

1 THE ASSOCIATION OF THE FEDERAL BAR
2 OF THE STATE OF NEW JERSEY

3
4 TRANSCRIPT OF PROCEEDINGS

5
6 THE
7 THIRTY-FIRST ANNUAL
8 UNITED STATES JUDICIAL CONFERENCE
9 FOR THE DISTRICT OF NEW JERSEY
10
11 LITIGATION IN AN AGE OF TERRORISM
12 THE GUANTANAMO CASES AND YOUR
13 RIGHTS IN TIME OF WAR
14 and
15 CIVILITY IN THE COURTS:
16 VIEWS OF THE BENCH AND BAR
17
18

19 Mayfair Farms
20 West Orange, New Jersey

21
22 March 22, 2007
23

24
25 Reported by Stanley B. Rizman, C.S.R.

6
1 difficult circumstances. This sometimes happens for
2 those of us who do this work. Even though we're
3 providing essential legal counsel, we're not
4 necessarily wanted or loved and he can tell you some
5 of his stories in that regard. But he has been an
6 outspoken advocate of maximum rights for detainees who
7 are facing these military commissions and processes.
8 He's an articulate and an experienced speaker.
9 To my right is my friend, Bahar Azmy,
10 professor at Seton Hall Law School. Bahar, with whom
11 I've had the opportunity to work on many occasions,
12 was the second person to my knowledge to have gone to
13 Guantanamo in an effort to meet and to represent a
14 detainee there, Gutierrez, who wasn't able to be here
15 today -- who was working for us at Gibbons at the time
16 was the first. That detainee, whose name was -- what
17 is it?
18 MR. BAHAR: Mubat Kurnaz.
19 MR. LUSTBERG: Mubat Kurnaz was a German
20 national of Turkish decent.
21 After a number of years of advocacy Bahar
22 obtained his freedom. He has been released from
23 Guantanamo. Bahar has continued his advocacy working
24 on the many appellate issues that have arisen that
25 address questions of scope of habeas review, the

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1 meaning of the suspension clause and the retention of
2 our Constitutional rights in this day and age.
3 He's -- he runs the Constitutional --
4 Civil Litigation Clinic at Seton Hall and teaches
5 constitutional law focusing on civil rights cases in
6 such areas as human trafficking, predatory lending,
7 and the like. An extraordinary attorney.
8 And to his right is Andrew McCarthy. Mr.
9 McCarthy is a former Assistant U.S. Attorney from the
10 Southern District of New York where he prosecuted the
11 terrorism case with regard to the 1993 World Trade
12 Center bombing. Since that time he's no longer
13 practicing law but is the Director of the Center for
14 Law and Counterterrorism at the Foundation for the
15 Defense of democracies, which is an independent
16 nonprofit organization in Washington dedicated to
17 defeating terrorism and promoting freedom. He is,
18 again, outspoken with respect to many of the issues
19 that confront us today. He believes that we should --
20 that the balancing should weigh more heavily in favor
21 of national security than civil liberties although I
22 don't want to characterize his position and I think
23 guarantees that will, in any event, have a very lively
24 debate here today.
25 I thought that -- for all of you who

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1 don't do this work -- and our firm has been honored to
2 do this work since its inception. I've been involved
3 in the civil liberties work around 9/11 issues since
4 9/12.

5 Judge Gibbons, as some of you may know,
6 my colleague and mentor in life, argued the Rasul case
7 which initially established the right of detainees to
8 seek habeas relief. But foremost -- we've been
9 involved as amicus or as litigants in cases ever
10 since. We've represented three detainees. Two of
11 whom are released and can talk a little bit about that
12 experience but that's not what I'm going to do.

13 I thought, though, for all of you that it
14 would be useful, at the outset, to just get a
15 five-minute primer on where the law is and how it has
16 evolved in that regard. For that I will turn it over
17 to Bahar and then comment to Greg about that.

18 We will start about learning a little bit
19 about the applicable law with respect to these issues.
20 Bahar.

21 MR. AZMY: So, a little bit of background
22 about Guantanamo and the status of the legal cases
23 there. Everybody in Guantanamo has been designated an
24 enemy combatant by the President. And about the 750
25 or so who have passed through Guantanamo and the 430

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1 detainees still there only ten have been charged with
2 any kind of crime or charged with the violation of the
3 laws of war and designated for trial by military
4 commissions will remain; the balance the President
5 claims the unilateral authority to detain indefinitely
6 until he believes the war on terrorism is over.

7 And it's one of those detainees, in that
8 group, Mubat Kurnaz, that I represented. So why
9 Guantanamo. I think having visited there five times
10 it is one of the strangest, in my view, most harrowing
11 places on earth.

12 I think Guantanamo was the choice driven
13 more by policy than law. That is, the administration
14 sought to find a place specifically outside the
15 jurisdiction of the United States courts. There is a
16 memo from December 2001 by an officer and counsel in
17 the Justice Department which specifically argues that
18 among the various places Guantanamo would be ideal for
19 situating America detention policy because it would be
20 outside the jurisdiction of the United States courts
21 and preserve, quote, the system that has been
22 developed, unquote.

23 I think that system is one in which the
24 administration wanted to conduct sort of endless
25 indefinite interrogations of terrorist suspects. And

3 (Pages 6 to 9)

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 1 response but as acts of war. And that has operational
 2 consequences because you don't simply call in the FBI
 3 to investigate crimes. You call in the United States
 4 military to hunt down the people who did this --
 5 committed those atrocities on this country.
 6 It also has legal consequences because
 7 although, frankly, none of us was particularly
 8 familiar with this as of September 2001 looking at
 9 what were the issues on our radar screen at the time.
 10 There is, in fact, a well -- a well established law of
 11 war and the fundamental decision of the President to
 12 treat these attacks as acts of war and to trigger the
 13 law of armed conflict has now been upheld and
 14 confirmed by both of the other branches.
 15 Both by Congress, which authorized the
 16 use of military force shortly after September 11 and
 17 by the Supreme Court in the Hamdi decision which
 18 upheld the use of war powers with respect to these
 19 detainees.
 20 So that aspect of this, it seems to me,
 21 is now well settled. Once we're in a law of war
 22 framework there is a settled law. We looked at this
 23 late 2001, early 2002, looking at with respect to
 24 detainees the kinds of things that nations have done
 25 during war throughout human history; namely, capturing

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 1 enemy combatants, detaining them, interrogating them
 2 and trying them for war crimes.
 3 We had what we thought was quite solid
 4 precedent for each aspect of that with respect to
 5 detention. We had a World War II era precedent called
 6 Johnson versus Eisentrager that held that aliens
 7 outside United States territory, which describes all
 8 of the aliens at Guantanamo -- and I'll drop a
 9 footnote about the status of Guantanamo and come back
 10 to that in a few minutes -- aliens outside sovereign
 11 U.S. territory, the Supreme Court said don't have
 12 statutory rights to habeas corpus; don't have
 13 Constitutional rights to habeas corpus under the
 14 suspension clause and don't have Fifth Amendment
 15 rights.
 16 So there seemed to be no Constitutional
 17 impediment to detaining enemy combatants and, indeed,
 18 the laws of war and the practices of war had
 19 authorized that throughout American history and that
 20 is the basis on which this country could hold two
 21 million enemy combatants during World War II.
 22 Critics of the administration like to say
 23 "without charges."
 24 Well, that's true. We didn't charge any
 25 of the German or Japanese POWs. But the justification

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 1 for detaining enemy combatants has always been not to
 2 inflict criminal punishment but simply to prevent
 3 people from returning to the battlefield during the
 4 course of ongoing hostilities.
 5 So the detention aspect of things seem to
 6 us quite well established. With respect to
 7 interrogation and treatment of detainees, we started,
 8 of course, with a bedrock limitation that under both
 9 federal criminal statutes and United States Treaty
 10 commitments the United States will not torture and the
 11 President made explicitly clear in all of the relevant
 12 military orders that that was out of bounds.
 13 But with respect to interrogations,
 14 generally, one can obviously have a robust
 15 interrogation program that doesn't rise anywhere near
 16 the level of torture. And when one is confronting an
 17 enemy like Al Queda that seems particularly important
 18 because you need to prevent every attack before it
 19 happens.
 20 And if you miss one, then there is
 21 another September 11. And the -- that's the
 22 operational urgency. The legal justification, as I
 23 said, no torture was an unquestioned rule throughout
 24 this. But the legal source of much more heightened
 25 protection for wartime detainees, of course, is the

