

THE NEW YORK CRIMINAL BAR ASSOCIATION

An Affiliate of the National Association of Criminal Defense Lawyers



NYCBA Members Newsletter

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Greetings and we welcome you the October 2004 issue of our Newsletter.

President's Message:

We are sorry to note the passing of our late colleague and esteemed friend Philip R. Edelbaum. A special commemoration of his life and career will be conducted at the Association of the Bar of the City of New York at four o'clock in the afternoon on Tuesday, October 12, 2004. Please respond if you plan to attend by sending an email to friendsofphil@verison.net.

Upcoming CLE Program:

We are pleased to announce the return of one of our most popular CLE programs - "The United States Supreme Court - Pending and Recent Cases." As always, the speaker will be our distinguished colleague, Professor Leon Friedman.

This year's Forum will be held on Thursday evening, October 28, 2004 at 5:30 p.m. in the Central Jury Room on the 15th Floor of the Criminal Courts Building, 100 Center Street, New York, NY.

Two hours of New York State MCLE credit will be awarded in the area of Professional Practice. Please make sure to arrive by 5:30 p.m. as MCLE rules prohibit awarding credit to late-comers.

Annual Winter Holiday Party:

It is not too early to start thinking about our Annual Winter Holiday Party which will be this year on December 6, 2004 at our usual spot - SPQR Restaurant, 133 Mulberry Street, New York, NY in "Little Italy." While precise details about this event will be posted in the November Newsletter, we hope that you will mark this date down in your diaries and plan to attend what is always one of the great social events of the year.

Blakely Update:

On Monday, October 4, 2004, the Supreme Court heard oral arguments in the two cases it agreed hear regarding the scope and impact of *Blakely v. Washington*, 124 S.Ct. 2531 (2004) on the Federal Sentencing Guidelines - namely namely, *U. S. v. Booker*, 73 U.S.L.W. 3033 (U.S. Aug. 2, 2004) (No. 04-104) and *U.S. v. Fanfan*, 73 U.S.L.W. 3073 (Aug. 2, 2004) (No. 04-105).

While it is impossible to predict how the Supreme Court will ultimately rule in these two cases, the general consensus of the lawyers and commentators who attended the oral arguments seems to be that a majority of the Justices will hold that the Federal Sentencing Guidelines cannot be distinguished from the Washington state sentencing scheme that was invalidated in *Blakely v. Washington*, 124 S.Ct. 2531 (2004); and that therefore large portions of those Guidelines will be held unconstitutional.

Equally clear, most commentators found it far more difficult to predict how sentencing in the Federal system will proceed if judges are no longer permitted to make factual findings, based on a preponderance of the evidence, that increase the sentences of criminal defendants.

For those interested in a more detailed analysis of the oral arguments, we strongly recommend the following resources:

[**Sentencing Law and Policy**](#) - a Website maintained by Professor Douglas A. Berman of Ohio State Law School which is generally recognized as the premier *Blakely* resource center on the Internet;

the [**Blakely Resource Center**](#) maintained by [USSGuide.com](#) to which all members of the NYCBA have full access and which contains the most current and comprehensive listing of *Blakely* resources, including

a Circuit-by-Circuit listing of all *Blakely*-related cases and copies of all the briefs filed in *Booker* and *Fanfan*;

[SCOTUSBlog](#), the Website maintained by Goldstein & Howe of Washington, D.C., where Thomas Goldstein presented an outstanding analysis of the oral arguments; and

[Blakely Blog](#), a Website maintained by Jason Hernandez, an enterprising third-year law student at Columbia Law School, who gave the most detailed recounting of the oral arguments as they developed.

