate). In ***Felten, et al. v. RIAA***, ***SDMI, Verance Corp., John Ashcroft, in his Official Capacity as Attorney General Of the U.S., et al.*** (DCNJ, CV-01-2669GEB), Edward W. Felten, a "tenured professor of computer science" at Princeton University, and a key Government witness in ***U.S. v. Microsoft*** (his testified about software he developed to remove the Microsoft web browser from the MS Windows operating system), "enters a contest to defeat watermarking technology that will be used to protect against the redistribution of audio content." Then, according to the Electronic Frontier Foundation (EFF), in doing so "Professor Felten and a team of researchers from Princeton University, Rice University, and Xerox discovered that digital watermark technology under development to protect music sold by the recording industry has significant security vulnerabilities. The recording industry, represented by the **Recording Industry Association of America (RIAA)** and the **Secure Digital Music Initiative (SDMI) Foundation**, threatened to file suit in April 2001 if Felten and his team published their research at a conference." Felten and his team thereupon sought a **Declaratory Judgment** in the **U.S District Court for the District of New Jersey** against **RIAA, SDMI**, **Attorney General Ashcroft** and others, based upon their **First Amendment** free speech rights, and only abandoned this litigation when the defendants agreed not to bring legal actions under the **DMCA** for their making this research public. Ironically, the Record Industry's threat of suit was made "by the very organization that sponsored the contest." It appears likely that a hotly contested key battle in these Digital Wars will be fought on **Capital Hill** next session. Hopefully, "fairness" and the **Constitution** will prevail. Also, this term, the **U.S. Supreme Court** will be deciding if "the author's life plus 70 years" is the "limited" **copyright** contemplated by the **U.S. Constitution**. (For another attack on the alleged "anti-

competitive" use of Intellectual Property Law, see "***Bush Opposes Patent Bushwhacks***," in the ***Federally Speaking*** Extra Issue of November 29, 2002.)

EYES NORTH! ***Federally Speaking***, we must keep a constant lookout beyond our borders. The **Canadian Competition Bureau's** Annual Report is helpful in this regard. For example, it confirms that as "a result of the increasing integration of the world economy and the globalization of commerce, international cartels are growing both in number and complexity," that accordingly the Bureau is "working more and more with agencies from other jurisdictions in its investigations of transnational anti-competitive conduct," and that the Canadians are currently "investigating 18 international cartels." Moreover, on "April 24, 2001, the Bureau, along with competition agencies from 12 countries, participated in the launch of a Web site that allows consumers to file complaints on the Internet about e-commerce transactions with foreign companies," which has grown to 17, and now includes the **Australian Competition and Consumer Commission, the Belgian Federal Administration for Economic Inspections, the Canadian Competition Bureau, the Danish Consumer Ombudsman, the Finnish Consumer Ombudsman, the Hungarian General Inspectorate for Consumer Protection, the Japanese Cabinet Office, NCAC, METI, JFTC, the Korea Consumer Protection Board, the Latvian Consumer Rights Protection Centre, the Mexican Procuraduria Federal del Consumidor, the New Zealand Ministry of Consumer Affairs, the Norwegian Consumer Ombudsman, the Polish Office for Competition & Consumer Protection, the Swedish Consumer Ombudsman, the Swiss State Secretariat for Economic Affairs, the United Kingdom Office of Fair Trading, and the U.S Federal Trade Commission,** as well as the **Organization for Economic Cooperation and Development** (go to: http://www.econsumer.gov/). Then, too, the "**Act to Amend the Competition Act and the Competition Tribunal Act**, S.C. 2002, c. 16," which came into force on June 21, 2002, now permits private causes of action before the **Competition Tribunal** in the areas of "refusal to deal, tied selling, exclusive dealing and market restrictions (sections 75 and 77 of the **Competition Act**);" gives the **Competition Tribunal** "the authority to issue interim orders prior to litigation to prevent irreparable harm to a business. … except mergers and specialization agreements;" and "enables the **Competition Bureau** to request formal assistance from foreign states to obtain and transmit evidence located abroad in non-criminal competition matters such as abuse of dominance" and "establishes a framework that sets out the basic requirements to be incorporated in any mutual legal assistance agreement negotiated for this purpose." The **Competition Bureau** has been receiving "about eight immunity requests each year" in international matters, to "grant individuals immunity from prosecution for criminal offences in exchange for assistance in investigating those offences." Also, eyes east, west and south!

