

College Columns

News and Views from The American College of Bankruptcy

Wanted: Publications Committee Members

by Evelyn Biery



▲ Evelyn Biery

The Publications Committee intends to prepare articles relating to pending or proposed legislation and what our nation's bankruptcy policies should be. We are especially interested in utilizing the extensive liquidation and reorganization experience of the Fellows to prepare philosophical and strategic articles on the current state of the laws and the ways in which bankruptcy policies in general can be improved.

We are seeking members for the Publications Committee. Committee members will

(a) interview Fellows, legislators and others whose positions in government or the profession give them the opportunity to influence bankruptcy law and policies; (b) prepare thoughtful and somewhat philosophical articles on the improvement of the bankruptcy system; and (c) prepare reports on the activities of the College during the various meetings and also in connection with the practice and administration of bankruptcy law.

If you have any comments or suggestions for making the *College Columns* meaningful to you, please contact me. You may reach me in Houston at 713/651-5544 or in San Antonio at 210/270-1730 or you may send a note by facsimile to me at 713/651-5246. ☐

Sixth Class of Fellows Inducted

The American College of Bankruptcy inducted its sixth class of Fellows on May 3, 1995, in ceremonies at the Great Hall of the United States Supreme Court. The College was honored to have Abner J. Mikva, Counsellor to President



▲ Sixth Class of Fellows

Clinton, deliver the keynote address. Also in attendance was Justice Sandra Day O'Connor who briefly addressed the Fellows and their guests.

The 32 Fellows in the sixth class represent all areas of the country. Each judge Fellow was nominated by a special committee appointed by the College board and each non-judicial Fellow was nominated by the Circuit Admissions Council of the College for each judicial circuit. The Board of Regents makes the final judgment with respect to admission of proposed candidates. Proposed Fellows not present at the induction ceremony must be inducted formally within two years of being nominated to receive membership in the College.

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College Holds All Fellows Meeting In Washington, D.C.

by Thomas B. Anderson

The 1995 All Fellows Meeting was held on May 4 at the historic Cosmos Club in Washington, D.C. This year's Fellows meeting followed the College's induction of the Sixth Class of Fellows in ceremonies in the Great Hall of the Supreme Court the evening before.

The Washington meeting was held under a full agenda which included committee meetings, a general business meeting, and concluded with a luncheon program presided over by Murray Drabkin. The business meeting saw the election of five directors for the College. The five nominees proposed by the Nominating Committee — John A. Barrett, L. Edward Creel, III, Harry D. Dixon, Jr., Merrill R. Francis, and Hon. Ralph Mabey — were elected as directors by acclamation.

A panel presentation on selected topics of bankruptcy reform for consideration by the National Bankruptcy Review Commission was the featured program of the meeting. Moderated by Leon Forman, the panel presented highlights of critical areas for bankruptcy reform, and at times dealt with questions and comments from the floor.

Improvement of Chapter 11. This topic reportedly was the reform popularity leader under a recent poll. Jerome Shukin reviewed the recommendations of the National Bankruptcy Conference for Chapter 11 reform, which included:

- Adoption of a "new value" rule for "old equity";
- Clarification of the standards and procedures for professional fees in bankruptcy cases;
- Elimination of the existing requirement that at least one impaired class approve a plan before it may be confirmed (thus enabling the cram down of all impaired classes); and
- Termination of exclusivity when cram down is commenced.

Bankruptcy Courts as Article III. Roger Whelan addressed this sensitive area by first reviewing a history of the problem,


beginning with *Northern Pipeline* and the implementation of the Emergency Rule. He compared the present state of bankruptcy judges under the Code to other federal Article I and Article III courts. There was some concern from the floor that opening up this issue for national debate would invite tinkering with a system that seemed to be working well for now.

Improvements to U.S. Trustee System. Jerry Patchan reviewed suggestions for improvement of the U.S. Trustee system, and artfully defended its role under the present organizational structure. The topic brought on a lively discussion from the floor with respect to the mission of the U.S. Trustee system — what should it be and how is it working.

Environmental Claims. The frustrating problems resulting from the apparent irreconcilable policies underlying environmental laws and the Bankruptcy Code was articulated by Michael Reed. The problem won't go away it seems, and Mr. Reed posed some solutions to consider.

