FEDERALLY SPEAKING

by Barry J. Lipson

Number 40

Welcome to **FEDERALLY SPEAKING,** an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 40th column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm.

"Tomorrow's Trials Today!!!" **--** will take you on a whirlwind one-day trip into the mind-bending electronic computer world of the future, compliments of the ***Western Pennsylvania Chapter*** of the ***Federal Bar Association.*** "While this may seem like ***Science Fiction***, much of it is ***Science Fact***, in practice or on the drawing board! And with ***'real-time' technology*** you may now be able enjoy that normally unavailable ***'second bite of the apple'***! All this, a delightful City Deli Lunch (with apple), and 7.0 hours CLE, including one hour of ethics, for $99.00 ($79.00 for current and new FBA members)." This is the "intro" to ***West Penn's*** newest CLE concept merging hard facts, technology, wonder, fun and ethics, blasting off at the **Federal Courthouse** - Courtroom No.1 – in Downtown Pittsburgh, Pennsylvania, at 8:30 AM on **Friday, June 11, 2004**. Scheduled topics include: ***The Courts are Wired*** (overviews by Chief Bankruptcy Judge Judith K. Fitzgerald and U.S. District Judge Thomas M. Hardiman); ***Electronic Lie Detection Today and Tomorrow;*** and ***Forensic eDiscovery***: ***Finding the Unfindable, Retrieving the Irretrievable, Catching the Uncatchable, and Protecting the Unprotectable Legally & Ethically.*** But the adventure's not nearly over yet! After a ***Field Trip to Judge Hardiman's Electronic Courtroom*** for familiarization and exploration, we well actually partake of ***"Tomorrow's Trials Today," a Demonstration of a Trial in the Electronic Age,*** including utilization of ***"Second Bite"*** Technology and Techniques in Depositions and Trials, ***real-time*** transcription, judicial notice of Internet content, videotape depositions, remote testimony, admissibility of electronic evidence, electronic demonstratives and argument aids, computer recreations, and display technologies for documents and tangible evidence. Ending, we hope, in a "safe Landing" and a better understanding of what the future holds in store. Interested? *For reservations contact: Carmine DiPaolo, Fifteenth Floor, Two Gateway Center, Pittsburgh, PA 15222-1447 (412/281-4900; carmined@springerlaw.com). As Courtroom seating is limited, only paid reservations hold seats.*

LIBERTY'S CORNER

DOUBLE JEOPARDY, WE THOUGHT WE KNEW YOU! ***"… nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb" – Fifth Amendment***. According to the **U.S. Supreme Court**, this "**Double Jeopardy Clause** protects against ***three distinct abuses***: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple

punishments for the same offense'" (***U.S. v. Halper***, 490 U.S. 435, 440 (1989)), and through the **Fourteenth Amendment** this protection from these "***three distinct abuses***" is applicable to the States. Simple enough? We have bigger fish to fry! No need to waste column space on this one! I used to think so until a ways back I unsuccessfully petitioned the **U.S. Supreme Court** for **Certiorari** on this very subject. To my chagrin, I became cognizant of the fact that you could, indeed, be tried, convicted and punished on the same ***exact*** facts **twice** for the same ***exact*** criminal act**,** and such was not uncommon. Thus, despite the **Fifth's** prohibition and the **Fourteenth's** making this prohibition applicable to the States, crimes such as bank robbery, drug trafficking, assorted assaults, etc., are successfully successively prosecutions by both the **Feds** and the States (see, e.g., ***Abbate v. U.S***., 359 US. 187 (1959)). Indeed, some have graphically described this psychic manipulation as "mental masturbation," and claim that by concocting and crowning the "spectre" of **"separate sovereigns**," the **Supremes** have permitted, perpetuated and encouraged ***Halper's "three distinct abuses"*** to grow and multiply. ***Why so?*** The cases seem to tell us the **High Court** has endorsed prosecuting such "dual" persecutions to eliminate "dueling" between the **Feds** and the States over who will try who (see, e.g., ***Rinaldi v. U.S***., 434 U.S. 22, 28 (1977)), but the cynical among us may conclude it is so each can "sovereignly" have its own "separate" pound of flesh! To the contrary, "the **Double Jeopardy Clauses** of certain state constitutions have been interpreted, under many circumstances, to prohibit state prosecution of a criminal act ***that has already been*** the subject of a **federal prosecution**. See, e.g., ***Commonwealth v. Mills***, 286 A.2d 638 (Pa. 1971)." ***USA v. Cavlin Sumler***, No. 96-3159 (DC Cir. March 10, 1998); emphasis added. The **High Court** (7-2) has now extended the cloak of the **"separate sovereign"** ruse to cover the second prosecution of an assault of a **Federal Officer** by a non-tribal member Indian who has already been convicted by the **Tribal Court** of the ***"loci"*** where the assault occurred (***U. S. v. Lara***, No. 03-107, __U.S.__ (2004)). But it would be "loco," the dissent intimates, to conclude ***Lara*** had ***not*** been ***"twice put in jeopardy"*** here ***and by the same sovereign***, for while a Tribe has sovereignty over its own members, any jurisdiction over non-member Indians (and non-Indians) it has ***was granted by*** **Congress** and therefore "a Tribe's exercise of this delegated power bars subsequent **Federal prosecution** for the same offense." Indeed, how does the **High Court's** interjection and exaltation of the **separate sovereign doctrine** help alleviate any of the ***Halper,*** admittedly abusive, ***"three distinct abuses"?*** **Double Jeopardy**, we thought we knew you!