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 1 Geneva Convention. The Geneva Convention applies.
 2 One simply cannot have an interrogation program where
 3 the rule is name, rank and serial number, full stop,
 4 and the Justice Department looked at the Geneva
 5 Convention and concluded that -- not that it was wrong
 6 in any way but that it simply didn't apply by its
 7 terms for at least three independent reasons.
 8 First, the convention most -- most
 9 provisions in the convention provide only to covered
 10 conflicts which are defined by treaty as conflicts
 11 between two signatory nations. So United States
 12 versus Germany was covered because each nation is
 13 signatory to the convention and the basic logic of the
 14 treaty is you secure heightened protections for your
 15 soldiers at the cost of providing heightened
 16 protections to enemy soldiers and all of that
 17 presupposes that one fights by the laws of war which
 18 include, most significantly, perhaps, not targeting
 19 civilians.
 20 Well, of course, Al Queda doesn't do
 21 that. They exist for the very purpose of violating
 22 those principles. They are not a signatory to the
 23 Geneva Convention and we had what we thought was a
 24 very strong basis for saying that the conflict, United
 25 States versus Al Queda, was not a covered conflict

5 (Pages 14 to 17)

<p>22</p> <p>1 rights. We prevailed on that basis in the D.C. 2 Circuit last month. 3 The other ambiguity with Rasul is whether 4 the court's reasoning is or is not limited to 5 Guantanamo. Parts of the opinion seem specific to 6 Guantanamo. Parts of it seem more general. But I 7 would like to disagree with the suggestion that Rasul 8 effectively held that Guantanamo was sovereign United 9 States territory. 10 Justice Kennedy, in his separate 11 concurrence, would have pretty much said that. We 12 think that is incorrect under the terms of the 13 governing leases and treaties with Cuba which preserve 14 sovereignty to Cuba. We think that is a fair 15 description of the reality at Guantanamo which is that 16 the United States can do one and only one thing on 17 that piece of land and that is run a military base. 18 We couldn't put a civilian agency down 19 there. We couldn't lease the land to the Ritz 20 Carlton. We couldn't sell the land. If there were 21 minerals on the land, we couldn't exploit them. We 22 can run a military base pursuant to the terms of a 23 treaty and a lease. And it would be shocking to think 24 that a court could effectively annex for the United 25 States territory of another sovereign against the</p>	<p>24</p> <p>1 country. 2 That's why it is so good we're having it 3 here in New Jersey today. I do want to give 4 Lieutenant Commander Kuebler, first, a chance to talk 5 about one of the issues that Greg talked about. That 6 was the issue of military commissions and whether it 7 is his that view it is, in fact, the case that the 8 military commissions as constituted and which he is 9 practicing before and you can talk about your 10 particular case as well as more generally are, in 11 fact, more protective of rights than historically has 12 been the case and, indeed, whether they are 13 sufficiently protective of detainees rights. 14 LIEUTENANT COMMANDER KUEBLER: Thank you, 15 Larry. 16 First of all, good morning. Thank you 17 for allowing me the opportunity to be here. As Larry 18 indicated, I'm a defense attorney with the Office of 19 Military Commissions in Washington, D.C. 20 I've had the pleasure of being with the 21 Office for about a year and a half now and being 22 assigned to represent two Guantanamo Bay detainees 23 Hassan Al-Ashrabi, a Saudi national, and from the 24 beginning of my time there and most recently within 25 the last month or so I've been assigned to</p>
<p>23</p> <p>1 wishes of the branch that conducts foreign policy. 2 So we don't think that the majority in 3 Rasul did that. They treated Guantanamo as 4 extraterritorial and they talked about the 5 extraordinary territorial scope of habeas corpus at 6 common law which was the fair justification for 7 extending habeas. 8 But, in any event, Congress has also 9 overruled that aspect of Rasul and we are very 10 comfortable taking the position consistent with 60 11 years of settled law that aliens who are not in the 12 United States and whose only possible connection to 13 the United States is a desire to wage war against it, 14 cannot invoke Constitutional rights against the United 15 States. 16 MR. LUSTBERG: An equally neutral view of 17 things. 18 (Laughter.) 19 MR. LUSTBERG: I'm going to allow Bahar a 20 couple of minutes to rebut that. We're not going to 21 have an appellate argument here. You all can 22 appreciate each of these many issues that Greg has 23 touched on have been the subject of volumes of 24 briefing, dozens of Law Review articles, tons of Op Ed 25 pieces and discussions like this all around the</p>	<p>25</p> <p>1 represent -- one of the attorneys assigned to 2 represent Omar Kadr, who is a Canadian detainee who is 3 over the age of 15, after allegedly killing a U.S. 4 soldier in a fire fight in Afghanistan. 5 I'd just like, if I may -- I don't want 6 to necessarily rebut Greg's very eloquent statement of 7 the Military Commission's position. But I'd like to 8 walk you through, I think, how that legal model looks 9 from the perspective of somebody representing a 10 Guantanamo Bay detainee charged with offenses before a 11 Military Commission. 12 What you have is the starting point -- 13 actually, let's back up -- by detainees, Mr. 14 Al-Ashrabi and Mr. Kadhr. One is what I'd like to 15 call sort of a post-paradigm-shift detainee and the 16 other one is what I like to call a pre-paradigm-shift 17 detainee. "Paradigm shift" referring to this movement 18 after 9/11 to, you know, reclassify terrorists as 19 nationalists. Three problem iterations as opposed to 20 law enforcement problems. 21 And so I've had a chance to sort of see 22 my clients', you know, rights under a couple of 23 separate legal issues. So, you know, with respect to 24 the, you know, sort of the -- and I should have said 25 this at the outset, but I think it's already evident</p> <p>7 (Pages 22 to 25)</p>

