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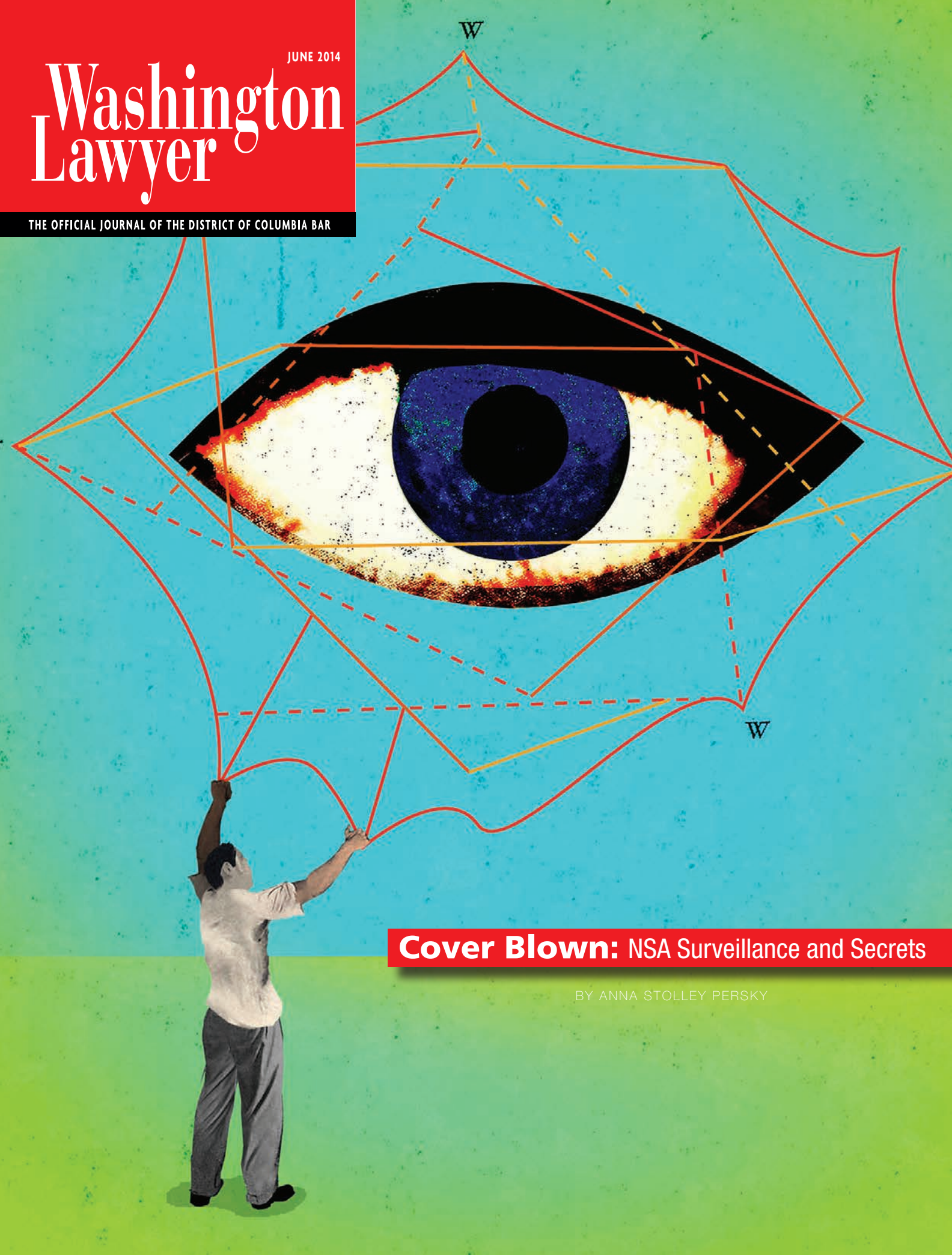

Cover Blown: NSA Surveillance and Secrets

BY ANNA STOLLEY PERSKY

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letters

Lincoln's Legacy Includes Legal Juggling Act

When I first started reading Robert B. Norris' article "Lincoln's Dilemma," I questioned why this piece, steeped in history, was included in a legal journal. About halfway through, however, I realized that the Dakota War involving the Dakota Indians' uprising in Minnesota featured several legal dilemmas, too: How would President Lincoln, a lawyer, handle war criminals and the proposed execution of the Indians? How would he adequately handle both the uprising and the ongoing Civil War? And how would he continue to prepare for the Emancipation Proclamation? Indeed, Lincoln had a lot on his plate.

What stood out for me in the article was Mr. Norris' point that "it would be difficult to find anyone who has not heard of Custer's Last Stand," yet few American citizens outside of Minnesota have heard of the Dakota uprising. In reading this article, I have learned a lesson in both history and the law. Nice job, *Washington Lawyer*.

—Janet Tennison
Colorado Springs, Colorado

For Some Lawyers, Burnout Starts Early

Kathryn Alfisi writes in April's cover story on job dissatisfaction, "the competitiveness often starts in law school where class rankings are held with great importance." Truth be told, the competitive environment starts long before law school—try high school or even middle school.

People who live in the Washington metropolitan area, as I do, don't need to look too far to feel the weight of this pressure. Some of the nation's top school systems are right here in our backyard, including Virginia's Fairfax County, and Maryland's Howard County and Montgomery County—and those are just the *public* schools.

It's no wonder that people burn out quickly in the legal profession. If you've been under extreme academic pressure since your teens, you're probably ready for a break by the time you reach your twenties and you're working in your first position as a law firm associate. And who could blame you?

—M. L. Vance
Gaithersburg, Maryland

Let Us Hear From You

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from the president

By Andrea Ferster

In Final Days at Helm, Challenges Are in Focus

Patrice Gilbert Photography

"The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, and comes short again and again, . . . but who does actually strive to do the deeds; . . . who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly."[1]

—Theodore Roosevelt

It has been an extraordinary privilege to lead the D.C. Bar as its 42nd president. In this column, my last as Bar president, I will report on the progress of projects launched or advanced by the Bar during my tenure and provide some food for thought about the challenges that lie ahead.

I am proud to have led the Bar in launching a community-wide dialogue about how "low bono" (i.e., reduced-fee) law practices could help address the unmet legal needs of the growing number of D.C. residents who cannot afford market-rate counsel, but who also don't qualify for legal aid. A feature-length article in *Washington Lawyer* titled "Above the Guidelines: Low Bono Widens Path to Access to Justice"[2] kicked off the dialogue in September, and our showpiece event took place on November 7, 2013, when the Bar convened a groundbreaking meeting that brought together 25 thought leaders representing all sectors of our legal community to examine programs that link lawyers willing and able to provide low bono legal services to low- and moderate-income residents.

The roundtable was facilitated by national and local experts who informed participants about law school-based "incubators for justice," reduced-fee lawyer referral programs, and other models for pairing underemployed lawyers with clients of modest means. The final report is now publicly available on the Bar's Web site.[3]

While the Bar cannot currently fund or staff a program similar to those we examined, it is my fervent hope that this discussion—and the search for solutions in the District of Columbia—will continue. The dual problem of underemployed lawyers and clients who need affordable representation is not going away.

I am also proud of another exciting initiative launched this year—the Pro Bono Committee's Working Group on Unaffiliated Lawyers. While large firms have infrastructure in place for doing pro bono work, unaffiliated lawyers do not. Our new working group is looking at ways to provide unaffiliated lawyers the same supervision and back-up support for their pro bono service that lawyers working for law firms or government agencies enjoy. Ultimately, I expect this working group to develop a model that will infuse the entire community with the services of a whole new battalion of pro bono lawyers.

Initiatives launched during past Bar presidents' tenures have flourished this year. The Bar's wonderful John Payton Leadership Academy, which graduated its first class in 2013, has now graduated its second class of new leaders. Members of the vanguard class are now serving as volunteer leaders on Bar committees, on section steering committees, and in voluntary bar associations as well as by standing for election to the Board of Governors.

And it is also very gratifying that many of the recommendations of the D.C. Bar's Family Law Task Force, which released its report last year, have been implemented by the D.C. Superior Court.

It is now time to look to the future. Here is the question that I ask you to consider: Are we doing enough to meet the challenges facing our profession and the community we serve?

The world in which we practice law has changed. Traditional markets for private sector legal jobs have shrunk while the costs of legal education have skyrocketed, creating huge barriers to entry and massive debt burdens for new lawyers, particularly our newest members. Legal services agencies struggle under stagnant funding and burgeoning needs, and access to justice concerns have reached crisis proportions.

Bold and innovative programs have been advanced by a number of our sister bars that are tackling these challenges. The Washington State Bar Association has partnered with statewide legal services providers and local law schools to create a "moderate means" program, a free referral panel that connects clients whose income is within 200 percent to 400 percent of the federal poverty level to lawyers who offer legal assistance at a reduced fee.[4]

The New York State Bar appointed a Committee on Legal Education and Admission to the Bar, which considered a host of bold changes in legal education designed to produce more practice-ready graduates and examined alternatives for scheduling the bar exam.[5] The New York Court created the Pro Bono Scholars Program, a novel plan that builds upon New York's new 50-hour pro bono bar admission requirement.

Under this new program, law students who agree to devote the entire final semester of their third year to full-time pro bono service under the supervision of a legal services provider, law firm, or corporation in partnership with their school are permitted to sit for the February bar exam in their third year of school.[6] This innovative program, already approved by the Board of Law Examiners, will allow students to become licensed attorneys almost immediately upon graduation, instead of enduring the traditional nearly year-long wait. It has the added advantage of vastly increasing the students' experience and pro bono service—estimated at 500 or more hours per scholar.

New York's program may not be appropriate for the District of Columbia, and certainly such solutions are not within the purview of the D.C. Bar, which does not handle attorney admissions. It is worth considering, however, whether delays in attorney admission are creating a hardship for new lawyers, and whether there are

continued on page 13

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the pro bono effect

By Christine M. Corkran

Small Business Clinic Aids Clients, Lawyers Alike

Ronald Flemmings

For those of us who practice in the ambiguously named field of "transactional law," it can be difficult to find pro bono opportunities within our realms of expertise. Some transactional lawyers use pro bono to try their hands at dispute resolution, but for those of us who panic at the thought of filing a motion or appearing in a courtroom, it can be challenging to find the right pro bono matter for our skills and interests.

Enter the Small Business Brief Legal Advice Clinic, part of the D.C. Bar Pro Bono Program's Community Economic Development (CED) Project. These several-hour, walk-in clinics held every month throughout the District give lawyers who specialize in corporate, real estate, tax, employment, and intellectual property law a chance to counsel small business owners and aspiring entrepreneurs—D.C. residents daring enough to open businesses in struggling neighborhoods, inspire their families and neighbors, and make a difference. Since the clinic started in 2004, attorney volunteers have assisted more than 1,500 such entrepreneurs.

I was introduced to the clinic as a member of the Small Business and Community Economic Development (SBCED) Clinic at The George Washington University Law School. Darryl Maxwell, managing attorney of the CED Project, provided tips on working with small business owners and founders of small nonprofits. For me, the SBCED Clinic was one of the most formative experiences during law school, mainly because the practical learning opportunities for aspiring transactional lawyers were so few, and the SBCED Clinic was a way to continue that experience as an attorney.

Any first-time volunteer may be overwhelmed by the passion of the entrepreneurs who come to the Pro Bono Program's Small Business Brief Legal Advice Clinic. Some have given up their full-time jobs or sunk their life savings into that dream. They come armed with notes, forms, contracts, leases, logos, and questions that cover every field of transactional law. The risks they have taken do not appear to scare them; rather, what they find daunting is the prospect of organizing a legal entity, filing tax returns, negotiating leases, entering into contracts, and paying employees.

While many of us who volunteer at the clinic are too risk-adverse to take a leap like these entrepreneurs have, the legal roadblocks they bring to us are our routine matters. Part of the responsibility of attorney volunteers is to make the law less scary and more manageable. Most entrepreneurs are surprised to learn the freedom they have, particularly when it comes to governing their businesses and entering into contracts. Understanding the scope of the law and receiving helpful resources empowers them to pursue their small business dream.

As an associate building my practice, the clinic is also an opportunity to gain experience in counseling clients, managing their expectations, and understanding what they really need. Particularly at the beginning of our legal careers, there is much to learn, not only substantively, but also in terms of the skills needed to be an effective advisor. At the clinic, the student becomes the teacher. The entrepreneurs who come to the clinic do not care whether their attorney-advisor has been practicing for 20 years or 20 days. To them, every attorney volunteer is an expert in all things business law.

There is no preparation with respect to individual entrepreneurs prior to the clinic. A brief intake interview is conducted on-site, and an attorney whose expertise matches with the issues spotted in that intake is paired with the entrepreneur. A moment's review of the intake summary is our first introduction to the business and the issues we will have to address. And, typically, those issues only scratch the surface of what the entrepreneurs really want, and need, to know.

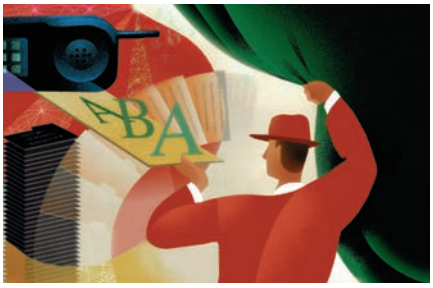
The clinic also does not afford us the luxury of time for reflection, and there is no opportunity to conduct real-time Internet research. Moreover, because of the limited nature of the advice provided, there is no follow-up the next day. We must provide the best answers we can in the course of our 20- to 30-minute conversation. Occasionally this means candidly admitting that we do not have a perfect and complete answer. Offering guidance "on the spot" teaches us to ask questions, determine what the entrepreneur really wants to know, and accept that sometimes our role is limited to providing information rather than advice. Fortunately, the entrepreneurs are grateful to take any piece of information along the way, and we can still make a difference in a limited time.

The time commitment for an attorney volunteer at the clinic is minimal, but the rewards are great. Talking with the entrepreneurs and answering their questions is a small way to be part of something big. The entrepreneurs leave grateful for free legal help and the validation of a real, live attorney. The attorney volunteers leave the clinic inspired by those brave enough to make their entrepreneurial dreams a reality. The opportunity to help those who dare to pursue their passion while improving the legal skills needed to assist any client is one no transactional lawyer—experienced or new—should miss.

Christine M. Corkran is an associate at McDermott Will & Emery LLP. Her practice is focused on corporate and securities matters, including mergers and acquisitions, securities offerings, and corporate governance. Corkran also counsels pro bono nonprofit organizations and is a regular volunteer with the D.C. Bar Pro Bono Program's Small Business Brief Legal Advice Clinic.

bar happenings

By Kathryn Alfisi



Mick Wiggins

Benitez to Take Oath of Office at Bar's Celebration of Leadership

Steptoe & Johnson LLP partner Brigida Benitez will take her oath of office as the 43rd president of the D.C. Bar on June 17 during its 2014 Celebration of Leadership at the Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW.

The evening will open with a Presidents' Reception at 6 p.m. to welcome Benitez, followed by the Celebration of Leadership at 7:30. The reception, which benefits the D.C. Bar Pro Bono Program, aims to raise money for its programs that provide legal assistance to economically disadvantaged residents in the District of Columbia.

Courtesy of Steptoe & Johnson LLP

Brigida Benitez

Courtesy of the USAF

Colonel Tonya Hagmaier

Apart from Benitez's swearing-in ceremony, highlights of this year's Celebration of Leadership include the announcement of the 2014 D.C. Bar election results and the presentation of awards to D.C. Bar sections, pro bono attorneys, law firms, and others who have served the Bar and its community.

The evening also features the presentation of the Bar's 2014 Beatrice Rosenberg Award for Excellence in Government Service to Colonel Tonya Hagmaier, director of civil law and litigation for the United States Air Force, and the Justice Thurgood Marshall Award to Brooksley Born, a retired partner at Arnold & Porter LLP.

For more information on the Presidents' Reception or to make a donation to the D.C. Bar Pro Bono Program, contact Kathy Downey at 202-588-1857 or kdowney@erols.com. For more information on the Celebration of Leadership, contact Verniesa R. Allen at 202-737-4700, ext. 3239, or annualmeeting@dcbar.org.

Lawyers Race for Heart Health at June Fundraiser Event

On June 14 lawyers and others will lace up their running shoes once again for the American Heart Association's (AHA) 24th annual Lawyers Have Heart race that starts at 7:30 a.m. at the Washington Harbour at Georgetown, 3000 K Street NW.

Lawyers Have Heart was cofounded in 1991 by two District of Columbia lawyers as a way for the local legal community to come together and support the AHA in its fight against cardiovascular diseases and stroke, which are common in high-stress professions like the law. The event has now grown to become the District's largest 10K race and has raised more than $9 million to benefit the AHA.

To register or for more information, contact Lindsey Difazio at 703-248-1705 or lindsey.difazio@heart.org, or Brad Weisberg at 703-248-1714 or brad.weisberg@heart.org, or visit www.runlhh.org.

June Employment Law Courses Cover Social Media, ADA Litigation Update

The D.C. Bar Continuing Legal Education (CLE) Program will offer three employment law-related courses this month, starting with "Nuts and Bolts of Employment Discrimination Law" on June 3.

Designed to teach attendees how to prove and defend a discrimination claim, this course provides recent case updates from the U.S. Supreme Court, the U.S. Court of Appeals for the District of Columbia Circuit, and the U.S. Court of Appeals for the Fourth Circuit.

Faculty will focus on the elements of proof under relevant federal statutes such as Title VII of the Civil Rights Act, the Americans with Disabilities Act Amendments Act (ADAAA), the Age Discrimination in Employment Act, the Genetic Information Nondiscrimination Act, and the Pregnancy Discrimination Act.

Kristin D. Alden of the Alden Law Group, PLLC; Avi Kumin, founder and partner at Katz, Marshall & Banks, LLP; and Thomas P. Murphy, a partner at Hunton & Williams LLP, will lead this course. They will cover, among other topics, disparate treatment (race, gender, national origin, religion, age, disability, and pregnancy); retaliation; harassment (hostile work environment); reasonable accommodations under the ADAAA; and equal pay.

The course is cosponsored by the D.C. Bar Corporation, Finance, and Securities Law Section; Health Law Section; Labor and Employment Law Section; and Litigation Section.

On June 16 the CLE Program will discuss the first cases decided under the newly expanded Americans with Disabilities Act (ADA) and what the rulings mean for attorneys representing either employees or employers.

"ADA Employment Law and Litigation Update 2014" will address questions such as how are ADA cases being analyzed under the ADAAA and U.S. Equal Employment Opportunity Commission regulations, what is the difference between pursuing actual disability and "regarded as" disability claims, can employers still challenge whether an employee's medical condition is a disability, are temporary impairments disabilities under the ADAAA, and is obesity an ADA disability?

Faculty includes Lisa J. Banks, founding partner at Katz, Marshall & Banks;

Daniel B. Kohrman of the AARP Foundation Litigation; and Jonathan R. Mook of DiMuroGinsberg PC.

The course is cosponsored by the D.C. Bar Administrative Law and Agency Practice Section; Corporation, Finance and Securities Law Section; Health Law Section; Labor and Employment Law Section; and Litigation Section.

