



Atlantic Legal Foundation *Report*

September 2002

Foundation Honors Pfizer CEO McKinnell

ALF presented its fifteenth Annual Award to Henry A. (Hank) McKinnell, Jr., Ph.D., Chairman and Chief Executive Officer of Pfizer Inc, at a reception and banquet held at The Ritz-Carlton New York, Battery Park on Wednesday, June 26, 2002. Pfizer is the world's largest research-based pharmaceutical company.

The Foundation's Annual Award honors a person who exemplifies the ideals and principles of public service and private enterprise.

In addition to serving Pfizer in positions of increasing responsibility for more than 30 years, Dr. McKinnell is a member of the Board of Directors of Moody's Corporation, John Wiley & Sons, Inc. and The Business Roundtable. He is chairman-emeritus of the Pharmaceutical Research and Manufacturers of America and the Business-Higher Education Forum. He recently was appointed by President Bush as a member of the Presidential Advisory Council on HIV/AIDS and is a director of The Business Council, the Royal Shakespeare Company America,



ALF Chairman Dan Fisk and ALF President Bill Slattery flank Pfizer Chairman and CEO Hank McKinnell, Recipient of ALF's Annual Award.

the Japan Society, and chairman of the Stanford University Graduate School of Business Advisory Council. He is Fellow of the New York Academy of Medicine, and a member of the Board of Trustees of the New York City Public Library, the New York City Police Foundation, Channel Thirteen/WNET, and the John F. Kennedy Center for the Performing Arts.

Accepting the Award, which was presented by ALF Board Chairman Hayward D. Fisk, Dr. McKinnell addressed the question: "Payers *Versus*

Patients: Who Will Stand Up for the Rule of Law?" His remarks are published in this issue of the *Report*. ■



Dan Fisk presents Hank McKinnell with Tiffany mantel clock.

Table of Contents

Foundation Honors Pfizer CEO McKinnell.....	1
Payers Versus Patients: Who Will Stand Up for the Rule of Law?	2
Slattery Praises ALF Sound Science Record	9
ALF Undertakes Mold/Sound Science Project	9
New Board, Advisory Council Members	10
New Cases & Controversies	12

Payers Versus Patients: Who Will Stand Up for the Rule of Law?

*Dinner Address by Hank McKinnell
Chairman and CEO, Pfizer Inc
Upon Acceptance of The Atlantic Legal Foundation's
Fifteenth Annual Award.*

I am honored to receive this award, and to share this podium with those who have won it in the past. That includes now-retired Pfizer chairman Ed Pratt, who spoke to you in 1989. Ed always made certain that Pfizer put corporate responsibility front and center. That sense of corporate responsibility influences everything we do.

Tonight, I want to elaborate on the concept of responsibility.

We know that our headlines are filled with stories of serious lapses in trust and responsibility, Worldcom being the latest. These lapses are serious, and those responsible should be punished. No one is above the rule of law. There is, however, another side to the rule of law: that it must be upheld, even for people and organizations out of public favor.

Tonight, I want to focus the question of the rule of law through the lens of America's research-based pharmaceutical industry. Here's my question: what are the dangers when the government must be both the guarantor of the rule of law and a powerful, often monopolistic buyer of health care products and services? Can governments play it straight, balancing the scales of fairness and justice? Or is there a temptation to bend the rule of law to favor payer's interests over those of patients. This question is complicated by the public's perception of drug companies and the role we play in world healthcare.

When Ed Pratt accepted this award 13 years ago, the pharmaceutical industry had a reasonably positive image. Today, we still feel the reverberations from the early 1990s, when the Clintons tried to demonize us to support their own healthcare agenda. The public continues to buy-in to a stack of

misperceptions about our industry. And, we have not confronted our worst critics very well.

Bob Dole made this point to a group of Pfizer managers last week in Washington. Senator Dole pointed out the difference between how he would have responded to Peter Jennings and his so-called "investigation" of the industry – and how the pharmaceutical industry actually responded. He said he would have called-in every marker he had in the media and explained that any "investigation" that doesn't interview a single patient, isn't an investigation at all. It's a frame-up.

But how did the pharmaceutical industry respond? We actually advertised on the Jennings program, probably paying full network rates.

Clearly, America's pharmaceutical companies have a long way to go in telling our story to an American public hearing lots of negativity about our industry. Unfortunately, the public perception of our industry affords cover to payers and governments that don't want to sustain their end of a social contract. It is easy to pillory the unpopular, especially if it saves money. Ultimately, negative public opinion about our industry results in greater regulation – adverse, often capricious actions by government – and, alarmingly, legal decisions that give excessive weight to public perception over justice and the rule of law.