<p>30</p> <p>1 forward in October 2004 and was stopped by Judge 2 Robertson's Order enjoining proceedings in the Handi 3 case and then there was Military Commission 2.0, which 4 was the second round which occurred in the winter and 5 spring of last year and now we're on, of course, post 6 MCA, 'm on Military Commission 3.0.</p> <p>7 During that renumeration process the 8 accused was not allowed to represent himself. And 9 that was part of the, I think, of a larger strategy 10 employed by the government to have a trial system that 11 would essentially exclude a defendant as much as 12 possible without making the thing look like a complete 13 farce.</p> <p>14 And so what you had was a system in which 15 not only did the detainee not have the right to see 16 evidence but could actually be thrown out of the 17 courtroom if the government wanted to introduce 18 classified evidence. That just was half of it.</p> <p>19 What you didn't see the way the 20 government gained the process to have house 21 conferences, chambers conferences with counsel and 22 avoid having to close the proceedings at all, but I 23 digress.</p> <p>24 Mr. Al-Ashrabi did not have the right to 25 self-representation. I was forced to represent him.</p>	<p>32</p> <p>1 working on behalf of detainees has been a subject of 2 great debate and official statement over the last 3 couple of months.</p> <p>4 I wonder if you wouldn't -- I know that's 5 something that you've also discussed and I wonder if 6 you would comment on that for the audience. And don't 7 hesitate to be a little controversial if you want to.</p> <p>8 MR. MC CARTHY: Thank very much for 9 inviting me here today. It is a pleasure to be here. 10 There has been a lot of controversy about not only 11 whether lawyers ought to work on these cases, but 12 whether it's appropriate to comment on that. I think 13 it's absolutely appropriate for lawyers to work on 14 these cases. And I don't -- I don't regard this, 15 having been intimately involved with this when it 16 was -- when the Justice Department was not just 17 appointing us here but was actually the entirety of 18 this in the 1990s. There, obviously, is a significant 19 legal aspect to this. But I don't think essentially 20 what we're dealing with is a legal problem. I think 21 it's mostly a national security problem.</p> <p>22 But to the extent that it has an 23 important legal aspect, I think the bar does itself 24 credit by representing people and certainly the 25 military people who are charged to represent these</p>
<p>31</p> <p>1 He was forced to accept me as his lawyer whether he 2 wanted that or not.</p> <p>3 And so I spent the last year or so sort 4 of working through the ethical and professional issues 5 that would arise in that situation and ultimately 6 advocating and, hopefully, ultimately successfully for 7 his right to terminate my representation and to 8 represent himself in a manner consistent with Ferretta 9 v. California, which is the leading Supreme Court case 10 on the subject. So that's my background. And then 11 within the last month or so, as I said, I've been 12 involved in the Cotter case. And I'll turn it back to 13 you.</p> <p>14 MR. LUSTBERG: Thank you.</p> <p>15 You've heard now from two people. Bahar 16 and from Lieutenant Commander Keubler, Professor Azmy 17 and Lieutenant Commander Keubler about the role that 18 lawyers have been playing in this process. As 19 everyone, I think, is aware, that issue of the 20 appropriateness of lawyers working on behalf of 21 detainees and whether particular consequences should 22 or could be visited upon those lawyers and their law 23 firms as a result of that kind of work and, also, on 24 the other side, even what the appropriateness of 25 military counsel such as Lieutenant Commander Kuebler</p>	<p>33</p> <p>1 defendants are doing their duty.</p> <p>2 Where I part company with the lawyers is 3 that I really don't see that it's inappropriate for 4 people to comment on this and say that they would not 5 be represented by lawyers who voluntarily lend their 6 legal skills to the enemy in wartime.</p> <p>7 I don't think the government ought to be 8 taking an official position on that and I think that 9 was the problem, mainly, with the Defense Department's 10 spokesman who sort of spoke out of turn on that.</p> <p>11 But I don't -- you know, I don't think 12 it's inappropriate to feel that way, and, obviously, 13 it's not inappropriate to feel that way, I don't think 14 it ought to be the sort of thing that people can't 15 comment on.</p> <p>16 Obviously, there's people who feel 17 exactly the other way. Who feel that the most 18 patriotic thing that lawyers can do is represent what 19 they feel to be the values that make America America.</p> <p>20 And for that reason they regard taking on 21 the representation of the enemy combatants as a duty 22 and an exhibition of patriotism at the highest level.</p> <p>23 I don't subscribe to that view of the 24 world, but I don't think it's a frivolous one. I 25 certainly respect the people who have gone down and</p>

9 (Pages 30 to 33)

<p>38</p> <p>1 Given the type of due process that we 2 want to give as a nation to criminal defendants is 3 something that is very worthy and ought to be done in 4 99.9 percent of the cases. But giving it to the enemy 5 in wartime is, in a word, nuts, because the underlying 6 assumption of our criminal justice system is that we 7 would prefer the government to lose. We'd rather see 8 a guilty person walk away than run the risk of 9 convicting an innocent person. That's our system. It 10 is the envy of the world and I think it ought to be. 11 But if you accept it when we're at war 12 and when we have an authentic national security 13 crisis, then it's essential that government wins 14 because it's the government that protects the system 15 that all of the rights that we revere are dependent. 16 So I don't think that you can treat this 17 threat with the underlying assumption of the criminal 18 justice system. 19 Now, that doesn't necessarily mean that 20 doing it the way we're doing it now is the right way. 21 And I think part of the -- the biggest part of the 22 problem that we have is that we have what Lieutenant 23 Commander Kuebler called "a novel type of war" and we 24 have two familiarity paradigms. We have a criminal 25 justice paradigm and a law-of-war paradigm. They are</p>	<p>40</p> <p>1 that it doesn't do us a lot of good if other nations 2 won't cooperate with us. If they think that it's too 3 much of an executive branch show, it's too 4 unilateral.. it, doesn't have sufficient checks and 5 balances. They are not going to extradite captured 6 terrorists. And if you don't have a system where 7 they'll cooperate with us, you're basically 8 outsourcing your national security, which is also 9 unacceptable. 10 So I think we need to really grapple with 11 a better way for us to do this going forward. That 12 doesn't mean what we're doing with the GITMO people is 13 violative of our law. I don't think it is at all. 14 But I think going forward it is important that 15 Congress step up to the plate and try to form a system 16 that our allies will cooperate with, that serves our 17 military necessity, but also affords people at least 18 the minimum amount of rights that you need to accord 19 people to make the trials and the detention worthy of 20 our system and our aspirations, et cetera. 21 MR. LUSTBERG: Bahar, how do you respond? 22 Now you've heard twice we're at war. And because 23 we're at war, forget about our fundamental rights; the 24 entire existence of our nation is at stake. And so, 25 therefore, there has to be at least some compromising</p>
<p>39</p> <p>1 familiar ones. 2 It's a natural human instinct to try to 3 go with what's familiar when you have a problem, but I 4 don't think they are a good fit necessarily for the 5 kind of novel conflict that we have. 6 And while I think it's laudable that 7 Congress has stepped up to the plate with the Detainee 8 Treatment Act and the Military Commissions Act, there 9 is more that has to be done going forward. Because 10 anybody who has followed this conflict, whether from a 11 legal aspect or any other aspect, knows that it may be 12 a generational challenge and we may be at this war for 13 a very, very long time. And the only way that we're 14 going to succeed -- and success really is getting 15 intelligence and preventing the next attack. 16 The only way that we're going to succeed 17 in it is if we induce our allies, the nations where -- 18 whether they're allies or borderline friendly nations. 19 The places where Al Queda operates. We need them to 20 cooperate with us. 21 And even if the system that we've 22 constructed here, the military commission system, the 23 detention system -- even if it is completely 24 satisfactory under our laws and under our 25 Constitutional system -- and I agree with Greg about</p>	<p>41</p> <p>1 of our due process freedoms, our procedural 2 protections and the Constitutional provisions that 3 otherwise would govern in a straightforward criminal 4 case. 5 MR. AZMY: I agree that at this time of 6 war we have to think carefully about particular 7 balance, but also not to lose sight of the sort of 8 basic fundamental principles that animate us as a 9 country, which is the rule of law. 10 And here let me, sort of, jump off and 11 take on and quibble a bit with a couple of comments 12 that Greg and Andy made. First, Greg, you know, 13 suggested that in World War II we held 2,000 enemy 14 combatants in the United States. German and Italian 15 prisoners 16 MR. LUSTBERG: Two million. 17 MR. AZMY: Two million. Sorry, but, of 18 course, They weren't enemy combatants. They were 19 prisoners of war, which is to say they were subject to 20 law. And in Guantanamo there is no law. 21 And we talk sort of frequently about, you 22 know, the rule of law and what does that mean. I 23 think one way to think about is the opposite. Without 24 law there is only willpower, discretion and frequently 25 violence. And that's what is going on in Guantanamo</p>

11 (Pages 38 to 41)

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1 he picked up a lot of false names.
2 So that's all the -- sort of process. I
3 don't think anyone strategically or legally thinks
4 that someone who has no connection whatsoever to
5 terrorism should be in Guantanamo and should be
6 subject completely to the discretion of the Executive.
7 And that's all this process is, from my
8 perspective, is to ferret out the innocent from the
9 guilty. And I think you know -- I take in my clients
10 case -- the Commander in Guantanamo, Harry Harris, was
11 asked by the German press after my client was
12 released, and it certainly demonstrated that a number
13 of -- in a number of ways that he had no connections
14 whatsoever to terrorism. Harris said, "Everyone there
15 is a terrorist. Everyone there is an enemy
16 combatant." Simply not accepting the possibility of
17 innocence.
18 And I think that sort of denies the
19 central -- really, the central narrative of America
20 law; that is, the government can make mistakes and
21 that innocent people can get swept up in those
22 mistakes; and that there needs to be some process to
23 prevent arbitrary detention of people who don't
24 deserve to be detained.
25 MR. LUSTBERG: I'm going to give each

