

talented individuals from whom we could choose fine magistrate judges who will serve the public well. I was fortunate to know Betsy for over 30 years in various capacities, first as a formidable opponent in a long running ERISA fiduciary case. Over the ensuing years, I came to know her work as a leader of stellar bar organizations, an inspiration and mentor to countless younger lawyers, a wise counsellor, and an ever faithful, indefatigable and multifaceted contributor to the work of the Southern District. The world was richer for her presence, and our loss is profound.” – Laura Taylor Swain, Chief Judge, U.S. District Court for the Southern District of New York

## **Personal History**

### **The Associate’s Dilemma - Regulation U**

By C. Evan Stewart



In the August 2021 issue of the *Federal Bar Council Quarterly*, I examined the dilemma purportedly faced by Joe Fortenberry in 1977 on what to do when he saw his

boss/partner lie about documents. In that same time period, another associate was faced with a different dilemma involving his boss/partner, but this time it was me.

### **Bright Eyed and Bushy Tailed**

It was late October 1977, and I had been at Donovan Leisure Newton & Irvine about three weeks. Donovan Leisure, at that time, was the fourth largest firm in New York City, and I was proud to be one of the 27 first-year associates at one of the country’s leading litigation firms.

At the beginning of the month, the firm held a reception for the biggest group of incoming lawyers in its history at the University Club. In the club’s historic Council Room we were individually introduced to George Leisure, Sr. – the oldest living founding partner. Hard of hearing, Leisure had a junior partner standing next to him who fed him a morsel of information about each young lawyer. When it came to my turn, the junior partner, not-so sotto voce, *whispered*: “This is Evan Stewart; he played tennis for Cornell.” Leisure nodded, graciously shook my hand and said: “I understand you are a tennis player, Mr. Stewart. In my day, I used to play with Fred Perry [a three time Wimbledon champion] when he was in New York.” Suitably impressed with that factoid, I passed the baton to the next in line.

Work-wise, I was quickly given a variety of litigation assignments for various partners involving a number of firm clients. It was exciting and heady stuff. But one assignment proved to be something for which I was not prepared.

### **Regulation U**

At 9:15 a.m. that late October day, I was sitting at my desk in the office I shared with another first-year when my phone rang. It was Roger Kapp. Kapp was a 41-year-old corporate partner, helping out on a litigation matter because it had an important securities component. He was a short, spark-plug built man with an impatient, Type-A personality; he used to punch the elevator button at 30 Rockefeller Plaza a dozen or more times on the theory that that would make the elevator appear more quickly.

“Evan,” he said, “can you come to my office right away?” “Yes, sir,” I replied. I walked down the corridor on the 38th floor to Kapp’s office and found him at his desk with his head down reading some legal tome. I knocked on the door, and he looked up at me with no recognition, so I said: “Mr. Kapp, you called and said you wanted to see me.” He gestured to me to sit in one of the chairs in front of his desk and began to speak: “I have been giving some thought to this case and have concluded that Regulation U is the key to winning it. Spend the day in the library and report back to me before 5:30 on why I am right.” “Yes, sir,” I replied, and left his office, just as Kapp was resuming the position in which I had found him.

I immediately went to the law library on the 39th floor and sought out the firm’s long-time librarian, Al Borner. “Mr. Borner,” I began, “I just left Mr. Kapp’s office.” “Uh oh,” he glumly replied. “Mr. Borner, he has asked me to do some research on Regulation U and I have no idea what

that is!” He gently responded: “Not to worry, that is a regulation created by the Federal Reserve and the set of those regulations is in that alcove” (pointing to one not far from where we were standing). I thanked Borner for being so helpful (and kind), but he just shrugged and said that was his job (“and please call me Al”).

And so I ploughed into learning about Regulation U, curious as to how it was going to win our case. Unfortunately, when I read the text of Regulation U, it appeared to have absolutely nothing to do with anything in the litigation. At that point, I was wondering how I had graduated from law school, let alone gotten a job at Donovan Leisure. With my father a Wall Street lawyer (and most of his friends the same), I had grown up with an ingrained belief that partners in leading New York City firms were, if not gods, certainly never wrong in their legal judgments.

So, I concluded, I was clearly missing something – perhaps if I read some cases interpreting Regulation U that would make clear what Kapp had in mind. Nope, that did not clear things up.

Perhaps leading law reviews on Regulation U would provide the answer? Nope, no help there either. Perhaps Kapp meant Regulation V, or Regulation T, or some other regulation close to Regulation U? Nope, nope and nope.

### Reporting My Research

With 5:15 fast approaching, I realized I needed to go report to Kapp on my research. Once outside his office, I saw him in exactly the same

position from earlier in the day. So I once again knocked on his door, and (once again) he looked up at me with no recognition. “Mr. Kapp,” I began, “you asked me to report on Regulation U and its applicability to our case.” “Oh yes,” he replied, “tell me why I am right and how it will win the case.” “Well actually, Mr. Kapp, I have spent the entire day reading everything I could on Regulation U, as well as the Federal Reserve regulations that surround that regulation, and none of them have any application to this case.”

After I delivered my conclusion, Kapp gave me a look I have never forgotten – he looked at me as if I was the dumbest person he had *ever* encountered. Scowling, he said ominously, “Be in my office tomorrow at 9:15 and we will call someone who will tell me why I am right about Regulation U!”