As an example, Tom Goldstein made the following comments and prediction about the sentencing options that were discussed during oral arguments and that will ultimately emerge from the Court's ruling:

"The government urge[d] the Court to hold that the [Guidelines] are 'advisory' and that judges have the discretion to sentence anywhere within the range of the statute of conviction (hereinafter, 'advisory guidelines') [while] the defendants urge[d] the Court to hold that the [Guidelines] are still 'binding' but the facts that give rise to enhances sentences must be alleged in the indictment and proved to a jury beyond a reasonable doubt (hereinafter, 'jury factfinding').

"Three Justices appeared to favor advisory guidelines: the Chief Justice and Justices Kennedy and Ginsburg (i.e., a member of the *Blakely* majority defecting to join the government on remedy).

"Four Justices appeared to favor jury factfinding: Justices Stevens, Scalia, O'Connor (i.e., a *Blakely* dissenter defecting to join the majority on remedy), and Souter.

"That leaves Justice Thomas (who did not ask any questions) and Justice Breyer. Justice Breyer identified discrete categories of findings that it would not be practical to put before the jury. It seemed that he might have been angling for a compromise under which jury factfinding is generally required, but not in those discrete categories of cases in which it would be impractical. On the other hand, he made clear he doesn't believe there is any obstacle to treating the [Guidelines] as non-binding.

"Neither the Justices for the advocates discussed the Double Jeopardy and Ex Post Facto implications of a ruling by the Court in the so-called

'pipeline cases.'

"On the basis of the foregoing, I predict the Court will require jury factfinding, at least in a substantial percentage of cases."

Professor Berman added a number of wonderful tidbits (as he always does). He started by predicting a decision in Booker and Fanfan "sometime in November" and he even predicted that Judge Thomas (who never spoke - "as is his custom") would write the majority opinion.

Professor Berman also commented on the fact that no one discussed "the critical question of how past cases could be impacted by Blakely - that is, no one mentioned the issue of retroactivity in any way." He then commented: "I would be surprised if Booker and Fanfan formally address retroactivity questions, though there is certainly a huge prison population eager to make Blakely claims even when sentences long ago became final."

Judicial Screening and Nominations:

The Mayor's Advisory Committee on the Judiciary is considering the application of **Florence Lyn Finkel** (presently with the New York City Civilian Complaint Review Board) and **Steven L. Schwartz** (business address 125-10 Queens Boulevard) for appointment to the Criminal Court.

The Committee requests that anyone with relevant information that would bear on either applicant's candidacy to please contact the , c/o Desiree Kim, at 36 West 44th Street, Suite 1408, New York, NY 10036, or by telephone at (212) 944-6225.

Web Site Features:

Each month, we try to point out some of the latest resources that we have posted on our Web site at www.nycrimbar.org/. In keeping with that tradition, we note the following items:

Private Investigators and Interpreters:

We maintain a constantly growing and updated list of [Private Investigators](#) and [Interpreters](#) who work in the downstate area and who have been recommended by various of our colleagues. To access these lists, click on the "*Investigative*

Tools" button on the menu at the top of our Homepage, then click on "*Menu II.*" Our list of interpreters contains persons who are fluent in seven different languages - and we always welcome any additions or corrections to any of our listings.

Membership Dues

Many of you have recently received a dues notice from our Treasurer, Len Levenson. If you have not yet paid your dues for 2004, please do so now. If you are unsure whether you have paid, please call Len's office at (212) 732-0522 to verify whether your dues are current. You can pay by credit card over the phone.

If you want to continue receiving this monthly Newsletter, and have full access to the NYCBA Website at www.nycrimbar.org, and full access to the P&J Websites at www.fedcrimlaw.com and www.ussguide.com, and receive without charge the weekly issues of Punch and Jurists, you must pay your dues. The NYCBA needs your support to continue to offer these services to you - and, like you, we are busy and just don't have the time to send repeated dues notices.

So, please, check your records today - and pay your dues now to avoid being cut-off from your membership benefits at the end of this month.

We welcome you back from your summer holiday.

Yours for a better defense,

Harvey Fishbein
President

Internet and Newsletter Committee:

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