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1 person a couple of minutes to just comment on each
2 other's position. And the way this is going, you can
3 see that each person says something that the next
4 person disagrees with. Brilliantly set up panel.
5 (Laughter.)
6 MR. LUSTBERG: I'll not going to share
7 with you my views of this. But anybody who knows me
8 knows those.
9 In any event, Greg, why don't you comment
10 on what Bahar just said? And in particularly, the
11 factual -- what he said were the facts that would seem
12 to demonstrate that, indeed, a number of people, maybe
13 even a majority, at Guantanamo are innocent and
14 shouldn't there be a reasonable system in place that
15 the government endorses, embraces and condones who
16 decides who should be there and who shouldn't.
17 MR. KATSAS: Thanks, Larry.
18 There is a reasonable system in place.
19 And every detainee at Guantanamo has been through a
20 Combatant Status Review tribunal, a military tribunal
21 established to determine whether or not that
22 individual is an enemy combatant.
23 That process was set up to adjudicate
24 status precisely for the reasons Bahar says with
25 respect to a population of about 500 detainees which

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1 had been winnowed down from a population of over
2 10,000 battlefield captures in Afghanistan, and so on.
3 Of the 10,000, only about 750 were even
4 sent to Guantanamo. Of the 750, about 250 were
5 released by the Defense Department before there was
6 Supreme Court intervention or the highly formalized
7 CSRT process. Of the 500 remaining, there were status
8 determinations which resulted in about 40 detainees
9 being released.
10 I think the fact that that number is a
11 relatively low percentage of the population is what
12 one would expect given that the population was
13 winnowed from more than 10,000 to fewer than 500.
14 On the other hand, I think that there
15 were 40 or so detainees released through the process.
16 It is very good evidence of the good faith with which
17 it was conducted.
18 After the Combatant Status Review
19 tribunals, every detainee is entitled to another
20 annual hearing at which the detainee, the detainee's
21 supporters, the detainee's lawyers, the detainees home
22 government can produce any new evidence that bears on
23 whether the detainee should continue to be detained.
24 Let's think about a for a minute. Think
25 about what happens in a garden-variety criminal

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1 conviction in this country. Right -- there is no --
2 there is no Constitutional or other right to have a
3 periodic re-review every year of whether the
4 conviction was, in fact, correct based on new
5 evidence. That is what DOD provides right now to
6 every single detainee at Guantanamo. So the notion
7 that there -- these people are just there on a whim I
8 think is not supportable.
9 With respect to the robustness of the
10 procedures. I think Bahar said, "Yeah, it's fine to
11 apply the law of war framework but we need to have
12 some kind of quick status determination; it can be run
13 by the military, but it should be consistent with what
14 the military has done in the past."
15 Now, the CSRT tribunals -- not only are
16 they consistent with what the military has done in the
17 past, but their procedures are more robust than the
18 military has ever applied with respect to status
19 determinations.
20 The genesis of the Combatant Status
21 Review tribunals was the Rasul and Handi decisions
22 which, you know, Rasul extended habeas at Guantanamo.
23 Hamdi addressed the extent of the process that would
24 be constitutionally permissible to detain an American
25 citizen in this country as an enemy combatant.

13 (Pages 46 to 49)

<p>54</p> <p>1 Denbo has done an excellent study of the seizures. 2 When that is the frame of reference, it 3 is clear this process comes nowhere near the 4 protections we traditionally afford to these folks 5 And let me make one final point. I think 6 there is almost tremendous agreement in principle on 7 this panel. It appears that the one empty chair here 8 is a true pre-thinker who thinks that the traditional 9 criminal justice process as it existed before 9/11 is 10 sufficient to deal with the threat to the country in 11 international terror. 12 I mean, I don't think any of us 13 subscribes to that point of view. And I think we all 14 agree with the proposition that it would be 15 appropriate to sit down and see whether you want to 16 engage in this discussion. Is it a war? Is it not a 17 war? 18 Certainly, everyone would agree that, you 19 know, departures or deviations from the normal 20 criminal process are appropriate. The question is 21 what departures, how much, what's necessary, what's 22 not necessary. 23 And if we had that discussion in, you 24 know, the fall of 2001 in designing military 25 commissions or the spring of 2002, I think we'd be in</p>	<p>56</p> <p>1 do you depart from the normal process that I don't 2 think we would come to if we had this discussion, you 3 know, five years ago. 4 And so, for example, we're talking about 5 necessity. It's like if we need to interrogate people 6 because we need intelligence, there's a ticking time 7 bomb or there is some sort of a terrorist time plot 8 that's ongoing and we need intelligence and we can't 9 worry about Miranda; we can't worry about Article 10 3(b), et cetera. 11 Well, you know, to the extent we need to 12 design a new rule, let's design that rule. I mean, 13 you know, if we go back and do the research and it 14 turns out military law already accounts for that 15 situation -- there's a fairly well established body of 16 military precedent that says that if you're conducting 17 an interrogation for intelligence purpose, Article 18 31(b), Miranda, Tempe -- being Tempe the case that 19 applies Miranda in the military system doesn't apply 20 and you can conduct that interrogation; you get that 21 information, get that intelligence; use it however you 22 want, statements are admissible; you're good to go. 23 But instead of applying that rule, we 24 decided these are people without rights, conduct 25 interrogations for purely law enforcement purposes and</p>
<p>55</p> <p>1 a totally different situation than we are in today. 2 We didn't. 3 Instead, the Executive branch went out 4 and said: We don't need to have that discussion with 5 Congress; we can rely upon our understanding of the 6 President's war powers and the law of war and go out 7 make a whole bunch of decisions about detention and 8 interrogation without getting prior authorization from 9 Congress. 10 And so now we find that there is a legal 11 regime that applies and Congress is forced to act -- 12 forced to act. And we have a system that is 13 designed -- around existing cases with existing 14 evidence. And we know that if we adopt a certain rule 15 on hearsay, we're going to not be able to convict a 16 certain number of people. If we adopt a different 17 rule on hearsay, then we will. 18 So, you know, this whole notion of the 19 rule of law where you have standards that, you know, 20 that you know are ahead of time and you apply them to 21 cases as they come up, we've turned that on its head. 22 And so now we have a system that we are 23 designing for a particular class of people in 24 particular cases and we're coming to certain 25 conclusions and answers about these questions of where</p>	<p>57</p> <p>1 there are no rules that apply and we can use that 2 information. So we can't go back and undo that. 3 If we sort of try to come to that million 4 course now and have a system that says intelligence 5 interrogations are okay; no rights or warnings are 6 necessary, but when interrogations are for law 7 enforcement purposes we have to do something. If we 8 elect that rule today, we can't convict the people we 9 have there at Guantanamo. 10 And I think there are a number of 11 particular examples that you can, you know, state when 12 you go through the trial rights, speedy trial, 13 compulsory process, confrontation, et cetera, we've 14 already made the decision. We've created the 15 necessity. And so now we have to create a system ex 16 post facto and we have to rely upon the decisions 17 we've already made. 18 I mean, it wouldn't be the decision we 19 would made five years, or we'd have to let the people 20 go. It's like it's a horrible position and all, you 21 know, Greg can do and folks do who created this 22 process can do: Well, we weren't doing anything 23 different; it was a war; it was like any other war. 24 and they have to, sort of, create this mantra of, you 25 know, we made decisions based on existing precedent</p>

15 (Pages 54 to 57)