In my experience, the root cause of our unfavorable popular perception is

that too many people see pharmaceutical companies as part of the "problem" and not as part of the solution. "The problem" is affordable access to health and healthcare. The all-too-common perception, one that rolls off the tongues of the Peter Jennings of the world, is that our industry is a barrier to that access. This perception flies in the face of the facts, as I see them.

The fact is that pharmaceuticals have revolutionized medicine and dismantled many barriers to health and health care. The success of our industry in fighting disease is taken for granted. The death toll from AIDS in America, just to cite one example, has dropped by more than 65 percent in the past decade. Why is this? Breakthrough drugs, that's why. Virtually all of these AIDS breakthroughs, as well as more than 90 percent of other new pharmaceuticals introduced in America, were discovered and developed by privately funded laboratories, such as Pfizer's. In fact, Pfizer spends \$100 million a week – on bio-

"Our discoveries, and those of other research-based pharmaceutical companies, continue to improve the odds that we all will die, paradoxically, of old age and in good health."

medical research. Our discoveries, and those of other research-based pharmaceutical companies, continue to improve the odds that we all will die, paradoxically, of old age and in good health.

Here's a telling point about the value of pharmaceuticals.

The baby boom generation – that's most of you, by the way – will begin to reach 85 years of age, in about 20 years. Now, the Rolling Stones will probably still be touring, but, right now, fully half of all people who reach 85 are actively progressing through the stages of Alzheimer's. We can deal with that in two ways. We can build lots of nursing homes, pay for lots of dead-end jobs in patient care, and prepare to warehouse half of the most influential generation in

“Blessed by open competition, a stable legal system and a tradition of patent protection, America’s pharmaceutical industry is arguably America’s most successful industry.”

American history. Or, we can invest in pharmaceutical research in high-paying scientific jobs and cure Alzheimer’s. To me, the choice is pretty easy. And, with continued incentives for research, I have no doubt that Alzheimer’s will be conquered.

America’s pharmaceutical industry can do the job; we are the gold standard of the world. Blessed by open competition, a stable legal system and a tradition of patent protection, America’s pharmaceutical industry is arguably America’s most successful industry. It is certainly an industry where we have the potential for sustainable competitive advantage. Our business model is simply stated: high risks, high rewards. Does this model work? Does it really serve patients? You be the judge. Remember 1981, when HIV was first characterized? Remember the near-panic in the 1980s about a mysterious, insidious, highly adaptable and always fatal pathogen? Within six years, a pharmaceutical company put into physicians’ hands the first drug to treat HIV.

Today, America’s pharmaceutical companies have created 64 treatments for HIV...with 100 more, including vaccines, in development. As a result, the death toll from AIDS in America has dropped by more than two-thirds. In America, HIV infection is progressing from a predictably fatal disease to a more controllable chronic condition. A vaccine or cure is years away, but that’s our goal, and we are investing appropriately. That investment – \$30 billion annually in research – is anchored in the confidence that our breakthrough discoveries will be protected from outright copying for a fixed period of time. Create a new drug, one better than current therapies, and you should reap the rewards. Or so it seems.

But payers, usually foreign governments, have their own agendas, and they are often at odds with patient interests, and the rule of law.

Consider what might happen to you, if you were the chairman of a successful pharmaceutical company. Your patented technology may be stolen by companies in India who will copy your products and sell them at substantial profits while their government looks the other way. Your products may be counterfeited – again, often with the collusion of an overseas government – a dangerous situation for your patients and your reputation. A nation may capriciously delay or deny your product’s market entry to protect its local industry or to keep down its medical budgets. Doctors may be actively discouraged from using your products, even if they are better for patients. Your products may be subject to unreasonable price controls, backed by threats to expropriate your technology.

I’m often asked why we even negotiate drug prices in some European nations, when we know that their price offers will not nearly reflect the costs of developing the medicine. What choices do we have? Do we deny the medicine to people who need it? Do we risk the expropriation of our technology? Pfizer has no negotiating leverage in dealing with nations that have monopolies on drug pricing. It’s their way, or the highway, and that unfairly shifts the cost of research onto patients in freer-market nations.

In all of these cases, the organizations that pay for healthcare, again usually governments, benefit from distortions in the rule of law. These governments pose numerous arguments to buttress their efforts to keep from paying for the health care they promised their citizens and to keep from paying their fair share of the cost of drug discovery and development. Ignoring the rule of law, we hear time and again, is entirely justified when society is in peril.

