FEDERAL PRACTICE
SECTION NEWSLETTER

CONNECTICUT BAR ASSOCIATION WINTER 2003

A Conversation with Judge Christopher F. Droney

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On December 9, 2002, the Federal Practice Section held its bi-monthly section-wide meeting at the Quinnipiack Club in New Haven. Following the business meeting, section member David Rosen conducted a "Conversation with Judge Christopher F. Droney," in a question and answer format. Following Mr. Rosen's conversation concerning the Judge's views on various topics relating to practicing in the Judge's Court, members of the section were invited to ask additional questions of the Judge. The following is a summary of some of Judge Droney's responses from the evening.

Judge Droney stated that he views his role in the "advocacy system" as a "referee." Accordingly, the Judge tries not to interfere with the parties' respective presentations, such as by asking questions of witnesses. The Judge stated that it is especially difficult for him to ask questions of witnesses during jury trials, for the jury, he noted, carefully listens to him, looking for signals concerning the Judge's view of the case, the parties and the witnesses.

Judge Droney noted that he conducts a formal courtroom and expects that attorneys will respect the protocol and decorum of the Court, such as standing when speaking and not interrupting others while others are speaking. However, the Judge stated that he understands that a great deal may be at stake at trial and that emotions may run high. Judge Droney noted that he finds that the electronic equipment that has made its way into trial practice is helpful and he welcomes it in his courtroom.

The Judge offered a few practical pointers that we all may have learned (but forgotten) in law school. The Judge suggested that attorneys keep the promises that they or the judge make to the jury, such as by not running over the time allotted for closing arguments. By way of example, Judge Droney noted that, if he tells the jury that "Attorney Doe will now have 45 minutes to present you his closing argument," you can rest assured that the jury will stop listening to the closing by the 46th minute. The Judge also suggested that attorneys limit cross-examination to 3 to 5 points, and then sit down. He noted that the jury will become lost if the cross-examiner tries to do too much during cross-examination. The Judge also suggested that attorneys consider when and what to fight over in Court and to save the Court's resources for the issues that deserve the Court's attention.

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properly train Lynch. *Id.* The jury returned a verdict in favor of Lynch but against Schriber. *Id.*

Schriber filed a motion to set aside the verdict based on qualified immunity and arguing the verdict was against the weight of the evidence and inconsistent with the Lynch verdict. *Id.* The district court agreed that the Schriber verdict was fatally inconsistent with the Lynch verdict and set aside the Schriber verdict. *Id.*

On appeal, the court overruled the district court's earlier ruling as to the Eighth Amendment claim and remanded for further proceedings on the merits. *Id.* at 195. On remand, the district court granted summary judgment in favor of the defendants once again. *Id.* This ruling was based, in part on the earlier jury verdicts because the Lynch verdict showed that the jury either did not believe Lynch made the alleged disclosure or the alleged disclosure could not harm the plaintiff because it was commonly known that she was both HIV-positive and a transsexual. *Id.* at 196.

Based on the Lynch verdict, the district court dismissed the Eighth Amendment claim because injury to the plaintiff is an essential element for the claim. *Id.* In addition, D'Villa did not present any different evidence as to the Eighth Amendment claim and submitting the claim to a second jury would "undermine the integrity of the judicial process if a second jury's findings were inconsistent with the first." *Id.*

The Second Circuit Court of Appeals disagreed, ruling that the district court's reliance on the jury verdicts as the law of the case was improper. *Id.* at 197-98. A jury verdict cannot be used as the law of the case unless its interpretation and quality are clear. *Id.* at 197. Several conclusions could all be equally supported by the Lynch and Schriber verdicts. It could be argued that they are inconsistent because the Lynch verdict necessarily determined that Lynch either did not disclose the information about D'Villa or that the information was already common. *Id.* at 198. Conversely, the Schriber verdict necessarily determines that Lynch violated D'Villa's rights because Schriber could not be found liable for improperly training Lynch if Lynch did not violate the plaintiff's rights. *Id.*

Alternatively, the two verdicts can be seen as consistent because the instructions required a finding of intentional injury by the defendants rather than mere negligence. *Id.* It is possible; therefore, that the jury found that Schriber had the necessary intent while Lynch did not. *Id.* Given the numerous conclusions that could be drawn from the Schriber and Lynch verdicts, under an abuse of discretion standard, the district court erred in relying on the Lynch verdict as establishing the law of the case. *Id.*

Lastly, and perhaps most importantly in any law of the case inquiry, the decision to apply or not apply the law of the case doctrine among courts of the same level "is discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment." *Aramony*, 254 F.3d at 410. If a valid reason to reconsider the ruling can be shown, the court has the authority to revisit the issue. The interest of justice may outweigh the principles of judicial efficiency, comity, and the desire to discourage forum shopping underlying the rule of self-disciplined consistency.

District Retreat at St. Clement's Castle

By: James T. Shearin
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On September 20, 2002, judges of the District and Second Circuit Courts and members of the federal bar, met for the

second District of Connecticut Retreat at St. Clement's Castle. The day was enjoyable and informative.