<p>62</p> <p>1 rights. It's the same thing as reading a will and 2 saying that somebody is not covered in it. 3 What I think we're arguing is that there 4 are -- I think there are these frameworks and 5 particularly Geneva is a sort of opt-in framework. 6 You have to conduct yourself in a way that qualifies 7 for protections. If you don't qualify for them, that 8 doesn't mean that you shouldn't have any protections. 9 But what we're talking about at that 10 point is institutional competence. How do you want 11 these protections to be brought? 12 And I would suggest that institutional 13 regularity and procedural regularity is a matter that 14 Congress ought to take on and figure out. And we 15 don't really want it to be done by courts on an ad hoc 16 basis stretching these principles that really don't 17 apply because they want to avoid the possibility of a 18 legal black hole. 19 So I think we want Congress to handle it. 20 MR. LUSTBERG: I want to, of course, 21 thank all these panelists. I hope this has given you 22 just a sense of the scope -- the breath of the issues 23 that are presented by the issues that -- by 24 Guantanamo, indeed, by all of the civil liberties 25 challenges that have arisen in the wake of 9/11,</p>	<p>64</p> <p>1 prosecution of eight German saboteurs in a bizarre 2 Supreme Court proceeding. And now we're witness to 3 history with what has transpired in Guantanamo. 4 What we have witnessed today are the 5 people that are making history on each side. I'm 6 really honored to be in their presence because we've 7 had Professor Azmy and Lieutenant Commander Keubler on 8 one side and Deputy Attorney General Katsas and Mr. 9 McCarthy on the other side. 10 It is a great segue into our next program 11 on professionalism because their views are so 12 dramatically different but yet they're professional. 13 That is a great statement of how we deal with issues 14 in this country. 15 We're going to take a 10-minute break. 16 Hurry on back and we'll have another 17 program. 18 (Recess.) 19 20 21 22 23 24 25</p>
<p>63</p> <p>1 although we've really focused on Guantanamo here 2 today. 3 In doing that, I think what you can see 4 is that the argument is complicated and that they're 5 being made by people who are very, very intelligent 6 and, indeed, brilliant and are very committed to their 7 positions. 8 And, really, that's a credit to our 9 system of laws and to the good faith of everyone who 10 is involved. Certainly, there are passions on both 11 sides. And I hope this has just given you a sense of 12 that, which is all we can do today. Obviously, we 13 could continue this debate for hours or days. That 14 is what goes on. 15 I want to thank the panel -- some of them 16 who have traveled quite a distance to be here. 17 (Applause.) 18 MR. LUSTBERG: Thank you all for your 19 attention. I know when I usually come to these, I 20 usually outside by now. I appreciate your time. 21 MR. POPLAR: Prior to 9/11 we have been 22 history on this topic of your rights in time of war. 23 the Second World War, the Civil War, the suspense of 24 habeas corpus in the Milgan case. The Second World 25 War and the detention of the Japanese Americans and</p>	<p>65</p> <p>1 MR. POPLAR: Larry goes back. We're 2 about to start the second half of the program. 3 Before we do, I'd like to call Doug 4 Alberts to say a few words for the New Jersey 5 Historical Society, a very vibrant -- a very 6 functional organization which is part of our District 7 Community right now. 8 MR. ALBERTS: Thank you. 9 (Applause.) 10 MR. ALBERTS: I try to be part of vibrant 11 organizations as a rule. 12 Thank you, Carl, and the Association of 13 the Federal Bar, for this opportunity to present a 14 brief report on the activities of the District Court's 15 Historical Society. 16 Since its creation in 1984, the Society 17 has enjoyed steady growth of membership and expansion 18 of its programs. Currently we have over 250 members 19 and member firms and a year-round calendar of 20 activities. 21 Last year the Society published the 22 first-ever written history of the United States 23 District Court. This book, which is still available, 24 is now in its second printing and has been nominated 25 for an award by the State Historic Commission.</p>

17 (Pages 62 to 65)

<p>70</p> <p>1 Since we have -- by the way, I would be</p> <p>2 remiss if I didn't mention that Magistrate Judge</p> <p>3 Hedges, who was originally scheduled to be on the</p> <p>4 panel this morning, could not be here.</p> <p>5 Relationships between lawyers and judges.</p> <p>6 Since we have the benefit of two distinguished members</p> <p>7 of the District Court here, let me begin with Judge</p> <p>8 Kugler, who I know has had some experience in this</p> <p>9 area.</p> <p>10 Judge Kugler, have you encountered Rambo</p> <p>11 and Ramba in your courtroom? If so, how have you</p> <p>12 dealt with them?</p> <p>13 JUDGE KUGLER: I have. I think we all</p> <p>14 have.</p> <p>15 JUDGE THOMPSON: I can't hear you.</p> <p>16 MR. POPLAR: May I say the sound system</p> <p>17 does not appear to be working very well. So please</p> <p>18 keep your voices up.</p> <p>19 JUDGE KUGLER: I bet we could find some</p> <p>20 place in South Jersey that has a sound system that</p> <p>21 works.</p> <p>22 MR. POPLAR: We could.</p> <p>23 (Laughter.)</p> <p>24 JUDGE KUGLER: The answer to your</p> <p>25 question is yes, I have. More than once -- can</p>	<p>72</p> <p>1 and move to South Jersey now.</p> <p>2 (Noise from microphone.)</p> <p>3 MR. ORLOFSKY: Judge, you screwed it up</p> <p>4 again.</p> <p>5 JUDGE GREENAWAY: Now we're like in an</p> <p>6 echo chamber.</p> <p>7 Obviously, the first thing you do is turn</p> <p>8 their microphone off.</p> <p>9 (Laughter.)</p> <p>10 JUDGE GREENAWAY: No one can hear them</p> <p>11 then and then there is no problem.</p> <p>12 I have to say, earnestly, that I haven't</p> <p>13 encountered the problem very often in my tenure. I</p> <p>14 don't really employ the warnings that Judge Kugler, I</p> <p>15 think judiciously, uses. I have maybe one sidebar.</p> <p>16 Tell them this really isn't going to happen and then</p> <p>17 the one time that I did have a problem, I went back to</p> <p>18 sidebar and I said "You will -- like your clients,</p> <p>19 you'd like to win. But I will embarrass you in front</p> <p>20 of the jury if this happens again."</p> <p>21 That was the end of it. It may seem a</p> <p>22 little heavy handed, I know. I think it is the best</p> <p>23 and most effective way to handle incivility quickly.</p> <p>24 MR. ORLOFSKY: Thank you, Judge</p> <p>25 Greenaway. I may hesitate to call upon you again --</p>
<p>71</p> <p>1 anybody hear me?</p> <p>2 More than once I've had problems with</p> <p>3 lawyers in court. It's funny reflecting on it right</p> <p>4 now. I think the three worst offenders that I had</p> <p>5 were all out-of-state counsel admitted pro hac vice.</p> <p>6 How to deal with it? I think a series of</p> <p>7 warnings, incrementally more and more serious</p> <p>8 warnings. I remember one lawyer from Pennsylvania who</p> <p>9 I kept warning to stop his behavior, which was very</p> <p>10 disruptive, stamping his feet, yelling, raising his</p> <p>11 voice. I, finally, just threw -- literally threw him</p> <p>12 out of the courtroom and told him he could not appear</p> <p>13 for the rest of the day until he calmed down and made</p> <p>14 his local counsel continue the trial in front of the</p> <p>15 jury.</p> <p>16 It is a difficult problem. Fortunately,</p> <p>17 it doesn't happen very frequently. I think the way to</p> <p>18 deal with it is to start slow and just keep warning</p> <p>19 them and warning them and warning them and giving them</p> <p>20 an opportunity to change their behavior. When they</p> <p>21 don't, I think it is incumbent upon the judge to do</p> <p>22 something about it.</p> <p>23 MR. ORLOFSKY: Judge Greenaway, have you</p> <p>24 encountered Rambo and Ramba in your courtroom?</p> <p>25 JUDGE GREENAWAY: We're going to adjourn</p>	<p>73</p> <p>1 (Laughter.)</p> <p>2 MR. ORLOFSKY: -- until I have more</p> <p>3 control over the microphone in front of you.</p> <p>4 Mr. Poplar, what about lawyers'</p> <p>5 relationships with lawyers? You were fond of telling</p> <p>6 me how you're a simple country lawyer. You keep</p> <p>7 telling juries that for 30 years. You're fond of</p> <p>8 telling me that and how large law firms take advantage</p> <p>9 of you in a variety of different ways.</p> <p>10 Tell us about some of your experiences,</p> <p>11 particularly with respect to requests for extension of</p> <p>12 times -- extension of time to answer or do other</p> <p>13 things or conduct at depositions.</p> <p>14 MR. POPLAR: I find every day that I have</p> <p>15 a difficult lawyer-adversary to deal with. I find in</p> <p>16 the big firms sometimes they inundate you with papers</p> <p>17 that are unreasonable in requesting continuances in a</p> <p>18 greater degree than it ever happened before.</p> <p>19 I think that there is a value to being</p> <p>20 unprofessional. I think there is a value to being</p> <p>21 discourteous because there seems to be no remedy for</p> <p>22 it. It makes it very, very difficult to litigate.</p> <p>23 As recently as yesterday a large</p> <p>24 Philadelphia firm refused to grant a postponement for</p> <p>25 a matter of -- a deposition on Monday which we got</p>