Executory Contracts. Professor Jay Westbrook addressed three areas of concern in dealing with the present Code provisions governing executory contracts. First, he suggested that the requirement of "executoriness" be reconsidered. This should result in the abolition of an executory test, such as the "Countryman test", and would instead provide for the assumption or rejection of any contract (new terminology might help mark the purposeful change). A second area visited by Professor Westbrook was the allocation of the economic risk inherent in the timing and procedure for assumption or rejection. Finally, it was suggested that the patch quilt Code provisions dealing with the many varieties of contracts and leases (real estate, transportation, etc.) be replaced by a universal set of rules applicable to all contracts.

Mass Tort Cases and Future Claims. This final topic presented by Stephen Case centered on the problem of unknown mass tort claimants and how to deal with these groups in the reorganization context.

The next All Fellows meeting will be held in conjunction with the annual meeting of the National Conference of Bankruptcy Judges in New Orleans, LA in October. 

Interview with College Fellow Jerry Patchan

Earlier this year, Evelyn Biery, Editor of *College Columns*, interviewed Jerry Patchan, the new Director of the Executive Office for U.S. Trustees in the Department of Justice.

You recently became the Director of the United States Trustee Program. What are your own goals for the Trustee Program?

I intend to lead a top notch professional organization and further, I intend that the bankruptcy bench and bar soon recognize us as a top notch professional group.

What do you see as the major administrative challenge for you as Director?

To do a lot more with a lot less. Budget limitations are a mighty serious consideration these days. A good percentage of the funds for the United States Trustee Program come from chapter 11 cases, and those cases are decreasing both in size and number.

Will you be able to obtain the assistance of the people you need?

I intend to lead a top notch professional organization and further, I intend that the bankruptcy bench and bar soon recognize us as a top notch professional group.

It isn't easy. We are understaffed in a number of positions in our offices. And there are general orders from the Department of hiring freezes and staffing limitations.

What brought you to accept such a challenge in such difficult times?

Because it is a challenge. I hope to

help the United States Trustees deal appropriately with bankruptcy problems and with bankruptcy professionals. There is already a group of fine people in the offices and I want to make the system even better.

What background brought you to seek out such challenges?

Before coming to the Department of Justice. I was Deputy General Counsel at the RTC. Prior to that I was in private practice, a partner at Baker & Hostetler in Cleveland. I have specialized in bankruptcy law throughout my professional career, on the bankruptcy bench and in practice both in a large firm, and prior to the bench, in small firms. I have been in a great variety of bankruptcy matters on behalf of a full-range of clients, debtors and creditors. I have handled cases personally and have managed cases and legal matters and law offices from afar.

When I started out, \$1,000 was a large fee; \$5,000 was an incredibly large fee. If I ever collected a \$5,000 fee, I remember I had mixed emotions, happy for the collection but apprehensive because I no longer had a large receivable to look forward to.

Even though I was with a large firm, I still know what problems face lawyers in small firms handling small cases, personal cases for individuals. Having served as a bankruptcy referee and later a bankruptcy judge, and having kept up contacts with many judges that were colleagues when I was on the bench, I can relate to the problems the judges face too.

What caused you to seek out service on behalf of the RTC?

Well, the RTC sought me out to oversee their bankruptcy cases. I responded because I was ready for fresh fields and because I wouldn't have to keep time sheets or draw up fee applications. But really, I went to the RTC because it was a challenge, it was where the action was. There were 27,000 pending bankruptcy cases there. I didn't know the number until I got there and got the first case count made. It was a great job with great legal work, fast paced, demanding, many novel issues. It kept me in Washington long beyond the time I had originally told my family I expected I would stay.

What are the major lifestyle changes

that you have experienced as you accepted challenges in the government sector?

Apartment living in town away from family, walking to and from work rather than the trip from the suburbs. Now too its always coach travel and the invariably bargain hotel room.

The challenge lies in the United States Trustees making their role understandable, making the reason for their position credible, and making their presentations and their dealings with counsel and the court with solid legal knowledge and with professional style.

What do you see as the major challenge for the United States Trustee's dealing with attorneys?