The HIV/AIDS crisis is often cited

as one of those perils, where the ends justify the means. Without question, the HIV/AIDS crisis is a tragedy nearly beyond human comprehension. But I am disturbed by simplistic solutions to the complex problems of the HIV pandemic. Confiscate or ignore patents, some thinking goes, and patients will benefit from cheap drugs. No matter how cheaply you can provide a drug, however, it is of no use if it can’t be delivered. Overturning patent law does nothing to tear down the barriers of healthcare access in southern Africa and other areas devastated by HIV. Instead, it gives cover to companies, who, with their governments’ complicity, stand to profit from the theft of our intellectual property. Or it distracts attention from the lack of will by governments to meet this crisis head on. The call to overturn patent law ignores a large, troubling reality: that many people do not have access to essential medicines because of social, political, and economic reasons that have nothing to do with the patent system.

The unvarnished truth about the AIDS crisis is that none of the nations most seriously affected have the infrastructure to deliver adequate treatments.

They don’t have the roads, the hospitals, the doctors, the training, the storage facilities, the communications networks or the other elements needed for broadly based anti-retroviral therapies. Nor, interestingly, do they have

patents, or the rule of law.

The emphasis has to be on building that infrastructure. This includes direct aid and I congratulate President Bush for his commitment to contribute a half-billion dollars to UN efforts to build that infrastructure. It also includes freeing developing nations from unfair tariffs and import restrictions on the goods

“Abrogating the rule of law, no matter how politically popular, is almost always counterproductive.”

they grow and produce. It is hypocritical for the developed world to admonish the developing world to “trade their way out of poverty” all the while protecting a variety of domestic industries. Abrogating the rule of law, no matter how politically popular, is almost always counterproductive.

In the case of pharmaceuticals, it undermines the incentives needed to sustain research and ultimately makes investment in biomedical innovation a bad bet.

I often hear from payers – notably, European governments – that we make too much in profit and that our margins can be forced down without damaging our efforts to create new medicines. That’s just not true. Exhibit Number One is the European pharmaceutical industry. A quarter-century ago, Central Europe was the medicine chest of the world. Today, that vibrant pharmaceutical industry is nearly gone. It’s vanished because national governments in Europe chose to stifle competition over allowing a vibrant industry to flourish and renew itself. You get what you pay for, and if you don’t want to pay for pharmaceutical research, you don’t get it.

I also hear from American legislators, and Canadian-born broadcasters, that prices for branded pharmaceuticals are much cheaper in Canada. First of all, they aren’t that much cheaper. More importantly, Canada destroyed its own research-based pharmaceutical industry more than 30 years ago. Canada now protects its generic industry and what you don’t hear about is Canadians coming to America to buy generic drugs at 20 to 25 percent of Canadian prices. You also don’t hear of how importing pharmaceuticals from Canada to America is...well, illegal. Officials on both sides look the other way when busloads of

“...numerous nations have undermined their own domestic drug industries to favor payers over patients. They’ve distorted the rule of law to exact favorable pricing to protect local industry or to circumvent patent law. Ultimately, these distortions come back to affect patients, who lose out on medical innovation, and to affect societies, who lose out on employment, economic development and the synergies of well-integrated medical treatment systems.”

people cross the border with suitcases full of prescription drugs. They do this for one reason: to coerce companies like Pfizer into selling our products at prices that do not reflect the costs of research.

In any case, numerous nations have undermined their own domestic drug industries to favor payers over patients. They’ve distorted the rule of law to exact favorable pricing to protect local industry or to circumvent patent law. Ultimately, these distortions come back to affect patients, who lose out on medical innovation, and to affect societies, who lose out on employment, economic development and the synergies of well-integrated medical treatment systems.

Europe is now facing the unintended consequence of its own social policy. That is, a new brain drain: pharmaceutical researchers coming here as the last refuge of unfettered medical R&D. But we shouldn’t spend much time patting ourselves on the backs in the United States for our enlightened approach.

The tort crisis is as much a threat to

“I congratulate the Atlantic Legal Foundation for your work in tort reform, particularly in fighting the menace of junk science in our nation’s courtrooms.”

our continued productivity as price controls in Europe or intellectual property theft in India. I congratulate the Atlantic Legal Foundation for your work in tort reform, particularly in fighting the menace of junk science in our nation’s courtrooms. The threat from “jackpot justice” in places like Texas and Mississippi is already raising the hurdle rate for decisions on what projects

should be pursued in biomedical research. When states pander to the plaintiffs’ bar and tip the scales of justice away from companies, it does hurt – and that hurt goes way beyond the bottom line. It affects the projects we choose to pursue, the medicines we can afford to research and the patients waiting for new cures.