FED-POURRI™

THREE STRIKES AND YOUR OUT, **MAYBE*!*** Isaac Ramirez never hurt anyone! He was merely a non-violent shoplifter who in 1991 pled guilty to two second-degree felony robbery offenses that amounted to "little more than shoplifting," for which he was sentenced to only a year in county jail. Five years latter he lifted a $199 VCR. Wobbling between charging a misdemeanor or a felony, the State of California warbled ***"Strike Three,"*** and charged Isaac with "petty theft with a prior felony," aggravated by these "little more than shoplifting" two "strike priors." At trial Isaac struck out and was sentenced to 25 years to life. Five and a half years later (and after finding religion in prison), **U.S. District Court** Judge J. Spencer Letts let Isaac go, apparently because under these circumstances the **Eighth Amendment** prohibition against **cruel and usual punishment** had been violated. **Ninth Circuit** Judge Kim Wardlaw, writing for the 2-1 majority, affirmed, finding that **the U.S. Supreme Court's** ***Lockyer v. Andrade***, 539 U.S. 63 (2003) decision, upholding California's Three Strikes Law, did not make the **Eighth Amendment** inapplicable to all third strike convictions under that Law, and that California had wobbled the wrong way on this "wobbler." The **Ninth Circuit** also chastised the State's Attorney General for claiming "he was without authority to dismiss or otherwise resolve this **federal appeal** … [d]espite his status as the chief elected law enforcement officer of the state and head of California's Department of Justice ... and the Three Strikes Law itself, which requires state officials to exercise discretion in its application" (***Ramirez v. Castro***, 04 C.D.O.S. 3350 (9th Cir. 2004)). So three strikes does not always mean you are out for the long haul, or will the Courts' also "wobble" here?

SHOULD THE FTC TEMPER/TAMPER WITH TEMPUR? TEMPUR-Pedic that is! A while ago your columnist responded to an advertisement to try ***"The Perfect Night's Sleep"*** for 90 days at **"NO COST TO YOU."** A tempting offer from "TEMPUR-Pedic Pressure Relieving Swedish Mattresses and Pillows!" The G-Rated video came and the constant mailings commenced. Why am I not now sleeping ***free*** on this "miracle

memory bed?" **I read the small print!** There it is finally revealed that not only must you ***pay first***, but that if you remember to return this memory mattress, they will temper their losses by retaining an amount equal to well-over a quarter of the mentioned retail price ("We'll reimburse the full purchase price … except for $159 original shipping/set-up cost"), and that's what Flyer #1 of the two just received still says. Flyer #2, however, seemed to show a retreat from such seemingly misleading, deceptive, false and fraudulent marketing practices. In giant letters Flyer #2 proclaims: **"FREE SHIPPING - *Put the $159.00* CASH IN YOUR POCKETS - NOT OURS!"** But, alas, you must always **read the small print,** which reveals here that: "We'll reimburse the full purchase price … except for a modest ***$160 return fee***" (emphasis ***finally*** added). Thus, an even higher ***return penalty*** in a newly conjured ***"return fee,"*** and no ***two*** "free" Swedish Neck Pillows either, as promised in Flyer #1 (of course, picturing ***5*** pillows). Doesn't TEMPUR's not so tacit tactics just tick-up your temper and tamper with your temperature? **FTC'ers**, enough said to damper this?