There is a natural tension between the United States Trustee and attorneys. Attorneys are focused on the needs of a particular client and the desires of parties in a particular case. The United States Trustee monitors procedures and activities on a case by case basis but with a view towards the integrity and credibility of the bankruptcy system overall. Sometimes the tensions erupt into conflict, particularly when objections to fees are filed or when the United States Trustee is the only party objecting when none of the parties or even the court concur.

The challenge lies in the United States Trustees making their role understandable, making the reason for their position credible, and making their presentations and their dealings with counsel and the court with solid legal knowledge and with professional style.

You mentioned the role of the United States Trustees. What is the role and mission of the United States Trustees?

When Congress established the United States Trustee Program, it said that the United States Trustees were to be "watchdogs" over bankruptcy. I have restated the mission of the Program to be:

"The United States Trustee Program acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. It works to secure the just, speedy, and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases."

What kind of defalcation problems do you have with trustees? What do you do when you turn up a problem?

When we turn up a situation where money or assets have been stolen from an estate, commonly as a result of our audit and investigations, we move quickly and firmly. Once we know the facts and depending on those facts we immediately stop assigning new cases, freeze bank accounts, seek removal from pending cases and turn the matter to the U.S. Attorney for further action. We also make a detailed audit, not only of the accounts which have suffered defalcations, but of all accounts and cases in the trustee's office.

We now will move for court orders surcharging guilty parties for the full cost of the audit both for in house and outside work incurred because of the defalcation. Repayment will be sought for the money or property taken plus all our costs and expenses.

How often are there defalcation situations?

Based on reports to me and the statistics I have seen for the past years, we have a defalcation situation by a trustee or an employee of a trustee every six or eight weeks on the average, somewhere in the country.

Do you see the United States Trustees becoming more active in regard to fee issues?

Yes, we will soon issue fee guidelines as required by the 1994 Reform Act. The courts are increasingly concerned and more active in regard to fees and expense reimbursement. Some judges welcome the involvement of the United States Trustees, some prefer to do all the analyses themselves.

What is your action plan with regard to the professionalism you mentioned earlier?

Initially, I am expanding the training program and will emphasize skills, the "how". Also we will emphasize in the training "why," for understanding of the reason for a particular activity. I also hope to form a policy advisory committee of judges, lawyers, academics and United States Trustees for input and for advice. But that committee will take time to form in order to comply with all legal and procedural preliminaries.

What experience have you had with such groups?

Based on reports to me and the statistics I have seen for the past years, we have a defalcation situation by a trustee or an employee of a trustee every six or eight weeks on the average, somewhere in the country.

For a number of years I was a member of the National Bankruptcy Seminar Faculty of the Federal Judicial Center. I participated in the planning and delivery of bankruptcy judges' seminar programs throughout the country. I also had many years on the Advisory Committee on Bankruptcy Rules. It is clear to me that the input from mixed groups of professionals is extremely beneficial. I want our people to benefit from discussions among competent professionals, viewing the bankruptcy process from different vantage points.

How will that affect how you do your job?

It will help it I am sure. I intend to do a lot of listening to a lot of people in a lot of places. I have been doing a lot of travel, visiting our offices, meeting with judges and practitioners at each stop. I find those discussions most informative and most productive.

What events do you foresee in Washington that will have a substantial impact on bankruptcy practice?

First there is the coming work of the

Bankruptcy Commission. Commission members have been appointed but expenses not yet funded. I presume funding and staff appointments will come soon. Another event is the study being made of the United States Trustee Program by the National Academy of Public Administration. The focus of the study is the possible privatization of functions of the United States Trustees. Other things going on are a White House bankruptcy study group looking at macro economic issues and bankruptcy I believe, and a newly formed Treasury group addressing the possible need for amendment to chapter 9 and whether new provisions should address derivatives. Presently, the Administrative Office of the Federal Courts is also looking at the United States Trustee Program and are seeking support to place the Program under the Administrative Office.

How long do you plan to serve as Director?

I am asked that regularly, most often by my friends and family back home. I don't have an answer yet. My job doesn't have fixed terms as I serve at the pleasure of the Attorney General and, I guess, at my own pleasure too.