19 (Pages 70 to 73)

<p>78</p> <p>1 professionalism seminar required by all in-house 2 counsel seeking limited licenses to practice in New 3 Jersey. To date we have had four seminars. We have 4 two to go and we've reached over 1200 in-house 5 counsel.</p> <p>6 The Superior Court judges, which we call 7 the young baby judges, the Municipal Court judges, 8 receive seminars by us. I participated in them 9 myself. They're well received.</p> <p>10 We have also developed a model seminar 11 for all County Bar Associations that can be used. 12 We're in the process with the Mason Gross School in 13 Rutgers in developing a DVD on ethics and 14 professionalism which will be available.</p> <p>15 And, finally, we continue to recognize 16 the accomplishments of good lawyers on a positive 17 basis with our annual professionalism Lawyer of the 18 Year Award. Every County Bar, specialty Bar, 19 participates in that. We've had 100 percent 20 recognition by lawyers. And, of course, the overall 21 Daniel Ahern Award recognizes the career achievement 22 and commitment of the high standard of lawyers. It is 23 a very active commission. We're working on it. We've 24 seen improvement.</p> <p>25 I do recommend everybody at their own</p>	<p>80</p> <p>1 Certainly at the head of a classroom, at 2 the head of a courtroom, we possess tremendous power 3 to make the weather. So what is it that we are 4 demonstrating with our choice of words? What is it 5 hat we are demonstrating with our body language, with 6 our demeanor, with our level of preparedness, with our 7 own expectations for ourselves with regard to 8 punctuality?</p> <p>9 For that matter I attempted to find that 10 while sticks are sometimes warranted, carrots tend to 11 work better. So I will always make a point of noting 12 the examples of civility, of professionalism, of 13 preparedness, of excellence that are demonstrated in 14 and out of the classroom.</p> <p>15 And I'll do that in class. Actually 16 stopping to pause and commend a particular student. 17 I'll also do that outside of class, sending an 18 e-mail, sending a handwritten note.</p> <p>19 If you treat people as they are capable 20 of becoming because the inherent tendency for civility 21 I am convinced, resides not just in some of us, but in 22 all of us. In some it just needs to be drawn out a 23 bit more. To the extent that we are guided, then, by 24 what we admire, rather than what repels us, we really 25 have the opportunity to be the change that we want to</p>
<p>79</p> <p>1 firms address the problems and I don't think we'll see 2 some of the stuff that Carl has elaborated on.</p> <p>3 MR. ORLOFSKY: Thank you.</p> <p>4 Paula, what are the law schools doing 5 about teaching professionalism?</p> <p>6 MS. FRANZESE: Yeah. We're mindful of it 7 all the time. Mindful that it certainly starts with 8 us.</p> <p>9 At the start of every semester I share 10 with my students an excerpt from Goethe who had 11 written centuries ago, "I have come to the frightening 12 conclusion that I am the decisive element. It's my 13 mood that tends to make the weather because with each 14 word, with each gesture I have the unique capacity, 15 the inherent power to make a life either miserable or, 16 alternatively, glad. I can always choose to humiliate 17 or, alternatively, to transcend."</p> <p>18 Here is the kicker.</p> <p>19 "If we treat people as they are, we make 20 them worse. If we treat them as they are capable of 21 becoming, we help them to become just that."</p> <p>22 I challenge my students to become the 23 aspiration statement and I like to think that I assist 24 by setting norms and appropriate baseline standards of 25 expectations for what it means to be a professional.</p>	<p>81</p> <p>1 see in the profession.</p> <p>2 MR. ORLOFSKY: Thank you.</p> <p>3 Dean Riccio, as a former Law School Dean, 4 academic and now a practicing lawyer again, how does 5 one reconcile the duty to zealously represent one's 6 client with professionalism?</p> <p>7 MR. RICCIO: I think you have to be 8 guided by principles of professionalism and your own 9 sense of integrity.</p> <p>10 I think, perhaps. The best way for me to 11 answer your question, Steve, is to ask a couple of 12 questions and then give you my reaction to them.</p> <p>13 The first is: Is more being done today 14 to promote civility and professionalism than there was 15 10 or 15 years ago?</p> <p>16 I think, after listening to Paula and 17 Rich and knowing of my own experience, the answer is 18 clearly yes, there's quite a bit being done. And 19 you'll see issues of civility and professionalism 20 cropping up in judicial opinions. You will see issues 21 of professionalism and civility being integrated not 22 only into formal law school events, but also into 23 courses that get taught.</p> <p>24 There is hardly a course in law school 25 where you can't, during one or more classes, integrate</p>

21 (Pages 78 to 81)

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1 extension of time to answer.
2 MR. BADALATO: And I think that a lot of
3 this is carried on by what we see. I try cases. You
4 think the jury has an idea that what they see on
5 television on some of these shows and some of these
6 judge shows is the way it's really done. But, again,
7 it all comes back to the firms.
8 If the firms are mentoring and teaching,
9 if the law schools are mentoring and teaching, the
10 young people will follow the good example and they
11 will not be allowed to do things like Carl said; not
12 grant an extension.
13 It's ridiculous getting into a case and
14 not giving someone the first time they call -- "Of
15 course, you can adjourn the deposition on Monday;
16 let's work out another date.
17 I mean, that's just absurd. But it is
18 fostered a lot by the O.J. trial. This last episode
19 with the Nicole Smith and what people and young
20 lawyers see on TV that they think that that's the way
21 to go in there, with a gun-slinging operation, and
22 that just simply is not the case.
23 MR. ORLOFSKY: Rich, how do you think
24 unprofessional conduct plays in front of a jury?
25 MR. BADALATO: I think, from my talking

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1 to judges and having tried cases for over 40 years, it
2 plays very poorly. I think the jurors pick it up. I
3 don't think they're impressed at all. I think they
4 like the people that are articulate and courteous at
5 all times, standing up when the jury comes in,
6 addressing the Court in a caring way even if you
7 really are angry with the judge's decision, not
8 displaying a temper, but holding it back. Maybe
9 talking to him in chambers.
10 I think it plays very poorly. My
11 experience is that there is very bad results with poor
12 conduct.
13 MR. ORLOFSKY: Carl, what is your view of
14 that issue?
15 MR. POPLAR: I agree with Richard. As
16 recently as last year I was doing a case -- and I
17 think the evidence was reasonably substantial -- in a
18 criminal matter.
19 A young prosecutor from Washington was
20 just disrespectful of me during the trial. I think
21 that caused me to bond with the jury. I thought that
22 alienated the jury.
23 I don't know -- it was a case before
24 Judge Kugler. I don't know if he picked up on that.
25 MR. ORLOFSKY: Do you think he picked up