So, what to do? As I said in the opening of my remarks, at the heart of our situation is the belief that our industry is a big part of the healthcare access problem. Ultimately, we, as an industry, need to reposition ourselves as a big part of the solution. My view is that we, as an industry, must create partnerships that engage payers, patients and everyone in between. We must foster alliances among governments, non-governmental institutions, other companies, and academic institutions. There are models that work.

They are not overnight solutions, but they are solutions, if everyone is willing to work at them. In combating disease in developing nations, Pfizer and other companies have helped to launch a number of partnerships that are taking hold and getting results. For example, International Trachoma Initiative, of which Pfizer is a key partner, is fighting an eye infection that causes ten million cases of blindness a year, all in developing nations, and all preventable. This partnership benefits from donations of

our antibiotic, Zithromax, but at its core is a well-thought-out, long-term approach to treating trachoma. Here, governments, companies and NGOs work together bolstered by aggressive goals, real accountabilities, and long-term commitments. The results have been impressive, and the initiative stands a good chance of ending trachoma by the year 2020. Closer to home, Pfizer is pioneering disease management approaches that provide a new kind of care for the poor and chronically ill.

In all of these partnerships, we can support the business model that has worked so well for so many years. That is we can afford to give away our products for free to those who truly cannot afford them but we cannot afford to do the same for payers who can afford them. We will gladly take price out of the equation if we can help those who truly need help. We are doing just that in the United States and Africa. But, in return, we ask governments to stand up

more firmly for the rule of law, and to support the treaties to which they have committed. Yes, to answer a question posed in a *Wall Street Journal* headline, Americans should not be subsidizing drugs for Norway; or France, or Canada or anywhere else rich enough to afford a flourishing competitive market. We, and the other rich nations of the world, should be helping to build health care-systems in southern Africa and the other nations afflicted by infectious disease.

In closing, let me say that dissatisfaction with our industry has been skillfully exploited by those who pay for healthcare. These payers have used lapses in the rule of law to benefit themselves, or to abet their local industries. In response, we as an industry must do better in proving that we are part of health and healthcare access solutions. Equally important, the payers of healthcare must stand behind the systems of rules and regulations they helped create, even at short-term cost. This will take creative

action, starting with the willingness by governments to acknowledge the proven value of medicines, and commitments to tackle the complex issue of access to medical care. We can no longer be the scapegoats for a failing health care bargain between governments and voters.

We can be part of the solution if the payers of healthcare work to restore fairness and justice to our highly regulated industry. Pharmaceuticals are, and always will be, a high-risk, high-reward business.

Gaming the system to deny us the rewards of success may gain some votes, fatten the wallets of the plaintiffs' bar, or satisfy the bureaucrats but ultimately, it will slow research into the cures of the future.

That leaves millions of patients with no help and no hope. ■

Previous Annual Award Honorees

1988

Hon. William E. Simon

Former Secretary of the Treasury

1989

Edmund T. Pratt, Jr.

Chairman and CEO of Pfizer Inc

1990

Irving S. Shapiro

Retired Chairman and CEO of DuPont

1991

Walter B. Wriston

Retired Chairman and CEO of Citicorp

1992

Paul H. Henson

Chairman, Kansas City Southern Industries, Inc.

Retired Chairman and CEO of Sprint Corporation

1993

Amb. Carla Anderson Hills

United States Trade Representative

1994

Malcolm S. Forbes, Jr.

President and CEO, Forbes Inc. and Editor-in-Chief of FORBES Magazine

1995

Alfred C. DeCrane, Jr.

Chairman and CEO of Texaco Inc.

1996

Bruce Atwater

Retired Chairman and CEO of General Mills, Inc.

1997

Hon. Donald Rumsfeld

Former and Current Secretary of Defense

1998

Hon. Rudolph W. Giuliani

Mayor of New York City

1999

General P.X. Kelley

USMC (Ret.)