Today, employers and employees alike must be mindful of how on-duty and off-duty use of social media can have consequences in the workplace. Employers must also take care to craft social media use policies that do not violate the legal rights of their employees.

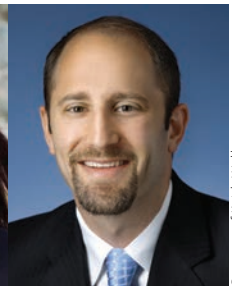
The CLE Program's June 23 course "Can They Fire Me for Putting That on Facebook?" will focus on social media policy—in particular what to include and what to never include—and National Labor Relations Board (NLRB) and court decisions on the legality of social media use policies.

Recent NLRB decisions will be of particular interest to employment, in-house, and business practitioners, as well as to labor and union attorneys, since they apply regardless of whether their clients are union members or unionized workplaces.

This course will look at decisions addressing the merits of employee claims of wrongful termination based on violations of social media use policies and the legality of requesting applicants' Facebook passwords during job interviews.

Courtesy of Cindy Alderton Photography

Diane Seltzer Torre



Courtesy of Keith Weller

Avi Kumin

Julienne W. Bramesco, labor counsel at the U.S. Postal Service; Lily Garcia, vice president for human resources and deputy general counsel at Strayer University; and Diane Seltzer Torre of Seltzer Law Firm will serve as faculty.

The course is cosponsored by the D.C. Bar Corporation, Finance and Securities Law Section; Criminal Law and Individual Rights Section; Family Law Section; Health Law Section; Intellectual Property Law Section; Labor and Employment Law Section; Law Practice Management Section; and Litigation Section.

All three courses take place from 6 to 9:15 p.m. at the D.C. Bar Conference Center, 1101 K Street NW, first floor.

For more information, contact the CLE Program at 202-626-3488 or visit www.dcbar/cle.

Washington Lawyers' Committee to Present 2014 Awards

The Washington Lawyers' Committee for Civil Rights and Urban Affairs will hold its 2014 Wiley A. Branton Awards Luncheon on June 18 where it will honor individuals who have worked to advance civil rights and equal justice.

This year's Wiley A. Branton Award winners are James Sandman, president of the Legal Services Corporation, and Nkechi Taifa, senior policy analyst at Open Society Foundations. Sandman served as D.C. Bar president from 2006 to 2007.

Courtesy of Marc McAndrews for the Open Society Foundations

Nkechi Taifa

The Washington Lawyers' Committee also will present its Vincent Reed Education Award to Karen Grisez and Joseph DeSantis of Fried, Frank, Harris, Shriver & Jacobson LLP for their commitment and contributions to improving public education in the District.

Additionally, Donald Kahl, executive director of the Equal Rights Center, will receive the Alfred McKenzie Award, named after the former Tuskegee Airman and lead plaintiff in a successful class action lawsuit brought by the Washington Lawyers' Committee challenging racial discrimination.

The event takes place from 12 to 2 p.m. at the Grand Hyatt Washington, 1000 H Street NW. For more information, contact Da'aga Hill Bowman at 202-319-1000 or daaga_bowman@washlaw.org, or visit www.washlaw.org.

Courses Focus on Attorney Contacts, Ethics Rules for Government Lawyers

There are many times when a lawyer (or individuals working for a lawyer) may want or need to contact unrepresented persons, which can pose significant ethics risks. In addition, there are times when a lawyer may want to contact a represented person directly, but ethics rules often prohibit attorneys from doing so.

On June 9 the D.C. Bar Continuing Legal Education (CLE) Program will explain these ethics rules in "Contacts With Represented and Unrepresented Persons: Ethics Issues for D.C. Lawyers."

Led by Thomas B. Mason of Zuckerman Spaeder LLP, the course will discuss practical scenarios that illustrate how the rules apply in a variety of settings, including contacts with in-house counsel, former employees of a business that is represented by counsel, government officials, and represented parties for the purpose of potentially representing those parties.

Attendees will learn what to do when a represented party initiates direct contact and what law applies when litigation or witnesses are located outside of the District of Columbia.

This program will look at ethics dos and don'ts of using investigators (or others) to contact unrepresented individuals in cases. It also will consider some scenarios that can cause problems relating to the prohibition on contact with unrepresented parties, including discrimination tester cases, trademark and franchise investigations, and government undercover work and national security cases.

The course takes place from 6 to 8:15 p.m. and is cosponsored by all D.C. Bar sections.

The complex ethical dilemmas facing government lawyers have seldom been more public and troubling than in the past year. Intense public scrutiny on a wide range of difficult and controversial issues has set ethical landmines that could trip even the most wary government attorney.

On June 25 the CLE Program will offer a new course, "Ethics and the Government Lawyer 2014: Hot Topics and Current Issues," to help attorneys sharpen their ethical analysis skills and increase their sensitivity to lurking ethical problems.

Using interactive hypothetical scenarios and a discussion of recent cases and issues, participants will examine the latest legal ethics developments as they apply to government practice.

Jack Marshall of ProEthics, Ltd. will address current issues such as government attorney use of blogs, Twitter, and Web sites; privilege and representation of government officials; and the limits of deceit.

The course takes place from 5:30 to 8:45 p.m. and is cosponsored by the D.C. Bar Administrative Law and Agency Practice Section; Antitrust and Consumer Law Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; District of Columbia Affairs Section; Environment, Energy and Natural Resources Section; Family Law Section; Health Law

Section; International Law Section; Labor and Employment Law Section; and Litigation Section.

Both courses will be held at the D.C. Bar Conference Center, 1101 K Street NW, first floor.

For more information, contact the CLE Program at 202-626-3488 or visit www.dcbar/cle.

WCL Summer Pro Bono & Public Interest Forum Returns in June

On June 12 the Washington Council of Lawyers will bring together attorneys, summer associates, and summer interns from law firms, government agencies, and public interest organizations for its Summer Pro Bono & Public Interest Forum.

The event intends to highlight the importance of pro bono and public interest work throughout one's career. Lunch and keynote address will be followed by a panel presentation in each of the following topic areas: civil liberties and civil rights, children and families, nonlitigation and transactional practice, criminal law and death penalty, and immigration and human rights.

Since its founding in 1971, the Washington Council of Lawyers, a voluntary bar association, has promoted public interest practice of law and pro bono service. Council members represent every sector of the Washington legal community—lawyers and pro bono coordinators from law firms and law schools, lawyers from public interest groups, government agencies and congressional offices, as well as law students and members of law-related professions.

The forum takes place from 12 to 2:30 p.m. at Arnold & Porter LLP, 555 12th Street NW. To register, visit www.wclawyers.org.

June Offerings Tackle White Collar Practice, Medical Malpractice Cases

In June the D.C. Bar Continuing Legal Education (CLE) Program will offer a new course on white collar criminal investigations and an introductory program on handling medical malpractice cases.

"Representing Clients in White Collar Criminal Investigations" on June 4 is directed toward practitioners who are new to white collar practice, as well as toward in-house counsel who need to know the basics of such investigations.

Faculty will provide an overview of representing an individual or company during a white collar criminal investigation, focusing on the pretrial investigative stage, including grand jury investigations and negotiations with the government to avoid indictment.

Attendees will learn about special concerns that arise when representing a company or an individual under investigation, including attorney–client privilege and ethics issues. The course also offers guidance for representing clients who face parallel civil and criminal investigations.

Sara Kropf of the Law Office of Sara Kropf PLLC; Adam Lurie, a partner at Cadwalader, Wickersham & Taft LLP; and Matthew Solomon, chief litigation counsel at the U.S. Securities and Exchange Commission, will serve as faculty.

The course is cosponsored by the D.C. Bar Antitrust and Consumer Law Section; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Health Law Section; and Litigation Section.

The CLE Program's June 24 course "Fundamentals of Handling a Medical Malpractice Case" is beneficial to both to newcomers to the field and to experienced practitioners who want to stay current with the law.

The course provides attendees with the basics of handling medical malpractice litigation from both the plaintiff and defense perspectives, and offers practice pointers on discovery, litigation strategy, obtaining experts, mediation, settlement, and pretrial and trial matters.

Courtesy of the Law Office of Sara Kropf PLLC

Sara Kropf

Speakers Catherine Bertram of Williams Bertram, PLLC and Crystal S. Deese of Gleason, Flynn, Emig & Fogleman, Chartered, will discuss the effective use of technology in the courtroom and will demonstrate how to qualify an expert witness in court. They also will teach attendees how to practice within the requirements of the D.C. Medical Malpractice Amendment Act of 2006.

The course is cosponsored by the D.C. Bar Courts, Lawyers and the Administration of Justice Section; Health Law Section; Litigation Section; and Tort Law Section.

Both courses take place from 6 to 9:15 p.m. at the D.C. Bar Conference Center, 1101 K Street NW, first floor.

For more information, contact the CLE Program at 202-626-3488 or visit www.dcbar/cle.

SAVE THE DATE

The Bar Association of the District of Columbia will hold its Annual Meeting and Luncheon on June 13 at the Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW. The event features the presentation of its Constance L. Belfiore Quality of Life Award to a law firm, corporate and general counsel office, or government and other legal departments that provide quality of life for their lawyers. For more information, contact 202-223-6600 or www.badc.org.

Federal Circuit's O'Malley Headlines BADC Intellectual Property Luncheon

The Bar Association of the District of Columbia (BADC) will hold its annual Intellectual Property Section Luncheon on June 25 featuring guest speaker Judge Kathleen O'Malley of the United States Court of Appeals for the Federal Circuit.

O'Malley was appointed to the court in 2010. Prior to her appointment, she served as a judge on the U.S. District Court for the Northern District of Ohio. She also served as the assistant attorney general and chief of staff for Ohio Attorney General Lee Fisher from 1992 to 1994 and chief counsel to Fisher from 1991 to 1992.

In addition to Judge O'Malley's speech, the luncheon will include a vote and induction of the section officers for the upcoming annual session.

The luncheon takes place from 12 to 1:30 p.m. at the National Press Club, 529 14th Street NW.

For more information or to register, visit www.badc.org.

Course Looks at Preserving IP Rights in Government Deals

The D.C. Bar Continuing Legal Education (CLE) Program will hold a series in June that will provide the information needed to preserve and protect a client's intellectual property (IP) interests in the government contract setting.

Faculty for the course, "Preserving Intellectual Property Rights in Government Contracts Series: A Beginner's Guide," will cover many aspects of IP rights, including an overview of the types of intellectual property that may be affected by a government contract, important government contract concepts that IP practitioners need to understand, and strategies for preserving IP rights in the government contract context.

Part one, "Relationship Between Intellectual Property and Government Contracts and Remedies for Government Misuse of IP" on June 18 will examine

the relationship between intellectual property—copyrights, patents, trade secrets, and trademarks—and government contracts. Learn how the government acquires IP rights and the significance of the acquisition of IP rights in government contracts. In addition, this session addresses government misuse of intellectual property and possible remedies, including injunctions and damages.

Part two, "Practical Strategies for the Preservation of IP Rights in Government Contracts" on June 19 will cover the practical strategies for preserving clients' rights when contracting with the U.S. Department of Defense and civilian agencies within the government.

David Bloch, a partner at Winston & Strawn LLP; Richard Gray of the U.S. Department of Defense, Office of the General Counsel; John Lucas of the U.S. Department of Energy, Office of the Assistant General Counsel for Technology Transfer and Intellectual Property; and James McEwen of Sikorsky Aircraft Corporation will serve as faculty.

Both sessions take place from 6 to 9:15 p.m. and are cosponsored by the D.C. Bar Corporation, Finance and Securities Law Section; Government Contracts and Litigation Section; and Intellectual Property Law Section. The series will be held at the D.C. Bar Conference Center, 1101 K Street NW, first floor.

For more information, contact the CLE Program at 202-626-3488 or visit www.dcbar/cle.

Reach D.C. Bar staff writer Kathryn Alfisi at kalfisi@dcbar.org.

SAVE THE DATE

The Hispanic National Bar Foundation will hold its Annual Awards Dinner at 6 p.m. on July 17 at the Ritz-Carlton, 1150 22nd Street NW, where it will celebrate the contributions of Latino leaders in the legal community. This annual event attracts an audience of distinguished legal scholars, local politicians, and Hispanic business leaders. Each year, the Hispanic National Bar Foundation honors Latino leaders for their contributions to the community, legal profession, and education. For more information, call 202-496-7206.

From the President

continued from page 6

solutions that might accelerate admission to practice in the District while allowing a careful review of all applicants' character and fitness.

The problems facing our legal profession, particularly the newest members of our bar, are urgent and need our creativity, commitment, and collective action. We should also be leading the fight to increase access to justice in the District. Are we, as a legal community, willing to dare greatly so that our place "shall never be with those cold and timid souls who know neither victory nor defeat"?[7]

Thank you again for the privilege of serving our bar this year.

Reach Andrea Ferster at aferster@railstotrails.org.

Notes

1 "Citizenship in a Republic," Apr. 23, 1910, speech at the Sorbonne, Paris, France, *The Works of Theodore Roosevelt*, vol. XIII, pp. 506–529.
2 Kathryn Alfisi, *Above the Guidelines: Low Bono Widens Path to Access to Justice*, Wash. Law., Sept. 2013, at 24.
3 To view the low bono report, visit http://bit.ly/1m6SEEu.
4 For information on the Washington State Bar Association's Modest Means Program, visit http://bit.ly/1mWlZ5O.
5 *The Future of Legal Education and Admission to the Bar*, NY State Bar Journal, Vol. 85/No. 7, Sept. 2013.
6 New York State Unified Court System, The State of the Judiciary 2014, available at http://bit.ly/1d2e17Q.
7 *Id.* at 1.

bar counsel

By Joseph Perry

The *Martin* Decision: A Lesson on Fees

Mick Wiggins

On February 13, 2014, the D.C. Court of Appeals reissued its opinion and denied petitions for rehearing and rehearing *en banc* in the matter of *In re Martin*. Bar Counsel commends the opinion to all members of the Bar as required reading on the charging and collection of fees.

First, the *Martin* court addresses the basic premise that a fee must be reasonable. *See* Rule 1.5(a). The court held that "[g]enerally, an attorney should not acquire 'a greater interest in the outcome of the litigation than his clients,'" and that the combination of Mr. Martin's contingency fee and hourly fees gave him "well over a 50% interest in the outcome of [his client's] litigation in violation of Rule 1.5(a)." The court further held that the fees of other lawyers working on the same matter must be taken into account (whether or not those lawyers are sharing a single fee). In Mr. Martin's case, the court stated that even if Mr. Martin's fee was reasonable (which it was not), "the fee unquestionably became unreasonable when taking into account the fees charged by [other] counsel."

Even if your billing always stays well within the bounds of reasonableness, the *Martin* case still has much to teach. For example, suppose that after having worked diligently for a standard 33 percent contingency, you receive a settlement check for your client's case. You e-mail your client a disbursement sheet in the morning. Having heard nothing back by the afternoon, you withdraw your share from trust.[1] Time to take that vacation you've been waiting for, right?

Maybe not. After *Martin*, District of Columbia attorneys have been advised that disbursing funds from your trust account to your operating account—even if you believe the funds are earned—does not eliminate your obligations under Rules 1.15(a) and (d).[2] Specifically, the court found that where a client, with *reasonable promptness,* disputes an attorney's right to fees already withdrawn from the attorney's trust account, the attorney must place the disputed amount in a separate account in accordance with Rule 1.15(a).

In *Martin*, the client disputed the attorney's claim to fees—at the latest—the day it received the disbursement sheet. The court held that it "need not address other circumstances in which a client is less diligent in reviewing and disputing an attorney's fee," and stated that what exactly constitutes "reasonable promptness" will be a case-specific inquiry. For the time being, a D.C. attorney who has already paid himself, and is then confronted with a client disputing his fee, might do well to remember this observation from the *Martin* court: "*The protections afforded by Rule 1.15 to a client's interest in disputed funds should not be underestimated.*"

> It is important to remember that regardless of timing, your client's dispute does not have to be 'genuine' . . . it only has to exist.

It is important to remember that regardless of timing, your client's dispute does not have to be "genuine," "serious," or "bona fide," it only has to exist. This may be sobering news to an attorney who just made considerable efforts to win a case and now wants only to cut ties with a client who enjoys disputing just about everything. Indeed, attorneys in the middle of such relationships might make every effort to hurry up and get out. After *Martin*, however, those attorneys are best advised to confirm their client does not object before making any distributions.

Finally, assume that you do get into a fee dispute with one of your clients. You properly maintain the disputed funds in a separate trust account, and proceed to arbitration before the Attorney/Client Arbitration Board (ACAB).[3] Further suppose that you feel the outcome of these proceedings is unjust.

Being a zealous attorney, you might plan on contesting the ACAB award. Generally, there may be nothing wrong with this proposition, but members of the Bar should note that in *Martin*, the court ruled that given the specific facts before it, it was not inclined to approve a "fight to the death." Specifically, the court found that Mr. Martin "repeatedly resist[ed] the mandatory arbitration process" and took "fruitless appeals" following an ACAB decision awarding fees to his client. The court found that this behavior defeated the purpose of Bar Rule XIII and unreasonably withheld the arbitral award to which Mr. Martin's client was entitled in violation of Rule 1.16(d). Although the court made clear that it "did not lightly dismiss" Mr. Martin's right to contest the outcome of arbitration, it appears that this particular right must be exercised within the bounds of reasonableness.[4] Separately, the court found Mr. Martin's conditioning of a settlement agreement with his client on withdrawal of the pending bar complaint seriously interfered with the administration of justice in violation of 8.4(d).

The *Martin* decision provides a good course on what you can charge, how to handle a dispute over what you charge, and the manner in which you can fight when that dispute is not resolved to your liking. It is also yet another affirmation of an idea found throughout the court's disciplinary case law: Client funds are sacrosanct.

Joseph Perry serves as assistant bar counsel.

Notes

1 Best practice in such a situation would be to speak with your client directly and obtain his or her signature on the disbursement sheet prior to withdrawing any funds.

2 Formerly Rule 1.15(c). Rule 1.15(d) states:

> When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

3 Under D.C. Bar Rule XIII, D.C. attorneys are deemed to have agreed to final and binding arbitration of fee disputes before the ACAB under certain common circumstances. D.C. Bar Rule XIII(a) states:

> An attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client, if such client was a resident of the District of Columbia when the services of the attorney were engaged, or if a substantial portion of the services were performed by the attorney in the District of Columbia, or if the services included representation before a District of Columbia court or a District of Columbia government agency.

4 Beyond what may or may not constitute a violation of Rule 1.16(d) in challenging an ACAB award, attorneys who assert claims that lack a good-faith basis in law or fact may also violate Rule 3.1 ("Meritorious Claims and Contentions").

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE DOUGLAS P. WACHHOLZ. Bar No. 930792. March 21, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Wachholz by consent.

