Introducing an Award Winner

Myrna Raeder

Some lawyers distinguish themselves by their contribution to the legal system. One of these is Myrna Raeder, who has distinguished herself by her work in criminal justice–as an academic, author, advocate, international lecturer, and recently as Chair of the ABA Criminal Justice Section.

By Selma Moidel Smith

Raeder's articles and testimony have been cited in nearly 100 legal publications. Her work has also been cited in books on criminal law and evidence, and by state supreme courts and federal courts. She has been quoted in almost 80 newspapers and magazines across North America, and interviewed on more than 300 radio programs—national, local, and international—as well as on nationally syndicated television programs.

Raeder distinguished herself early. At Hunter College in 1968, she received her B.A. summa cum laude with honors in political science, and as a member of Phi Beta Kappa. At New York University School of Law in 1971, she received her J.D. cum laude and an award for a law review note, with Order of the Coif among other honors. She completed her studies in 1975 with an LL.M. at Georgetown Law Center, where she was a Prettyman Fellow from 1971–73 and served an internship as a Special Assistant U.S. Attorney.

Her teaching career began at the University of San Francisco School of Law as an assistant professor and co-director of the Criminal Law Clinical Program from 1973–75. For the next four years, she was an associate in the litigation department at O'Melveny & Myers in Los Angeles.

In 1979, Raeder joined the faculty of

Southwestern University School of Law in Los Angeles, where she has received its highest honors. In 1990, she was named the first Irwin Buchalter Professor and is currently the Paul Treusch Professor. Among her many publications is *Federal Pretrial Practice*, now in its third edition (Lexis). Despite her heavy publishing and lecturing schedule, she has been closely involved in student activities, serving as faculty advisor for law review, moot court, and the trial advocacy program.

Raeder has also been honored by the women's bar, serving two pivotal terms as president of the National Association of Women Lawyers from 1994–96, and as a board member of the Women Lawyers Association of Los Angeles.

On May 23, 2002, we met in Los Angeles for the first of several discussions about her career. From the topics we discussed, we have chosen several for the readers of *Experience*. We have also chosen to present Raeder's thoughts in a more substantive form than the usual question-and-answer format would permit.

Our selections follow.

ABA Criminal Justice Section

The Criminal Justice Section is viewed by many as a think tank that grapples with divisive high profile policy issues. By design, its leadership structure includes prosecutors, defense counsel, judges, and academics. The Section is well respected for its Criminal Justice Standards and creates policy directives that are routinely adopted by the ABA House of Delegates and are influential in the ensuing public debate. I appreciated the opportunity to lead the Section, because I have always tried to promote workable compromise on issues that seemingly have no middle ground, in order to find a balance that is both fair and effective.

The Section's strong voice in the criminal justice policy arena results in large measure from its representation of a broad spectrum of opinions. It acts as a catalyst for change. When legislators are faced with the entire criminal justice community speaking with one voice, such unlikely allies are hard to ignore. However, it's a challenge trying to obtain consensus while reaching all of the issues on the calendar when you have many of the best and brightest criminal justice thinkers and advocates in the room.

In this task, I was well served by having chaired the Section's Rules of Evidence and Procedure Committee for a number of years. That committee is heavily populated with academics who can be perfectionists. It was a challenging task to make sure that our meetings were not simply fascinating exchanges of opinion, but produced work product, whether in the form of comments to the Federal Judicial Conference, policy reports to the Section's Council or reports to be submitted for comments by the bench and bar. The Rules Committee worked on a long-term evidence project that is still consulted when evidence reform is being considered.

In my term as Chair, I concentrated on several seemingly unrelated issues, each of which turned on a question of fairness. I focused primarily on section committees, since they develop section policies and are the incubators for section leaders. In addition to attracting strong, enthusiastic committee chairs, I made an effort to reach out to many who had not previously been active in the Section.

I created several new committees, including one on Women in the Criminal Justice Community, which overnight became the second largest committee in the Section, and an ad hoc committee for outreach to law schools. I also created two substantive committees. One examined science and technology issues, which were particularly important because this was the period when advances in DNA and its impact on procuring convictions as well as exonerating those wrongfully convicted of crimes were solidifying. The other committee looked at innovations in criminal justice such as drug courts and restorative justice concepts that address the defendant's interaction with the community. Because these are often at odds with an individual rights approach to criminal procedure, the traditional criminal justice community, both prosecutors and defense counsel, tended to ignore or downplay their significance. I attempted to provide a forum for more dialogue on these issues.

