



# Atlantic Legal Foundation *Report*

September 2001

## Cohen Honored at 25th Anniversary Celebration

FORMER UNITED STATES SENATOR and Secretary of Defense William S. Cohen was the recipient of ALF's Annual Award at a sold-out reception and banquet on June 21, 2001 in New York City. Secretary Cohen, currently Chairman and CEO of The Cohen Group, an international consulting firm, was introduced by ALF Director Charles Work.

ALF Board Chairman Hayward D. Fisk presented the award, which honors a person who exemplifies the ideals and principles of public service and private enterprise. Accepting the engraved Tiffany mantel clock, Secretary Cohen saluted the work of the Foundation. His remarks focused on the unique role of the United States regarding the world order and the challenges the corporate community faces in competing in an increasingly global marketplace.

The evening included recognition of ALF's Twenty-fifth Anniversary by proclamations from New York Governor George Pataki and Pennsylvania Governor Tom Ridge, United States Senator Arlen Specter and New York City Mayor Rudolph Giuliani. Governor Ridge's Proclamation captured the sentiment expressed in others:



Secretary Cohen addressing ALF's Annual Award Banquet guests.

*"For 25 years, the Atlantic Legal Foundation has advocated principles that have enabled this nation to flourish — limited government, individual rights and free enterprise....The Foundation has offered legal counsel and has brought cases in state and federal courts throughout the country on behalf of the corporate community, distinguished scientists, educators, and governmental leaders, as well as individuals stifled by overzealous regulation."*

### Table of Contents

Cohen Honored at 25th Anniversary Celebration . . . . .	1
Whelan Elected to Board . . . . .	3
Lytton to Head American Corporate Counsel Association . . . . .	3
Butler Named Dean . . . . .	3
New Cases and Controversies . . . . .	4
ALF Appoints Four Advisory Council Members . . . . .	6
On the Horizon . . . . .	7
Board of Directors, Advisory Council Members and Officers . . . . .	8



ALF Director Chuck Work introducing Secretary Cohen.

### Slattery Salutes ALF Leadership and Expanded Mission

ALF President and Director William H. Slattery, in his remarks at the Annual Award dinner, paid tribute to the more than one hundred combined years of individual leadership the Foundation has enjoyed in its twenty-five years. Singled out were Chairman Hayward Fisk, former Chairman and current Director James Wyer, Vice Chairman Douglas Foster, former President, Senior Vice President and General Counsel Martin S. Kaufman, Vice President of Administration Rosemary Heckard-Webber, Senior Vice President and former Advisory Council member Briscoe Smith and former President Ned Lewis. He extended the Foundation's gratitude to these officers and to the other long-time directors and advisors, affiliated with some of the nation's most prominent corporations, law firms,



Secretary Cohen flanked by ALF President Bill Slattery and Chairman Dan Fisk.

universities and foundations.

Slattery noted that ALF's client list is growing in number and diversity, with its "first chair" docket as full as it has ever been. In addition, ALF's amicus work is applauded by many. "Our briefs are welcomed by charter school leaders in New Jersey and New York while our advocacy shakes the entrenched bureaucracy with which so many public school children and parents are burdened." He cited ALF's work opposing "bogus expert scientific evidence" and the Foundation's accelerated efforts to bring together outstanding members of the scientific community to share the teachings of sound science.

Slattery concluded: "After 25 years, ALF continues to do its job, does it in a responsible manner and does it very well." ■



ALF Chairman Dan Fisk presenting the fourteenth Annual Award to Secretary Cohen.



Former Chairman Jim Wyer shares a comment with Bingham Dana's Hugh Freund.

## Annual Award Dinner Host Committee

ALF extends its appreciation to the Dinner Host Committee for making the Twenty-fifth Anniversary award dinner the most successful ever:

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## Whelan Elected to Board

STEPHEN T. WHELAN, A MEMBER of ALF's Advisory Council since 1997, was elected to the Board of Directors at the Board's June meeting.



A partner in Thacher Proffitt & Wood in New York City, he is a member of that firm's Structured Finance Practice Group, concentrating in asset securitization, lease financings and secured lending.

