



The New York Minutes

Southern District of New York FBA Chapter Newsletter

Volume 1, Issue 4

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Pictures from Office of the Federal Defender Reception at S.D.N.Y.:



Front Row (left to right): Judge Cathy Seibel, Richard Zabel, Eugenie Montaigne (FDNY), Anna E. Finkel (FDNY), Nancy Mao (FDNY), Jennifer L. Brown (Attorney-in-Charge, FDNY), Seth Orman (FDNY), Giselle Villanueva (FDNY), Rachel Gregory (FDNY), Colleen P. Cassidy (FDNY), Roland Thau (FDNY), Kimbel Joseph (FDNY) and Judge Deborah A. Batts.

Back Row (left to right): Christopher A. Flood (FDNY), Robert M. Baum (FDNY), Jonathan A. Marvinny (FDNY), Mark B. Gombiner (FDNY), David E. Patton (Executive Director & Attorney-in-Chief, FDNY), Chief Judge Loretta A. Preska, Raphaella Friedman (FDNY), Wanda Toro (FDNY), Karen Van Outryve (FDNY), Glenn Almas (FDNY), Heidi Van Es (FDNY), and Peggy Cross-Goldenberg (FDNY).

**SDNY
Chapter
OFFICERS**

President - Philip R. Schatz; President Elect - William F. Dahill; Vice President - Olivera Medenica; Treasurer - Jason Nardiello; Secretary - Ira Abel; National Delegate - Michael Zussman; Delegate to the Network of Bar Leaders - Amy Gell; Immediate Past President - Simeon H. Baum; Membership Chairs - Bradley Marks; Younger Lawyers Chair - Stacy E. Yeung

Letter from the Editor



Olivera Medenica, Wahab & Medenica LLC

Dear FBA Members,

On behalf of the Southern District of New York Chapter of the Federal Bar Association, I want to welcome you to the June 2013 edition of The New York Minutes.

These past few months have been particularly active for our chapter. We hosted a reception honoring the office of the Federal Defender and the new Chief Federal Defender David Patton (see left), participated in the FBA's Annual Capitol Hill day, and were finally able to see the efforts of FBA members Ray Dowd and Bruce Moyer come to fruition with the announcement of the long-awaited security pavilion for the Daniel Patrick Moynihan U.S. Courthouse. We have included some of these highlights here. I hope you enjoy the newsletter, and look forward to reviewing your continued submissions to The New York Minutes.

Sincerely,

Olivera Medenica

NYM

SPECIAL EVENTS SECTION:



Open Letter from Chapter President Philip R. Schatz:

Dear Fellow Members of the SDNY Chapter of the Federal Bar Association:

At the suggestion of Chief Judge Loretta Preska of the Southern District of New York, the Federal Bar Association and Network of Bar Leaders yesterday hosted a reception to honor the office of the Federal Defender and the new Chief Federal Defender David Patton. Almost 150 judges, assistant United States Attorneys, and lawyers attended the reception. It was an incredible turnout for an incredibly good cause.



The FBA is at the forefront of efforts to rescue our Federal Courts and its major segments from the ravages of sequestration.

David Patton (left) spoke movingly of the havoc that budget cuts have made on his office and its mission to protect indigent defendants, including unpaid furloughs for all employees.



It was heartwarming to see the mutual respect and support from the many Assistant United States Attorneys in attendance, including Deputy United States Attorney Richard Zabel (right), who also gave an impassioned speech in support of the Federal Defenders. Chief Judge Preska and FBA Second Circuit Vice President Ray Dowd also gave notable remarks in support of the Federal Defenders.

These photos (see front page) can only suggest the support of the assembled audience for our Federal Defenders. They are a crucial element of the administration of justice in our Federal Court. If we don't provide them with all the tools they need, justice is not being done.

On behalf of the officers of our chapter, I hope you will help us in our effort to reinstate the funding necessary for the mission of the Federal Defenders.