There are a number of goals ahead as I mentioned, and it will take me some time to attain them. I hope to achieve them for the Program before too much time passes. But as this is a nationwide program and has many interests and many localisms, it takes time for a reasoned change. ☞

Sixth Class of Fellows Inducted

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Judge Mikva spoke about his varied experiences in his lifetime in the law. Once a law clerk to Justice Minton, he has been a law teacher, a partner in a major law firm, a Congressman, Federal Appeals court judge and now legal counsel to the President. His colorful and engaging anecdotes were warmly received by the Fellows and guests.

A reception was held in the courtyard of the Supreme Court after the induction ceremony for the inductees and other Fellows, their guests and members of the American Bankruptcy Institute. ☞

New Regents Appointed



▲ Hon. Glen E. Clark

Hon. Glen E. Clark currently serves as Chief Judge of the United States Bankruptcy Court for the District of Utah. He served on the Board of Governors of the National Conference of Bankruptcy Judges and has chaired the Board of Trustees of the NCBJ Endowment for Education. He served as President of the NCBJ from 1992 - 93. He served as a member of the Bankruptcy Education Committee of the Federal Judicial Center. He is a Charter Fellow of the American College of Bankruptcy. He is presently a member of the Committee on the Judicial Branch of the Judicial Conference of the United States. Judge Clark is a member of the First Class of Fellows.



▲ Francis P. Dicello

Francis P. Dicello is a Senior Partner at Hazel & Thomas in Washington, DC. He was a U.S. Trustee for the District of Columbia and the Eastern District of Virginia from 1979 - 1982. He also served as Assistant Chief of the Civil Trial and Settlement Review Sections of the Tax Division of the U.S. Department of Justice from 1978-1979. He is a member of the Business Bankruptcy Committee of the American Bar Association, and former Chair of the Business Bankruptcy Committee of the District of Columbia Bar. Mr. Dicello is a member of the Third Class of Fellows.



▲ Hon. Lisa Hill Fenning

Hon. Lisa Hill Fenning serves as U.S. Bankruptcy Judge for the Central District of California. Before taking the bench, Judge Fenning practiced at O'Melveny & Myers in Los Angeles, where she was founding member of the business bankruptcy group. Judge Fenning currently serves as chair of the NCBJ Endowment for Education. She serves on the Executive Committee of the Bankruptcy Court for the Central District

of California and chairs the Court's Rules Committee. Judge Fenning is a member of the Fifth Class of Fellows.



▲ Vernon O. Teofan

Vernon O. Teofan is a Shareholder in Jenkens & Gilchrist, P.C., in Dallas, Texas and the head of its Bankruptcy and Reorganization Section. He is a graduate of the Notre Dame Law School and a Fellow of the American College of Commercial Finance Lawyers. He is an active member of the State Bar of Texas and the American Bar Association. He has served as an officer and director of the American Bankruptcy Institute and was the recipient of its 1992 Distinguished Service Award. Mr. Teofan is a member of the First Class of Fellows. ☞

New Directors Elected



▲ John A. Barrett

John A. Barrett is a partner with Fulbright & Jaworski LLP. He is a graduate of the University of Kansas and the University of Texas School of Law. He is a member of the National Bankruptcy Conference. Barrett has been past Chairman of the American Bar Association's Business Bankruptcy Committee, and the International Bar Association's Section on Business Law's Insolvency and Bankruptcy Committee. He has been a contributing editor to *Norton's Bankruptcy Law and Practice*. He has served the College as the 5th Circuit Regent.



▲ Merrill R. Francis

Merrill R. Francis is a partner with Sheppard, Mullin, Richter & Hampton. He is a graduate of Stanford Law School. Francis was a past Chair of Business Bankruptcy Committee and member of the Council of the Business Law Section of the American Bar Association. Francis has served the College as the 9th Circuit Regent.