Mr. Whelan is chair of the Leases and Secured Financing

Sub-committee of the American Bar Association, co-author of the ABA Annual Survey on Developments in the Law of Leases, and publishes and lectures several times each year on topics such as securitization, leasing, municipal finance, FASIT legislation and bankruptcy. He has written two books on UCC Article 2A and the Securitization chapters in the Matthew Bender & Company treatises on Commercial Finance and Equipment Leasing.

Whelan is a magna cum laude graduate of Princeton University. He received his J.D. from Harvard Law School in 1971. ■

## Lytton to Head American Corporate Counsel Association

ALF DIRECTOR WILLIAM LYTTON has been elected Chairman of the Board of the American Corporate Counsel Association, the premier bar association serving the needs of in-house counsel. Lytton is Senior Vice President and General Counsel of International Paper Company, based in Stamford, Connecticut. ■

## Butler Named Dean

ADVISORY COUNCIL MEMBER HENRY N. Butler has been appointed Dean of The Argyros School of Business and Economics and James Farley Professor of Economics at Chapman University, Orange, California. ■

## New Cases and Controversies

IN RECENT MONTHS, ALF HAS BEEN retained to participate in ten litigations raising sound science issues, improper government regulation and attempts to stifle charter schools.

### Sound Science Litigation

Representing the National Federation of Independent Business, with a membership exceeding 500,000 small businesses throughout the U.S., ALF filed an action in the District of Columbia against the U.S. Environmental Protection Agency, in *National Federation of Independent Business v. Whitman*, challenging the EPA's new lead reporting rule.

The EPA has published a final rule dramatically reducing the reporting threshold for the use of lead and lead compounds to 100 pounds — a reduction by a factor of 250 in the case of facilities that “manufacture or process” lead, and by a factor of 100 in the case of facilities that “otherwise use” lead. The rule also eliminates the *de minimis* exemption for lead and lead compounds. As a result, any amount of lead or lead compounds present in a mixture or trade name product must be counted toward the reporting threshold, no matter how low the concentration of lead in the mixture may be.

The combined effect of reducing the reporting threshold and eliminating the *de minimis* exemption will be to subject perhaps tens of thousand of additional facilities to the burdens of making threshold determinations for lead and lead

compounds, and preparing and filing annual reports when the 100-pound threshold is exceeded.

ALF's complaint charges that the EPA rule-making was procedurally flawed and not supported by any sound scientific analysis, and violates the Small Business Regulatory Enforcement Fairness Act (SBREFA).

Tom Sullivan, Executive Director of the NFIB Legal Foundation, said that “The Small Business Regulatory Enforcement Fairness Act requires EPA to consider small business views presented by an advisory panel made up of government officials and small businesses. EPA's refusal to convene the advisory panel for the lead reporting rule prompted NFIB's lawsuit. NFIB fought hard to get SBREFA enacted so that small business would have a seat at the table when regulatory decisions are made, and now that small businesses have that right, the NFIB will hold agencies like EPA accountable.”

In *Navarro v. Missouri Pacific Railroad* the plaintiff claims that his deceased wife, who worked for the railroad primarily as a clerk, developed multiple myeloma from exposure to diesel fumes from locomotives. The trial court admitted the testimony of plaintiff's experts as to the extent of Mrs. Navarro's exposure and a claimed association between diesel exhaust fumes and cancer. The jury returned a verdict of \$2 million.

ALF's *amicus* brief argues that the plaintiff's experts' testimony was based on a flawed and unreliable estimate of exposure and no empirical measurement of the concentration of diesel particles in the air at the rail yard, and that there is no support in the scientific literature for any association between diesel fumes and multiple myeloma.

*Carrillo v. Lockheed Martin* presents the issue of whether claims for reimbursement of the costs of medical monitoring are properly certified for class action status. The California Court of Appeal held that there were disparate and dissimilar issues of duration and intensity of exposure, pre-existing medical conditions and other factors, and therefore class action status should be denied. ALF filed an *amicus* brief on behalf of medical experts in epidemiology, toxicology and public health in the Supreme Court of California urging affirmance of the intermediate appellate court ruling.

In *Alcan Aluminum v. U.S.*, ALF appeared in support of Alcan Aluminum's appeal to the U.S. Circuit Court of Appeals for the Second Circuit in a Superfund case. The United States claims that nickel and PCBs from a waste site leached into the ground water. Alcan was one of the companies that used the dump for disposal of industrial waste. The Daubert issue which ALF addressed is whether the court improperly ignored nineteen tests conducted by the federal EPA which showed that the amount of nickel and PCBs in the groundwater at the site and in surrounding areas was no higher than normal “background” levels.