2000

Norman R. Augustine

Retired Chairman and CEO of Lockheed Martin Corporation

2001

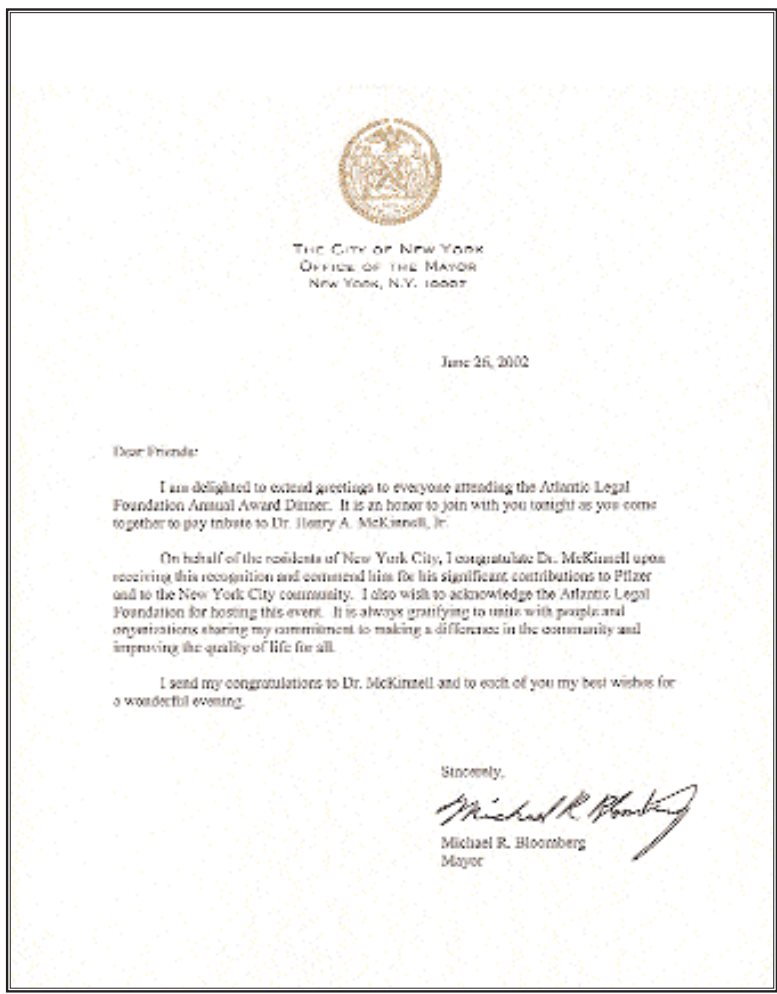
Hon. William S. Cohen

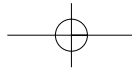
Former Secretary of Defense and United States Senator

The Atlantic Legal Foundation



Guests fill the Ballroom at the Ritz-Carlton New York, Battery Park, as Dr. McKinnell delivers his remarks.



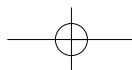


The Atlantic Legal Foundation's Fifteenth Annual Award Reception and Banquet



- 1. ALF Director George Frazza with Lorraine Graham (center) and Marie Frazza.
- 2. (l-r) ALF Director Phil Sellinger, ALF Advisory Council member Arthur Fergenson and ALF Director George Frazza.
- 3. (l-r) Pfizer Senior Vice President and General Counsel Jeff Kindler, who introduced Dr. McKinnell, and ALF President Bill Slattery.

- 4. Guests Robert Haig and Sophia Gianacoplos.
- 5. (l-r) ALF Interns Nazar Khodorovsky (Columbia '03) and Neil Maddux (Princeton '03).
- 6. Advisor Al Ferguson chats with ALF Director Bill and Lorraine Graham.
- 7. (l-r) ALF Director and Treasurer Steve Harmelin, Pfizer CEO Hank McKinnell and ALF Director and Secretary Chuck Work.



Annual Award Dinner Host Committee

ALF extends its appreciation to the Dinner Host Committee for making this year's Annual Award Dinner our most successful ever:

Founders

Anderson Kill & Olick, P.C.
Arnold & Porter
Cadwalader, Wickersham & Taft
Computer Sciences Corporation
Davis Polk & Wardwell
Fitzpatrick, Cella, Harper & Scinto
Hale and Dorr LLP
Kaye Scholer LLP
McCarter & English, LLP
O'Donnell & Shaeffer, LLP
Pfizer Inc
Rubin & Rubin, Chartered
Sills Cummis Radin Tischman Epstein & Gross, P.A.
Spherion Deposition Services
The Feinberg Group, LLP
The Pumpkin Foundation at the request of Joseph H. and Carol F. Reich

Benefactors

Con Edison
Covington & Burling
Dilworth Paxson LLP
Epstein Becker & Green P.C.
Gibson, Dunn & Crutcher LLP
International Paper
McDermott, Will & Emery
Morrow & Co., Inc.
Piper Rudnick LLP
Ross & Hardies

Sponsors

Bressler Amery & Ross, P.C.
Grotta, Glassman & Hoffman, P.A.
Edmund T. Pratt, Jr.
Rockwell Automation, Inc.
Shook, Hardy & Bacon LLP
Dr. Barry H. Smith

Slattery Praises ALF Sound Science Record

In welcoming guests at the Annual Award Dinner, ALF President William Slattery emphasized the Foundation's outstanding record of advocating sound science in the courtroom. He noted:

"Representing an extraordinary team of scientists, including several Nobel laureates, ALF had a hand in the landmark *Daubert* trilogy in the U.S. Supreme Court and has gone on to challenge, for example, lawyers who claimed their clients have been injured by electro-magnetic fields and exposures to various other substances. ALF has appeared where class action litigants demand damages for medical monitoring where

there are no signs of injury at all, a suspect group of cases now pushed by the plaintiffs' bar.