FOLLOW UP

UNPUBLISHED OPINION DILEMA UPDATE. As previously reported in ***Federally Speaking*** columns Nos. 21, 25, 35 and 37, "in the **Fourth, Sixth** and **D.C. Circuits** 'unpublished opinions' are given full precedential weight; in the **First, Third, Fifth Eighth, Tenth** and **Eleventh Circuits** they are given persuasive, but not binding, precedential weight; and in the **Second, Seventh, Ninth** and **Federal Circuits** they are given no precedential weight" and virtually all citation to unpublished opinions in these "no precedential weight" **Circuits** are prohibited. However, the "emancipation" and "legitimization" of unpublished opinions is one step closer. On April 14, 2004, the **U.S. Judicial Conference Advisory Committee**, by a 7-2 vote, endorsed the proposed rule permitting citation in **Federal Courts** to "unpublished opinions" (which, of course, are already normally readily available on the Internet anyway). Still necessary are approvals by the full **Judicial Conference** and the **U.S. Supreme Court.** Purportedly, over 80 percent of all **Federal** appellate cases are adjudicated with unpublished opinions. As noted in ***Federally Speaking*** No. 25, "it has been reported that one [published] survey of such opinions found that not only did the unpublished opinions 'included a surprising number of reversals, dissents, and concurrences,' but 'we discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases.'(**Merritt and Brudney**, 54 Vand. L. Rev. 71, 119 (2001))." We will ***"publish"*** future developments ……

SCALIA'S SCINTILLA OF SECRECY. We all deserve at least a scintilla of secrecy, but should this extend to a **U.S. Supreme Court Justice** speaking publicly ***"off the bench"***? Justice Antonin Scalia ordinarily advises the sponsoring body that his ***policy*** is that such speeches not be electronically broadcast or recorded. Accordingly, as reported in ***Federally Speaking*** No. 28, when the "Cleveland City Club … chose U.S. Supreme Court Justice Antonin Scalia for its ***'Citadel of Free Speech Award'*** because he has 'consistently, across the board, had opinions or led the charge in support of **free speech'**," he so "told the Club that he wanted this blackout, that he 'insisted on banning television and radio coverage'." At that time "Barbara Cochran, president of the **Radio-Television News Directors Association**, was quick to point out to her counterpart at the City Club that: 'The irony of excluding journalists from an event designed to celebrate the **First Amendment's** guarantee of **free speech** is obvious to all. The decision to discriminate against the electronic media, especially when the City Club traditionally allows videotaping of its speakers, is reprehensible'." This ***policy*** has, however, apparently continued and became "newsworthy" again this past April 7, 2004, when Justice Scalia gave two speeches in Hattiesburg, Mississippi, one at William Carey College, where he announced this ***policy*** beforehand, and the other at the Presbyterian Christian High School, where he did not. At the High School, when two print media reporters commenced taping the speech, **U.S. Deputy Marshal** Melanie Rube ordered them to stop, confiscated their equipment, erased their recordings, and only returned "same" after the Justice concluded his remarks. Executive Director Lucy Dalglish of the **Reporters Committee for Freedom of the Press** promptly protested, writing that these actions violated the **Privacy Protection Act,** as it "is clear that the statute's purpose is to provide maximum protection for the news media against seizures of work product." Justice Scalia quickly responded to Ms. Dalglish: "I was as

upset as you were … I have written to the reporters involved, extending my apology and undertaking to revise my ***policy*** so as to permit recording for use of the print media." But the problem remains with regard to the broadcast media and Ms. Cochran was once again quick to protest: "Your ***policy*** of excluding electronic media from your public appearances has been extremely troubling to our members for years … To exclude television cameras and audio recording is the equivalent of taking away pencil and paper from print reporters. Your policy puts television and radio journalists at a distinct disadvantage." The Justice, however, has a different prospective: "The electronic media have in the past respected my **First Amendment** right not to speak on radio and television when I do not wish to do so, and I am sure that courtesy will continue." (Ironically, Justice Scalia also complained that a pen and paper note taker misquoted him as saying "people don't revere the **Constitution** like they used to.") What think you, should Scalia have his scintilla of secrecy?