Very truly yours,
Philip R. Schatz
S.D.N.Y. Chapter President
May 15, 2013

SDNY Event Covered by New York Law Journal:

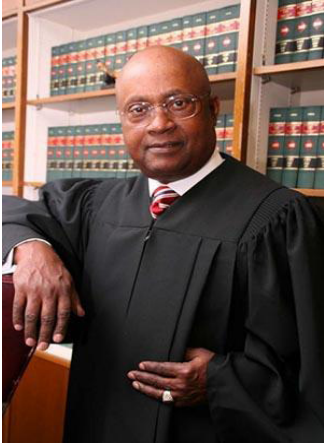
The SDNY Chapter tribute to the Federal Defenders was featured in the May 20th, 2013 edition of the New York Law Journal. Included in the coverage was a picture of past SDNY chapter president, Amy Gell, and past EDNY chapter president, Robert Rando, alongside Chief Judge Loretta Preska and David Patton, executive director, Federal Defenders.

A reprise of the event was held on May 20th, 2013 by the EDNY Chapter at the Brooklyn US Courthouse, 225 Cadman Plaza. Congratulations to both chapters for such a well attended and successful event.



FBA Co-Hosts the Hon. Theodore T. Jones, Jr. Trial Advocacy Workshop

The SDNY Chapter of the Federal Bar Association was honored to co-sponsor the Metropolitan Black Bar Association’s Honorable Theodore T. Jones, Jr. Trial Advocacy Program on Saturday, April 13, 2013. The event was made possible by the generous support of the international law firm Cleary Gottlieb Steen & Hamilton LLP.



The overflow crowd of several hundred lawyers and judges filled Cleary Gottlieb’s largest conference space for this day-long, 5 credit program. Panels of 3-4 judges and lawyers, skillfully moderated by Bronx Supreme Court Justice Alvin Yearwood, presented expert advice on all aspects of trial advocacy. Panelists included current and former judges Zachary Carter, former US Magistrate Judge, Cheryl Chambers, Appellate Division, Second Department, Barry Cozier, former justice of the Appellate Division, Second Department, George B. Daniels, US District Court for the SDNY, William F. Kuntz, II, US District Court for the EDNY, and Milton A. Tingling, Justice of the Supreme Court, New York County, and eminent practitioners Ghilliane Reed (Gibbons), Guy Mitchell (Asst. NY Attorney General), Breon Peace (Cleary), Sheila Boston (Kaye Scholer), Joseph Drayton (Cooley), Lance Ogiste (Counsel to Brooklyn DA Charles Hynes), Xavier Donaldson (Donaldson & Chilliest), and Anthony Ricco (Fellow, American College of Trial Lawyers). Nadine Fontaine, MBBA President, and Carlos Davila-Caballero of Cleary Gottlieb introduced the program.



Judge Jones (March 10, 1944 – November 6, 2012) was an outstanding judge, first on the New York Supreme Court (1990 to 2007) and then on the New York Court of Appeals. “I can’t think of anyone more committed to equal justice for everyone who enters our courts,” Chief Judge Lippman remarked to the New York Times following Judge Jones’ untimely death from a heart attack in November 2012, “He had the passion, the energy and the practical skills to develop solutions to what once seemed an intractable problem [the Justice Task Force to reduce wrongful convictions].” He is remembered for his passion for justice and his dedication to promoting diversity in the court system.

Our cosponsor, the Metropolitan Black Bar Association, has been a leading voice for lawyers of color since it was formed in 1984 by the merger of the Harlem Lawyers Association, founded in 1921 and the Bedford Stuyvesant Lawyers Association, founded in 1933.



MBBA Pres. Nadine Fontaine, SDNY Ch. Pres. Phil Schatz, Justice Alvin Yearwood.



Hon. Milton Tingling, Hon. George Daniels, Hon. Cheryl Chambers, Ghilliane Reed.

SPECIAL ANNOUNCEMENTS:



S.D.N.Y. Gets Long-Awaited Security Pavilion:

In May, Chief Southern District Judge Loretta A. Preska formally announced the construction of a long-awaited security pavilion at the Daniel Patrick Moynihan U.S. Courthouse at 500 Pearl Street. The construction of this pavilion has been a priority since the September 11, 2001 attacks, especially given the nature of the SDNY docket. The pavilion is estimated to cost approximately \$10 million and will run on the western side of the courthouse. It will allow court security to screen for weapons and explosives outside of the building instead of inside. This will shorten wait times for entry into the building for lawyers, litigants and the public.

The FBA has been at the forefront of security efforts at both the SDNY and EDNY. In the southern district, this security pavilion is a direct result of concerted and sustained efforts by the FBA, spearheaded by Raymond Dowd and Bruce Moyer. Chief Judge Preska and District Executive Ed Friedland agree that the pavilion would simply not have happened without the FBA. In an email, Chief Judge Preska succinctly told Bruce Moyer, Raymond Dowd and others at the FBA that “[w]e wouldn’t have done it without your able assistance and advice.” (see also Letter from Judge Preska, next page).

Raymond Dowd and Bruce Moyer have also provided invaluable support to the Eastern District of New York. At the request of Chief Judge Ammon and District Executive Gene Corcoran, Raymond Dowd, EDNY President Ernie Bartol, and former EDNY President Rob Rando met at the courthouse to brainstorm efforts to complete the important perimeter and counterterrorism measures of the Brooklyn courthouse. They have since helped organize crucial meetings with members of Congress and others to help move this essential project to completion.

These security projects are absolutely essential to the health of our federal courts, and the FBA has been stepping up to the plate to help get the projects done. Raymond Dowd and Bruce Moyer deserve a hearty round of applause. These efforts are time consuming but rewarding, and the assistance of FBA members is crucial in moving forward.

Chapter Members Participate in FBA's Capitol Hill Day:

On April 25, 2013 FBA members swarmed legislators’ offices all around Capitol Hill to publicize issues of vital importance to our Federal Courts. Raymond Dowd and Amy Gell participated from our Chapter, as well as Rob Rando, past President of the EDNY Chapter. The event was a huge success and received nationwide AP coverage. Mark your calendars for next year’s effort!



Letter from Chief Judge Loretta A. Preska:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
500 PEARL STREET
NEW YORK, NEW YORK 10007-1312

LORETTA A. PRESKA
CHIEF JUDGE

212-805-0240
FAX 805-7941

May 7, 2013

Raymond Dowd, Esq.
Dunnington, Bartholow & Miller LLP
1359 Broadway, Suite 600
New York, NY 10018

Dear Ray,

Thank you and your colleagues at the Federal Bar Association for your efforts in aid of the Court's quest for funding for construction of a Security Screening Pavilion at the Daniel Patrick Moynihan Courthouse. The FBA's drawing attention to this long standing need was invaluable in this effort.

We look forward to welcoming you to the courthouse to inspect the pavilion upon its completion. Thank you again.

Best personal regards.

Sincerely,


Loretta A. Preska

The Why and How of Determining Whether a Worker is an Independent Contractor or an Employee



By: Andrew S. Baron, Esq. and William F. Dahill, Esq.

Mr. Baron is Special Counsel to, and Mr. Dahill is a Partner with, Wollmuth Maher & Deutsch LLP.

Why should employers be concerned whether they have properly classified a worker as an independent contractor or employee? In short, there are substantial benefits to using independent contractors, but there are ample costs associated with misclassifying a worker that can far outstrip any benefits. Benefits include reducing or eliminating: (i) tax, unemployment insurance and workers' compensation costs; (ii) liability under certain fair employment practice and wage and hour laws; (iii) employee benefit expenses and (iv) liability for the acts of a worker. Incorrectly classifying an employee as an independent contractor, however, opens up a minefield that can result in the imposition of extensive damages or penalties under a panoply of statutes, regulations and common law principles. In one of the more well-known instances, a court determined Microsoft misclassified workers as independent contractors and allowed the workers to sue for back benefits. After winding its way through the courts for another four years, Microsoft eventually settled the matter for over \$90 million. This is in addition to Microsoft's own attorneys' fees and costs and the considerable distraction it caused to Microsoft.

Unfortunately, there is no clear-cut answer as to whether a specific worker is an employee or independent contractor. This is partly due to the fact that, depending on before which court or governmental agency an employer finds itself, or over which issue an employer is litigating, courts and governmental agencies employ different tests. For example, there is the IRS' 20 factor test, the test for the Fair Labor Standards Act and various other common law tests that the Courts use depending on the legal issue at hand. While there is no straight-forward method an employer can use to determine independent contractor vs. employee status, this does not mean that an employer cannot utilize these tests to either properly classify a worker or have a good faith argument it properly classified a worker.

There is a common denominator that runs throughout each test in almost all cases, and is considered the most important factor: the degree to which the employer controls the methods and means that the putative independent contractor or employee uses to perform his or her work. See, e.g., Hanson v. Transportation Gen., 45 Conn. App. 441, 446, 696 A.2d 1026, 1028 (Conn. App. Ct. 1997) ("There is no dispute about the ultimate test" in determining independent contractor vs. employee status. It is the right of general control of the means and methods used by the person [in performing the work] whose status is involved.");

Chrisanthis v. County of Atlantic, 361 N.J. Super. 448, 455 (App.Div. 2003) ("The most important of these factors" in determining independent contractor status is "the employer's right to control the means and manner of the worker's performance."); Bynog v. Cipriani Group, Inc., 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692, 694-95 (2003) (Under well-established New York law, "the critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results."); Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 114 (2d Cir. 2000) ("the 'greatest emphasis' should be placed on the first factor--that is, on the extent to which the hiring party controls the 'manner and means' by which the worker completes his or her assigned tasks) (collecting cases); RE-STATEMENT (3D) OF AGENCY, § 7.07(3) ("an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work"). That is, the less direction and control than an employer exercises over a worker, the more likely he or she is an independent contractor.

Courts and governmental agencies use varying "sub-tests" in determining the degree of control, but with a common theme: the extent that an employer supervises a worker and instructs him or her where, when and how to work. For example, the Equal Employment Opportunity Commission ("EEOC") lists, among other factors, the following to be used in determining the degree of control:

- (i) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- (ii) whether and, if so, to what extent the organization supervises the individual's work; and
- (iii) whether the individual reports to someone higher in the organization.

Similarly, in determining the degree of control, the IRS looks at the instructions that a business gives to the worker regarding:

- (i) when and where to work;
- (ii) what tools or equipment to use;
- (iii) what workers to hire or assist with the work;
- (iv) where to purchase supplies and services;

- (v) what work must be performed by a specified individual; and
- (vi) what sequence to use.

In applying this “sub-test,” the IRS, by way of example, determined that a computer programmer hired to complete a one-time project was an independent contractor where, among other things, the employer did not provide instructions on how the computer programmer was to complete the project beyond providing the specifications and the computer programmer worked from home at his own convenience.

In sum, each case is different and employers (most appropriately through the advice of counsel) must analyze each situation when it decides to employ a worker as an independent contractor. If an employer exercises enough “degree of control” over an individual, then he or she is an employee. The analysis arguably stops there. If, however, an employer and its counsel determine that the employer does not exercise the sufficient “degree of control” to turn a worker into an employee, then the employer and its counsel must review all factors and tests that courts and governmental agencies employ. ***

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Obiter Dictum



Philip Schatz,
SDNY Chapter President

The NY Minutes thanks the generous contribution of Philip Schatz in creating this crossword puzzle. Enjoy!

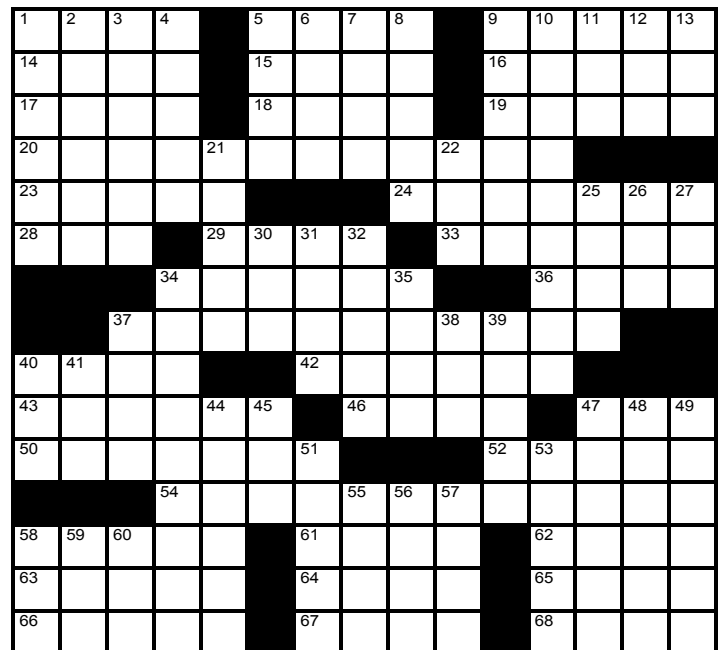
Across

- 1. “Surely you ___!”
- 5. Celestial bear
- 9. Gets promoted
- 14. Pay to play
- 15. Close, as an envelope
- 16. Bar, at the bar
- 17. Accords, e.g.
- 18. Quinn sisters’ Indie rock band “Tegan and _____”
- 19. 1 down’s address, with “Square”, or Tammany Hall saloon owner “Big Tom”
- 20. Said in passing (Latin)
- 23. World-weary
- 24. Relating to body movement
- 28. “Get it?”
- 29. Glasgow girl
- 33. Computer storage media
- 34. Westchester Parkway, or the “P” in P.G. Wodehouse
- 36. Res ___ loquitur
- 37. Eastern District courthouse location, named for renowned minister
- 40. “The Band” drummer Levon
- 42. “Goodness!”
- 43. Syrian capitol
- 46. Chicago’s Emanuel
- 47. Costa del ___
- 50. Dunk
- 52. Pontificate
- 54. Countercharges
- 58. British ___
- 61. Bone-dry

- 62. Egyptian fertility goddess
- 63. Jet enemy
- 64. Pie perch
- 65. Revealing work of art?
- 66. Bright circle?
- 67. “De bene _____” (special appearance)
- 68. Half a cubit

Down

- 1. Second Circuit Chief
- 2. Allow
- 3. Narrow channels, in science
- 4. Exams
- 5. “Back in the ___”
- 6. Go through
- 7. Indian garment
- 8. “Woe is me!”
- 9. Tax-time hope
- 10. Change, chemically
- 11. Cardinal letters
- 12. Want ad abbr.
- 13. 80s-90s Trump-bashing satirical monthly
- 21. Caught congers
- 22. ___-tac-toe
- 25. Soup in Sevilla
- 26. Instant Msgs.
- 27. Gp. that whistled “Dixie”?
- 30. Am. Lawyer, Nat. Law J., N.Y. Law Journal conglomerate
- 31. Certain herring
- 32. More rational
- 34. Child spoilers, perhaps
- 35. Film rating org.



- 37. Mr. Kadiddlehopper
- 38. Church of Scientology Founder (inits.)
- 39. EDNY Chief
- 40. Osaka “okay”
- 41. “A Nightmare on ___ Street”
- 44. SDNY Chief
- 45. Notice of motion substitute (abbr.)
- 47. Shows interest
- 48. Iroquoian language
- 49. Diminish
- 51. Clear, as a disk
- 53. Nuisances
- 55. Showy flower
- 56. Wire measures
- 57. Doing nothing
- 58. An end to sex?
- 59. Oft-filmed H. Rider Haggard novel
- 60. PC linkup