FOLLOW-UP

MICRO-SPONTE. U.S. District Judge Colleen Kollar-Kotelly, of the **D.C. District**, found that the settlement in ***U.S. v. Microsoft,*** Civil Action Nos. 98-1232 and 98-1233, was not in the public interest unless the Court could act "***sua sponte,"*** meaning the Court must retained jurisdiction to "pursua" Microsoft spontaneously, and, thus, retain the power to "voluntarily" and of its "own accord," monitor the effectiveness of and "tweak" the settlement "without the litigants having presented the issue for consideration." That's what she said and meant when she only conditionally approved the settlement on November 1, 2002, pending the addition of such provisions. "One of the more salient concerns raised in the comments is the fact that neither Microsoft, nor the government, are obliged under the proposed decree to report to the Court regarding Microsoft's compliance with the decree. Compounding this omission from the decree is the limited nature of the clause specifying the degree to which the Court retains jurisdiction." The Court continued, Section VII of the proposed settlement "does not clearly vest the Court with the authority to act ***sua sponte*** to order certifications of compliance and other actions by the parties. Such a circumstance

is not acceptable to the Court. The Court considers it imperative, in this unusually complex case, for the Court's retention of jurisdiction to be clearly articulated and broadly drawn. Such clarity and broad reservation of power are necessary to ensure that the Court may require action of the parties when it deems appropriate and need not wait for the parties to file a motion before action is taken. … Accordingly, out of an abundance of caution, the Court will condition its approval of the consent decree pending an alteration to § VII which makes clear that the Court may take appropriate action regarding enforcement of the decree on its own volition and without prompting by the parties. In the presence of such a provision, there will be no doubt that the Court may require certifications of compliance, the regular status reporting, and other action by the parties as the Court deems necessary or appropriate." The Court then concluded that the proposed settlement, "although not precisely the judgment the Court would have crafted, with the exception of the reservation of jurisdiction, does not stray from the realm of the public interest." One might suspect that this is not the last act in the "Micro-Sponte" epic, especially as normally the Court would rely on the prosecuting agency to monitor such a settlement.

THANKS BE TO GOOGLE! An author's lot can seem lonely at times. You may be communicating with many readers, yet without feedback it can feel like you're spitting into the wind. That's why I like cocktail parties and receptions. Not just for the mind expanding fluids and "printable" tidbits, but for the feedback that you actually have readers, and for the expanded conversational topics which flow freely from the mixture of these fluids with the research done for the columns, that you can beguile them with. Yes, writing these columns takes research (and sometimes fluids don't hurt). That's also why authors like to see their words quoted in scholarly works and more widely disseminated. Thanks be to ***Google***! A recent ***Google*** Internet search uncovered all of the above. First it revealed this author's Lawyers Journal writings quoted in ***"Antitrust, Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations,"*** by Professor of Law Bruce H. Kobayashi of George Mason University School of Law, where, citing from Lipson, ***Local Firm Sends Competitor to Jail***, 2 Lawyers J. 6 (2000), at footnotes 66 and 85 (www.gmu.edu/departments/law/faculty/ papers/docs/02-04.pdf), he credits the article with the intelligence that "Carbide Graphite, with a market share approximately equal to that of Showa Denko, received leniency under the Antitrust Division's Leniency Policy and paid a zero fine," and that at "the time of sentencing, the $135 million fine imposed on SGL and the $10 million dollar fine imposed on its CEO, Robert J. Keoehler were the largest ever imposed against a corporation and an individual." Then it showed that even vocal utterances had found their way from and/or into the pages of the Lawyers Journal. Thus, John D. Messina, in his ***University of Pittsburgh Law Review*** Comment, "***Lawyer + Layman: A Recipe for Disaster! Why the Ban on MDP Should Remain,"*** at 62 Pitt Law Review 367, 377-378 (lawreview.law.pitt.edu/volumes/ vol62i2/Messina-%20367%20R.pdf), borrowed yours truly's words as Chair of the ACBA "Unauthorized Practice of Law Committee" from "Rachel Berresford, ***Beat 'em or Join 'em: The Multidisciplinary Practice Debate***, 1 Law. J., Jul 1999, at 1" (also reprinted as part of the ***American Corporate Counsel Association (ACCA) MDP*** **InfoPAK** at http://www.acca.com/advocacy/mdp/berresford.html), to wit, "[e]ven if the American Bar Association adop[ed] this recommendation [by the ABA committee appointed to research the issue of MDP's] it [would] have [had] no effect in Pennsylvania, unless the Supreme Court of Pennsylvania decide[d] to change the PA Rules of Professional Conduct." Conversely, ***Juris, the Duquesne University School of Law News Magazine,*** carried a parallel report of your columnist's presentation to U.S Supreme Court Justice Sandra Day O'Connor of "the first Carol Los Mansmann Award for Distinguished Public Service" (see http://www.juris.duq.edu/winter2001/justice.htm; see also the ***Federally Speaking*** columns for October and November, 2001). Thanks be also to ***Google*** for finding that the FBA San Antonio Chapter's re-prints various ***Federally Speaking*** columns in their ***Newsletters***, such as December 2001 (http://www.fedbarsatx.org/Newsletters/June%202002%20Newsletter%20.doc), and June 2002 (http://www.fedbarsatx.org/Newsletters/December%202001%20Newsletter%20.doc). Thank you San Antonio, we will remember the Alamo!