### Charter School Litigation

ALF's motion to file an *amicus* brief on behalf of the New Jersey Charter Public Schools Association has been granted and the brief has been filed in New Jersey's intermediate appellate court. ALF argues that additional regulation for charter schools is not required and inappropriate — a position advanced also by the New Jersey Commissioner of Education. Norman Atkins, president of the New Jersey Charter Public Schools Association, noted: "ALF's brief enabled us to inform the court of the unique characteristics of charter schools which otherwise would not have been heard."

ALF has been asked to represent the New York Charter Schools Association by filing an *amicus* brief in the New York Court of Appeals (if leave to appeal is granted) in a case permitting a school district to challenge the issuance of a charter. The defendants, whose position ALF would support, include the Board of Trustees of the State University of New York and its charter school administrative agency, the New York Charter School Institute, and Victory Schools, Inc., a for-profit school operator.

ALF also will appear on behalf of the New York Charter Schools Association in another appeal which involves important interpretations of New York's charter school legislation.

### Illegal Government Activity

In *Gamble v. Zoellick* the Foundation brought an action against the Secretary of Commerce and the U.S. Trade Representative to force the Government to resume

meetings of the Industry Sector Advisory Committee for Chemicals and Allied Products and to limit membership on the committee to representatives of producers of chemical and related products. The suit was partially successful in that committee meetings, after ten months' suspension, were resumed; however, representatives of "environmental interests" were held to be appropriate committee members. The court's opinion stated that ALF's legal contentions had "appeal," but held that the plaintiffs had not established the invasion of a "legally protected interest which is concrete and particularized."

Martin S. Kaufman, ALF's Senior Vice President and General Counsel, noted that "New Jersey's reverse discrimination program is not justified under the standards set by the U.S. Supreme Court in the *Croson* case."

In *GEOD v. New Jersey* ALF challenges the New Jersey Department of Transportation's Minority and Women's Business Enterprise Program as a violation of the equal protection rights of GEOD, a white male-owned firm. Martin S. Kaufman, ALF's Senior Vice President and General Counsel, noted that "New Jersey's reverse discrimination program is not justified under the standards set by the U.S. Supreme Court in the *Croson* case. There is no evidence that New Jersey state agencies ever

discriminated against minority or woman-owned firms in awarding contracts. There isn't even a valid 'disparity study' that shows that woman and minority owned firms received fewer state contracts than they should have on a purely statistical basis."

ALF also has filed a complaint on behalf of eight New Jersey firefighter candidates (including minority candidates and one female candidate), with the State of New Jersey and the United States as defendants, challenging the design, administration and scoring of the 1999 entry-level New Jersey firefighter exam.

ALF has filed an *amicus* brief in *Adarand Constructors v. Mineta* in the Supreme Court of the United States in an appeal involving a claim by a white male-owned company that lost a subcontract because the U.S. Department of Transportation regulations require states which receive federal highway construction funds to set "goals" for the use of minority and woman-owned contractors and a federal program awarded monetary "incentives" to prime contractors who awarded subcontracts to minority owned enterprises. ALF's brief contends that the Tenth Circuit Court of Appeals improperly took judicial notice of a Department of Justice publication, prepared by an experienced paralegal, and which was insufficient to carry the government's burden of providing a "strong basis in evidence" that there is a "compelling" government interest in adopting racial, ethnic and gender discriminatory criteria in awarding federal contracts. ■

## ALF Appoints Four Advisory Council Members

FOUR OUTSTANDING NEW MEMBERS have been appointed to ALF's Advisory Council.

**Ronald E. Gots., Ph.D.** is a managing principal of the International



Center for Toxicology and Medicine, Rockville, Maryland. He received his A.B. in chemistry and his

M.D. degree from the University of Pennsylvania. He received his Ph.D. in Pharmacology from University of Southern California School of Medicine. Since 1975, he has devoted his professional activities to solving clients' problems in environmental medicine, toxicology, causation analysis, and risk communication. He has assisted hundreds of clients in analysis, strategy and testimony in chemical injury claims, regulatory matters, mass tort claims, environmental and workplace exposure issues, and risk communication.