"ALF's participation in cases like these, representing scientists with impeccable credentials, has helped to discourage scientifically dubious claims which in too many other situations have lead to enormous damage awards, increased insurance premiums, and added burdens to taxpayers."

Slattery also conveyed greetings and words of praise for Hank McKinnell and Pfizer from New York Mayor Michael Bloomberg and outlined ALF's new Mold/Sound Science initiative, detailed below in the *Report*. ■

ALF WEBSITE

ALF's website, www.atlanticlegal.org, is updated regularly to record developments in cases and other significant happenings. It also contains ALF's briefs dealing with important substantive issues which have been used effectively by other public interest foundations. ■

ALF Undertakes Mold/Sound Science Project

For the past several years, the United States has seen a staggering increase in litigation involving health related claims allegedly due to the presence of indoor mold, claimed by some to be the next toxic tort wave rivaling the asbestos nightmare. The plaintiffs' bar, based on multi-million dollar verdicts, proclaims "mold is gold" and as schools and other public buildings undergo expensive remediation, the media's coverage is riveting. All this mold "hype" ignores the fact that there is no scientific evidence that mold causes the kind of serious health effects that are being claimed.

The common issue in the burgeoning mold litigation is the admissibility of expert testimony linking the presence of mold to the injury. As a noted expert in the area has observed, "I feel sick, there is mold; therefore, the mold made me sick" makes no medical sense. Yet in countless cases throughout the country, plaintiffs are asking courts and juries to award huge damages on this theory of alleged causation. The application of reliable evidence and the best scientific assessments to the central causation-in-fact issue is critical and has been the focus of ALF's work representing distinguished *amici* in other science-

related cases and is the focus of ALF's mold sound science initiative.

ALF is marshaling the impressive resources of its Advisory Council, both scientific and legal, to ensure that sound science, not speculation masquerading as science, is applied in determining the admissibility of expert testimony. ALF also can call upon the advice of the many distinguished scientists it has represented as *amici* in the past.

The project strives for scientific and medical objectivity. It will examine issues on which plaintiff's counsel must prevail if expert testimony is to be admitted. ■

Hopkins and Sellinger Join Board; Halvorsen, McMahon and Primps Added to Council

Recently, ALF has added five distinguished individuals to its leadership.

New Members of ALF's Board of Directors



Henry H. Hopkins, Esq., Vice President and Chief Legal Counsel, T. Rowe Price Associates in Baltimore, Maryland, has joined ALF's Board of

Directors. Mr. Hopkins is a graduate of Trinity College and the University of Maryland School of Law. He has served on a number of professional and civic boards and currently is a member of the Board of Visitors, University of Maryland Law School.



Philip R. Sellinger, Esq., also has been elected to the Board, following his service as a member of the Advisory Council. Mr. Sellinger is a member of Sills

Cummis Radin Tischman Epstein & Gross, P.A. in Newark, New Jersey. He is the Chairman of the firm's Litigation Department and is a former Assistant United States Attorney and Clerk to Hon. Anne E. Thompson, Chief Judge, U.S. District Court for the District of New Jersey.

Mr. Sellinger is a graduate of the University of Massachusetts and New

York University Law School. He specializes in insurance coverage and technology litigation. Mr. Sellinger is a Charter Fellow and Board member, National Center for Preventative Law.

New Members of ALF's Advisory Council



Thor L. Halvorsen has joined the Advisory Council. He is the Executive Director of the Foundation for Individual Rights in Education (FIRE)

in Philadelphia, PA. Mr. Halvorsen graduated *magna cum laude* from the University of Pennsylvania with B.A. and M.A. degrees in History and Political Science. He is the former Director of University Affairs of the Intercollegiate Studies Institute. He has written op-eds for several newspapers, including The Wall Street Journal, and appears frequently on CNN and the FOX News Channel.



John D. McMahon, Esq., also has joined the Advisory Council. Mr. McMahon is Senior Vice President and General Counsel of Consolidated

Edison, Inc., having served in that position since 1998.

Mr. McMahon graduated from Manhattan College in 1973 and New York Law School in 1976. He completed the Advanced Management Program of Wharton Business School in 1998. He is Vice Chair of the Electricity Committee of the Public Utility, Communications & Transportation Law Section of the American Bar Association and a member of the Edison Electric Institute Legal Committee where he serves on the Legal Executive Advisory Committee.