IN RE JEFFREY R. WILLIAMS. Bar No. 414757. March 21, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Williams by consent, *nunc pro tunc* to December 3, 2012.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Reciprocal Matters

IN RE SHERON A. BARTON. Bar No. 997851. March 6, 2014. In a reciprocal matter from the United States District Court for the District of Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Barton for one year, *nunc pro tunc* to January 8, 2014. Reinstatement is subject to the conditions imposed by the United States District Court for the District of Maryland and contingent upon fitness. Barton had been found to have submitted meritless filings, failed to appear at court hearings, failed to keep clients apprised of the status of the representations, charged excessive fees, and failed to adequately supervise a nonlawyer.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE GILBERT BABER. Bar No. 428285. March 25, 2014. Baber was suspended on an interim basis pursuant to D.C. Bar R. XI, § 9(g), pending final action on the Board on Professional Responsibility's December 30, 2013, recommendation of a three years' suspension with fitness and restitution as a condition of reinstatement.

IN RE ANDRE P. BARBER. Bar No. 466138. March 13, 2014. Barber was suspended on an interim basis pursuant to D.C. Bar R. XI, § 9(g), pending final action on the Board on Professional Responsibility's December 31, 2013, recommendation of disbarment.

IN RE TAKISHA BROWN. Bar No. 472664. March 25, 2014. Brown was suspended on an interim basis pursuant to D.C. Bar R. XI, § 9(g), pending final action on the Board on Professional Responsibility's December 30, 2013, recommendation of disbarment.

IN RE LORENZO C. FITZGERALD JR. Bar No. 390603. March 25, 2014. Fitzgerald was suspended on an interim basis pursuant to D.C. Bar R. XI, § 9(g), pending final action on the Board on Professional Responsibility's December 31, 2013, recommendation of a one-year suspension with fitness.

IN RE CHARLES MALALAH. Bar No. 978801. March 25, 2014. Malalah was suspended on an interim basis pursuant to D.C. Bar R. XI, § 9(g), pending final action on the Board on Professional Responsibility's December 31, 2013, recommendation of disbarment.

IN RE WILLIAM N. ROGERS. Bar No. 73221. March 25, 2014. Rogers was suspended on an interim basis pursuant to D.C. Bar R. XI, § 9(g), pending final action on the Board on Professional Responsibility's December 31, 2013, recommendation of a 90-day suspension with fitness.

Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dcattorneydiscipline.org and search by individual names.

IN RE MIKE MEIER. Bar No. 444132. On October 15, 2013, the Virginia State Bar Disciplinary Board publicly reprimanded Meier for attempting to violate a rule relating to candor to a tribunal.

IN RE JON E. SHIELDS. Bar No. 431003. On November 5, 2013, the Virginia State Bar issued Shields a public reprimand without terms for failing to safeguard an advanced fee in trust until earned, failing to communicate with a client, and failing to protect a client's interests upon termination of the representation.

IN RE LOWELL J. GORDON. Bar No. 142380. On January 24, 2014, the Attorney Grievance Commission of Maryland reprimanded Gordon for failing to

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legal beat

By Kathryn Alfisi and David O'Boyle

News and Notes on the D.C. Bar Legal Community

D.C. Bar Announces 2014 Award Recipients

The D.C. Bar has announced its 2014 annual awards of achievements and exceptional projects in the past year that will be honored at its Celebration of Leadership on June 17.

The Bar will present its Exceptional Service Award to D.C. Council Chair Phil Mendelson and V. David Zvenyach, the council's general counsel, for establishing the Pro Bono Legal Volunteer Program for the Council of the District of Columbia. The program is open to all D.C. Council employees who are licensed to practice law and allows them to take up to 20 hours of administrative leave per calendar year to engage in pro bono service.

This year's Frederick B. Abramson Award will be presented to the Limited Scope Working Group, which developed recommendations to institutionalize the practice of limited scope representation in the District, giving low, limited, and moderate means individuals greater access to counsel.

The D.C. Bar Legal Ethics Committee and the Family-Based Immigration Law Book Project, developed by volunteer faculty of the D.C. Bar Continuing Legal Education Program, will both receive the Bar Project of the Year award. The D.C. Bar Antitrust and Consumer Law Section will receive Section of the Year.

Arnold & Porter LLP has been chosen to receive Pro Bono Law Firm of the Year, while Kurt Jacobs of Sidley Austin LLP and Allen Snyder of the Children's Law Center will be honored as Laura N. Rinaldi Pro Bono Lawyers of the Year.

Earlier the D.C. Bar announced that Brooksley Born, a retired partner at Arnold & Porter, will receive its Justice Thurgood Marshall Award for her strong commitment to and excellence in the fields of civil rights and individual liberties. In addition, Colonel Tonya Hagmaier, director of Civil Law and Litigation for the United States Air Force, will be presented with the Bar's Beatrice Rosenberg Award for Excellence in Government Service for her contributions to the legal profession and her dedication to public service.

The 2014 Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting will be held at the Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW.—*D.O.*

Kathryn Alfisi

D.C. Court of Appeals Chief Judge Eric T. Washington (center) joins the 16 graduates of the 2014 John Payton Leadership Academy (see story on page 20).

President-Elect Candidates Discuss Qualifications, Plans at Forum

D.C. Bar president-elect candidates Timothy K. Webster of Sidley Austin LLP and Stephen I. Glover of Gibson, Dunn & Crutcher LLP discussed their qualifications and outlined their leadership plans during a candidates' forum on April 23 at the Bar's headquarters.

Webster was the first to speak, starting with his professional background. He has spent his entire legal career in the District of Columbia, first as a judicial law clerk, then as a trial attorney at the U.S. Department of Justice, and finally as partner at Sidley. While at Sidley, Webster became the general counsel for the D.C. Bar, a role he held for six years.

Courtesy of Gibson, Dunn & Crutcher LLP

Courtesy of Sidley Austin LLP

Stephen I. Glover **Timothy K. Webster**

Webster said he will bring three critical attributes to the position of president-elect: balance (his professional background has given him the ability to look at things from different perspectives), strong consensus-building skills, and experience as the Bar's former general counsel.

He then outlined three areas he would focus on as president-elect. First, he said he would work with incoming Bar president Brigida Benitez to revise the Bar's strategic plan; second, he would look at nondues sources of funding, which he said are becoming scarcer; and finally, he will explore nontraditional sources of funding for the D.C. Bar Pro Bono Program, which is supported entirely by voluntary contributions.

Glover followed with a similar theme. He talked about how he has been practicing law in the District for 34 years and has been involved with the Bar for about 20, starting with its sections, then the Pro Bono Program, followed by the Strategic Planning Committee, and finally, the Board of Governors, on which he now serves.

Glover said he is running for the president-elect "because the Bar is really a great

June 17, 2014

7:00 PM – Reception
7:30 PM – Dinner & Program

Mayflower Renaissance Hotel
The Grand Ballroom
1127 Connecticut Avenue NW
Washington, DC

CELEBRATION of LEADERSHIP

D.C. BAR AWARDS DINNER & ANNUAL MEETING

We invite you
to attend this gala dinner to salute
D.C. Bar outstanding leaders and projects.

The evening will feature the installation of

Brigida Benitez

incoming president of the D.C. Bar.
Other newly-elected officers will also be welcomed.

We are proud to announce
these D.C. Bar 2014 Awards Recipients

Brooksley Born
Justice Thurgood Marshall Award
For Excellence, Achievement and Commitment
To Civil Rights and Individual Liberties

Colonel Deah T. Hagmaier
Beatrice Rosenberg Award
For Excellence in Government Service

Information about other 2014
D.C. Bar Award Winners can be found online at
www.dcbar.org, site search "celebration."

Join the Celebration of Leadership Host Committee. Purchase a group of tickets for your firm or organization to be listed on the committee. Host Committee groups receive recognition on the D.C. Bar web page and in the commemorative dinner program.

To reserve your place on the Host Committee, email annualmeeting@dcbar.org **before June 2**.

$1080 for full table (10 guests)
$540 for half table (5 guests)
$108 per person

Register online at www.dcbar.org, site search "celebration" or call Verniesa R. Allen, 202-737-4700, ext. 3239 for more information.

DCBAR

organization," and then went on to praise its members and programs.

If he were to become president-elect, he would focus on the Pro Bono Program, strengthening its existing programs and creating new ones; leadership, particularly how to recruit a young, diverse group of leaders; and the strategic plan because there are "a lot of changes that are affecting the legal profession and all of these have a significant impact on the Bar."

Candidates for D.C. Bar secretary, treasurer, and for seats on the Board of Governors, as well as in the ABA House of Delegates, also were introduced during the forum.—*D.O.*

Abramson Scholarship Foundation Celebrates 20th Anniversary

More than 250 people, including U.S. Supreme Court Justice Ruth Bader Ginsburg, gathered on March 20 at the Hamilton Live to celebrate the Abramson Scholarship Foundation's 20th anniversary. Also on hand were current and former scholars and past and present leaders of the foundation.

The evening included music from Duke Ellington's jazz ensemble, a special performance by mezzo-soprano opera singer Denyce Graves, and past scholars sharing their stories about how they benefitted from the foundation.

Dr. Rhondee Benjamin-Johnson, one of the foundation's first scholarship recipients, spoke about how the financial assistance she received allowed her to focus on her undergraduate studies while attending Spelman College and helped her on her way to Harvard Medical School. After completing medical school, Dr. Benjamin-Johnson became a physician of internal medicine and now serves as the medical director of the Georgia Avenue-Petworth site of Mary's Center, an organization in the District of Columbia and Maryland that provides access to health care services, regardless of a recipient's ability to pay.

Former scholar Kalon Hayward, now an actor and producer in New York City, thanked board members and the foundation for the financial assistance that not only supported him through his studies at Fordham University, but also separately contributed to his attendance of the British American Drama Academy's selective Shakespeare Program at Oxford University in London.

The foundation, which provides mentoring and financial assistance to qualified high school students in the District of Columbia, was established by friends and colleagues of Frederick B. Abramson, a distinguished member of the D.C. legal community and former president of the D.C. Bar. Abramson was known as much for his mentoring and support of others as he was for his professional skills and acumen.

In an interview with *District Lawyer* following his election as D.C. Bar president in 1985, Abramson said, "I think . . . that lawyers have a unique responsibility as part of this profession to give something back. We are the leaders. We are very privileged . . . [W]e need to give some of that back by way of help: monetary and actual help and assistance to people who are less fortunate."

In its 20th year, the foundation plans to award scholarships to the largest class of four-year scholars to date.— *D.O.*

Justices for Human Rights

Richard Reinhard

U.S. Supreme Court Justice Stephen Breyer and retired Chief Justice Margaret Marshall of the Massachusetts Supreme Judicial Court were among the speakers at the April 21 panel discussion "The Future of Human Rights" held at Georgetown University Law Center.—*K.A.*

Veteran D.C. Reporters Gather for 'Meet the Press' Event

On April 29, six veteran reporters gathered at Arent Fox LLP to talk about the past year's hot stories in politics, government, and business around the District of Columbia. Those in attendance at the "Meet the Press 2014" event were able to turn the tables on members of the press and ask them questions about recent stories, journalistic practices, and how reporters determine what is "newsworthy."

The discussion, hosted by the D.C. Bar District of Columbia Affairs Section, covered a variety of the reporters' takes on subjects, ranging from the recent early primary for the D.C. mayoral race to the decriminalization of marijuana in the District.

In light of reporters' frequent use of cell phone audio and video recordings and the explosion of blogs and startup news services, NBC4 Washington reporter Tom Sherwood said that traditional forms of media are almost unrecognizable from when he entered the profession.

"Write the three traditional forms of media on a mirror," Sherwood said. "Then drop the mirror and look at the shattered pieces on the ground. That is the media landscape now."

The panel also clarified what the phrases "off the record" and "on background" mean, and what sources should expect from journalists when providing information. "A reporter is not your friend," Sherwood said, and you can never assume that what you tell a reporter will not be published if you do not make it clear that it is off the record.

The discussion also touched on the issue of D.C. voting rights and D.C. statehood. Nikki Schwab, writer of the "Washington Whispers" column for U.S. News & World Report, said that the statehood movement does not register with people outside of the District. In her experience, the largest concern people have is, "What would you do with the American flag?" questioning how a 51st star would be worked into the flag to represent a new state.

Sherwood offered advice to advocates for D.C. statehood: "Tell the other 48 states to stop subsidizing Virginia and Maryland," because there is currently no commuter tax for citizens of the two states who work in the District.

According to the panelists, the biggest upcoming stories for the District will be the November 2014 mayoral race, the fate of current D.C. Mayor Vincent Gray, and the at-large race for the D.C. Council.

Other reporters serving on the panel included Aaron Davis of The *Washington Post*, Davis Kennedy of the Northwest Current, Will Sommer of *Washington City Paper*, and Tisha Thompson of NBC4 —*D.O.*

Members Must Pay D.C. Bar Dues by July 1

The D.C. Bar has sent its members their annual dues statements for fiscal year 2014–2015. The deadline for payment is July 1.

Dues are $268 for active members and $130 for judicial members and inactive members. Dues not received or postmarked by July 15 will be assessed a late fee of $30. Members whose Bar dues and/or late fee, if applicable, are not received or postmarked by September 30 automatically will be suspended.

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The PRESIDENTS' RECEPTION

Honoring incoming D.C. Bar President

Brigida Benitez

The D.C. Bar Pro Bono Program provides legal information, advice and representation to 20,000 individuals, nonprofit organizations and small businesses in our community. The Pro Bono Program is supported entirely by generous donors like you. Please donate today.

Law Firm/Corporate Sponsors:	Individual Sponsors:
Underwriter $20,000 to $30,000	**Pro Bono Partner** $2,500
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Presidents' Circle $10,000	**Patron** $500
Benefactor $5,000	**Sponsor** $250
Patron $2,500	
Sponsor $1,000	

June 17, 2014

6:00 PM – 7:30 PM

Mayflower Renaissance Hotel
1127 Connecticut Avenue NW
Washington, DC

Tickets: $125 per person
Sponsor contributions received by **June 1, 2014** will be recognized in the Presidents' Reception program.

Please make checks payable to

D.C. Bar Pro Bono Program
Presidents' Reception
1101 K Street NW, Suite 200
Washington, DC 20005-4210

— or —

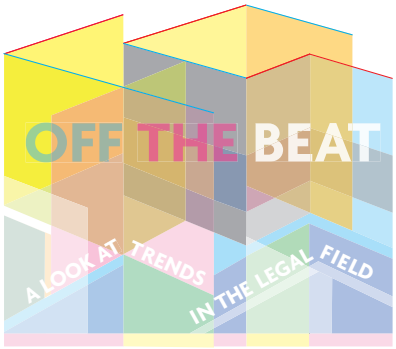
Contribute online:
www.dcbar.org/pro-bono

Contributions above the $55 per person cost of the reception are tax-deductible.

For more information please contact Kathy Downey at 202-588-1857 or kmdowney@erols.com

DC BAR PRO BONO PROGRAM

Proceeds to benefit the D.C. Bar Pro Bono Program, which is supported entirely by voluntary contributions.



D.C. Bar Produces Next Generation of Leaders With Leadership Academy

The 16 lawyers were divided into groups and given a small water balloon, masking tape, and uncooked pasta. The objective: Make the tallest tower that supports the water balloon using only the materials.

While that may read like a kindergarten project, this was actually an exercise in one of the three sessions of the D.C. Bar's newly renamed John Payton Leadership Academy. The activity was intended to get the attorneys to work with and lead teams.

Now in its second year, the Leadership Academy aims to identify, inspire, and educate D.C. Bar members to be leaders of the Bar and to encourage them to use their leadership skills in professional settings, local bar associations, and community organizations. The 2014 class attended sessions in March and April.

Following in Payton's Footsteps

The three sessions explored, among other topics, communication skills and styles, influence and persuasion, civility and professionalism, leadership styles, participating in and leading effective meetings, strategic thinking, and responding to challenges.

Session one, held on March 7, featured a presentation by James Sandman, D.C. Bar past president, former managing partner at Arnold & Porter LLP, and current president of the Legal Services Corporation (LSC).

Sandman spoke about the importance of civility and professionalism in volunteer leadership. "Who you are as a person has everything to do with whether you'll rise," he told the group. "How you treat people matters."

Sandman also discussed the three elements that he thinks are critical to one's legal career: personal integrity, treating people with respect, and valuing diversity.

Session two took place on March 28, and the attorneys heard from former D.C. Bar presidents Robert Spagnoletti, a partner at Schertler & Onorato, L.L.P, and Darrell Mottley, a principal shareholder at Banner & Witcoff, Ltd., as well as from Leadership Development Committee member Laura Possessky, a partner at Gura & Possessky, P.L.L.C.

The two March sessions were conducted by Jill McCrory and Steve Swafford of Leadership Outfitters.

During the final session on April 25, former D.C. Bar president and NAACP general counsel Kim Keenan gave the class leadership advice based on her own experiences. The Leadership Academy was conceived during Keenan's term at the Bar.

Keenan told the participants that "everyone imagines leadership differently" and urged them to "lead as you."

Keenan also spoke briefly about John Payton, who served as president and director-counsel of the NAACP Legal Defense and Educational Fund, Inc., and who Keenan credits as one of the people responsible for her current job. Payton passed away in 2012.

"This [is] so him," she said of the Leadership Academy that now bears Payton's name.

The session was led by Paul D. Meyer of Tecker International.

At the academy's closing reception, incoming Bar president Brigida Benitez also recounted Payton's tremendous impact on her legal career. "Frankly, I don't know if I'd be standing here today if it weren't for John," she said.

Benitez and Payton worked on the University of Michigan affirmative action case that went before the U.S. Supreme Court while both were attorneys at WilmerHale LLP.

"For those of us who worked with John, he was a mentor. . . . He was an extraordinary leader. He was a natural leader in part, I think, because he was confident of his convictions. You are now permanently connected to someone who was a great lawyer and an inspiring leader, so live up to it," Benitez told the academy's new graduates.

Payton's widow, lawyer Gay McDougall, was in attendance and was presented with a framed resolution renaming the Leadership Academy in her husband's honor.

Graduates' Perspectives

Among those hoping to live up to Payton's legacy is Arian June, of counsel at WilmerHale. June was interviewed by Payton for a summer associate position at the firm while she was at the University of Pennsylvania Law School.

"The academy was particularly inspiring for me because it was built on the leadership values of John Payton, which were: integrity, respect, and public service," she said. "There could not be a better way to honor him."

LSC Assistant General Counsel Rebecca Weir said the Leadership Academy, which was her introduction to certain personality and work-assessment tools, was "eye-opening."

"I learned so much about myself and how I work and how I best work with others. It's been a tremendous takeaway . . . and something I've really been able to implement in my legal career," she said.

Kevin Henley, an associate at Arnold & Porter, said the academy was a tremendous experience on a number of levels. He heard about the academy through Sandman, who chairs the Bar's Pro Bono Committee that Henley recently joined.

"I really took a lot away from it professionally, and certainly in terms of networking with other young lawyers in the city it was invaluable," he said.

According to Henley, the academy was not so much about giving participants leadership skills, but about helping them to identify skills they already have and "making clear that there's no one right leadership style, that you can be a leader who is very vocal or you can be a leader who is reserved."

For Miller & Chevalier, Chartered, senior associate Jonathan Kossak, the presentations by former Bar leaders were "tremendously inspiring." And Brenda Zwack, a principal at O'Donnell, Schwartz & Anderson, P.C., saw the academy as "an excellent opportunity to learn transferable skills" that she's already using in her law firm and in her work with a nonprofit organization.—*K.A.*

Kathryn Alfisi

American University law students (from left) Christopher Bonk and Chelsea Zimmerman, D.C. Court of Appeals Judges John Steadman and Inez Smith Reid, D.C. Bar President Andrea Ferster, and Howard University law students Amanda Butler-Jones and Zorba Leslie appear at the end of the D.C. Cup Moot Court Competition.