Dr. Gots has chaired two international symposia on "Multiple Chemical Sensitivities: the State of the Science" and sat on a committee convened by the International Programme on Chemical Safety to evaluate the "chemical sensitivity" issue (Berlin, Germany, February 1996). He has lectured widely and has testified at Congressional subcommittee hearings concerning victim compensation legislation. He is

the author of six books, chapters in six additional books and over fifty articles.

**Robert E. Juceam** is a partner in Fried, Frank, Harris, Shriver &



Jacobson in New York. From 1995 to 2001 he chaired the firm's litigation department in Washington, D.C.

He has defended public companies, their directors and executives in a variety of civil and criminal matters involving many different areas of substantive law. He has been active in bar association work and has received a number of professional achievement awards. He is a graduate of Columbia College and Columbia Law School and holds an LL.M from New York University. He began his legal career as law clerk to the Hon. Irving Ben Cooper in the Southern District of New York.

**Susan L. Meade** is a senior vice president in the government affairs



group of J P M o r - gan Chase and Company, where she has responsibility for legislative and political

issues on the federal and state levels.

She began her banking career at Manufacturers Hanover where, at the time of its merger with Chemical Bank, she headed the federal Government Affairs Group. Ms. Meade served on the staffs of U.S. Senator Hugh Scott (R-PA), Representative Edward G. Biester (R-PA) and the Speaker of the Arizona House of Representatives. She holds a B.A. degree in Political Science from the University of Pennsylvania, where she is an Associate Trustee and member of the Executive Committee of the Trustees' Council of Penn Woman.

**Alan Charles Raul** is a partner in the Washington, D.C. office of Sidley



A u s t i n Brown & Wood. Mr. Raul has practiced in the areas of administrative and constitutional law,

as well as intellectual property, privacy, consumer protection, internet and E-Commerce law. His practice involves general and appellate litigation, and business counseling. Mr. Raul served as General Counsel of the U.S. Department of Agriculture (1989-1993) and as General Counsel of the Office of Management and Budget in the Executive Office of the President (1988-1989). Earlier, he served in the White House as Associate Counsel to the President (1986-

1988). During his tenure as Associate Counsel to the President, Mr. Raul represented the White House in connection with the Iran-Contra investigations.

He received his A.B. and M.P.A. degrees from Harvard. After graduating from Yale Law School in 1980, Mr. Raul clerked for Judge Malcolm R. Wilkey of the U.S. Court of

Appeals for the District of Columbia Circuit. Mr. Raul is a member of the Council on Foreign Relations, and has served in various leadership positions in the Federalist Society, the American Bar Association and the American Heart Association. ■

### Atlantic Legal Foundation Website

*We are posting briefs and other documents on ALF's website. Please visit us at [www.atlanticlegal.org](http://www.atlanticlegal.org).*

## On the Horizon . . .

**Gregory P. Joseph, Esq.** will address ALF's Board and Advisory Council at their joint meeting in Philadelphia on October 4-5. Mr. Joseph is a Fellow of the American College of Trial Lawyers and former Chair of the 60,000-member Section of Litigation of the American Bar Association. He is currently Co-Chair of the Third Circuit Task Force on Selection of Class Counsel by appointment of Chief Judge Edward Becker. He will speak on "Auctions and Class Actions: Selecting Lead Counsel for the Class."

Harvard University Press has just published the second edition of *Risk-Benefit Analysis*, by **Richard Wilson** and Edmund A.C. Crouch. Professor Wilson, Mallinckrodt Research Professor of Physics at Harvard University, is a long-time member of ALF's Advisory Council.

Managing risk in a complex economy and in a democratic society is an extremely difficult task. Professor Wilson's book introduces the ideas and difficulties associated with attempts to formally perform risk assessments and make risk-benefit comparisons in the fields of health and human welfare.

*Risk-Benefit Analysis* provides an inclusive and authoritative review of the methodology for assessing risks to human health. The book shows how such risks are defined, measured, and estimated; how variability and uncertainty enter into such risk assessments and must be dealt with; how perceptions of a risk may vary among different individuals and groups; and how differences in the perception of a risk and the corresponding risk-benefit relationship can shape the risk-management decision. The authors use a broad array of pertinent data which they have assembled to illustrate their analyses.

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