Also joining the Advisory Council is **William G. Primps, Esq.**, partner in the New York office of LeBoeuf, Lamb, Greene & MacRae. Mr. Primps graduated

from Yale University, with a B.A. degree *cum laude* with distinction (history) in 1971 and was awarded a J.D. degree by Harvard Law School in 1974.

Mr. Primps concentrates in the litigation of matters arising from complex transactions in regulated industries. ■

New Cases and Controversies

Cole, as Trustee v. County of Santa Barbara - Takings; "Coerced" Public Access Easement

ALF has filed an *amicus* brief in support of a petition for *certiorari* in the U.S. Supreme Court in this takings case, involving the "grant" of an option for an easement to the California Coastal Commission by the then owner of beachfront property in exchange for permission to build an addition to her home. Subsequently, the Supreme Court in *Nollan v. California Coastal Commission* held that such easements, if not reasonably related to the permit sought, were unconstitutional takings. In this case, the "option" remained dormant for many years. Shortly before it was to expire, the Coastal Commission prevailed upon Santa Barbara County to exercise the option. By then, the property had been transferred to a trust which promptly brought suit to have the option declared invalid on *Nollan* grounds. The California court held that the suit was time barred; ALF argues on behalf of its client, The American Association of Small Property Owners, that as a matter of federal constitutional law the time did not start running until the County sought to exercise the option, because that is when the taking occurred. ■

Beharry v. Reno – Statute and "Customary International Law" Conflict

ALF, working with co-counsel Pacific Legal Foundation, has filed an *amicus*

brief in support of the Government in *Beharry v. Reno*. Donald Beharry is a convicted felon (for burglary and armed robbery) who held a green card. Pursuant to statute, the Immigration and Naturalization Service ordered him deported. Beharry sought a "hardship exemption" because his daughter, now 8 years old, was born in the U.S. and thus is a citizen. The exemption was denied on the grounds that Beharry's claim does not fall within any of the statutory exemption categories because he was convicted of an "aggravated felony." Beharry petitioned for a writ of *habeas corpus* in the U.S. District Court for the Eastern District of New York. Judge Jack Weinstein granted the petition and, while acknowledging that the U.S. statutes do not provide for an exemption in this case and that he was making new law, decided that "customary international humanitarian law," including treaties and conventions to which the U.S. is not a party, or which have not been ratified, "overrides" U.S. statutory law. The judge concluded that "in the interests of the child," Beharry should be permitted to have a "discretionary hearing" on his claim for a waiver of deportation on "compassionate grounds."

ALF and PLF argue in their *amicus* brief that even if "customary international law" is part of "federal common law" it does not override clear statutory provisions, and that the district court also overreached its constitutional

authority – essentially supplanting the judgment of Congress – by using "customary international law" to "interpret" an unambiguous federal statute. ■

In re Hanford Litigation – Disease Causation

The Foundation has filed an *amicus* brief in the United States Court of Appeals for the Ninth Circuit on behalf of 16 prominent scientists with particular expertise in epidemiology, radiation medicine, ionizing radiation, public health and toxicology (including Nobel Prize winners in Medicine and in Chemistry) in support of defendants' petition for rehearing. The cases involve claims by 4500 individuals, who allege that radiation from the Hanford nuclear weapons facility, operated by defendants under contract with the U.S. government from 1943 through 1987, caused them to suffer various forms of cancer and thyroid disease. The district court excluded the testimony of many of plaintiffs' witnesses, and for the most part granted summary judgment in favor of the defendants. The Ninth Circuit reversed, and rejected the settled legal standard for proving causation in toxic exposure cases previously applied by two unanimous panels of the Ninth Circuit.

In its brief ALF argues that the *Hanford* panel misapprehended the essential role of epidemiology in establishing disease causation, and the rationale for of the "doubling of risk" standard. ■

Atlantic Legal Foundation, Inc. is a nonprofit public interest legal foundation. It is a Section 501 (c)(3) organization and contributions are tax deductible. The Foundation charges no fees for the services it renders. Your contributions will be used to help support the Foundation's mission. The Foundation is supported by grants from philanthropic foundations, contributions from corporations and donations from individuals.