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1 on that?
2 JUDGE THOMPSON: Give us an example.
3 MR. POPLAR: Example of the disrespect?
4 JUDGE THOMPSON: Yes.
5 MR. POPLAR: I can recall asking the
6 young man if I could borrow an exhibit that he used on
7 direct that I wanted to use on cross and he threw it
8 at me.
9 I, sort of, had this poker face because I
10 was applauding this stuff. I thought it was a great
11 thing for me.
12 Then he would make faces and be surly
13 with me and I thought it was -- I thought it was good
14 for my ability to bond with the jury. Unrelated to
15 anything I was doing.
16 MR. ORLOFSKY: Judge Kugler, do you have
17 a comment on that?
18 MR. KUGLER: Not on Carl's case because
19 his client awaits sentencing.
20 (Laughter.)
21 JUDGE KUGLER: Anyway --
22 MR. POPLAR: On a minor count. The major
23 count we went home on.
24 JUDGE KUGLER: The whole area of how a
25 jury reacts to unprofessional conduct by a lawyer? I

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1 think a lot depends on the tone that the judge sets in
2 the courtroom. I think the jury follows the judge's
3 lead. If the judge makes it clear that it is not
4 acceptable conduct, the jury will follow the judge.
5 That is why I think the judges have to be very careful
6 about not putting up with that and putting an end to
7 it very quickly.
8 I think Carl and Richard are both
9 absolutely correct. If the jury understands it is
10 unacceptable, the jury is going to hold it against the
11 person perpetrating that kind of conduct. They tell
12 me all the time that they do. They don't like these
13 lawyers. It is pretty clear.
14 MR. ORLOFSKY: Judge Greenaway, how do
15 you think unprofessional conduct plays with a jury?
16 JUDGE GREENAWAY: I'm not going --
17 MR. ORLOFSKY: Don't touch the microphone
18 please.
19 (Laughter.)
20 JUDGE GREENAWAY: I hesitate even to
21 touch the base.
22 I think that my experience speaking with
23 jurors after a trial is that they -- they're always
24 taken aback by unprofessionalism and discourtesy --
25 any kind of discourteous act among lawyers.

23 (Pages 86 to 89)

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1 do. Fortunately, not very frequently.

2 MR. ORLOFSKY: What do you do, for

3 example, if ultimately a lawyer or a law firm that has

4 behaved unprofessionally or overzealously files a fee

5 petition?

6 JUDGE KUGLER: Fee petitions are very

7 difficult in the Third Circuit. The judge's -- mine

8 and I know most judges I know, obvious reaction to

9 those kind of fee petitions, there is something

10 terribly wrong about this. It is too much. Because

11 this was a lot of wasted time.

12 It is not that easy to do. You have to

13 go through it line by line. It's very difficult in

14 the Third Circuit precedent to just say: Well, I

15 wouldn't have spent this much time on that.

16 And lawyers shouldn't spend this much

17 time on that. It's a -- a fee petition is not a good

18 way to attack that problem.

19 MR. ORLOFSKY: How do you think judges

20 should address the problem?

21 JUDGE KUGLER: Well --

22 MR. ORLOFSKY: Do you think they should

23 address it in opinions that they publish?

24 MR. KUGLER: Well, we do address it in

25 opinions that we publish. I know I made a reference

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1 to some of my opinions to the Code of Professionalism.

2 Although it's aspirational only and not to be used for

3 disciplinary matters or litigation purposes, I,

4 nevertheless, refer to that.

5 If it's particularly egregious and some

6 kind of penalty needs to be assessed -- I know you've

7 done it. I've done it. I think we have all done it.

8 Requiring lawyers to attend some kind of CLE course on

9 professionalism. I don't know it does much good. But

10 I don't know what else we're supposed to do.

11 I think the Dean and Carl had a good

12 point. Looking out over this room, there is not one

13 of you in this room, I don't think, who would refuse

14 to grant a continuance if asked by an adversary.

15 This is not really the audience for the

16 problem. I think you're all here to find out what you

17 should do when you're faced with these kinds of Rambo

18 lawyers and what kind of remedies you have for that.

19 I don't think we need to teach many of you anything

20 about professionalism.

21 So it's a difficult problem. I'm not so

22 sure the courts are the answer. I know a lot of you

23 try to get the judges involved in this. We get all

24 kinds of correspondence that goes back and forth

25 between lawyers. Nasty stuff. Name-calling stuff.

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1 I'm not so sure what you expect us to do about it.

2 Carl and Steve alluded earlier to this

3 Third Circuit opinion by Judge Barry. It's Seldana

4 versus K-Mart. It makes it exceedingly difficult for

5 the courts to impose any kind of sanctions for

6 behavior that occurs at a deposition and not in front

7 of a judge. It is a very difficult problem.

8 Obviously, you look to us for help.

9 We'll try to do what we can do. Please understand

10 there is not a lot we can do.

11 MR. ORLOFSKY: Judge Kugler, what about

12 this practice so many lawyers engage in of copying a

13 Court on correspondence that they send to their

14 adversary? Is that appreciated?

15 JUDGE KUGLER: No.

16 (Laughter.)

17 JUDGE KUGLER: Frankly, it's counter

18 productive. I characterize these things -- it's name

19 calling.

20 And, of course, it always generates -- it

21 doesn't always. With good lawyers it doesn't generate

22 any response. But, invariably, it generates a

23 response from the adversary who then writes to me and

24 says: Well, no, I didn't start this, you know, she

25 started it and she is a no good. It goes on and on.

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1 It goes on and on. There is no end to it.

2 I'm not there. I don't know what's going

3 on. I don't know who's generating this.

4 When I was a Magistrate Judge, I used to

5 get them on the phone to find out what the crux of the

6 problem is so it didn't get any further down the road

7 or any worse. But, no, it is not appreciated because

8 I'm not sure what it is you expect me to do about your

9 problem.

10 MR. ORLOFSKY: Judge Greenaway, what's

11 your view on that?

12 JUDGE GREENAWAY: That is really the key

13 to the problem.

14 MR. ORLOFSKY: Don't touch the

15 microphone.

16 JUDGE GREENAWAY: That's really a key to

17 the problem. What is it you that you want us to do

18 when we get letters, as Judge Kugler just alluded to.

19 I basically get folks immediately on the phone.

20 But the worst is when either in those

21 letters or however it's relayed to the Court, there

22 are allegations of untruths. That's about as pleasant

23 as I can put it. And I have no idea, earnestly, what

24 you want us to do.

25 My general response is: Look, you're all

25 (Pages 94 to 97)