▲ Hon. Ralph Mabey

Ralph R. Mabey chairs the Bankruptcy Reorganization Practice Group of LeBoeuf, Lamb, Greene & MacRae. A graduate of Columbia Law School, Mabey served as U.S. Bankruptcy Judge for the District of Utah from 1979-1983. He is a member of the National Bankruptcy Conference, the ABA Joint Task Force (of the Litigation and Business Law Sections) on Bankruptcy Court Structure and Insolvency Processes, and the American Law Institute International Insolvency Project. Mabey has served as a member of the Bankruptcy Rules Committee of the U.S. Judicial Conference, as Managing Editor of *Norton Bankruptcy Law Adviser*, on the Board of Editors of the *American Bankruptcy Law Journal*, and as contributing author for *Collier on Bankruptcy*. He is an Adjunct Law Professor at Brigham Young University. He has served the College as 10th Circuit Regent. ☞

Looking Ahead: The National Conference of Bankruptcy Judges

A number of important events are scheduled for the College during the National Conference of Bankruptcy Judges, October 29 - November 1 in New Orleans, LA. Please mark your calendars now.

Sunday, October 29

11:00 am - 1:00 pm

Board of Directors Meeting

1:00 - 3:00 pm

Board of Regents Meeting

3:00 - 4:00 pm

Committee Meetings

Bankruptcy History Committee

Hon. John K. Pearson, Chair

Bankruptcy Review Commission

Project Committee

Neal Batson, Co-chair and

Gerald Smith, Co-chair

On-Line Committee

Ron Martin, Chair

Publications Committee

Evelyn Biery, Chair

Pro Bono Committee

David Sykes, Chair

4:00 - 6:00 pm

All Fellows Meeting

6:00 - 7:00 pm

Informal Reception

In Memory of... Paul F. Festersen



▲ Paul F. Festersen

Paul F. Festersen of Omaha, Nebraska, passed away August 5, 1995 in Omaha. Born April 22, 1940 in Omaha, he received his B.A. degree from Yale University in 1961 and his LL.B. degree from Harvard Law School in 1964. Paul practiced law in Omaha as a solo practitioner from 1964 until the time of his death.

I first got to know Paul through his wonderful article "Equitable Powers in Bankruptcy Rehabilitation: Protection of the Debtor and the Doomsday Principle," 46 Am. Bankr. L.J. 311 (1972), which I read while I was working on the Bankruptcy Review Commission. I thought it one of the best articles I had encountered and cited it in the Commission's Report. That was not the last time I referred to Paul's perceptive "Doomsday" article. I frequently refer to it in lectures and writings. Paul grasped and made simple for all of us a fundamental truth. Bankruptcy courts do not allow worthwhile and viable businesses to

founder on the rocks of ill conceived statutory provisions. It was not too many years thereafter that I had the opportunity to work with Paul. I referred a client to him, and it was a pleasure meeting and working with him. Several years ago I was working on an article on postconfirmation jurisdiction with Prof. Frank R. Kennedy and once again found an incisive article by Paul that proved very helpful in pulling together the postconfirmation, jurisdictional provisions of the reorganization provision of the Bankruptcy Act. Paul characterized the morass with typical humor: "After confirmation of a plan, those things which do occur take place because the court 'retains jurisdiction.' The phrase appears repeatedly in the Act. It is nowhere defined and only slightly understood. The object is to set sail upon this uncharted sea, and to inquire what promise it may hold for the salvation of the struggling enterprise."

Not only was Paul a provocative and perceptive writer, but he was an able lecturer at Creighton University. A highly respected practitioner, Paul was listed in *Best Lawyers in America* and represented major businesses.

Indicative of Paul's Midwestern wit and his humility are some of Paul's introductions for himself which appeared in the *Snipe Bulletin, Harvard Law School*

Reunion Reports, and notes for his band, the Street Railway Company Jazz Band.

Paul perceives himself as your friendly neighborhood business doctor, specializing in workouts, bankruptcy, and reorganization. The ultimate boutique, Paul F. Festersen, P.C. consists of one lawyer who remains deliriously happy with his decision to navigate the bramble patch of practice without company. He has now and then published and been permitted to inflict his views on those attending soirees hosted by the likes of the Practising Law Institute and the National Conference of Bankruptcy Judges. The firm is notable for the efficiency with which it conducts its internal affairs and has never come to the attention of those busybodies at *The American Lawyer*.

Paul, a wonderful human being and an extraordinary intellect, will be sorely missed by all of those who knew him. Paul is survived by his wife Sigrid and his daughters Else and Anneliese and his son Peter. Paul's family and our profession has suffered a great loss. It is with personal sadness that I realize that I will no longer have Paul to look to for guidance. ☩

— Gerald K. Smith



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