Kapp then returned his head to the legal tome he was reading, signaling my dismissal.

### An All-Nighter

Pure terror filled me as I shrank away from Kapp’s door: my budding legal career was going to end in approximately 16 hours. Maybe if I went back to the library and redoubled my efforts I would see the light and understand how Regulation U really could save the day?

So, as the sun set over Manhattan, I pored over the same ground from earlier in the day. Not only did an epiphany not occur, but as midnight approached my mind started to hurt as not finding the “right” answer was causing me to hallucinate.

Finally, at 2 a.m., I decided I needed to go back to my apartment, shave and shower, put on a new suit, and (hopefully) return to the law library refreshed (and refortified by coffee) to unlock the mystery(ies) of Regulation U.

Back at the library at 4 a.m., I gave it my last, best shot: What was I missing? Why was I so stupid? What jobs could I get at McDonald’s? Unfortunately, this did not do the trick, and like a condemned man on death row, I watched as the clock moved inexorably from 6 to 7 to 8 and then to 9. At 9:10, wondering how I was going to explain to my father that my legal career had lasted not even four weeks, I grimly headed down to face my executioner.

### Facing My Executioner

At 9:14 I knocked on Kapp’s door. He was still positioned as he had been the prior day. Again, he looked up at me with no recognition. “Mr. Kapp,” I said with fear and trepidation, “you told me to report to you and you would call someone about Regulation U.” Channeling the same look he had given me the prior afternoon, Kapp pointed at me and then to the chair in front of his desk next to his speaker phone: “You, sit there!” As I sat in the chair my mind flashed to a scene in “Thunderball,” when the Spectre miscreant is electrocuted, his chair goes down under the floor, and then returns empty and sizzling. There would be no report to my father; rather, my charred remains would forever be entombed in the bowels of 30 Rockefeller Plaza!

With his Type-A style, Kapp quickly hit many buttons on the speaker phone. After a few rings, a disembodied voice came on the box: “Hello.” Now, I was just a minute or two from my execution. Kapp replied: “Bob, Roger Kapp here. Bob, this isn’t a social call. I’m calling, Bob, because you are the world’s expert on Regulation U. You know more about that regulation than any man alive. Let’s face it, you wrote the book on Regulation U!” In reply, Bob said: “Well Roger, you are gilding the lily a bit, but yes, I do know a lot about Regulation U.” Kapp jumped in: “And that’s why I’m calling, so let me tell you about our situation.” He then went on to give Bob a truly brilliant precis about the litigation, as you would expect from a Wall Street law firm partner. When he had finished, Kapp then asked, “And so, how does Regulation U win the case for us?”

Now, I had only seconds before the electricity would enter my body. My terror was only enhanced by the seemingly long delay Bob took before proving Kapp right and me the dumbest ex-first-year associate ever.

“Uh, Roger,” Bob intoned, “Regulation U has nothing whatsoever to do with your case.” A long silence then ensued. Finally, Kapp broke the silence: “Well, thanks a lot Bob. I owe you a lunch. Talk soon.” Then Kapp hung up and his head returned down to the same tome, in the same position he had been in since the day before.

So there I sat. Was this a good moment for me? I was not so stupid: I had been right; I had given Kapp the correct conclusion. But, here was my boss/partner humiliated and

proven wrong in front of (and by) some nobody first-year associate. Maybe I was not going to die immediately, but I did not think Kapp would be inviting me out to lunch anytime soon. After what seemed to be an eternity, with me sitting in the almost-death chair and Kapp with his head down reading his tome, I found enough of my voice to blurt out, “Is there anything else you would like me to do, Mr. Kapp?” “No!” And so I tip-toed out of his office.

### Postscripts

- Kapp subsequently left Donovan Leisure to become the general counsel of one of the firm’s major pharmaceutical clients. His tenure in that position was cut short when it was discovered he had engaged in a longstanding practice of pretending to be a doctor, calling hospitals and ordering enemas for female patients. *See Frig v. Lenox Hill Hospital*, 167 Misc. 2d 42, 676 N.Y.S. 2d 971 (Sup. Ct. 1995). The New York Post ran several articles about him, dubbing him “Doctor Enema.” Apart from his legal troubles over that behavior, Kapp also was accused of improperly diverting trust funds over which he was the trustee. Shortly after this latter issue became public, Kapp committed suicide.
- I never told any Donovan Leisure partners of my near death experience with Kapp until years after I had left the firm. At lunch with Ken Hart, with whom I had worked very closely on many matters over many years, something led to my recounting the foregoing story to my mentor. With his jaw out

at half mast during most of my retelling, Ken just shook his head when I finished: “I guess I now know why Kapp never liked you.”

### From the Courts

## Magistrate Judge Cho Joins the Eastern District Bench

By Travis J. Mock



After graduating from the University of Michigan with high honors, Magistrate Judge James R. Cho obtained his law degree in 1999 from the University of Minnesota Law School. He then joined the Chicago office of Seyfarth Shaw to practice labor and employment litigation, relocating to the firm’s New York City office in 2005 to focus on large class actions.

In 2008, Magistrate Judge Cho became an Assistant U.S. Attorney in the Civil Division of the U.S. Attorney’s Office for the Eastern District of New