I used my time as Chair to educate and

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Myrna Raeder was one of five women honored by the ABA Commission on Women in the Profession with its 2002 Margaret Brent Women Lawyers of Achievement Award.

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advocate about what I view as wrong-headed, overly punitive sentencing policies concerning nonviolent offenders, which have had a devastating effect on minority communities and children of single mothers. While much of my advocacy is on behalf of incarcerated mothers and their children, many of the same sentencing issues, ranging from mandatory minimums to inflexible sentencing guidelines, affect everyone convicted of crimes, their families, and the communities in which they reside.

The public is just beginning to wake up to the impact of having hundreds of thousands of prisoners being released yearly, at a time when the economy is uncertain, and the collateral consequences of sentencing can easily be as severe as imprisonment for those reentering society. Disentitlement from many jobs, public housing, higher education, public assistance, and voting as well as deportation and termination of parental rights may all follow an offender into the community upon release. Both during and since my term as Chair, I have written, lectured, and argued for legislation that is not only fairer, but will ultimately better protect the community.

Uniform Rules of Evidence

I became an ABA advisor to the committee that revised the Uniform Rules of Evidence for the National Conference of Commissioners on Uniform State Laws. As an evidence professor and as chair of the CJS Rules Committee, I had many opportunities to see how the rules worked in practice and which ones were difficult to administer, or created results perceived as unfair, or unintended. The committee was ably chaired by Judge C. Arlen Beam, a federal appellate judge from the Eighth Circuit, and had the added benefit of having a reporter, Leo Whinery, who is both an evidence professor and a Commissioner. Although as an advisor I had no vote on the committee, I was provided ample opportunity to suggest problems with current rules and possible solutions, as well as to answer questions posed by committee members.

The work, which extended over several years, was particularly demanding because the committee decided that unlike the Uniform Rules' earlier approach of using the Federal Rules of Evidence as its benchmark, it would make its own evaluation of how the rules were working, and if appropriate, draft rules that differed from the FRE. Over the years, there had been relatively little reform of the FRE that was not dictated by Congress. The Commissioners felt that the states deserved model rules that would best reflect current theory and practice.

I am glad to say that the revision of the Uniform Rules was adopted by the Commissioners and approved by the ABA. The rules varied in a number of important ways from their federal counterparts, and now serve as an alternative model for states that are considering evidence revisions. I recently participated in a symposium issue of the *University of Oklahoma Law Review* that analyzed the most significant features of the Uniform Rules, which include treatment of experts, the residual hearsay and child hearsay exceptions, and privileges, as well as definitions of evidence that are more suited to a technological era.

National Judicial College

I have cotaught a course in Criminal Evidence at the National Judicial College for nearly ten years. I have always believed strongly in judicial education. The Judicial College provides a forum for judges from around the country, and sometimes from around the world, for sharing their perspectives on evidentiary issues they all confront. While some believe that all evidence rulings boil down to ad hoc decisions based on balancing undue prejudice against probative value, there really are rules that govern. In fact, it is difficult to condense the course into one week. Some of the most illuminating class interchanges occur when judges realize that what is accepted practice in some jurisdictions is reversible error in others.

Discussion of judicial philosophy is also common in this setting. For example, when, if ever, should a judge intervene in the absence of an objection? Not surprisingly, judges vary significantly on such issues, but the interchange is important to their being reflective about the power they wield. Most teachers at the Judicial College are judges, and obviously, professors can be viewed as too

Smith is a member of the Senior Lawyers Division Council and immediate past chair of the Experience *Editorial Board. She is a past president of the Women Lawyers Association of Los Angeles.*

academic, so it is always important to focus on the practical implications of the rules, and not on abstractions. However, we have a real role to play in judicial education by painting the broader picture of how the rules operate nationwide.

The particular topics I teach are the ones that typically generate the most controversy: the admissibility of expert testimony, the redefinition and expansive interpretation of hearsay exceptions, and the meaning of the right to confront witnesses and present a defense. These are the areas that I also write about and comment on in the media because my interest in education extends to lawyers and academics as well as to judges and law students.