Payments may be remitted by mail or submitted online at www.dcbar.org/login. For online payments, members will need their username and password, which automatically can be retrieved if their e-mail address matches what the Bar has on file.

When paying dues, members also may join a section or renew their section memberships and make contributions to the D.C. Bar Pro Bono Program. Members are encouraged to confirm all of their personal information on the dues statement, including e-mail addresses.—*K.A.*

Federal Judges Honor 30 Firms at Pro Bono Recognition Breakfast

On April 23 the chief judges of the District of Columbia federal courts honored 30 local law firms for their outstanding leadership in pro bono services at the 40 at 50 Judicial Pro Bono Recognition Breakfast.

The breakfast honors law firms at which at least 40 percent of all attorneys dedicated at least 50 hours to providing pro bono legal services. This year, a record 12 firms reached at least 50 percent participation at 50 hours or more. Four of the 12 firms reached 60 percent or more. Two firms, Arnold & Porter LLP and Jenner & Block LLP, reached 65 percent or more with both firms meeting the "40 at 50" goal among partners alone.

Speaking on the growing number of partners achieving the "40 at 50" goal, Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia said, "There is no greater example of a firm's commitment to pro bono legal services than a firm's leadership" participating in pro bono work.

Judge Sullivan also reflected on the pro bono cases he had been involved in over his legal career and the rewarding nature of pro bono work, sharing how he once paid for a paternity test out of his own pocket for one of his pro bono clients who could not afford the test, providing crucial evidence in his client's case.

Chief Judge Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit encouraged those present not to become complacent by continuing to provide more pro bono legal services. He also thanked them for upholding "one of the best parts of the [legal] profession."

"I am pleased to see a significant number of firms are increasing their pro bono commitments," Chief Judge Garland said. "At our first recognition breakfast in 2004, only seven firms met the '40 at 50' standard. That number has more than quadrupled since then, and more than a third of the firms we honor this year have taken their commitments to an even higher level."

James Sandman, chair of the D.C. Circuit Judicial Conference Standing Committee on Pro Bono Legal Services and president of the Legal Services Corporation, took the podium to honor Judge Robert L. Wilkins of the D.C. Circuit. The Standing Committee made a contribution to the D.C. Access to Justice Foundation to honor Judge Wilkins for his work as liaison judge to the committee.—*D.O.*

Howard Wins D.C. Affairs Section's First Moot Court Competition

On April 5 students from several District of Columbia law schools competed in the D.C. Bar District of Columbia Affairs Section's first-ever D.C. Cup Moot Court Competition.

During the three-round competition, the students argued cases before volunteer "judges" involving the District's Home Rule Act and the Council of the District of Columbia's adoption of the Share the Street Amendment Act of 2013.

"I'm participating in this competition because I love oral advocacy, and Howard has a strong tradition of it," said Zorba Leslie, a student at Howard University School of Law. "It's also great to connect with students and teams from other schools in the District."

One of the judges before whom Leslie had to present her oral argument in round one of the competition was David Zvenyach, chair-elect of the D.C. Bar Sections Council, counsel to the D.C. Council, and the brainchild behind the competition. Zvenyach hoped that this year's competition would give students an opportunity to learn about the Home Rule Act. "It's important and also fun," he said. "I hope the students find this to be both intellectually rewarding and personally satisfying."

In the final round of the competition, the teams from American University Washington College of Law and How-

continued on page 43

Cover Blown

NSA Surveillance and Secrets

BY ANNA STOLLEY PERSKY

In the immediate aftermath of the September 11 attacks on the World Trade Center and the Pentagon, U.S. leaders and the American public voiced concern that terrorists were planning more, or even worse, violence in the country.

Congress and the Bush administration discussed how they could further strengthen the country's security and intelligence-gathering abilities. They cobbled together the USA Patriot Act, an attempt to improve the tools available to the government in its fight against terrorism.

When the U.S. House of Representatives passed the Patriot Act, 357–66, on October 24, 2001, only Sen. Russ Feingold, a Democrat from Wisconsin, opposed the legislation. (Some congressional members later admitted they had not read the entire text of the bill before voting on it.) President George W. Bush signed the Patriot Act into law two days later.

In retrospect, critics say the Patriot Act was too broad in scope. The act allows for the indefinite detention of suspected terrorists, imposes tougher sentences on those convicted of terrorist crimes, and enhances counterterrorism tools. It also gives terrorism investigators the ability to access business records without obtaining a search warrant. More than a decade later, the Patriot Act and government tactics used in the fight against terrorism are under scrutiny.

The most recent debate on the Patriot Act is centered on the law's section 215, which the National Security Agency (NSA) has been using to collect bulk data information from telephone companies. In the past year, the public has learned that the NSA has secretly collected and is maintaining basic phone records, such as appears on a phone bill, of virtually all U.S. residents. That information is being stockpiled within the U.S. government for five years.

Since former NSA contractor Edward Snowden revealed the scope of the agency's bulk telephony metadata program, the tension between privacy rights and national security has turned into a full-scale international battle.

"This is the most important debate about privacy we've seen in our lifetime," says David Cole, a professor specializing in constitutional law and national security at Georgetown University Law Center in Washington, D.C. "It is the challenge of the next generation: How do we adapt our laws to ensure that people can enjoy the conveniences of the digital age without forfeiting privacy?"

Orin S. Kerr, a professor specializing in privacy law at The George Washington University Law School in Washington, D.C., says there is fear on both sides of the issue. "One side is fearful of the risk of a terrorist attack. The other side is fearful of the misuse of database of information. Each side tends to downplay the fear of the other," he says.

The underlying question is, what is "the expectation of privacy in the era of big data," according Stephen I. Vladeck, who teaches national security law at American University Washington College of Law.

"On the one hand, there is the argument that we don't have any expectation of privacy in something we give to

Illustrations by Brian Stauffer/theispot.com

a third party, like our phone records to the phone company," says Vladeck. "But there are also arguments for distinguishing between the information we give to private parties and what we expect the government to get. Our phones have GPS trackers built into them, but we don't expect that we are empowering government to know where we are at all times."

Who (and What) Is Caught Up in the Dragnet?

At its core, section 215 of the Patriot Act allows the government to seek secret court orders to collect "tangible things" that could be relevant to an international terrorism, counterespionage, or foreign intelligence investigation.

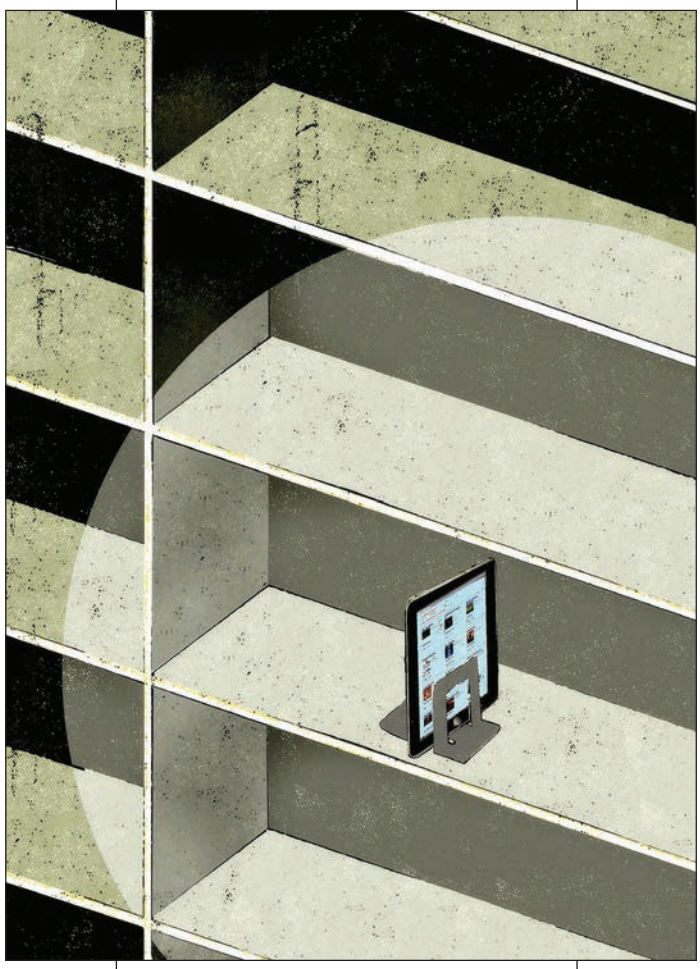
To critics, the NSA's bulk metadata collection program, which operates under section 215, violates the U.S. Constitution by intruding upon the average citizen's expectation of privacy without the necessary probable cause or other legal justification. Privacy advocates say the NSA program is frighteningly similar to the government overreaching depicted in Franz Kafka's *The Trial* or George Orwell's *1984*.

"The overarching question is, should the government be permitted to engage in bulk collection of data that reveals a great deal of intimate and private information about American citizens?" asks Cole. "This question raises a whole host of other questions about how and to what extent we will preserve privacy in the digital age. Will we preserve privacy or will we simply allow it to go the way of the eight-track player by default? This is a question for the Supreme Court, Congress, and U.S. citizens."

To national security advocates, however, the NSA program and the underlying law supporting it contribute to the government's ability to investigate terrorism and protect the country.

Steven Bradbury, former head of the U.S. Department of Justice's Office of Legal Counsel, says the public's "heated overreaction" to the NSA's intelligence-gathering procedures is based upon a misunderstanding of the bulk telephony metadata collection program.

"There is a popular misconception that this program is some sort of dragnet program of surveillance. People think the NSA is listening to their phone calls and tracking the connections of average citizens, just looking for something suspicious," says Bradbury, now a partner at Dechert LLP. "The fact is that it doesn't work that way and it can't work that way. By court order, the NSA only reviews the data for evidence of connections to specific, identified phone numbers linked to foreign terrorist organizations."



Bradbury also points out that there are more invasive means of intelligence gathering, such as wiretapping or installing a GPS device on a suspect's car.

"Those forms are aimed at zeroing in on private communications or the zone of privacy of individuals," says Bradbury. "In contrast, the NSA's telephone metadata collection involves only business records generated by phone companies. It doesn't include the substance of anyone's private calls and it doesn't involve the physical invasion of anyone's zone of privacy."

In addition to the debate over section 215, critics also decry the NSA's ability to record the conversations of foreigners as authorized under section 702 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FISA). Specifically, by virtue of section 702, the NSA can acquire foreign intelligence by targeting non-U.S. individuals living abroad. News that the NSA was monitoring the phone conversations of foreign leaders like German Chancellor Angela Merkel sparked international outrage and concern.

"To me, this is a much greater potential infringement on privacy than section 215," says Michael A. Vatis, a partner specializing in privacy and technology law in the New York office of Steptoe & Johnson LLP. "There won't be as many people implicated, but it does involve the collection and retention of the content of telephone calls and electronic communications."

White House Changes Course

As one would expect, privacy advocates such as the Electronic Frontier Foundation (EFF) and the American Civil Liberties Union (ACLU) have filed lawsuits challenging the NSA programs operating under section 215 of the Patriot Act and section 702 of FISA.

Section 215 and other portions of the Patriot Act are set to sunset in a year. At that point, Congress can choose not to renew the section, revise it significantly, or simply approve again its continued use.

However, the NSA metadata program may be considerably tweaked by next year. President Barack Obama and administration supporters originally asserted that the NSA program was necessary, and that supervision by the U.S. Foreign Intelligence Surveillance Court (FISC, or FISA

Court) sufficiently curbed any potential abuse. Nevertheless, earlier this year Obama limited the manner in which data is being collected. In March, the president backtracked further, unveiling a legislative proposal to end the NSA's collection and storage of bulk phone records.

Under the proposal, the records would stay with phone companies. In fact, every time the NSA seeks to obtain specific records, absent an emergency, it would have to get FISA Court approval. The court would have the power to order phone companies to quickly provide particular records without additional court approval over a limited period of time.

In announcing the proposed changes, Obama told reporters that there are "clear safeguards" against "some of the dangers that people hypothesize when it came to bulk data."

"But I recognize that people were concerned about what might happen in the future with that bulk data," the president said during a press conference on March 25 in the Netherlands where he attended the 2014 Nuclear Security Summit. "This proposal that's been presented . . . would eliminate that concern."

In a statement released by the White House two days later, Obama said, "I have decided that the best path forward is that the government should not collect or hold this data in bulk."

Obama's proposal represents a "huge sea change," according to Michael Sussmann, a Washington, D.C.-based partner in the privacy and data security practice at Perkins Coie LLP. "It would end the large-scale government collection of telephony metadata and reduce the program to court-ordered and court-supervised collection of specific targets. It's still casting a wider net than pre-9/11, but this would be a tremendous difference from what the program is now."

Mark Rumold, a staff attorney at the EFF, says he is "happy to see that the administration recognizes that the program as it is currently structured has to end." But, he adds, "The devil is in the details."

'No Such Agency'

Certainly, the collection of massive amounts of intelligence data, especially in wartime, is nothing new. In fact, the United States was already collecting, decoding, and analyzing communications data long before the NSA was created. Going back to World War I, for example, the United States created the Cable and Telegraph Section, also known as MI-8, to decipher enemy communications.

In 1952 President Harry Truman created the NSA to continue the government's ability to conduct the code breaking done during World War II. Nicknamed "No Such Agency" because of its history of secrecy, the NSA is now the government's largest intelligence operation.

> "This is the most important debate about privacy we've seen in our lifetime. It is the challenge of the next generation: How do we adapt our laws to ensure that people can enjoy the conveniences of the digital age without forfeiting privacy?"
>
> David Cole, a professor specializing in constitutional law and national security at Georgetown University Law Center

While the NSA operates under the jurisdiction of the military, it reports to the director of national intelligence. The NSA is tasked with monitoring, collecting, decoding, and analyzing global and domestic data for intelligence purposes. The agency is also tasked with protecting U.S. communications and information systems.

Congress enacted FISA in 1978 to provide rules for overseeing government surveillance and searches conducted for foreign intelligence purposes. As part of the act, Congress created the FISA Court, intended to allay concerns that the government was abusing its use of electronic surveillance.

The NSA began collecting telephony and Internet metadata in bulk in 2001. At first, it got its authority from presidential authorizations.

"After September 11, it was determined that there were gaps in the collection of information by the intelligence community," says Carrie F. Cordero, a practicing attorney who is also an adjunct professor and director of National Security Studies at Georgetown Law. "One major problem was a gap in the ability to quickly make connections between phone numbers used by individuals inside the U.S. to phone numbers of people outside the U.S. who are associated with terrorism."

In May 2006, the FISA Court granted an NSA application to collect and retain bulk metadata using section 215. At the time, the Justice Department successfully argued to the court that section 215 could be interpreted to allow for the systematic gathering of domestic phone data in bulk.

"When section 215 was passed, probably nobody thought about bulk metadata collection as a potential use," says Sussmann. "The [section] 215 program was the product of creative thinking on the part of the intelligence community."

Under section 215, the NSA collects all phone records generated by particular telephone companies in the United States by using the authority of a FISA Court order. Every 90 days, the FISA Court must renew the order. The information, described as bulk metadata, generally contains the telephone numbers involved, the dates and times of calls, and the duration of these calls. After collecting the records from the telephone companies, the NSA then stores the information for five years before destroying it. Phone companies only have to store call data for 18 months.

NSA investigators have access to the stored data for their probes, but they are limited in the scope of their research. Investigators can only access the data through queries of individual phone numbers that the government has reasonable, articulable suspicion of having links to specified foreign terrorist organizations.

"The reason the NSA needs to collect and retain the full set of metadata for a period of years is so it can effectively dis-

cover the historical connections to those terrorist numbers," says Bradbury. "That's a valuable tool that enables the FBI to investigate previously unknown phone numbers that might be used by terrorist cells operating in the U.S., like the al Qaeda hijackers that perpetrated the 9/11 attacks."

At first, the NSA could search numbers three "hops" or connections from the original "seed" number, one that meets the NSA's reasonable, articulable suspicion standard that it is associated with an international terrorist organization. Earlier this year, Obama reduced the number of hops to two.

Director of National Intelligence James R. Clapper explained in June 2013 that the NSA's accumulation of data is similar to books stored on library shelves but rarely opened.

"So the task for us in the interest of preserving security and preserving civil liberties and privacy is to be as precise as we possibly can be when we go in that library and look for the books that we need to open up and actually read," Clapper said.

Spying Programs Revealed

Initially, the overwhelming majority of Americans supported the concept of the Patriot Act, often described as legislation to fix holes in intelligence communications and security methods. In specific, the Justice Department said that revising section 215 would make it easier for government officials investigating terrorism to get records from third parties like banks, businesses, and libraries.

Prior to section 215 of the Patriot Act, federal investigators needed to show a judge they had the probable cause necessary to obtain a subpoena.

But section 215 permitted federal officials, such as agents of the Federal Bureau of Investigation, to get records related to a foreign intelligence investigation by requesting a FISA Court order.

At first, the protests were somewhat muted over section 215. In fact, librarians were the first to loudly object to the provision, concerned over the ability of the FBI to review their patrons' library records. The American Library Association said that library patrons have a right to privacy in regards to the information they seek.

But, in the past year, the public has become increasingly aware that the government has been utilizing section 215 to collect far more information than library records or customer business receipts.

The biggest revelations came more than a decade after Congress passed the Patriot Act. *The Guardian*, a British newspaper, and

The Washington Post began publishing articles revealing the extent to which the NSA was collecting bulk metadata.

"It wasn't until Edward Snowden disclosed the scope of what the NSA was doing that this became a national and global debate," says Cole.

Snowden's leaks not only revealed the NSA's section 215 bulk metadata collection program, but also the agency's foreign surveillance program under section 702 of the FISA Amendments Act. The leaks revealed the extent of the program, including the surveillance of Merkel and other world leaders. Not surprisingly, the revelations triggered international protest.

The public also has learned of the NSA program dubbed PRISM, which allows the agency to obtain private information about users of particular Internet companies; it targets foreigners believed to be associated with terrorism.

According to declassified court documents, the NSA has gathered about 250 million Internet communications each year without a warrant. As opposed to the bulk metadata program, PRISM allows the NSA to collect the content of the communication.

"The question for the government becomes, is it worth the price that you pay if the surveillance gets revealed?" asks Vatis, who founded the National Infrastructure Protection Center at the FBI. "If you are talking about the German chancellor, then maybe it's not."

According to the *Washington Post*, the NSA has the capacity to record 100 percent of a foreign country's phone calls. Under its MYSTIC program, which uses voice interception and dates back to 2009, the NSA can even conduct "retrospective retrieval" of the calls up to 30 days later.

Clapper recently acknowledged that the NSA has searched communications by Americans when gathered into the database of information from foreign targets. In April, Attorney General Eric Holder said the Justice Department is still reviewing possible changes to the program.

Expectation of Privacy

As for the NSA's bulk metadata collection program, critics have traditionally argued that the mass collection violates the Fourth Amendment protection against unreasonable search and seizure. To show a Fourth Amendment violation, there must be a reasonable expectation of privacy. In 1967 the U.S. Supreme Court limited the use of wiretaps on telephones, finding in *Katz v. United States*[1] that the right to privacy extended to private conversations over the telephone

In the case, Charles Katz was convicted

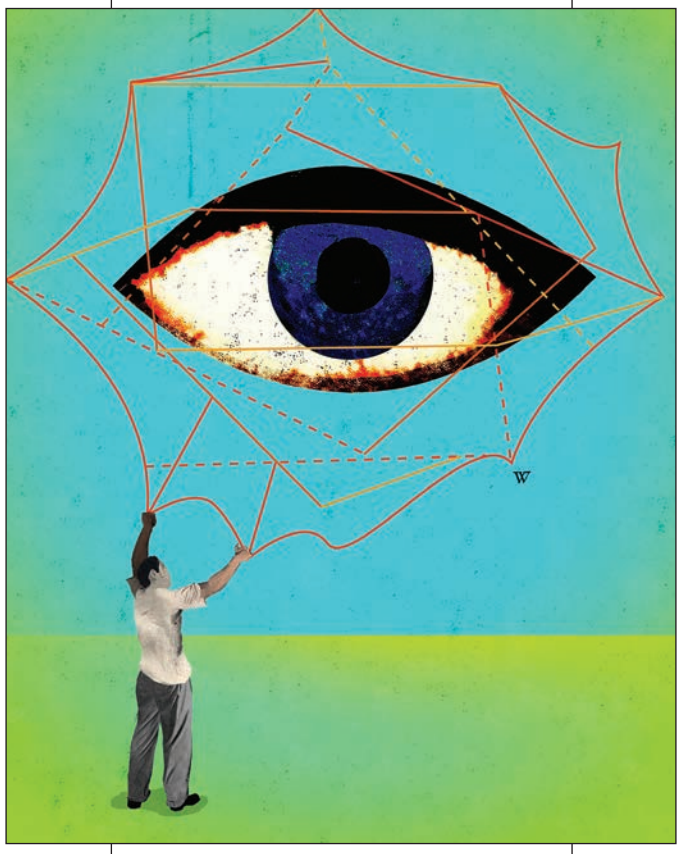
of transmitting wagering information over telephone lines in violation of federal law. The conviction was based in large part on evidence from an FBI wiretap of a telephone booth. The Court ruled 7–1 that the FBI violated the Fourth Amendment by failing to secure a search warrant predicated upon probable cause.

But in 1979 the Supreme Court found in *Smith v. Maryland*[2] that the acquisition of telephone call information through a pen register does not require a warrant. The Court concluded 5–3 that there is no expectation of privacy in telephone call records.

Writing for the majority, Justice Harry A. Blackmun explained that telephone users "typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes."

"[I]t is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret," Blackmun wrote.

In a more recent case, *United States v. Jones*,[3] the Supreme Court held that attaching a GPS device to a vehicle and then using it to monitor the vehicle's movements constitutes a search under the Fourth Amendment.



To Cole, the *Jones* case shows that the Supreme Court can and does "adapt Fourth Amendment doctrine to ensure that we don't lose our privacy by technological default."

In her concurrence in *Jones*, Justice Sonia Sotomayor wrote that people "disclose the phone numbers that they dial or text to their cellular providers; the URLS that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries and medications they purchase to online retailers. . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."

Cole and other legal experts have argued that Sotomayor's concurrence reflects a modern concern over an outdated third party rule.

"She made the point, one that has been echoed by many government officials, members of Congress, and experts since, that the third-party disclosure rule may need to be reconsidered in the digital age," says Cole. "The mere fact that to live in the modern world requires the transmission of digital information on a continuous basis to phone and Internet service providers should not, she suggested, mean that we have no expectation of privacy with respect to that information."

While the public debate focuses on the Fourth Amendment question, there are other legal arguments against the NSA bulk metadata collection program. In its lawsuit on behalf of advocacy groups, the EFF asserts that the program violates the First Amendment right to association.

Vladeck says the strongest argument against the program is it violates statutory intent. "The program is not remotely what Congress had in mind. It clearly wasn't thinking about phone records in 2001," says Vladeck. "Congress was clearly worried about storefront records back then, and didn't really know that it was supposedly 'reauthorizing' something different in 2010. So there is an argument that the program should be thrown out on the basis of statutory intent."

Conflicting Rulings

There have been a number of lawsuits challenging the legality of section 215 since the Patriot Act became law. And ever since Snowden leaked the details of the NSA's bulk metadata collection program, there have been even more lawsuits, including one filed by Sen. Rand Paul (R–Ky.) in February.

So far, there have been conflicting court rulings on whether the NSA program should be allowed to proceed.

In December 2013, Judge Richard J. Leon of the U.S. District Court for the District of Columbia ruled in *Klayman v. Obama* that the NSA program should be stopped as it "likely violate[s] the Fourth Amendment." Leon issued a preliminary injunction against the NSA, but he stayed the order to allow for an appeal. (On April 7, the Supreme Court turned down the plaintiffs' request for the justices to review the case.)

"I cannot imagine a more 'indiscriminate' and 'arbitrary invasion' than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval," wrote Leon. "Surely, such a program infringes on 'that degree of privacy' that the Founders enshrined in the Fourth Amendment."

But also in December, Judge William H. Pauley III of the U.S. District for the Southern District of New York granted the government's motion to dismiss in *ACLU v. Clapper*, finding the program to be lawful. Pauley, citing *Smith*, wrote that the call records belong to the phone com-

pany, not to the ACLU.

"The effectiveness of bulk telephony metadata collection cannot be seriously disputed," wrote Pauley. The judge also found that Congress was "clearly aware of the need for breadth and provided the Government with the tools to interdict terrorist threats."

Given the potential for even more conflicting rulings in the circuits, Timothy Edgar, who served as the first director of privacy and civil liberties for the White House National Security Staff, insists that at some point "the Supreme Court is going to have to revisit this issue and give us more guidance."

"We have a very outdated way of looking at communications," says Edgar, now a visiting fellow at Brown University's Watson Institute for International Studies and an adjunct professor at Georgetown Law. "What seems to be a straightforward rule becomes not so straightforward when you look at the complexity of communications these days. What about e-mail communications? Our efforts to make sense of privacy rules [are] starting to break down and we don't have enough guidance about what is protected and what isn't."

But Sussmann wonders whether the Supreme Court will step in anytime soon. "It's hard to tell how much they want to delve into the issue right now, or how much they want to wait a bit and leave it to the markets and other forces," he says.

Legislative Wrangling and a Wary Public

In January, the Privacy and Civil Liberties Oversight Board, an independent agency within the executive branch, found that the NSA's mass collection of phone data violates existing law. The divided panel found that the program raises serious threats to civil liberties and appears to have limited value in fighting terrorism.

Separately, in December the president's Review Group on Intelligence and Communications Technologies also advised an overhaul of the program.

Obama's proposal would curb the NSA's ability to search phone numbers, but it is not the only reform effort being circulated on the Hill. In fact, the next few months promise more political battling over what types of reforms should be made to the NSA.

One approach, introduced in the House Intelligence Committee, would end the government's mass collection of phone records. However, it would permit the government to acquire e-mail and phone data from telephone companies and Internet service providers when the government has "reasonable and articulable suspicion" that a particular number has a connection to terrorism. The government would be able to go two hops from the seed number without prior court approval.

Another reform effort, the USA Freedom Act, would authorize the government to get business records only of suspected terrorists or individuals known to be communicating with them and would require court approval for each request.

It is not at all clear that congressional leaders and the administration will reach a consensus anytime soon.

After Obama announced his legislative proposal to change the NSA's bulk metadata collection program, some legal experts wondered why he didn't do so using his presidential authority. Edgar and other legal experts say that passing the program's overhaul through Congress was not necessary and may, in fact, stall any changes.

"I don't know that there can be agreement in Congress on this issue," says Edgar. "I would hope the president isn't hanging his entire hat on getting Congress to approve this new approach."

The revelation of the scope of the NSA's surveillance programs has resulted in a public relations crisis, according to some observers. When the news first hit, the administration touted its importance in the fight against terrorism.

Most Americans now disapprove of the NSA's bulk metadata collection program, according to a January *USA Today*/Pew Research Center Poll.

"There's basically a discomfort with the government holding this data," says Vatis. "There is a lack of trust because of the lack of transparency about how the NSA operates. The fact that the NSA's program came out in dribs and drabs in the news exacerbates the discomfort."

One problem with analyzing the usefulness of the program is that so much of the information is classified.

"It's not obvious whether the program is working or not," says Kerr, a recognized scholar of criminal procedure and computer crime law. "The information is classified. No doubt there are people within the government who have the sense as to whether the program is helpful or not, but the rest of us, as outsiders, don't have access to that same information."

Some critics say that even if the content of the calls aren't being read, and even if investigators have thus far been ethical in how they run the program, the easy access to massive amounts of information leaves open the possibility for abuse at a later time.

In addition, experts claim that the public is generally confused about what

the NSA program does and how it works. Some people simply don't know the difference between the agency's bulk metadata collection program and its foreign surveillance program, which allows for the examination of content. Other observers say the details are complex and there are too many unanswered questions.

"Who does it apply to? People don't know. Who can use it? How are targets selected?" asks Sussmann, a former prosecutor in the Justice Department's Computer Crime and Intellectual Property Section. "The American public does not know how it works."

During a Senate Select Committee on Intelligence hearing in March, Sen. Ron Wyden (D–Ore.) asked Clapper, "Does the NSA collect any type of data at all on millions or hundreds of millions of Americans?" Clapper responded: "No, sir," and then, "Not wittingly. . . ."

Months later, Clapper explained in an interview with NBC's Andrea Mitchell, "I responded in what I thought was the most truthful, or least untruthful manner. . . ."

Vatis points out that the government's initial response to revelations about the NSA program, such as Clapper's remarks, didn't exactly inspire public confidence. "That did not make people feel any more comfortable with it," says Vatis.

To some observers, the Obama administration's about-face on the program can be seen as a retreat in the face of public disapproval.

But, according to Vatis, Obama's revised outlook could simply indicate that the administration determined that the bulk metadata collection program has not been useful enough to wage a political battle over it. The changes to the program "wouldn't have been proposed if the NSA had taken a really strong position."

"In the internal debate over this, the NSA could have said this is a crucial program," says Vatis. "Obama would have stuck to his guns and kept the program as is, if that had been the case. This is a sign that the NSA did not think this program was as crucial as it and others suggested when it was first revealed."

Anna Stolley Persky wrote about the career struggles of contract attorneys in the January 2014 issue of the magazine.

Notes

[1] 389 U.S. 347 (1967).
[2] 442 U.S. 735 (1979).
[3] 565 U.S. __ (2012).

Time to Retire the 'R' Reference?

Challenging the Trademark Registrations of the Washington Professional Football Team

By Jesse A. Witten

For decades, Native Americans and others have objected to the name of Washington's professional football team because, regardless whether any offense is intended, "redskin" is a disparaging term used to refer to Native Americans.[1] Recognizing this fact, at least 28 high schools and two colleges and universities, including Miami University in Ohio, have dropped "redskins" from their sports team names since 1979.[2]

The controversy has received extensive attention over the past year. The National Congress of American Indians (NCAI)—the largest organization of Native American tribes and individuals in the country—and numerous Indian tribes, Native American leaders, political figures, religious groups, prominent journalists, and many other groups and individuals have protested the team's name. Even President Obama shared his view that opponents of the name have "real, legitimate concerns," and that it is time to think about a change.[3]

While public discussion has intensified, a long-simmering legal issue is whether trademarks containing the term "redskin" in reference to Native Americans are eligible for federal trademark registration. The federal trademark law known as the Lanham Act bars registration of trademarks that contain matter that "may disparage persons … or bring them into contempt, or disrepute."[4] Nevertheless, over the years Pro-Football, Inc. (PFI), a closely held company now controlled by Daniel Snyder that owns and operates the Washington NFL franchise, and others have applied to register "redskins" trademarks. Although there is no indication that the examining attorneys at the U.S. Patent and Trademark Office (USPTO) analyzed the nondisparagement requirement, six applications submitted by PFI were approved for registration between 1967 and 1990.

In 1992 a group of prominent Native Americans led by Suzan Shown Harjo, president of the Morning Star Institute and former executive director of the NCAI, petitioned the USPTO's Trademark Trial and Appeal Board (TTAB) to cancel the six PFI trademark registra-

"Taking the Stand" appears periodically in Washington Lawyer *as a forum for D.C. Bar members to address issues of importance to them and that would be of interest to others. The opinions expressed are the authors' own. Jesse A. Witten, an attorney with Drinker Biddle & Reath LLP, represents the petitioners in* Blackhorse v. Pro-Football, Inc.

Illustration by Dan Page/theispot.com

tions. In 1999 the TTAB ruled in favor of the petitioners in *Harjo v. Pro-Football, Inc.* and ordered that the registrations be cancelled.[5] Subsequently, however, the U.S. Court of Appeals for the District of Columbia Circuit held that the *Harjo* petition was barred by the doctrine of laches because the petitioners supposedly waited too long after reaching the age of majority to file their cancellation petition. In 2006, while *Harjo* was under review by the D.C. federal courts, a second petition was filed by a group of younger Native Americans (to avoid the laches issue). The second petition, captioned *Blackhorse v. Pro-Football, Inc.*,[6] is pending before the TTAB and awaiting decision.

Since the *Harjo* petition was filed, the USPTO has considered numerous additional applications for new trademark registrations filed by PFI and others containing the term "redskin" in reference to Native Americans. Between January 1993 and March 2014, USPTO examining attorneys have refused registration of at least 12 such applications on disparagement grounds.

Suspect Origins of the Team Name

The Washington Redskins started in Boston in 1932 as the Boston Braves. At that time, the team played at Braves Field, home of the Boston Braves baseball team (now the Atlanta Braves). The football team's owners, led by George Preston Marshall, adopted the local baseball team's name, which was a common practice at the time. In addition to the Boston Braves, NFL teams in the 1920s and 1930s that took their names from existing baseball teams in the same cities included the Brooklyn Dodgers, New York Giants, New York Yankees, Cincinnati Reds, Pittsburgh Pirates, and Cleveland Indians. Other NFL team names were derived from baseball team names, including the Chicago Bears (derived from Chicago Cubs) and the Detroit Lions (derived from Detroit Tigers).

In 1933 Marshall became the sole owner of the Boston Braves and moved the football team to Fenway Park, home of baseball's famed Boston Red Sox. Sharing a home with the Red Sox, Marshall changed the team's name to Boston Redskins. Thus, Marshall continued the existing practice of deriving a football team's name from the local professional baseball team name while keeping his team's Indian imagery.

A November 1972 Redskins game program explains: Marshall "started with his team in Boston on Braves Field. When he switched playing sites, he wanted to change names but keep the Indian motif. Since he was now sharing a park with the Red Sox and at the same time liked Harvard's crimson jerseys, Redskins seemed appropriate."[7]

PFI has recently stated that Marshall selected the name Redskins to honor the team's coach, William Dietz, who was hired in 1933 and who held himself out as Native American.[8] This claim is a modern invention. It contradicts the earlier explanation in the team's 1972 program. And the team was already named the Braves, with an Indian motif selected, long before Dietz was hired to coach. Marshall himself denied that he renamed the team Redskins to honor Dietz or other Indian players. As *The Hartford Courant* reported in 1933:

> George Marshall, owner of the Boston professional football team, today changed its name from Braves to Redskins.
>
> 'So much confusion has been caused by our football team wearing the same name as the Boston National League baseball club,' he said, 'that a change appeared to be absolutely necessary. The fact that we have in our head coach, Lone Star Dietz, an Indian, together with several Indian players, has not, as may be suspected, inspired me to select the name Redskins.'[9]

Even more, Marshall's views on what it means to "honor" an ethnic group deserve no consideration. He was a notorious and open racist who adamantly opposed racial integration. Because of Marshall, the Washington Redskins was the last NFL team to integrate.

The exclusion of African Americans from the NFL ended in 1946.[10] By 1952 the Redskins was one of only two teams without an African American player, and by 1955 the only team. Marshall did not permit an African American on the team until 1962. He relented only because the U.S. Department of the Interior threatened to revoke his lease of the D.C. Municipal Stadium (now RFK Stadium) unless he ended discrimination against African Americans, and only after intervention by NFL commissioner Pete Rozelle.[11]

Further, in presenting professional football games, Marshall mocked Native Americans and their culture in multiple ways. The team's original fight song lyrics, written by Marshall's wife, included these mocking lines (as well as a call to fight for "old Dixie"):

Hail to the Redskins, Hail Victory
Braves on the warpath, Fight for old Dixie
Scalp 'em, swamp 'em
We will take 'em big score
Read 'em, weep 'em, touchdown!
We want heap more . . . .

Likewise, under Marshall, the cheerleaders were dressed in Indian-themed outfits with black braided wigs to look like stereotyped Indian women.

In 1972, after Marshall had died, a delegation of Native American leaders, including the president of the NCAI, met with then team president Edward Bennett Williams to object to the team name, the fight song, and the cheerleader outfits. In response, Williams changed the cheerleader outfits and took out the "most offensive" language in the fight song (and

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—George Preston Marshall, owner of the Boston Braves

replaced "Fight for old Dixie" with "Fight for old D.C."). The day after the meeting, Williams wrote a letter to Rozelle describing the meeting and stating that the Native American leaders "cogently" explained how the team's name was racist and pressed for a change. Williams did not change the team's name, however.

Disparaging Marks and Harjo

Section 2(a) of the Lanham Act requires the USPTO to refuse to register any trademark that "[c]onsists of or comprises . . . matter which may disparage . . . persons, living or dead . . . or bring them into contempt, or disrepute." The TTAB has set forth a two-part inquiry to determine whether a mark is disparaging under section 2(a):

> 1. What is the meaning of the matter in question, as it appears in the marks and as those marks are used in connection with the goods and services identified in the registrations?
>
> 2. Is the meaning of the marks one that may disparage the referenced group?[12]

Further, the TTAB has stated that "[i]n deciding whether the matter may be disparaging we look, not to the American public as a whole, but to the views of the referenced group."[13] The views of the referenced group are reasonably determined by the views of a 'substantial composite thereof.'[14] A substantial composite may be less than a majority of the group.[15] In addition, disparagement is determined as of the date of registration.[16] The TTAB has also held that there is "no practical difference" between matter that may bring one into "contempt or disrepute" and matter that "may disparage" under section 2(a).[17]

Recent TTAB decisions finding disparagement include *In re Heeb Media, LLC*[18] (affirming refusal to register mark containing the term "Heeb," which may disparage persons of Jewish descent); *In re Geller*[19] (non-precedential) (affirming refusal to register mark "Stop the Islamisation of America" on grounds that it is "disparaging to Muslims in the United States"); and *In re Simon Shiao Tam*[20] (affirming refusal to register mark for "The Slants" on grounds that it may disparage persons of Asian descent).

In 1992 Harjo and six other Native American leaders filed a petition to cancel six trademark registrations of PFI pursuant to section 14(3) of the Lanham Act.[21] Section 14(3) provides for cancellation of a registration granted contrary to section 2(a). As noted, section 2(a) provides that a trademark is not eligible for registration if it "[c]onsists of or contains . . . matter which may disparage . . . persons, . . . or bring them into contempt, or disrepute. . . ." The marks in question were registered between 1967 and 1990, and all contained the term "redskin."

In its 145-page opinion issued in April 1999, the TTAB ruled in favor of the *Harjo* petitioners and directed that the registrations containing "redskins" be cancelled. The TTAB held that because the registrations contained the term "redskin" in reference to Native Americans, each of the six trademarks contained matter that may disparage Native Americans or bring them into contempt or disrepute.[22]

After the TTAB's ruling, in lieu of an appeal to the federal circuit, PFI filed an action against the *Harjo* petitioners in the U.S. District Court for the District of Columbia pursuant to 15 U.S.C. § 1071(b). On September 30, 2003, the district court entered summary judgment in favor of PFI.[23] It held that the *Harjo* petition was barred by laches, ruling that the petitioners had waited too long after their 18th birthdays before filing their petition. In the alternative, the district court stated that the TTAB's decision was not supported by substantial evidence, asserting that the board did not make necessary findings of fact to support its ruling:

> [T]he TTAB only made specific findings of fact in two areas—linguistic evidence and survey evidence. These findings are very limited, because in most instances, the TTAB merely drew from the undisputed portions of the record to make these findings of fact. Indeed, the TTAB heard no live testimony and the testimony cited in its opinion merely came from deposition transcripts. For the rest of the voluminous record, the TTAB decided not to make findings of fact, and instead simply cataloged the evidence put forth by both parties.[24]

Further, the TTAB has stated that "[i]n deciding whether the matter may be disparaging we look, not to the American public as a whole, but to the views of the referenced group." The TTAB has also held that there is "no practical difference" between matter that may bring one into "contempt or disrepute" and matter that "may disparage" under section 2(a).

Because of the TTAB's supposed failure to make fact findings, the district court severely restricted its review of the record that was before the board:

> The Court's review of the TTAB's findings of fact is limited by necessity given the paucity of actual findings of fact made by the TTAB. Even though it spent fourteen pages cataloging the evidence in the case, the TTAB made specific findings of fact in only two areas: (1) linguists testimony, and (2) survey evidence. *Since the TTAB only made specific findings of fact in two areas, it is only these two areas that are subject to court-scrutiny under the substantial evidence test.*[25]

The district court's critique of the TTAB's *Harjo* decision was mistaken and does not accurately portray the board's thoughtful decision. In *Harjo*, the TTAB thoroughly and carefully reviewed and weighed the factual record, and fully explained the reasons for its conclusions.

On appeal, the D.C. Circuit did not comment on the district court's criticism of

"Redskin" Trademark Applications Since 1992

Mark	Applicant	Filing Date	Date of Section 2(a) Refusal (Disparagement)	Status
"Washington Redskins"	PFI	8/3/92	11/16/92	Suspended pending outcome of HARJO
"Redskin Review"	Atlantic Publishing Group, Inc.	9/8/92	1/8/93	Abandoned because applicant failed to respond to refusal notice
"Boston Redskins"	NFL Properties, Inc.	2/23/94	7/18/94	Suspended pending outcome of HARJO
"Redskins Fanatics"	PFI	1/11/96	11/18/96	Abandoned because applicant filed notice of express abandonment
"Redskins Pigskins"	PFI	1/11/96	11/18/96	Abandoned because applicant filed notice of express abandonment
"Redskins Rooters"	PFI	1/11/96	11/18/96	Abandoned because applicant filed notice of express abandonment
"Redskins Broadcast Network"	PFI	8/9/99	8/29/00	Suspended pending outcome of HARJO
"Washington Redskins Cheerleaders"	PFI	3/22/01	8/13/01	Suspended pending outcome of HARJO
"Washington Redskins 70th Anniversary Est. 1932 Limited Edition"	PFI	3/21/02	8/27/02	Abandoned because applicant filed notice of express abandonment
"Redskin"	Red.com, Inc.	8/10/11	9/22/11	Abandoned because applicant failed to respond to notice of refusal
"Redskins Hog Rinds"	James Bethel	8/30/13	12/29/13	Applicant has not yet responded to notice of refusal
"Washington Redskins Potatoes"	George Weston	10/15/13	3/17/14	Applicant has not yet responded to notice of refusal

the TTAB's fact-finding effort. It addressed only laches. The D.C. Circuit affirmed the district court ruling that laches barred the petition as to six of the *Harjo* petitioners, and remanded the matter to the district court to consider further whether laches barred the remaining petitioner.[26] On remand, the district court ruled that the remaining *Harjo* petitioner was barred by laches; the D.C. Circuit affirmed that laches ruling, and the U.S. Supreme Court denied a petition for a writ of certiorari.[27]

The BLACKHORSE Petition—and Where Things Stand

In August 2006, between *Harjo*'s two trips to the D.C. Circuit, five young Native Americans—Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan, and Courtney Tsotigh—filed another petition to cancel the same six PFI trademark registrations. Because of their younger age, they are presumably not subject to the same laches argument that ultimately doomed *Harjo*.

The TTAB suspended activity in *Blackhorse* until the federal proceedings in *Harjo* were completed. The *Blackhorse* stay was lifted in 2010, after the Supreme Court denied certiorari in *Harjo*. *Blackhorse* is now fully briefed, and the TTAB held a hearing in March 2013. The *Blackhorse* petition is now awaiting a ruling by the TTAB.

Evidence introduced by the *Blackhorse* petitioners proving disparagement includes:

- Dictionaries, reference works, and other written sources that state that "redskin" is disparaging;
- Evidence regarding the 1972 meeting between the president of NCAI and other Native American leaders and the president of PFI at which the Native American delegation objected vigorously to the team name and demanded a change;
- Resolutions and other actions of the NCAI opposing the team name;
- Opposition of other Native American groups and individuals to the team name;
- Expert testimony that "redskin" was not a term used in late 20th-century newspapers to refer to Native Americans, while "Indian," "American Indian," and "Native American" were widely used;
- Examples of "redskin" used in written sources in a derogatory manner;
- Examples of "redskin" used in movies in a derogatory manner;
- Various admissions by PFI and the NFL that "redskin" is a disparaging term; and
- Examples of PFI's use of the team name and marks in ways that mock Native Americans and their culture.

The *Blackhorse* petitioners' evidence is summarized in Petitioners' Trial Brief.[28]

Meanwhile, since the *Harjo* petition was filed, USPTO examining attorneys have ceased approving new applications for trademarks using "redskins" in reference to Native Americans. Examining attorneys have refused to register "redskins" trademarks at least 12 times on disparagement grounds since 1992.[29] PFI was the applicant for seven of the marks. For four of those marks, PFI notified the USPTO that it was abandoning its application rather than seeking further review of the refusal under USPTO procedures.[30]

Legislative Push Barring 'Redskin' Registrations

Although USPTO examining attorneys have repeatedly refused to register "redskins" trademarks since 1992, after 22 years of litigation before the TTAB and federal courts there is still no final outcome to the petitions to cancel the six PFI trademark registrations. A bipartisan group of members of the U.S. House of Representatives has decided that Congress should make it plain that the bar on registering marks that contain matter that "may disparage" or "bring persons into contempt, or disrepute" includes, and always has included, marks that contain "redskin" in reference to Native Americans.

Two weeks after the *Blackhorse* hearing before the TTAB on March 20, 2013, a bipartisan group of sponsors, led by Democrat Eni F. H. Faleomavaega and Republican Tom Cole (a member of the Chickasaw Nation), introduced H.R. 1278, the Non-Disparagement of Native American Persons or Peoples in Trademark Registration Act of 2013. H.R. 1278 would cancel existing trademark registrations containing the term "redskin" in reference to Native Americans, and would also deny registrations for new applications using the term. The bill would make clear that "redskin," when used in reference to a Native American or group of Native Americans, is deemed "disparaging" under section 2(a) of the Lanham Act. The bill has been referred to the Subcommittee on Courts, Intellectual Property and the Internet of the House Judiciary Committee.

* * *

As controversy continues to follow the Washington football team's name, the USPTO is obligated by statute to pass judgment on the name. Since 1992, examining attorneys at the USPTO have routinely refused registration of "redskin" trademarks on disparagement grounds. In *Blackhorse*, the TTAB is currently deciding whether to cancel the six existing PFI trademark registrations using the term "redskin."

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Notes

1 Dictionary definitions of "redskin" include: "Offensive Slang. Used as a disparaging term for a Native American," *The American Heritage Dictionary of the English Language*, http://ahdictionary.com/word/search.html?q=redskin (accessed March 24, 2014); "usually offensive: American Indian," *Merriam-Webster Online Dictionary*, http://merriam-webster.com/dictionary/redskin (accessed March 24, 2014); "Slang: Often disparaging and offensive. A North American Indian," *Dictionary.com Unabridged. Based on the Random House Dictionary*, http://dictionary.reference.com/browse/redskin (accessed March 24, 2014); "dated, offensive: An American Indian," *Oxford Dictionaries*, http://oxforddictionaries.com/us/definition/american_english/redskin (accessed March 24, 2014); "North American Indian (usually construed as offensive)," *The New Lexicon Webster's Dictionary of the English Language* (vol. 2, Lexicon Publications, Inc., 2004); "(slang) offensive term for Native Americans," http://vocabulary.com/dictionary/Redskin (accessed March 24, 2014); and "Offensive Slang. Used as a disparaging term for a Native American," http://education.yahoo.com/reference/dictionary/entry/redskin (accessed March 24, 2014).

2 National Congress of American Indians, "Ending the Legacy of Racism in Sports & the Era of Harmful 'Indian' Sports Mascots" (Oct. 2013) at 14. Since 1980, over 2,000 schools have dropped Indian-themed sports team names; roughly 1,000 Indian team names remain. *See id.* at 8.

3 David Nakamura, *Obama: 'I'd Think About Changing' Washington Redskins Team Name*, Wash. Post, Oct. 5, 2013.

4 15 U.S.C. § 1052(a).

5 50 U.S.P.Q.2d 1705, 1739 (TTAB 1999).

6 No. 92-046185 (TTAB).

7 *Redskins Edition of Pro! Magazine* (Nov. 20, 1972) at 5A.

8 It is doubtful that Dietz was actually a Native American; the United States charged him with falsely claiming that he was a Native American in order to avoid the draft in World War I. *See* Linda M. Waggoner, "On Trial: The Washington R*dskins' Wily Mascot: Coach William 'Lone Star' Dietz," *The Montana Magazine of Western History* (2013) at 24–47.

9 "Boston Braves Grid Men Become 'Redskins,'" *The Hartford Courant* (July 6, 1933) at 15.

10 Before 1933, a small number of African Americans played at various times in the NFL, but none from 1933 to 1946.

11 *See* Thomas G. Smith, *Showdown: JFK and the Integration of the Washington Redskins* (2011).

12 *See, e.g., In re Heeb Media, LLC*, 89 U.S.P.Q.2d 1071, 1074 (TTAB 2008); *In re Squaw Valley Development Co.*, 80 U.S.P.Q.2d 1264, 1267 (TTAB 2006).

13 *Blackhorse v. Pro-Football, Inc.*, No. 92-046185 (TTAB May 31, 2011) (citing *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1739 (TTAB 1999).

14 *Id.* (quoting *Harjo*, 50 U.S.P.Q.2d at 1739).

15 *See id; In re Heeb Media, LLC*, 89 U.S.P.Q.2d at 1074.

16 *See id.*

17 *Harjo*, 50 U.S.P.Q.2d at 1740.

18 89 U.S.P.Q.2d 1071 (TTAB 2008).

19 No. 77940879 (TTAB Feb. 7, 2013), *affirmed*, No. 13-1412 (Fed. Cir. May 13, 2014).

20 108 U.S.P.Q.2d 1305 (TTAB Sept. 26, 2013), *on appeal*, No. 14-1203 (Fed. Cir.).

21 15 U.S.C. § 1064(3).

22 *Harjo*, 50 U.S.P.Q.2d at 1705, 1748.

23 *See Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 68 U.S.P.Q.2d 1225 (D.D.C. 2003).

24 *Id.*, 284 F. Supp. 2d at 102, 68 U.S.P.Q.2d at 1230.

25 *Id.*, 284 F. Supp. 2d at 119, 68 U.S.P.Q.2d at 1243 (emphasis added) (citations omitted).

26 *See Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 75 U.S.P.Q.2d 1525 (D.C. Cir. 2005).

27 *See Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 87 U.S.P.Q.2d 1891 (D.D.C. 2008), *aff'd* 565 F.3d 880, 90 U.S.P.Q.d 1593 (D.C. Cir.), *cert denied* 130 S. Ct. 631 (2009).

28 *Blackhorse v. Pro-Football, Inc.*, No. 92-046185 (TTAB Sept. 6, 2012) (Docket No. 177), available at http://ttabvue.uspto.gov/ttabvue/v.

29 Information about the registration applications is available at www.uspto.gov.

30 For the other three marks, the USPTO granted PFI's request to suspend further proceedings pending the outcome of *Harjo*. Although the *Harjo* proceedings are now completed, the agency is presumably suspending further review of the three marks until the conclusion of *Blackhorse*.

Q&A

Interview by
Kathryn Alfisi

MEET THE PRESIDENT:
A Conversation With Brigida Benitez

Brigida Benitez will be sworn in as the D.C. Bar's 43rd president at the June 17 Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting.

Currently, Benitez is a partner at Steptoe & Johnson LLP, where she focuses her practice on global dispute resolution, internal investigations, and compliance matters. She previously worked at the Inter-American Development Bank, investigating potential fraud and corruption in bank-financed activities spanning 26 countries in Latin America and the Caribbean. She started her legal career at WilmerHale LLP.

Benitez served as a member of the D.C. Bar Board of Governors and on the Bar's Budget Committee, Strategic Planning Committee, Nominations Committee, and the Steering Committee of the Bar's Courts, Lawyers and the Administration of Justice Section. As a member of the Bar's Pro Bono Committee, Benitez worked with Judge Vanessa Ruiz of the D.C. Court of Appeals in establishing the D.C. Bar Pro Bono Program's Spanish Language Advice and Referral Clinic (now the Immigration Legal Advice Clinic).

Benitez also served as president of the Hispanic Bar Association of the District of Columbia and as a member of the board of directors of the Women's Bar Association of the District of Columbia.

Benitez received her bachelor's degree from the University of Florida and graduated from Boston College Law School.

Tell us a little bit about your upbringing.

I grew up in a working-class community near Miami. My parents, Raimundo and Ohilda, raised my younger brother and me in a loving home with a very strong work ethic, a product of their Cuban roots. They emigrated from Cuba to this country, each in search of a better life and greater opportunity. They met and married in New York, where I was born, and then shortly after that, they moved to Miami.

Neither of my parents had the opportunity to go to college. My dad had worked since he was 12 years old to support his family. My younger brother is also a lawyer, a prosecutor, and he has dedicated his career to public service.

Growing up, did you ever think about becoming a lawyer?

No, I didn't grow up thinking I was going to become a lawyer. I didn't know any lawyers, never met any lawyers, and didn't have many professional role models. I recognized from an early age that school was important and that education was the key to a better future for me and my family, so I was always thinking ahead. I remember at one point I thought I wanted to be a psychologist; I'm not sure why, because I didn't know any psychologists, either. Maybe it was a sense of wanting to help people.

I became interested in journalism in junior high school after taking a journalism class as part of a summer gifted program. I really enjoyed writing, so I went to college thinking I was going to be a journalist. It was in college that I picked criminal justice as a minor; in taking those classes, I became interested in law school. I remember I took a white collar crime class, and I had a professor who wrote a comment on one of my papers asking if I had ever considered going to graduate school.

Why did you choose Boston College for law school?

I applied to several schools, mostly in the Northeast, and Boston College seemed like a great school. I was very fortunate to receive a scholarship. It was a fantastic experience. BC Law School is an excellent school with a wonderful sense of community, and that's something I very much valued while I was there. It's one of the reasons I have remained involved with the law school over the years.

What were your early experiences in Washington, D.C.?

When I came to Washington, D.C., I joined what was then Wilmer, Cutler, and

Photographs by Patrice Gilbert

Q&A

"From day one, we were thinking that this could be the case that could go to the Supreme Court and could set a precedent, and so all along we were imagining the Supreme Court as our audience."

Pickering LLP (now WilmerHale). I was there for 16 years, and my practice was a combination of complex litigation and investigations. The firm was where I grew up as a lawyer. I started as an associate and was promoted to partner in January 2001, becoming the firm's first Latina partner. I left the firm in 2010 when I was recruited by the Inter-American Development Bank (IDB) to head up what was then a relatively new office called the Office of Institutional Integrity. This was a senior management position, and the office was responsible for implementing compliance programs and investigating potential fraud and corruption in any projects financed by IDB in 26 countries in Latin American and the Caribbean. After a couple of years, I decided to return to private practice and I joined Steptoe & Johnson LLP, where I am a partner today. I wanted to take the experience from the IDB and apply it to the private sector to serve clients. Steptoe has an excellent global anti-corruption practice and a very collegial culture, and the firm wanted to continue to expand its practice in Latin America, so it was a great fit for me.

Who were your mentors and what role did they play?

I have been blessed in my career to have had terrific mentors, people who have cared about me, provided me with valuable opportunities, given me frank advice, guided me along the way, and helped me to become a better and happier lawyer. One of them was [the late] John Payton, with whom I worked on a number of cases, including the University of Michigan cases [involving diversity in higher education] that went to the U.S. Supreme Court. John led by example and he exemplified that combination of private practice and public service that I have since tried to model. He was very smart and I learned a great deal from him about being a lawyer. I still can't believe he's gone. I miss him. When I was asked to consider seeking the nomination for president-elect of the Bar, I remember thinking that he would have been one of the first people I would have called for advice. Then I realized I knew what he would have said, so I did it.

I look back and I realize that I have been very fortunate to have had good mentors and friends at my side. There were a number of others at Wilmer, including John Rounsaville Jr., who was one of my strongest supporters at the firm. I also worked with [former Bar president] John Pickering on pro bono matters when I was a very young associate. By then, he was already a retired partner, but he remained very active. He was a great mentor and was somebody who liked to work with young associates. He was tremendously committed to public service, and I was very fortunate to have had the opportunity to work with him, to have him as a mentor, and, ultimately, to have him as a friend.

Mentors have been crucial to my development, and they continue to be. At Steptoe, I also have found mentors who are inspiring, accomplished role models. I really have been blessed with people who have taken an interest in me and who have given me opportunities without which I wouldn't be where I am today. A good example is my involvement with the D.C. Bar. John Payton, who served as Bar president from 2001–02, first got me involved in the Bar when he was president-elect about 15 years ago.

What was it like being part of a landmark case like the University of Michigan affirmative action case?

Being part of the University of Michigan team has been one of the highlights of my career for many reasons. For one, as a litigator, to see a case go from the filing of a complaint to resolution at the U.S. Supreme Court is incredibly rare, so that was a tremendous opportunity and learning experience. Also, I was privileged to be involved in a case dealing with an issue, diversity in higher education, about which I am very passionate. It was a fascinating experience because no one had won a case like it, so we had to be creative and strategic in building the case. From day one, we were thinking that this could be the case that could go to the Supreme Court and could set a precedent, and so all along we were imagining the Supreme Court as our audience. We put together an expert case that proved the value of diversity in higher education. To build that case and to have the Supreme Court agree with us was an amazing and rewarding experience.

Tell us more about your involvement in the D.C. Bar.

I started on the President's Pro Bono Initiative Task Force while John Nields Jr. was president and John Payton was serving as president-elect. We were examining what law firms were doing in terms of pro bono service. After that, I served on the Pro Bono Committee for four years, and from there I just stayed involved. I served on the Strategic Planning Committee and

the Nominations Committee, and I have remained involved in the Bar one way or another until I was elected to the Board of Governors about three years ago.

What do you take away from Bar service?

I think it's a two-way street: If you give back and serve, you can be very fulfilled. For me, Bar service has been very valuable because I have met great people and done interesting things; I have really been able to contribute to my community and the legal profession. As a lawyer, I feel an obligation to give back to the profession, to the community, and to the world around me. You can do that through Bar service.

While serving on the Pro Bono Committee, I worked with Judge Vanessa Ruiz of the Court of Appeals—who has also been a great mentor to me—in creating an advice and referral clinic that provides legal services in Spanish. That was 10 years ago, and the clinic is still going strong as the Immigration Legal Advice Clinic. That has made a real impact on the community. That's just one example of the things I have accomplished through Bar service.

You also teach law at American University and Georgetown.

I enjoy teaching and the interaction with law students. Part of it is serving as a mentor to law students who are just starting their careers. This semester, I am teaching a course on international business litigation at Georgetown.

How do you find time to participate in all these activities?

It's a juggling act, but these are all things that I enjoy. Since becoming president-elect, when people approach me to talk about the Bar presidency, they say, "Congratulations, I think, or is it condolences?" I respond: "It's congratulations," because I really am excited about this. I care very much about the Bar, and I think that if you believe in an organization, then you have to be willing to roll up your sleeves and step up when asked to take on a leadership role. I do things that I am passionate about, and I think it's important to find things that you're interested in, where you can make a contribution and that also fulfill you.

What skills and experiences will help you as Bar president?

I believe my experience, my background, my work with the Bar, my commitment to public service—all of this provides a solid foundation for serving as president. Ultimately, I believe I can make a valuable contribution. Over the years, I have become well-acquainted with the Bar and how it runs. I also have gotten to know the Bar's staff, a tremendous group that keeps the Bar running as smoothly as it does. I have been involved with the Bar at the committee level, in the sections, and on the Board—in short, I have gotten to know the Bar from all angles. So I feel that I have a good understanding of the Bar's priorities and its challenges.

In addition, I have been very involved with other bars and community organizations. Being able to take that experience and really focus on things that are important to the Bar and its members is very useful.

This role is also meaningful to me on a personal level. As I mentioned earlier, I had the honor of having John Pickering and John Payton—both past presidents of the Bar—as partners, friends, and mentors. It's truly an honor to have the opportunity to carry that torch forward, to continue that tradition of excellence, to help support the growth of the Bar, and to help enhance the service it provides to its members.

What are your priorities as Bar president?

First, I want to promote the Bar's continued leadership and support for access to justice and pro bono services. The Bar has been a leader in these areas, and the need is as great as ever. I think it should be a priority to support access to justice and pro bono services to fulfill that very important aspect of our profession. I believe that public service is the heart of our profession. I began my service to the Bar in the area of pro bono, and that remains important to me. We are really lucky to have what is regarded as the best pro bono program in the country. I want to make sure that I support the program and that I help any way that I can to improve it.

One thing that's in the works is implementing a strategic planning process for the Pro Bono Program. The last time the Bar did this was in the early 1990s, so it's a good opportunity to really assess where the program is, what it could be doing better, and what things should it focus on in the coming years.

Second, I want to address the impact of an increasingly global profession. This is an opportunity for our bar, and it's an opportunity we should seize on immediately. We should position the Bar in the context of our global legal profession. We need to address the steps that the Bar can take to be ahead of the curve and how it can better serve its members throughout the District of Columbia, the country, and the world. We have more than 100,000 members globally, we have a number of members who are engaged in cross-border practices, and we're going to see more foreign lawyers who are going to seek admission to our bar. All of these things have implications as far as what we should be doing as a bar. We must ask, how we can better serve our members, and what kinds of procedures, practices, and rules should we be thinking about as we move forward? I plan to convene a task force to study these issues and make recommendations to the Bar.

Finally, I want to focus on strategic planning for the Bar. I served on the Bar's first Strategic Planning Committee five years ago, and I think the development of a strategic plan has been key in maintaining the Bar's focus on its mission and priorities. Five years later, I think it's an opportune time to form a committee to reexamine the Bar's strategic plan and its implementation. One of my priorities in doing so is to ensure that we are serving our members and increasing professional development opportunities for members at all levels and from all segments of the profession.

Underscoring these three key areas is a shared sense of the value diversity has played in our success and will continue to play in the future of our Bar. We are fortunate to have a tremendously diverse Bar in the broadest sense. I share the Bar's commitment to diversity and to capitalizing on that diversity for our continued success.

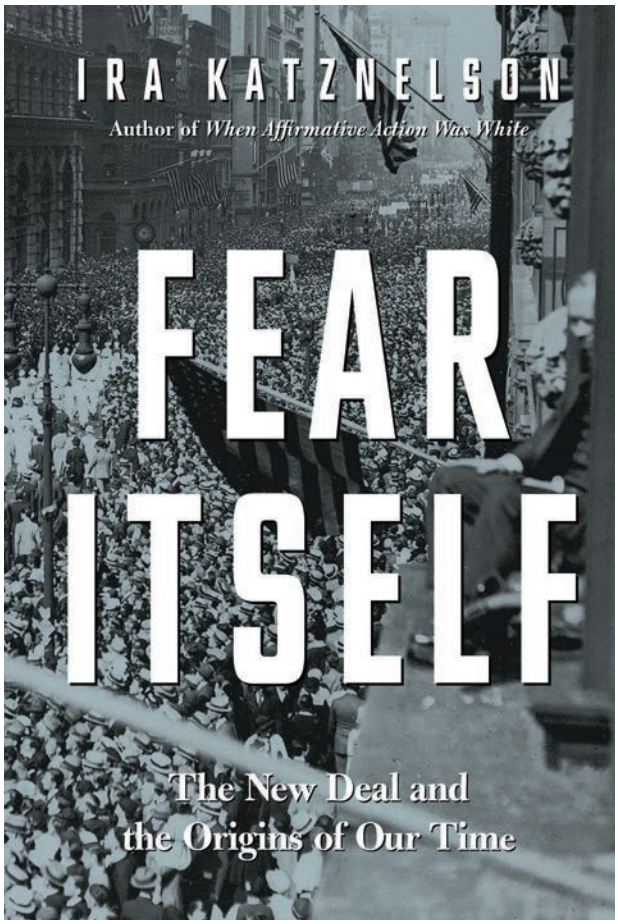
What kinds of activities do you enjoy outside of work?

My family is very important to me. I visit Florida fairly regularly to see my parents, my brother, and my wonderful nephew, Joseph, who I love spending time with. I am also a runner, so that's how I spend a lot of my free time, which I think helps me to maintain a healthy balance. I'm competitive and I like to challenge myself, so I enter races. I've run six marathons so far and a number of other races.

Anything else you'd like to add?

I feel privileged to be a member of this bar. This is the best place to practice law. We're a community. That's why I'm here, because I want to continue to foster that sense of community and to follow a long tradition of excellence. I hope more and more of our members will join me and become engaged in our bar.

Reach D.C. Bar staff writer Kathryn Alfisi at kalfisi@dcbar.org.



Fear Itself: The New Deal and the Origins of Our Time
By Ira Katznelson
Liveright Publishing Corporation, 2013

REVIEW BY DAVID HEYMSFELD

In Fear Itself: The New Deal and the Origins of Our Time, Ira Katznelson provides valuable insights into the history of America from 1932–1953. He covers the tumultuous years of the Great Depression, the New Deal, World War II, and the start of the Cold War. In these years, the country made critical decisions about our economy and our role in the world. Katznelson helps us understand two important features involved in these decisions: the key role played by Southern Democrats in Congress, and the continuing discussion during the period about whether we should move to an economy run by centralized planning rather than by competition.

Most of the histories that have been written about these years focus on the decisions of Presidents Roosevelt and Truman. Katznelson shifts the focus to the Congress where he believes the critical decisions were made, with Southern Democrats playing a dominant role. The highest priority of Southern Congressional Democrats (who were exclusively white) was to preserve the economic structure of the South and the accompanying economic and social suppression of blacks. To gain passage of New Deal Reform legislation, the presidents had to make Faustian agreements to exclude blacks from many benefits.

Katznelson demonstrates convincingly that during this period Congress was far from a rubber stamp for legislation sent over by the administration. Congress played an active role in initiating legislation and in shaping its details. For almost all of this period, the Democrats controlled Congress, and Southern Democrats were a large percentage of the Democratic members. Southern Democrats always held more than 40 percent of Democratic seats in the Congress, and in some Congresses, Southern Democrats had a majority of Democratic seats.

Their influence exceeded their numbers. Because most Southern Democrats held safe seats, their members gained seniority, which gave

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them committee chairs and other leadership positions. Their lengthy tenures also enabled them to become masters of issues and congressional procedures.

Southerners were the gateway to the passage of legislation and how that legislation would be shaped. They successfully resisted federal interference with exclusionary election practices such as the poll tax and discriminatory literacy tests. In the 1930s these practices limited black voting in the South to about 4 percent of the black population. They also resisted federal interference with the violence used to preserve white supremacy. The ultimate violence was lynching and killing, which was frequently used against blacks for perceived sexual improprieties against white women. In the first year of the New Deal, 1933, there were 28 lynchings of blacks in the South. Southern Democrats opposed federal intervention on states' rights grounds.

Southern Democrats were willing and in some cases enthusiastic about legislation to improve the status of workers, such as minimum wages, rights of workers to unionize, and unemployment assistance, so long as Southern blacks were largely excluded from the benefits. At the start of the New Deal, more than two-thirds of Southern blacks worked in agriculture and related food processing industries or as domestic household help. Southerners in Congress insisted on provisions that excluded these workers from many New Deal programs. Workers in agriculture and domestic households were not covered by minimum wage and hour codes established under the National Recovery Administration. They were excluded from subsequent federal minimum wage laws and the Social Security Act. Agricultural and domestic workers also were excluded from the Wagner Act that gave workers the right to organize and bargain collectively.

Southerners succeeded in weakening the United States Employment Service, a federal agency with programs designed to reduce unemployment by matching workers to available jobs and administer unemployment compensation. There were strong Southern concerns that these powers would be used to undermine the Southern economic structure that limited blacks to low paying jobs. The South was successful in taking the administration of unemployment programs away from the federal government and giving the responsibility to the states.

Southerners had negative feelings about unionization, particularly unions affiliated with the Congress of Industrial Organizations. The CIO was not supportive of racial discrimination, and it threatened Southern white domination of better paying industrial jobs. Although the Southern Democrats supported 1930s legislation giving workers the right to organize, after World War II the South turned anti-union. They joined with the Republicans to pass the Taft–Hartley Act, which limited labor strength in a number of ways, including allowing the states to pass right-to-work laws.

Ultimately, the South's efforts to preserve white supremacy were undermined by the economic development of the South fostered by the New Deal and the war. Katznelson concludes that "The New Deal—the New Deal of the CIO and the welfare state—produced at first mere chinks, then whole openings for social change that were grasped by an incipient, soon powerful, movement for equal rights for blacks."

In the international arena, Southern Democrats were key to legislation that enabled the United States to provide important assistance to Britain and the Soviet Union in the years before we entered the war against Nazi Germany. Southern support for the allies surprised some in Nazi Germany, who had thought that Southerners would understand Nazi theories of racial superiority. Katznelson finds a number of explanations for the South's support of Britain. More than 90 percent of Southern whites traced their roots to England. Southern evangelicals resented Nazism's "anti-Christian impulses." In addition, Germany was hurting the South economically. Germany's expansion closed many European markets to Southern tobacco and cotton.

Southern support was critical to the passage of legislation allowing the United States to provide assistance to Britain in the years before we entered the war. Legislation to continue military conscription shortly before Pearl Harbor was passed by the House by one vote. Southerners voted in favor, 123–8.

After World War II, Southerners supported an activist role for the United States in opposing Soviet expansion in Europe. Their support was critical since many Republicans were isolationist or mainly interested in opposing communist expansion in the Far East.

The other major focus of Katznelson is on the debate during the 1932-1953 period about whether our economic and political system should be converted to a system of centralized planning. Under such a system, competition would be replaced by the government promoting or requiring cooperation between the government, industrial firms, and workers. At the start of the Great Depression, there was considerable doubt over whether parliamentary democracies and competitive capitalism could provide economic well-being. As Katznelson describes it, at the start of the New Deal, with 25 percent unemployment in the United States and the financial system in chaos, the "nay sayers. . . . claimed that liberal democracies were . . . too enthralled with free markets to manage a modern economy successfully."

The president of Columbia University, Nicholas Murray Butler, told the freshman class in 1932 that dictatorships were putting forward "men of far greater intelligence, far stronger character and far more courage than the system of elections." Some suggested that we should follow Mussolini's example of fascist dictator and a controlled economy (This was before Mussolini was discredited by his association with Nazi Germany). As Senator David Reed of Pennsylvania said in 1932, "If this country ever needed a Mussolini it needs one now. . . . Leave it to Congress [and] we will fiddle around here all summer trying to satisfy every lobbyist, and we will go nowhere. . . . The country wants stern action and action taken quickly."

During the 1930s much of the world turned to authoritarian forms of government, and parliamentary democracies were rare beyond North America, England, France, the Low Countries, and Scandinavia.

In the United States the New Deal never abandoned the concept that the economy should be regulated under laws passed by Congress. But the early New Deal did move toward transitioning from a competitive economy to a controlled "cooperative" economy, in which economic decisions would be made to satisfy national interests rather than by the results of decisions made by individual businesses operating in their self-interest. The National Recovery Administration, established in 1933, abandoned the competitive approached and allowed firms in an industry to agree on prices and wages. NRA had limited success and ultimately was declared unconstitutional by the U.S. Supreme Court. The later New Deal returned to the concept of a competitive economy, constrained by some regulation designed to protect consumers and workers.

In World War II the need to provide our large military force with expensive

supplies and equipment led to a controlled economy, with government decisions playing a major role in allocating raw materials, and establishing levels of output, prices, and wages.

After the war, there was some sentiment for continuing to have the economy run under government planning, but this was not the majority view. Southern Congressmen generally opposed federal planning, fearing it would be a tool for enhancing the economic position of blacks. In 1942 and 1943, Southerners defunded the National Resources Planning Board, which was the main federal agency considering enhanced federal planning for the postwar economy. Katznelson concludes that some of the concepts of a planned economy survived in the Cold War in the industries supporting national defense and security. For the rest of the economy, the consensus, made final in the Eisenhower years, was to reject the concept that the federal government would direct industries through democratic planning. Rather, economic outcomes would be determined by competition based on self-interest. The government would support the overall economy by general fiscal management, including decisions on government spending and taxation and interest rates. There would continue to be a safety net and regulation to ameliorate the harshest effects of competition.

This consensus has been our basic approach for the past 50 years, although the role of government has been challenged from the Right in the Reagan years and more recently by the Tea Party and allied conservatives. We also have preserved a democratic system based on a rule of law. Katznelson helps us to understand that these outcomes were not inevitable in a country faced with "Fear Itself" over a 1930s economy that seemed unable to reduce employment below 20 percent, and the threats from totalitarian enemies in the 1940s and 1950s. At the same time, Katznelson forces us to be aware that the cost of preserving our economic and political system was the continued harsh treatment of large numbers of Americans. In Katznelson's words, "liberal democracy prospered as a result of an accommodation with racial humiliation and its system of lawful exclusion and principled terror." We should not ignore the dark side of the New Deal.

David Heymsfeld retired from the federal service in 2011 after a long career that included service as staff director of the House Committee on Transportation and Infrastructure.

Legal Beat

continued from page 21

ard faced off before D.C. Bar President Andrea Ferster and D.C. Court of Appeals senior Judges Inez Smith Reid and John Steadman, who also served as judges for the competition. Leslie and teammate Amanda Butler-Jones were more persuasive in their arguments and won the competition.

In addition to American and Howard, schools that took part in the competition included Catholic University of America Columbus School of Law, The George Washington University Law School, Georgetown University Law Center, and University of the District of Columbia David A. Clarke School of Law.—*K.A.*

Harvard Prof. Lazarus Shares Insights at Sections Legends Event

On May 1 Harvard Law Professor Richard Lazarus shared stories from his legal career within government and academia as part of the D.C. Bar's Environment, Energy and Natural Resource Section's Legends of Environmental Law Speaker Series.

Lazarus recounted his "unsettling" story of how he decided to study and go on to practice environmental law. After graduating high school at 16, he was unsure of what he wanted to do, and, after some drifting, realized he could "marry his passions and abilities" in the field of environmental law. At the time, the U.S. Environmental Protection Agency was in its infancy, and the field of environmental was brand new.

Upon completing law school, Lazarus began what he called "the best job in the world" at the Environment & Natural Resources Division at the U.S. Department of Justice, where he later returned as assistant to the solicitor general. Throughout his legal career, Lazarus has been involved in more than 40 U.S. Supreme Court cases.

Moderator Jamie Auslander, a principal at Beveridge & Diamond, P.C., asked Lazarus to share some of his most memorable moments in front of the Supreme Court. "It is unbelievably terrifying [and] thrilling at the same time," Lazarus said. He spoke of how he was always worried about what his father called "imposter syndrome," or, the fear that he would be "exposed" for not being prepared enough in front of the justices.

Lazarus recounted an instance in which Justice John Paul Stevens asked him about Section 215 of the Social Security Act, a section that Lazarus did not know. Shaken, but thinking on his feet, Lazarus asked the justice if he had meant to ask about Section 512 of the Social Security Act instead. Justice Stevens paused and then confirmed that he had actually meant to ask about Section 512, one that Lazarus was very familiar with.

On the evolution of environmental law, Lazarus said he was disappointed with the past 24 years during which Congress has "completely abdicated [its] responsibility to draft environmental legislation." Because of this, environmental agencies must rely on statutes drafted more than 20 years ago in a field that is rapidly evolving.—*D.O.*

Reach D.C. Bar staff writers Kathryn Alfisi and David O'Boyle at kalfisi@dcbar.org and doboyle@dcbar.org, respectively.

New Bar Members Must Complete Practice Course

New members of the District of Columbia Bar are reminded that they have 12 months from the date of admission to complete the required course on the D.C. Rules of Professional Conduct and District of Columbia practice offered by the D.C. Bar Continuing Legal Education Program.

D.C. Bar members who have been inactive, retired, or voluntarily resigned for five years or more also are required to complete the course if they are seeking to switch or be reinstated to active member status. In addition, members who have been suspended for five years or more for nonpayment of dues or late fees are required to take the course to be reinstated.

New members who do not complete the mandatory course requirement within 12 months of admission receive a noncompliance notice and a final 60-day window in which to comply. After that date, the Bar administratively suspends individuals who have not completed the course and forwards their names to the clerks of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia, and to the Office of Bar Counsel.

Suspensions become a permanent part of members' records. To be reinstated, one must complete the course and pay a $50 fee.

The preregistration fee is $219; the onsite fee is $279. Courses will be held June 10, July 12, August 12, and September 13. Advanced registration is encouraged.

For more information or to register online, visit www.dcbar.org/membership/mandatory-course.cfm.

attorney briefs

By David O'Boyle

Honors and Appointments

Christopher I. Moylan was accepted for membership by the Swedish-American Bar Association… **Mary L. Smith**, general counsel of the Illinois Department of Insurance, has been elected president of the National Native American Bar Association… **David C. Frederick**, a partner at Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC, has joined the board of directors at the American Constitution Society for Law and Policy… The U.S. Senate has confirmed **Christopher R. Cooper**, a former partner at Covington & Burling LLP, as a federal judge on the U.S. District Court for the District of Columbia… **Andrew Greenfield**, a partner at Fragomen, Del Rey, Bernsen & Loewy LLP, has been elected to the firm's global executive committee, and also has been appointed by the U.S. Secretary of Commerce to the board of directors of Brand USA, a public-private partnership established by Congress to promote international travel to the United States… **Suzanne Rich Folsom** has been appointed general counsel and senior vice president of governmental affairs at United States Steel Corporation… **David P. Clark** has been appointed by the U.S. comptroller general as an administrative judge and member of the Government Accountability Office's Personnel Appeals Board.

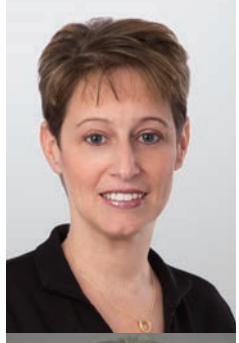
On the Move

Rebecca N. Zelenka, a member of the corporate team at Fried, Frank, Harris, Shriver & Jacobson LLP, has been elected partner. **Michael J. Anstett** and **Jennifer Wollenberg** have been promoted to special counsel on the firm's litigation team… **Markus B. Heyder** has joined the Centre for Information Policy Leadership at Hunton & Williams LLP as vice president and senior policy counselor. **Djordje Petkoski** and **Susan F. Wiltsie** have been promoted to partner at the firm… **Amy Davine Kim** has joined BuckleySandler LLP as counsel in the firm's anti-money laundering and Bank Secrecy Act practice… **Praveen Goyal** has joined Hogan Lovells as counsel in the firm's government regulatory practice… **Michelle E. O'Brien** has joined the Marbury Law Group in Reston, Virginia, as partner. **Louis Troilo** has joined as associate… Commercial litigator and compliance counselor **Daniel T. O'Connor** has joined the legal affairs department of 3M Company in St. Paul, Minnesota… **Charles Duross** has joined Morrison & Foerster LLP as head of the firm's global anti-corruption practice… **David Folds** and **John McJunkin** have joined the financial institutions team at Baker, Donelson, Bearman, Caldwell & Berkowitz, PC as shareholder. **Dan Carrigan** joins as of counsel. **Craig D. Rust** joins the firm as associate… **Matthew Rossi** and **Laurence Urgenson** have joined Mayer Brown LLP as partner… **Jon R. Fetterolf** has joined Zuckerman Spaeder LLP as partner… **Randall Reaves** has joined the law division of the National Trust for Historic Preservation as attorney and director of contracts… **Raymond F. Monroe** has joined Miles & Stockbridge P.C. as principal in the firm's government contracts practice… **Christopher E. Ondeck** has joined the litigation team at Proskauer Rose LLP as partner… **Christian R. Bartholomew** has joined the securities litigation and enforcement team at Jenner & Block LLP… **Philip Macres** has joined Klein Law Group PLLC as principal… Baker, Donelson, Bearman, Caldwell & Berkowitz, PC attorney **Alicia L. Chestler** has been elected as shareholder at the firm.

Company Changes

Paul Varela and Todd Metz have launched **Varela, Lee, Metz & Guarino LLP**, a construction and engineering law firm with offices in Tysons Corner, Virginia, and San Francisco… **Tully Rinckey PLLC** has moved its Washington, D.C., office to 815 Connecticut Avenue NW.

Grace O. Aduroja has joined Polsinelli PC as associate on the firm's government contracts practice team.



Erica Weiss has joined Holland & Knight LLP as partner on the firm's real estate team.

William D. Nussbaum has joined Saul Ewing LLP as partner in the firm's higher education and commercial litigation practices.

Author! Author!

Ira P. Robbins, a professor of law at American University Washington College of Law, has coauthored an article with U.S. District Judge **Mark W. Bennett** titled "Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing," published in the *Alabama Law Review*, volume 63, issue 3. This is the first-ever survey of all federal district judges regarding the role of allocution in federal sentencing… **Mark A. Bardley** has written *A Very Principled Boy: The Life of Duncan Lee, Red Spy and Cold Warrior*, which was published by Basic Books.

D.C. Bar members in good standing are welcome to submit announcements for this column. When making a submission, please include name, position, organization, and address. Please e-mail submissions to D.C. Bar staff writer David O'Boyle at doboyle@dcbar.org.

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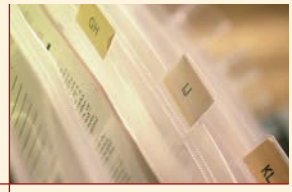

Note: Unless otherwise indicated, all D.C. Bar events are held in the D.C. Bar Conference Center at 1101 K Street NW, first floor. For more information, visit www.dcbar.org or call the Sections Office at 202-626-3463 or the CLE Office at 202-626-3488. CLE courses are sponsored by the D.C. Bar Continuing Legal Education Program. All events are subject to change.

JUNE 3

Corporate Tax, Part 5: Section 355 Update
12–2 p.m. Sponsored by the Corporate Tax Committee of the Taxation Section.

Nuts and Bolts of Employment Discrimination Law
6–9:15 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section; Health Law Section; Labor and Employment Law Section; and Litigation Section.

JUNE 4

Basic Training and Beyond, Day 1: How to Start a Law Firm
9:15 a.m.–4:30 p.m. Sponsored by the D.C. Bar Practice Management Service Committee. Contact Daniel M. Mills or Rochelle D. Washington, assistant director and senior staff attorney, respectively, of the Practice Management Advisory Service, at dmills@dcbar.org and rwashington@dcbar.org, or call 202-626-1312.

Representing Clients in White Collar Criminal Investigations
6–9:15 p.m. CLE course cosponsored by the Antitrust and Consumer Law Section; Courts, Lawyers, and the Administration of Justice Section; Criminal Law and Individual Rights Section; Health Law Section; and Litigation Section.

JUNE 5

Lunch and Learn: A Day in the Life of an Entertainment Lawyer
12–2 p.m. Sponsored by the D.C. Bar Practice Management Service Committee. Contact Daniel M. Mills or Rochelle D. Washington, assistant director and senior staff attorney, respectively, of the Practice Management Advisory Service, at dmills@dcbar.org and rwashington@dcbar.org, or call 202-626-1312.

The Developing Regulatory Framework Under the Dodd–Frank Act for Municipal Advisors
12–2 p.m. Sponsored by the Broker-Dealer Regulation and SEC Enforcement Committee of the Corporation, Finance and Securities Law Section and cosponsored by the Administrative Law and Agency Practice Section; Courts, Lawyers and the Administration of Justice Section; Law Practice Management Section; and Litigation Section.

JUNE 6

An Introductory Course on Wills and Advance Directives
9:30 a.m.–1 p.m. Sponsored by the D.C. Bar Pro Bono Program, Catholic Charities Legal Network of the Archdiocese of Washington, Columbus Community Legal Services of the Catholic University of America, and Legal Counsel for the Elderly and cosponsored by D.C. Bar Estates, Trusts and Probate Law Section, Health Law Section, and Litigation Section.

Advanced Effective Writing for Lawyers Workshop
9:30 a.m.–1:45 p.m. CLE course cosponsored by all sections of the D.C. Bar.

JUNE 9

Contacts With Represented and Unrepresented Persons: Ethics Issues for D.C. Lawyers
6–8:15 p.m. CLE course cosponsored by all sections of the D.C. Bar.

JUNE 10

Bankruptcy Training for Pro Bono Attorneys, Part 1
9 a.m.–4 p.m. Sponsored by the D.C. Bar Pro Bono Program Bankruptcy Clinic, the American College of Bankruptcy, and the American College of Bankruptcy Foundation and cosponsored by Catholic Charities Legal Network of the Archdiocese of Washington, Legal Counsel for the Elderly, and the D.C. Bar Antitrust and Consumer Law Section, Corporation, Finance and Securities Law Section, District of Columbia Affairs Section, and Litigation Section.

JUNE 11

The SEC Speaks to the D.C. Bar, Part 1: SEC Director of Enforcement Andrew Ceresney
12–2 p.m. Sponsored by the Broker-Dealer Regulation and SEC Enforcement Committee of the Corporation, Finance and Securities Law Section and cosponsored by the Federal Bar Association and the D.C. Bar Administrative Law and Agency Practice Section; Arts, Entertainment, Media and Sports Law Section; Courts, Lawyers and the Administration of Justice Section; Law Practice Management Section; and Litigation Section. K&L Gates LLP, 1601 K Street NW.

Media Law Committee Brown Bag Lunch
12:15–1:30 p.m. Sponsored by the Media Law Committee of the Arts, Entertainment, Media and Sports Law Section. The Washington Post, 1150 15th Street NW.

Free Monthly Networking Event for Environmental Professionals
5:30–7:30 p.m. Sponsored by the Air and Water Quality Committee of the Environment, Energy and Natural Resources Section and cosponsored by the Environmental Law Institute. Laughing Man Tavern, 1306 G Street NW, Sideline Room (Lower Level).

Guardianships and Conservatorships in the District of Columbia
6–9:15 p.m. CLE course cosponsored by the Estates, Trusts and Probate Law Section; Family Law Section; Health Law Section; and Labor and Employment Law Section.

JUNE 12

Bankruptcy Training for Pro Bono Attorneys, Part 2
9 a.m.–4 p.m. See listing for June 10.

10th Annual Legends of the D.C. Bar Luncheon
12–1:30 p.m. Sponsored by the Law Practice Management Section and cosponsored

by the Administrative Law and Agency Practice Section and Health Law Section.

Lunch and Learn: What Small Firm Lawyers Need to Know About Malpractice Insurance
12–2 p.m. See listing for June 5.

Tax Audits and Litigation, Part 8
12–2 p.m. Sponsored by the Tax Audits and Litigation Committee of the Taxation Section.

JUNE 13

The Changing Legal Landscape of Foreclosures in the District of Columbia
11:30 a.m.–2:30 p.m. Sponsored by the Antitrust and Consumer Law Section and cosponsored by the Administrative Law and Agency Practice Section; Courts, Lawyers and the Administration of Justice Section; Litigation Section; and Real Estate, Housing and Land Use Section.

JUNE 16

ADA Employment Law and Litigation Update 2014
6–9:15 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section; Corporation, Finance and Securities Law Section; Labor and Employment Law Section; and Litigation Section.

JUNE 17

The SEC Speaks to the D.C. Bar, Part 2: SEC General Counsel Anne Small
12–2 p.m. See listing for June 11.

2014 Presidents' Reception to Benefit the D.C. Bar Pro Bono Program
6–7:30 p.m. Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW, East Ballroom. Contact Kathy Downey at 202-588-1857 or kdowney@erols.com.

Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting
7–9 p.m. Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW. Contact Verniesa R. Allen at 202-737-4700, ext. 3239, or annualmeeting@dcbar.org.

JUNE 18

Preserving Intellectual Property Rights in Government Contracts: A Beginner's Guide, Part 1
6–9:15 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section; Government Contracts and Litigation Section; and Intellectual Property Law Section.

JUNE 19

State and Local Taxes, Part 6
12–2 p.m. Sponsored by the State and Local Taxes Committee of the Taxation Section.

International Law Section Speed Networking Event
8–10 a.m. Sponsored by the International Trade Committee of the International Law Section and cosponsored by the International Trade Committee of the American Bar Association Section of International Law and the Virginia State Bar International Practice Section. Arnold & Porter LLP, 555 12th Street NW.

Preserving Intellectual Property Rights in Government Contracts: A Beginner's Guide, Part 2
6–9:15 p.m. See listing for June 18.

JUNE 20

How to Be a Successful Associate
12–1:30 p.m. Sponsored by the Sections Office.

JUNE 23

Can They Fire Me for Putting That on Facebook?
6–9:15 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section; Criminal Law and Individual Rights Section; Family Law Section; Health Law Section; Intellectual Property Law Section; Labor and Employment Law Section; Law Practice Management Section; and Litigation Section.

JUNE 24

50 Hot Technology Tips
12–1:30 p.m. Sponsored by the Law Practice Management Section.

JUNE 25

Basic Training and Beyond, Day 2: How to Grow a Law Firm
9:15 a.m.–4:30 p.m. See listing for June 4.

Ethics and the Government Lawyer 2014: Hot Topics and Current Issues
5:30–8:45 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section; Antitrust and Consumer Law Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Environment, Energy and Natural Resources Section; Family Law Section; Health Law Section; International Law Section; Labor and Employment Law Section; and Litigation Section.

Bar Counsel

continued from page 15

obtain client consent before using funds for attorney fees, failing to communicate with a client, and a lack of competence in handling a client's matter.

Informal Admonitions Issued By the Office of Bar Counsel

IN RE VIVIEN J. COCKBURN. Bar No. 459931. March 13, 2014. Bar Counsel issued Cockburn an informal admonition. While serving as prosecutor assigned to a case wherein the accused was charged with first-degree felony murder and other charges in relation to the stabbing death of a victim, Cockburn knew or should have known information that tended to negate the guilt of the accused but failed to disclose this information to the defense and engaged in conduct that seriously interferes with the administration of justice. Rules 3.8(e) and 8.4(d).

IN RE RODNEY C. MITCHELL. Bar No. 489439. March 14, 2014. Bar Counsel issued Mitchell an informal admonition. While retained to represent a client in two related civil matters, Mitchell failed to safeguard the client's property and promptly deliver it to the client. Additionally, in connection with the termination of representation, respondent failed to take timely steps, to the extent reasonably practicable, to surrender papers and property to which the client was entitled. Rules 1.15(a), 1.15(c) and 1.16(d).

IN RE MICHAEL A. ROMANSKY. Bar No. 942169. March 13, 2014. Bar Counsel issued Romansky an informal admonition for failing to report a 2006 guilty plea in the Circuit Court of Arlington County, Virginia to the District of Columbia Court of Appeals and the Board of Professional Responsibility, as required pursuant to DCCA Rule XI, § 10.

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted at www.dcattorneydiscipline.org. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.*

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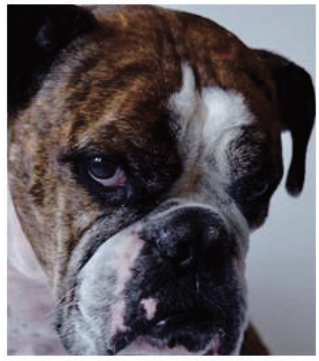

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legal spectator

By Jacob A. Stein

The Knock on the Door

There are places where you can participate in a good conversation, and there are places where you can participate in a conversation that is not so good. Let's start with one that is not so good. I found it in a little book titled *An Essay on Conversation.* It was written by Henry W. Taft and published in 1927. Mr. Taft was a prominent lawyer like his older brother, lawyer and President William Howard Taft. Although Henry W. Taft served with distinction as the Grand Master of the Wine and Food Society and as president of the New York City Bar Association, his contemporaries found him a bit stuffy. He was not a good conversationalist.[1]

Mr. Taft commences his essay in the grand tradition, mourning over the death of the gentle art of the times and places for good conversations. After the preliminaries, he says the best conversations were the ones heard at the old English dinner parties and in the famous French salons of the 18th century.

He says based on his personal experience, the conversation is good at a dinner party of six or eight people, people of breeding, the best people, the people with the common decency to be of fine parentage.

I regret that lawyers in court are where the conversation is not so good. The trial is over. The judge has given the instructions. The closing argument has been made, and the jury is in the jury room.

The lawyers and the clients have the courtroom to themselves. They wait for that deadly knock on the jury door with its note or its verdict.

As time passes, the lawyers drift away from their clients and converse between themselves, gently criticizing the judge.

Plaintiff's lawyer (PL): *Bill, have you been before this judge? I haven't.*

Defendant's lawyer (DL): *Yes, I have.*

PL: *What is her background?*

DL: *I recall she was a prosecutor.*

PL: *You know, I thought that.*

DL: *What made you think that?*

PL: *She ran this case with no waste of time. She let me put on only one expert.*

DL: *You are lucky you got one expert.*

PL: *She only gave 45 minutes for lunch.*

DL: *Listen, I could do without lunch.*

PL: *Well, she left on her big evidentiary ruling, I think it is appealable.*

DL: *I heard that three people left the Lincoln firm. What was the trouble?*

PL: *I heard some things but I really don't know.*

Then the lawyers talk about their cases. Vanity often sneaks into the conversation. Stories are told. The brilliant cross-examination. They ask each other about certain clients. One lawyer suggests that the attorney–client privilege prevents him from disclosing several big secrets he's been keeping.

Each lawyer has his iPad. Each sends and receives e-mails and makes and receives phone calls. All this out in the corridor.

Off and on, a client wants to talk with his lawyer about the case. Did the main witness come off well? Is juror No. 3 on their side? How long will it be before a verdict? Should we have settled? If we lose, is there an appeal? Where is there a good place to eat?

Three hours later, the lawyers are told by one of the clerks that the foreman of the jury has a note. In a few minutes, the clerk enters the courtroom. She takes her seat below the bench. The court reporter enters the court. Then the judge takes the bench. "Remain seated. Counsel, the jury sent a note. The clerk has it. I shall ask the clerk to read it and then bring the jury back, and I will read the note to the jury." The lawyers do their best to appear nonchalant. It's very hard, though: The note may give an insight into what the verdict will be.

In a personal injury case, the note may say, "The jury would like the Judge to have the reporter read again the law on contributory negligence." This is bad news for the plaintiff. In the District of Columbia, Maryland, and Virginia, if the jury finds that the plaintiff's negligent conduct contributed to the accident, then the plaintiff loses despite the fact that the defendant's negligence is much greater than the plaintiff's. Contributory negligence is a harsh, archaic doctrine.

On the other hand, a note that says, "We would like to know how much the plaintiff sued for," would be good news for the plaintiff.

The judge tells the jury the part of the instruction that the jury has requested. The judge then tells the jury to return to the jury room and continue the deliberations.

Now there will be a real conversation by the lawyers concerning the prospect of a settlement. The lawyers leave the courtroom and, preliminarily, one says to the other, "We are here for a long time. What is your rock bottom number? I'll call the home office. Let's get out of here. The adjuster leaves at 5 p.m. It is 4:45 now. I think I can resolve this and we'll get home before 6."

Reach Jacob A. Stein at jstein@steinmitchell.com.

Notes

1 *Causes and Conflicts* by George Martin, 1970, *Houghton* Mifflin Company.

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