CREPPY WELCOMED IN THE 3RD CIRCUIT. All three Third Circuit Judges in ***North Jersey Media Group v. Ashcroft*** (3rd Cir 2002; No. 02-2524), agreed that the **constitutionality** of the **Creppy Directive,** directing the blanket closure of all special interest deportation hearings, is "governed by the test developed in ***Richmond Newspapers, Inc. v. Virginia***, 448 U.S. 555 (1980), to wit, the two-part "experience and logic" test, which "asks first whether a particular proceeding has a history of openness, and then whether openness plays a positive role in that proceeding." In ***Richmond Newspaper,*** the **Third Circuit** two-judge majority acknowledged that "the **Supreme Court** held that the right of the press and public to attend criminal trials 'is implicit in the guarantees of the **First Amendment**.' Id. at 580 … The open trial 'gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality'" and "discouraged vigilantism by "providing an outlet for community concern, hostility, and emotion'" (Id. at 569-571). They also acknowledged that this right of access applied to both criminal and civil trials ("in ***Publicker Industries, Inc. v. Cohen***, 733 F.2d 1059 (3d Cir. 1984), we applied ***Richmond Newspapers*** and held that the **First Amendment** implicitly incorporates a right of access to civil trials"). Then too, while the **Third Circuit** majority further advised that they "are keenly aware of the dangers presented by deference to the executive branch when **constitutional liberties** are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy," they apparently found that "openness" does not "plays a positive role" here, because they believed "the Government presented substantial evidence that open deportation hearings would threaten national security." They also apparently found some solace in their belief that even without an open hearing "these aliens are given a heavy measure of **due process** -- the right to appeal the decision of the Immigration Judge (following the closed hearing) to the **Board of Immigration Appeals (BIA)** and the right to petition for review of the BIA decision to the **Regional Court of Appeals**. See also ***INS v. St. Cyr***, 533 U.S. 289, 300 (2001) (noting that because the Constitution 'provides the **Writ of Habeas Corpus** shall not be suspended, . . . some judicial intervention in deportation cases is unquestionably required by the **Constitution'**)." However, Judge Scirica dissented, believing that for "these" people, and for "all of the people," "the requirements of the [Richmond] test are met. … Deportation hearings have a consistent history of openness. … The **Supreme Court** … in both ***South Carolina Port Authority*** [***FMC v. South Carolina State Ports Authority***, 122 S. Ct. 1864 (2002)] and ***Butz*** [***Butz v. Economou***, 438 U.S. 478, 513 (1978)] concluded that **constitutional** principles applicable to civil cases were relevant to the administrative proceedings at issue. … I agree with the majority, therefore, that 'on a procedural level, deportation hearings and civil trials are practically indistinguishable.' … Public access to deportation hearings serves the same positive function as does openness in criminal and civil trials. … Accordingly, the demands of national security under the logic prong of **Richmond Newspapers** do not provide sufficient justification for rejecting a qualified right of access to deportation hearings in general. … There must be **'a substantial probability'** that openness will interfere with these interests … [and] deference is not a basis for abdicating our responsibilities under the **First Amendment**. … ***United States v. Robel***, 389 U.S. 258, 264 (1967) (… 'Implicit in the term national defense is the notion of defending those values and ideals which set this Nation apart.'). … But a case-by-case approach would permit an Immigration Judge to independently assess the balance of these fundamental values. Because this is a reasonable alternative, the **Creppy Directive's** blanket closure rule is **constitutionally infirm**. As the **Supreme Court** reasoned in ***Globe Newspaper*** … 'a mandatory rule requiring no particularized determinations in individual cases, is **unconstitutional**.'" (***Globe Newspaper Co. v. Superior Court,*** 457 U.S. 596 (1982). For the Creppy "score" up to the time of this writing, see ***"Creppy's 'Stay' at the Supreme Court,"*** in the ***Federally Speaking*** Extra Issue of November 29, 2002.)

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

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