For example, for the past few years, I have served on the planning committee for the annual Science and the Law Conference sponsored by the National Institute of Justice. The focus of this conference is on expert testimony and expanding the interchange between the legal and forensic communities on cutting edge issues. These conferences have been groundbreaking, and it has been a particular treat to be able to help select the topics for the panels. On occasion, I have been known to suggest that we should include a subject I know little about, since I am probably not alone in my ignorance.

These conferences have been outstanding in attracting individuals from many disciplines. They enable lawyers, judges, lab directors and analysts, social scientists, and law enforcement to talk about the issues that often divide us, not simply because of differences between prosecutorial and defense perspectives. I am looking forward to the next conference this October in Miami. For anyone interested, the agenda is posted at **www.ojp.usdoj.gov/nij/sciencelaw.htm**.

DNA as Evidence

I became interested in the potential of DNA in criminal cases in the late 1980s when the courtroom use of DNA was in its infancy. The possibility that technology could provide answers that were more reliable than fallible or biased testimony of witnesses was startling. The DNA promise of identifying the guilty and freeing the innocent has been recognized in cases where biological evidence can be tested. The DNA exonerations have forced the country to recognize that individuals can be wrongfully convicted, even of capital crimes. Of course, DNA evidence only solves a relatively small percentage of crimes, but they are often the most heinous murders and sexual assaults.

Professor Myrna Raeder and Dean Leigh H. Taylor, Southwestern University School of Law, Los Angeles

However, even today we cannot forget that when DNA is introduced as evidence against a criminal defendant, it is not sacrosanct. If evidence is contaminated, if errors are made in testing, if there are questions about the basis for the probabilistic evidence of a match presented to a jury, or in rare cases when a forensic expert lies or fudges the results, injustices can still occur. Over the years, my interest in DNA expanded to all expert testimony, because courts have started to take their gatekeeping role in excluding specious expert testimony more seriously. In the mid 1990s the Supreme Court held that under the Federal Rules of Evidence, judges could admit expert testimony only if it is reliable. More recently, this approach was applied not only to hard science, but all expert testimony, and the federal rules were amended to clarify the applicable standard.

My early interest in the courtroom use of DNA was responsible for my being sought out by the media in the O.J. Simpson case. There was a need for commentators to explain the legal standards for using this type of evidence and the significance of the exchanges between the lawyers and the experts. In other words, I served an educational function of making the debate over DNA evidence understandable to a science-phobic public. Ultimately, I commented on a range of evidentiary topics during the Simpson case, believing it was important that the public hear explanations about the applicable legal standards, not simply opinions of who appeared to be winning or losing on a given day.

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For further information on topics discussed in this article, Raeder may be reached at mraeder@swlaw.edu.

Association of American Law Schools

I was Chair of the Evidence Section of the Association of American Law Schools. The Section meets once a year at the annual AALS meeting, and my primary task was to set the topics and panelists for that meeting. In typical fashion, I decided we should have two panels, one devoted to new technology in the courtroom and the other to race and gender in evidentiary policy. I then solicited additional articles and organized a symposium issue on these topics in the *Southwestern University Law Review*. The Evidence Section has had a long history of selecting individuals who are recognized authorities and scholars in the field, and I appreciated being included in this group.

Career and Family

Family has always been important to me. My husband, Terry Kelly, and I met when we were next-door neighbors in the law school dormitory at NYU. I am lucky to have a husband who has always believed in me and encouraged me to reach out for opportunities that I might not otherwise have attempted. Because he was a partner in a large firm and had a very intense civil litigation practice for many years, he understood the time demands that we both faced. I waited to have children until my late 30s, so that I could better balance career and family. Fortuitously, just as my travel schedule dramatically increased, my husband decided to retire from active practice. This permitted me the freedom to become Chair of the Criminal Justice Section as well as the ABA advisor to the Uniform Rules of Evidence Committee.

I should also mention that children—including our two teenage sons—always have a way of keeping you humble. During the period when I was on local and national TV almost daily, one of my sons turned to me and asked, "Why does anyone want your opinion?" But they were equally brutal to my husband, who was interviewed on local TV about a case he was trying. Their comment was, "Are you only on one channel?" ■