MORE ON MOORE. "The legal options of restoring Judge Moore to office are getting slimmer," lamented the attorney for "disbenched" former Alabama Supreme Court Chief Justice Roy Moore, so we "***will now circulate a petition asking Gov. Bob Riley to appoint Roy Moore to the vacancy for chief justice.*** My legal opinion is that Judge Moore is eligible for the appointment" (emphasis added). In ***Federally Speaking*** No.35 we had reported that the "**Earthly Supreme Court for America** has, for now, left to the **Heavenly Supreme Court** questions of selected religious doctrines entering the secular governmental plane and has thus honored the **'Separation of Church and State Doctrine'** contained in the first **Ten Amendments** to the **U.S Constitution, the Bill of Rights**, by letting stand the **Eleventh Circuit's** affirmance of the **Order of Removal** of the Ten Commandments monument from the Alabama State Judicial Building ***(In re Roy S. Moore,*** Nos. 03-258 and 03-468 (Nov. 3, 2003); see ***Federally Speaking***, No. 31)," which was resisted "monumentally" by ex-Justice Moore, even to his willful disobedience of this **Federal District Court Order.** These remarks were in response to the April 30, 2004 rejection of this "defrocked" jurists appeal to be re-clocked in his Judicial Robes, by the Alabama Supreme Court appointed "Special Court," which was especially established to hear this appeal. Is this "disbenchment" matter now dispensed with? ***Moore*** or less!

THE FAX, JUST THE FAX, MA'AM – AN UPDATE Y'ALL. ***Federally Speaking*** No. 6 reported on "the **Telephone Consumer Protection Act of 1991** [47 U.S.C. 227], which provides that: 'No person may transmit an advertisement describing the commercial availability or quality of any property, goods or services to fax machine without express permission or invitation'," that such complaints to the **Federal Communications Commission (FCC)** had increased by nearly 500 percent, and "that under current **Federal Law**, in addition to **FCC** fines, consumers can seek from broadcasters of junk faxes, in state court, up to $1,500 for each violation, and do so as **Class Actions**." We can now report "peachy" actions under this **Act** in Georgia, y'all! For example, Georgia attorney Sam Nicholson was faxed 6 unsolicited Hooters' Lunch Coupons. Resisting the allure of hooting hooters at Hooters, he instead sued! His class action certification on behalf of 1,321 non-requesting "hootless" fax recipients was upheld by the Georgia Court of Appeals (***Hooters of Augusta v. Nicholson***, 245 Ct. App. Ga. 363 (2000)), and it was a real "hoot" when this class was subsequently awarded an $11.9 million verdict against Hooters, of which $3.9 million was for Class Action Counsel, and $15,000 for "Sam the Man" himself as Class Rep (***Sam Nicholson v. Hooters of Augusta,*** No. 95RCCV616 (Richmond Super. March 21, 2001)). Also pending is a Georgia case involving Carnette's Car Washes' 73,500 "junk" faxes, which could result in the Car Washes "taking a bath" of up to $110 million (***Hammond v. Carnette's***, No. 02CV77622 (Gwinn. St., Sept. 20, 2002)). Then too, AMF Bowling Centers is in the process of settling an unsolicited fax class action filed in Fulton County Superior Court (Georgia) because of its up to 352,000 unsolicited faxes, for a real bargain of only up to $1 million in cash and $1.5 million in coupons. ***If tried, AMF Bowling could be "bowled over" by a verdict of up to $528 million.*** Previously, a 1,052 lawyer and law firm fax class action settlement for $87,500 had been approved by this Fulton County Court. These, then, ma'am are the fax, the Georgia fax, "peach fuzz" and all, y'all!

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issues are available on the United States District Court for the Western District of Pennsylvania website and bracketed [ ] numbers refer to Columns in the Index of Columns on that site: (http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm).