

The Federal Lawyer

February 2009 Volume 56 Number Two

Editor in Chief
René Harrod (954) 627-9916
rharrod@bergersingerman.com
Managing Editor
Stacy King (571) 481-9100

Sarah Perlman, Production Coordinator

Book Review Editor
Henry Cohen (202) 707-7892
Judicial Profile Editor
Michael Newman (513) 977-8646

Editorial Board: Kelle Acock, Nathan Brooks, Julie China, Henry Cohen, R. Johan Conrod Jr., Thomas Donovan, Raymond Dowd, Kim Koratsky, David Lender, Jeffrey McDermott, Michael Newman, Jonathan Redgrave, Hector Ramos, Becky Thorson, Michael Tonsing, Daniel Winslow, Vernon Winters

Columns

- 3 President's Message
- 6 At Sidebar
- 10 Washington Watch
- 14 The Federal Lawyer In Cyberia
- 16 IP Insight
- 18 Labor and Employment Corner
- 20 Judicial Profile
Hon. Federico Moreno
- 24 Focus On
Litigation Involving Generic Products
- 26 Focus On
Gang-Based Asylum Claims

Departments

- 12 Chapter Exchange
- 22 Letter to the Editor
- 51 Language for Lawyers
- 52 Supreme Court Previews
- 64 Membership Roundup
- 68 Last Laugh

Book Reviews

- 58 *Abraham Lincoln* • By James M. McPherson
Lincoln: The Biography of a Writer • By Fred Kaplan
Reviewed by Henry Cohen
- 59 *An Honest Calling: The Law Practice of Abraham Lincoln*
By Mark E. Steiner
Reviewed by Henry S. Cohn
- 60 "Work Hard, Study ... and Keep Out of Politics!"
By James A. Baker III; with Steve Fiffer
Cheney: The Untold Story of America's Most Powerful and Controversial Vice President • By Stephen F. Hayes
Reviewed by John C. Holmes
- 61 *Making Your Case: The Art of Persuading Judges*
By Antonin Scalia and Bryan A. Garner
Reviewed by David F. Herr
- 62 *Jingle Jangle: The Perfect Crime Turned Inside Out*
By Jim Rix
Reviewed by Daniel L. Kaplan

28 | Between a Rock and a Hard Place: Limitations on a Health Care Provider's Right to Indemnification

BY KEELY E. DUKE AND ANDREW M. HYER

During lean economic times, payments by Medicare and Medicaid account for an increasingly large share of health care providers' revenue streams. As such, health care providers and the attorneys that represent them need to be especially concerned about activities giving rise to False Claims Act (FCA) liability. Moreover, potential amendments to the FCA that will be favorable to plaintiffs appear to be on the horizon. These and other factors may converge to create a "perfect storm" of FCA liability for many health care providers in the near future. Counsel should be aware of the intricacies of indemnity claims relating to FCA actions.

36 | Beating Rich: Three Ways to Recover Attorney's Fees in Miller Act Cases

BY STEVEN J. KOPRINCE

The Miller Act is a statute applicable to all federal construction projects valued at \$100,000 or more. Because sovereign immunity prevents mechanics' liens on public projects, the Miller Act requires the prime contractor on the project to provide a substitute for a mechanic's lien: a payment bond, through a qualified surety, for the protection of first- and second-tier subcontractors. A subcontractor or sub-subcontractor who is not paid may sue on the payment bond to recover unpaid amounts.

42 | The Class Action Fairness Act and the New Federal e-Discovery Rules: To Remove or Not to Remove?

BY MICHAEL R. PENNINGTON AND ROBERT J. CAMPBELL

The culmination of an extensive lobbying effort over several years by many business organizations, the aim of the Class Action Fairness Act was to expand federal jurisdiction over class actions and to curb perceived abuses of the class action device. However, as often happens with tort reform legislation, passing CAFA required substantial compromise with organizations representing competing interests, including the American Trial Lawyers Association. The result was a statute that makes removal of class actions to federal court a somewhat more available option than it was before—but at the price of significant risks and burdens for the removing defendant.

It helps to be a Supreme Court justice to take on this topic. The Court sees some of the best of the appellate bar, as well as a steady stream of lesser advocates. This experience gives Justice Scalia a superb background for writing about how to persuade a judge. Bryan Garner, an authority on legal writing in the United States, also has thought a lot about how to persuade judges. And both Scalia and Garner also know how to fail to persuade judges.

Making Your Case is well organized, dealing in turn with general principles of argumentation, legal reasoning, briefing, and oral argument, each comprising several sections headed by a black-letter rule, of which there are 115 in the book. Two good rules are "Cite authorities sparingly" and "Quote authorities more sparingly still"; another rule is to banish acronyms. Lawyers would find it useful to place a list of the book's 115 rules into their trial or appeal notebooks.

It is not fair to fault a book like this for restating some old rules—they are true today and still important. The book would be short indeed were it limited to truly original observations. Scalia and Garner explain why the classic rules make sense and also suggest why many of the rules deserve to be broken. In the process, they offer valuable insight into how a lawyer can be both effective and original in approach. For example, they state the general rule not as "Lead with your strongest argument" (the oft-stated formulation), but as "If possible, lead with your strongest argument," and they explain why it is not always best to begin with your strongest argument. And they encourage a thoughtful approach that makes for effective, forceful, and nonformulaic briefs.

The authors do not agree between themselves on everything, and that adds perspective to this book. Garner is a strong advocate of eschewing any substantive content in footnotes, whereas Scalia takes a more reasonable view, pointing out that the solicitor general's briefs in the Supreme Court regularly relegate to footnotes substantive material that is not crucial to the justices as they read the briefs but that is helpful

for clerks doing deeper research into the issues raised in the briefs. Similarly, the authors disagree on the use of contractions in briefs, with Scalia adhering to Garner's one-time view that they have no place in briefs, and Garner now of the opinion that they may make a brief more readable. The authors' dialogue is helpful and informative and should encourage thoughtful—rather than automatic—use of the rules included in the book.

This book is also noteworthy for its breadth. As an experienced appellate lawyer, I found myself taking notes and underlining key points. And the book underscores these points with short practical examples. In addition, *Making Your Case* offers practical advice on some of the more elusive aspects of preparing briefs: planning the brief; understanding the different roles of opening, responsive, and reply briefs; and recognizing the role played by the mandated sections of briefs.

The book's discussion of oral argument is similarly insightful. It contains advice that would help prepare for a major argument before the Supreme Court but that is just as valuable for any appeal or motion argument. The authors stress preparation (as any writer on this subject must) but also advise how to schedule it—the best time to start, the steps to take, ways to organize, and the virtue of conducting a moot argument—and proceed to give practical advice on how to do a good job at the lectern. I would add to their pointers: *Reread pages 161 through 206 of this book during the weekend before your argument.*

Making Your Case will be in the bookcase beside my desk, alongside a small number of other indispensable guides for my legal practice. Like Strunk and White's *Elements of Style*, I will take *Making Your Case* out periodically and read it again—there isn't stronger testimony I can offer as to this book's value. If you read it once, you will consult it frequently again. **TFL**

David Herr is a partner in the Minneapolis firm of Maslon Edelman Borman & Brand, LLP, where he heads the Appellate Practice Group. He annotates the

Manual for Complex Litigation, Fourth ed. (West 2008) and is the author of Multidistrict Litigation Manual (West 2008) as well as numerous other books and articles on federal court practice. He is a past president of the American Academy of Appellate Lawyers and currently serves as president of the Academy of Court-Appointed Masters.

Jingle Jangle: The Perfect Crime Turned Inside Out

By Jim Rix

Broken Bench Press, Zephyr Cove, NV, 2007. 468 pages, \$39.00.

REVIEWED BY DANIEL L. KAPLAN

We all should have a cousin like Jim Rix. Better yet, we should have a justice system that is too reliable to convict an innocent man of murder twice. Failing that, a cousin like Jim Rix can be quite handy.

Rix didn't think much of it when his mother casually said to him, "You have a cousin on death row, and he's innocent." But Rix was curious and wrote to his cousin, Ray Krone. In response Rix received Krone's facially compelling account of having been wrongly convicted and sentenced to death. Krone's case quickly turned into a sort of hobby for Jim Rix—although using the word "hobby" here is a bit like using it to describe Lance Armstrong's cycling.

Ray Krone was an Air Force veteran and postal worker, who had never before had so much as a traffic citation. Yet, he was convicted of having brutally raped and murdered a female employee at a bar that he frequented. As a result of a car accident and reconstructive surgery, his left front tooth was noticeably lower than his right one, and when the detective leading the investigation came to see Krone shortly after the murder (mistaking Krone for an entirely different "Ray" who had been dating the victim), he stared at Krone's wayward tooth throughout the whole interview. The officer then brought in styrofoam plates and had Krone bite into them. The officer held the plates

up next to a bite mark on the victim and eyeballed them. Apparently the patterns struck the officer as similar enough to generate the mental black hole that experts in wrongful convictions have dubbed the "confirmation bias." From that point forward, the question was not whether Ray Krone was guilty, but how to *prove* that he was guilty.