<p>1 MR. ORLOFSKY: Before I ask Judge Kugler 2 to rule on something that is not before him and give 3 you an adversary opinion, let me say all of us have 4 been in that situation. And I think the way to deal 5 with it is, first, to be patient; second, to create an 6 appropriate record. And when you reach the tipping 7 point, and that's really a matter of judgment, then I 8 think you have to go to the Magistrate Judge or the 9 District Judge for some relief.</p> <p>10 Now, in most cases, you know, you may be 11 going to the magistrate court, but if it's for a 12 matter of scheduling you may be going before the 13 Magistrate Judge to address those questions. And I 14 think our magistrate judges are sophisticated enough 15 to understand what's going on. But that's a difficult 16 problem. It is not one that is easily resolvable. 17 It's really a judgment call on your part. And you'll 18 also have, you know your client with you looking over 19 your shoulder and pressuring you to do something about 20 it.</p> <p>21 So, Judge Kugler, now that I've answered 22 the question, what's your view of that? 23 (Laughter.) 24 JUDGE KUGLER: It takes incredible 25 patience, which I think is part of your professional</p>	<p>102</p> <p>1 MR. ORLOFSKY: What I like; a short, 2 succinct answer. 3 It's a real problem, but one has to 4 balance the issues of professionalism with one's duty 5 to one's client.</p> <p>6 And Jeff raises a valid point. When is 7 enough enough? And that's really a judgment call. 8 When you do go in -- when you do go in before the 9 Magistrate Judge or the District Judge, you have to be 10 able to present a pretty compelling record. So it is 11 important for you to document it.</p> <p>12 Now, in terms of scheduling. Obviously, 13 the magistrate judges have -- in this district have 14 fairly regular scheduling conferences. So you'll be 15 in before them every 90 days or so and there will be 16 scheduling orders in place and you're expected to 17 comply with the deadline.</p> <p>18 So, you know in most cases those issues 19 are going to come before the Magistrate Judge in the 20 first instance, and that's the point, the opportunity, 21 if you will, to make your point.</p> <p>22 One of the areas of professionalism that 23 isn't often addressed, although it is certainly in 24 every Code of Professionalism that has been adopted in 25 this court and in other courts are courts -- judges'</p>
<p>103</p> <p>1 responsibility, is to be incredibly patient. And I 2 think, as much as it pains me, I agree with Steve 3 about it gets -- 4 MR. ORLOFSKY: Did you get that down, 5 Stan? 6 THE REPORTER: Yes. 7 JUDGE KUGLER: -- it gets to a tipping 8 point where you have to enlist the aid of, probably, 9 the Magistrate Judge to get the thing back on 10 schedule.</p> <p>11 I don't think it does you any good to 12 write to the Court in a whiny way and say: This 13 person is being mean to me. 14 Just say: Look, factually -- very 15 neutral -- say: I've scheduled depositions on these 16 days; this lawyer has canceled each and every one of 17 them; judge, we need to get this thing back on 18 scheduling; we may need an Order compelling 19 depositions and we need a conference. 20 Leave it at that. That is the best we can 21 hope for.</p> <p>22 MR. ORLOFSKY: Judge Greenaway, do you 23 want to comment? 24 JUDGE GREENAWAY: No. 25 (Laughter.)</p>	<p>104</p> <p>1 duties to lawyers. Okay. So this is kind of a 2 sensitive subject, but it's worth -- I think worth 3 airing in this District where the judges have a fairly 4 collegial relationship with the Bar and the Bar is 5 collegial with the Court and also with each other. 6 Judge Kugler, what about that, the 7 Court's obligations to lawyers? What is your view of 8 that? 9 JUDGE KUGLER: I think we all take it 10 very seriously, obviously. I think it was a great 11 idea to put this in this litigation conduct 12 guidelines. If you look at the other ones in your 13 package from all the various states, you're not going 14 to see many that refer to the judges' responsibilities 15 to the lawyers and the litigants. It's just New 16 Jersey and in the Seventh Circuit that have adopted 17 that. Ours is based on the Seventh Circuit one. 18 But it's a difficult problem. Maybe we 19 ought to get into a discussion as to what you, the 20 lawyers, should do when you have a problem with a 21 judge and how to get that resolved. I don't know if 22 you want to get into that at this point.</p> <p>23 MR. ORLOFSKY: Well, we're talking about 24 professionalism. It is part of our Code of 25 Professionalism.</p>

27 (Pages 102 to 105)

<p>110</p> <p>1 midst.</p> <p>2 If what we move towards is what we tend</p> <p>3 to talk about most and if what expands is what we tend</p> <p>4 to think about the most, then we've got to be talking</p> <p>5 more about this thing more about this and acting more</p> <p>6 about this.</p> <p>7 MR. ORLOFSKY: Richard.</p> <p>8 MR. BADALATO: I just want to tell you</p> <p>9 that just yesterday the Conference of Presiding Judges</p> <p>10 is looking over a proposal from the Commission on</p> <p>11 Professionalism of adding a component wherein, much</p> <p>12 like the lawyers, when a lawyer acts out in poor</p> <p>13 conduct, that can be reported to the County Bar, which</p> <p>14 then goes to the Assignment Judge, who brings them in,</p> <p>15 et cetera.</p> <p>16 We're asking the Court to consider a</p> <p>17 similar procedure for state court judges because the</p> <p>18 biggest problem is lawyers don't want to blow the</p> <p>19 whistle for fear of reprisal. So the confidentiality</p> <p>20 factor is that they would report it to the County Bar.</p> <p>21 They would have a little investigation, report it to</p> <p>22 the Assignment Judge on an anonymous basis --</p> <p>23 confidential basis with no ethical problems or</p> <p>24 anything.</p> <p>25 The judge would be brought in and it</p>	<p>112</p> <p>1 And in my experience, when you make that</p> <p>2 presentation with most judges who care about what they</p> <p>3 do as judges, they will perk up.</p> <p>4 MR. ORLOFSKY: Well, that is a good</p> <p>5 point.</p> <p>6 Of course, what Ron doesn't mention is</p> <p>7 that it takes a lot of courage to do that. It is not</p> <p>8 easy to do that sometimes, for all the obvious</p> <p>9 reasons.</p> <p>10 Mr. Poplar.</p> <p>11 MR. POPLAR: But this difference between</p> <p>12 a young lawyer in front of an intemperate judge, and</p> <p>13 so on, with the stature of Ron Riccio before an</p> <p>14 intemperate judge and speaking out, what does the</p> <p>15 young lawyer do?</p> <p>16 If you walk into the courthouse, there</p> <p>17 are, maybe, 50 young lawyers in the courtroom and</p> <p>18 there are ten senior lawyers in the courtroom. The</p> <p>19 young lawyers can't stand up to an intemperate judge.</p> <p>20 They just can't do it.</p> <p>21 MR. ORLOFSKY: We have about a minute or</p> <p>22 two left before we have to conclude.</p> <p>23 Does anyone in the audience have a</p> <p>24 question or comment they wish to share?</p> <p>25 MR. BAIN: So many years ago there was an</p>
<p>111</p> <p>1 would be discussed about his or her conduct.</p> <p>2 Hopefully, if we could get that, he could isolate some</p> <p>3 of these judges and get decisions before they retire.</p> <p>4 MR. RICCIO: Steve, if I could weigh in</p> <p>5 on this for a second?</p> <p>6 Implicit in your question is that the</p> <p>7 judge is not behaving appropriately and is doing so</p> <p>8 intentionally. If it is a repetitive situation -- if</p> <p>9 it is an egregious situation, it is one thing. If it</p> <p>10 is intemperance, impatience, perhaps not as attentive</p> <p>11 to an argument as he or she should be, it is perhaps</p> <p>12 because the judge doesn't even understand that he or</p> <p>13 she is not behaving as you would hope that he or she</p> <p>14 would behave.</p> <p>15 I think in situations like that, if</p> <p>16 you're an effective lawyer and not a potted plant, you</p> <p>17 say something to the judge and you do it in a</p> <p>18 respectful, honest and open way.</p> <p>19 At least in my experience, when I've had</p> <p>20 judges who were not giving the attention to the case</p> <p>21 either to the extent or in the manner that I hoped it</p> <p>22 would be given, I would in a very professional and</p> <p>23 gentle but, nevertheless, hopefully, effective way let</p> <p>24 the judge know that I don't think you're doing what</p> <p>25 you are supposed to be doing.</p>	<p>113</p> <p>1 editorial in The New Jersey Lawyer. It suggested that</p> <p>2 maybe the federal bench should be subject to peer</p> <p>3 review similar to the state courts, as mentioned</p> <p>4 before. That may require an amendment to the</p> <p>5 Constitution. A decision of two panels of the D.C.</p> <p>6 Court of Appeals that -- if they had been put together</p> <p>7 would have held that any disciplinary action taken</p> <p>8 against a federal judge could be only impeachment.</p> <p>9 I suggest to you maybe we should consider</p> <p>10 some sort of peer review.</p> <p>11 MR. ORLOFSKY: Judge Kugler, any</p> <p>12 thoughts?</p> <p>13 JUDGE KUGLER: You do have peer reviews</p> <p>14 for Magistrate Judges and Bankruptcy Judges because</p> <p>15 they come up for reappointment at the end of the term.</p> <p>16 There have been Bankruptcy Judges,</p> <p>17 Magistrate Judges -- I am happy to say never in New</p> <p>18 Jersey, but in other states, who were denied</p> <p>19 reappointment because of the opposition of the Bar.</p> <p>20 If that happens to Article III judges --</p> <p>21 you need to amend the Constitution. There is a</p> <p>22 statute where you can file a formal complaint against</p> <p>23 an Article III federal judge which goes to the Court</p> <p>24 of Appeals. The Chief Judge reviews it. He or she</p> <p>25 could dismiss it or refer it to a hearing. Then you</p>

29 (Pages 110 to 113)

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