The morning began with a panel discussion moderated by Judge José Cabranes on the tension of dealing with the rights of privacy and due process at a time when societal pressure resulting from the events of September 11, 2001 have led to a dramatic emphasis on preserving security. The panel included Attorney Viet Dinh, U.S. Asst. Atty. Gen. of the Office of Legal Policy; Professors Harold Koh and Ruth Wedgewood of Yale University and Attorney Philip Tegeler, Legal Director, Connecticut Civil Liberties Union.

Judge Cabranes's panel was followed by a discussion on the absence of opening statements in federal court and whether the District's local rule, which makes such statements the exception rather than the rule, should be changed. This is an issue that had been debated by the Federal Practice Section for some time prior to the meeting and the consensus of those who had considered it then was that the Bar would like the opportunity to offer opening statements. The discussion was moderated by David Rosen. The panelists included the Honorable Janet B. Arterton, the Honorable Robert N. Chatigny, the Honorable Linda Lager, Attorney Joseph Garrison and Attorney Patrick Noonan.

Joe Garrison and Pat Noonan reproduced an opening statement from a trial before Judge Chatigny. The panelists then discussed the opening statement, pointing out what was permissible and what was not permissible. Judge Lager offered her insights into the practice of opening statements in state court. The judges, although not of a singular mind on this issue, were concerned that opening statements would turn into opening arguments and cause error in the trial. Several of the judges present also indicated that they are rarely asked for the opportunity to make an opening statement.

During lunch we heard from Judge Barrington D. Parker, the newest member of the Second Circuit, on the status of that court and from Chief Judge Alfred V. Covello on the status of the District Court. We also received a report from Clerk of Court Kevin Rowe and members of his staff concerning the establishment of electronic filing in Federal Court, an event which is just around the corner.

After lunch, the audience focused on the absence of individualized jury voir dire in the federal court system. This too is an issue that the Federal Practice Section had considered for the last year and a half with the Section recommending to the judges that the Local Rules should be altered to expand individualized jury selection, although not as broadly as permitted in state court. In many respects, the District of Connecticut is quite unique in the limits it places upon individualized jury selection. The Section decided to focus on this issue at the retreat to solicit input from the judges, as well as the Bar, on whether the recommendation was a sound one. Most of the judges stated that they are very rarely asked to inquire of a potential juror and believe that the strike method employed by most of the judges now (where a set number of jurors are placed in the jury box and asked more detailed questions than the entire panel of jurors) works to establish a greater level of information.

The panelists consisted of the Honorable Christopher F. Droney and the Honorable Alan H. Nevas, representatives of the plaintiffs' and defendants' bars (Attorney William Davis and Attorney Margaret Mason, respectively), representatives of the criminal prosecution and defense bars (then acting U.S. Attorney John Danaher and Attorney Paul Thomas) and Brian Cutler, an expert in jury selection and a principal of

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Jury Tactics, L.L.C. The program was moderated by Attorney William Wenzel.

The day ended with a reception on the beautiful grounds of St. Clement's Castle.

We were fortunate to have top notch moderators and superlative speakers, as was perhaps best demonstrated by the fact that the day was sold out.

Judge Janet C. Hall and Attorneys Frank Silvestri and William Dow deserve special appreciation for planning the event.

Stay tuned for the District's next Retreat in 2004.

Communications with Experts: Watch What you Say, Someone May be Listening

By: Holly Winger
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A recent decision (W.R. Grace v. Zotos International, No. 98-CV-838S(F), (W.D.N.Y. Aug. 27, 2002) from the United States District Court for the Western District of New York, which affirms an earlier magistrate judge's decision with which some Federal practitioners may already be familiar, highlights the importance of expecting that virtually anything that is provided to an expert witness may have to be disclosed to an opposing party. This decision interprets amendments to the Federal Rules of Civil Procedure regarding disclosure of expert information and official Comments to Rule 26 as effectively eliminating the work product privilege, which previously protected attorney thought processes and communications with expert witnesses.

The range of materials which the Court required be produced to opposing counsel included: case notes and business diaries maintained by the experts; requests for proposals and retainer agreements; bills; all communications with counsel regarding information which the expert uses to form opinions; and counsel's written comments regarding draft reports. The fact that a communication with the expert contained "core" work-product, i.e. mental impressions and/or litigation strategy, did not exempt the communication from disclosure to opposing parties.

The Court recognized that some greater protection may be afforded communications with experts hired only to consult or render advice, rather than testify at trial or deposition. If an expert both testifies and consults, great care should be used to separate those activities, with separate retainer agreements, separate billing entries carefully delineating which work falls into each category and separate communications for consulting activities. Communications and materials shared with consulting experts may also be exposed to discovery by opponents, if "special need" can be established.

This recent decision emphasizes the right of opposing parties to see draft reports from experts and comments by counsel concerning draft reports. The opinion discusses retrieving drafts from computer storage and reconstructing "deleted" drafts. Although no discovery request specifically asked for "drafts," the court granted sanctions to the plaintiff when, two weeks before a deposition, defense counsel proposed that the expert dispose of draft reports to avoid confusion. The court found that a request for the "complete file, including notes or other work product," necessarily included draft reports. The court went so far as to find "a duty to preserve and maintain...draft reports for possible disclosure upon Plaintiff's request." In light of this decision, if an expert has a practice of deleting prior drafts, counsel may want to