Contributions may be mailed to **Atlantic Legal Foundation, 150 East 42nd Street, New York, NY 10017**
Tel. (212) 573-1960 Fax: (212) 857-3653



This report design/layout, typesetting and printing courtesy of Merrill Corporation's Document Management Services.
Contact: Thomas P. Hollo, Senior Vice President, (212) 229-6526

Atlantic Legal Foundation

Board of Directors

Francis B. Burch, Jr., Esq.
Co-Chairman
Piper Rudnick LLP

William J. Calise, Jr., Esq.
*Senior Vice President,
General Counsel and Secretary*
Rockwell Automation

Hayward D. Fisk, Esq.
Chairman, ALF
Vice President, General Counsel and Secretary
Computer Sciences Corporation

Douglas Foster, Esq.
Vice Chairman
Atlantic Legal Foundation

George S. Frazza, Esq.
Of Counsel
Patterson, Belknap, Webb & Tyler LLP

William H. Graham, Esq.
*Senior Vice President,
General Counsel and Secretary*
Bethlehem Steel Corporation

Stephen J. Harmelin, Esq.
Treasurer, ALF
Managing Partner
Dilworth Paxson LLP

Henry H. Hopkins, Esq.
*Vice President and
Chief Legal Counsel*
T. Rowe Price Associates, Inc.

Ernest B. Hueter
President
National Legal Center
for the Public Interest

Quentin J. Kennedy, Esq.
Executive Vice President (Ret.)
Federal Paper Board Co., Inc.

Edwin L. Lewis, Esq.
Vice President and General Counsel
American Science & Engineering, Inc.

William B. Lytton, Esq.
*Senior Vice President and
General Counsel*
International Paper Company

Philip R. Sellinger, Esq.
Chairman
Litigation Department
Sills Cummis Radin Tischman
Epstein & Gross, P.A.

William H. Slattery, Esq.,
President
Atlantic Legal Foundation

Clifford B. Storms, Esq.
*Senior Vice President
and General Counsel (Ret.)*
CPC International

S. Maynard Turk, Esq.
Of Counsel
Stewart & Associates

Stephen T. Whelan, Esq.
Partner
Thacher Proffitt & Wood

Charles R. Work, Esq.
Secretary, ALF
Head, Litigation Department
McDermott, Will & Emery

James I. Wyer, Esq.
Of Counsel
St. John & Wayne, L.L.C.

Director Emeritus

Hon. Stanley H. Fuld
Chief Judge of New York State
and of the Court of Appeals (Ret.)

Advisory Council

Henry N. Butler, Esq., Ph.D.
The Argyros School of Business and Economics
Chapman University

Arthur F. Ferguson, Esq.
Partner
Piper Rudnick LLP

Alfred L. Ferguson, Esq.
Of Counsel
McCarter & English

Ronald E. Gots, M.D., Ph.D.
Managing Principal
International Center for Toxicology
and Medicine

Thor L. Halvorsen
Executive Director
Foundation for Individual
Rights in Education, Inc.

Dr. Ronald Hart
Director Emeritus
National Center for
Toxicological Research

Robert E. Juceam, Esq.
Partner
Fried, Frank, Harris, Shriver & Jacobson

Roger S. Kaplan, Esq.
Partner
Jackson Lewis Schnitzler & Krupman

John D. McMahon, Esq.
*Senior Vice President
and General Counsel*
Consolidated Edison, Inc.

Susan L. Meade
Senior Vice President
Government Affairs
JPMorganChase & Co.

Arden Davis Melick
Vice President Public Affairs (Ret.)
KeySpan Energy

Dr. A. Alan Moghissi
President
Institute for Regulatory Science

Professor Charles W. Mooney, Jr.
University of Pennsylvania Law School

Mr. Rodney W. Nichols
Former President and Chief Executive Officer
New York Academy of Sciences

Mr. Walter K. Olson
Senior Fellow
Center for Legal Policy at the
Manhattan Institute

Hamilton Osborne, Jr., Esq.
Partner
Haynsworth Sinkler Boyd, P.A.

William G. Primps, Esq.
Partner
LeBoeuf, Lamb, Greene & MacRae LLP

Alan Charles Raul, Esq.
Partner
Sidley Austin Brown & Wood

Paul C. Rooney, Jr., Esq.
Partner (Ret.)
White & Case, LLP

Sally Satel, M.D.
American Enterprise Institute

Dr. Frederick Seitz
President Emeritus
The Rockefeller University

R. Edwin Selover, Esq.
*Senior Vice President and
General Counsel*
Public Service Electric & Gas Co.

Barry H. Smith, M.D., Ph.D.
Senior Vice President
The Rogosin Institute

Dr. A. F. Spilhaus
Executive Director
American Geophysical Union

Professor Richard Wilson
Department of Physics
Harvard University

Advisor Emeritus

Lee Loevinger, Esq.
Of Counsel
Hogan & Hartson

Other Officers

Martin S. Kaufman, Esq.
Senior Vice President and General Counsel

Briscoe R. Smith, Esq.
Senior Vice President and Counsel