Once the black hole has formed, every new piece of information is sucked into its vortex—reflexively spun with one purpose in mind: how to use this information to confirm the guilt of the suspect, and, if it can't be used for this purpose, how to downplay or discount the information. The most glaring signs of innocence are ignored, while the most ordinary facts and circumstances are made sinister. Even something as innocuous as a pack of condoms in Krone's dresser drawer became evidence of his guilt—not because the package had tissue or DNA on it (there was no tissue or DNA linking Krone to the victim), but because the package "proved" that Krone was "a cold-blooded killer with the presence of mind to don a condom before committing the rape."

In theory, experts are objective scientists who can provide a check against the power of the confirmation bias. In reality, these experts' minds are often just as prone to black holes as everyone else's mind is. And the role of experts at trial is to amplify the pull of these holes, sucking the jury in. The jury in Ray Krone's first trial was obviously impressed with the video presentation prepared by a forensic odontologist that purported to show how perfectly Krone's teeth matched the bite mark. The jurors asked to see the tape again during their deliberations, then convicted Krone in less than two hours. Rix himself was impressed with the apparent match, and initially he was hesitant to visit his cousin. But then Rix had the bite mark analysis reviewed by another expert, who noted that one of the supposed tooth marks was actually a mole and that an entire range of Krone's teeth was missing from the bite pattern on the victim. This expert concluded that the bite mark *excluded* Krone as the perpetrator. Rix eventually conducted a telling experiment: He sent a model of his *own* teeth to a board-certified forensic odontologist and asked him to com-

pare it to the bite mark evidence used in Krone's trial. Rix claimed that the model was taken from a fictional college student whose murder remained unsolved but hinted to the expert that he believed the source of the model was the killer. Shortly thereafter, Rix received the expert's firm conclusion that his teeth matched the bite mark from the victim in Krone's case together with a trial-ready video presentation illustrating the match. Rix mused darkly that, if the product of his little experiment were to reach the prosecutor, Krone's case might be reopened and dubbed "the case of the biting cousins."

Krone's first conviction was overturned by the Arizona Supreme Court, but, despite an aggressive defense attack on the bite mark analysis, he was convicted again. Subsequent interviews with the jurors confirmed that they had fixated obsessively on the bite mark evidence, even to the extent of voting on the match tooth by tooth. When the majority of teeth were elected "guilty," the jurors reluctantly concluded that they had to convict Krone. Krone was eventually exonerated when DNA found on the victim was matched to that of a man serving a 10-year sentence for child molestation; at the time of the crime of which Krone was convicted, the newly discovered suspect was living 300 yards from the bar where the victim had been found. Soon it was announced that this man had confessed, and the county attorney acknowledged that "[a]n injustice was done." Ray Krone was released after having spent 10 years, three months, and eight days in prison.

Having contributed countless hours and thousands of dollars to Krone's case—reviewing the evidence, researching the scientific and legal issues, chauffeuring Krone's lawyer to and from court, and crashing meetings of the American Board of Forensic Odontologists, among other adventures—Rix earned the right to walk away satisfied with this result. But by this time, he had developed his own mental black hole, theorizing that the man who had now "confessed" was also innocent. Reluctant to abandon his theory, Rix scrutinized the "confession" interview closely and found its legitimacy indeed suspect. The man had been so drunk on the night of the murder that he had no

clear memory of what had happened, and he was exceptionally susceptible to suggestive questioning. He was putty in the hands of a skillful interrogator (dubbed "Svengali" by Rix), who shepherded the man into acknowledging that he had had a confrontation with the victim and awoke the next morning with blood on his hands. Rix notes that the quantity of this man's DNA on the victim was excessive, as if he had slobbered all over her shirt, which he might well have done if, as Rix theorized, the man was falling-down drunk when the victim wrestled him to his feet and out of the men's room shortly before she was murdered by someone else. Rix acknowledges that this is only a pet theory in which he became personally invested, but the shakiness of the man's "confession" gives Rix's theory momentum it might otherwise lack. As a result, the reader is left wondering whether the lawyers on both sides might have fixated on the DNA evidence just as myopically as Krone's juries had fixated on the bite mark evidence.

Other than being Ray Krone's cousin, Jim Rix has no personal investment in the justice system. He is not a lawyer but the co-owner of an Internet-based billing service for dentists. His book leaves us with powerful critiques but no recommendations. Fortunately, these issues are beginning to be addressed with some rigor, as the revolution in DNA technology has revealed the importance of understanding the phenomenon of wrongful convictions. Unfortunately, understanding our mental black holes does not make them go away. Our only remedy is to study these black holes closely enough to avoid them—a delicate process that requires constant self-examination and course correction. But it is a process that we must master, because we can always be certain of two things: law degrees and black robes will never free us from our natures, and there will never be enough Jim Rixes to go around. **TFL**

Daniel I. Kaplan is an assistant federal public defender in the District of Arizona and the immediate past president of the FBA Phoenix Chapter.