JANUARY 2010

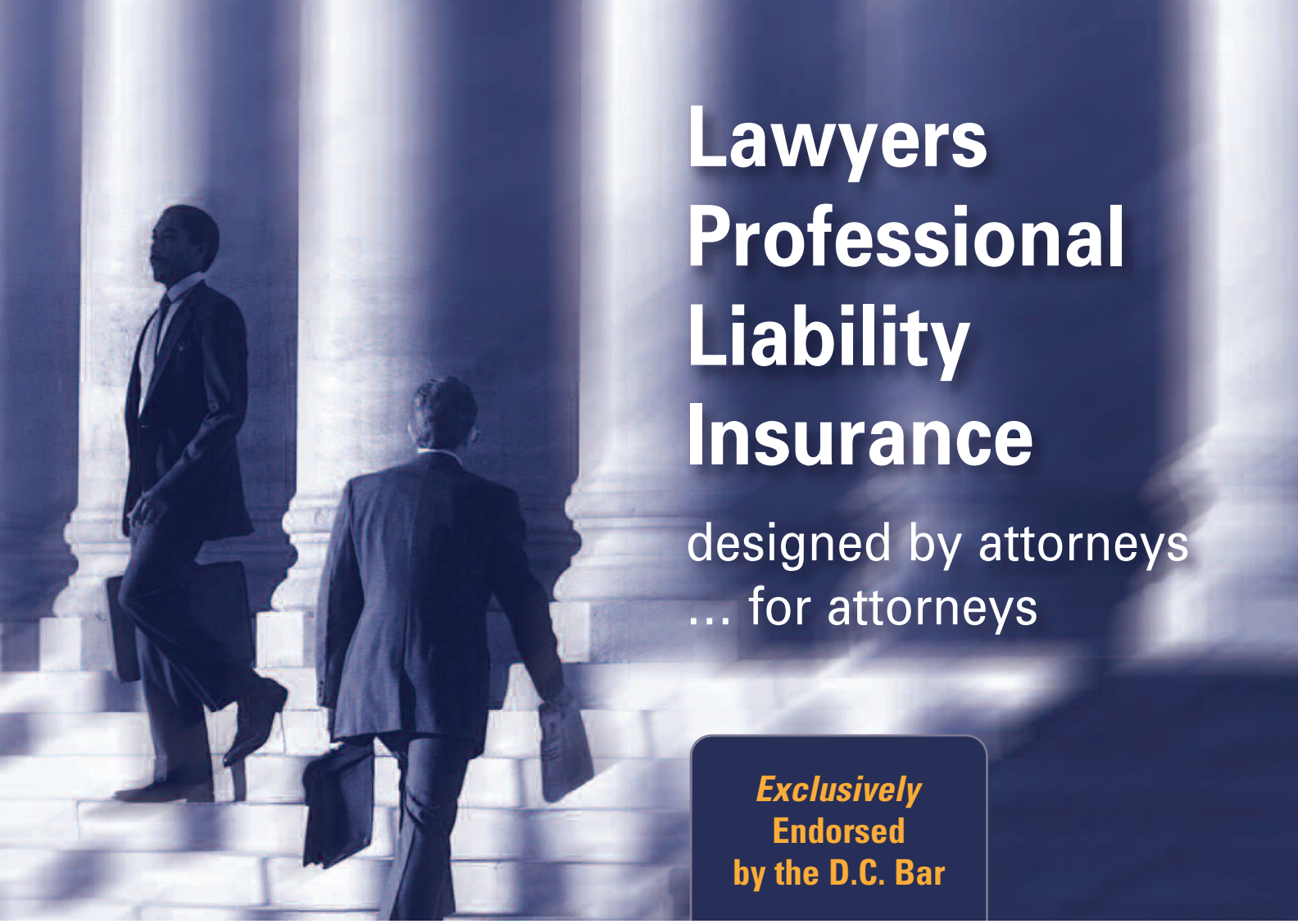
Washington Lawyer

THE OFFICIAL JOURNAL OF THE DISTRICT OF COLUMBIA BAR

Financial Crisis 2008:

Where were the lawyers?

By Sarah Kellogg



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letters

Standing Guard Against Gradual Gun Regulation

In Ronald Goldfarb's November 2009 "Books in the Law" review, he leaves unchallenged the straw man arguments posited by Dennis A. Henigan in his antigun book *Lethal Logic: Exploding the Myths That Paralyze American Gun Policy.* After implying that those who support the right to keep and bear arms "[defy] civil discourse and rational debate," Goldfarb also questions why some support the right so fervently. To answer this question, I suggest that Goldfarb consider the rationale for the Second Amendment's inclusion in the Bill of Rights, which Thomas Jefferson described as follows:

> The strongest reason for the people to retain the right to keep and bear arms is, as a last resort, to protect themselves against tyranny in government.

Advocates for the right to keep and bear arms often face criticism when discussing its primary rationale. Many who favor increased gun regulation feel that the right has no place in a peaceful society. They do not believe that our government could ever go the way of the Stalin regime or the Khmer Rouge era. Henigan appears to be of this mindset and tries to convince readers that the "slippery slope" argument—allowing some gun control will lead to increased regulation until the right to keep and bear arms is eviscerated—is absurd. He indicates that incremental reform would never lead to our government banning guns. As Goldfarb's article suggests, "banning guns is not the goal of most gun control advocates."

Interestingly enough, Henigan has supported just the kind of legislation that would effectively ban an entire class of firearms—handguns—by affixing his name to an amicus brief filed with the United States Supreme Court in support of such a law in the District of Columbia.

It is this sort of incremental change against which our Founding Fathers had warned. In Jefferson's words, "even under the best forms of government those entrusted with power have, in time, and by slow operations, perverted it into tyranny." James Madison, in a speech at the Virginia Ratifying Convention in 1788, agreed and stated that "there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations."

It is because of this type of "gradual and silent encroachments" that supporters of all of our civil rights must remain vigilant, for once lost such rights are not easily regained. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

—John H. Doyle
Ruther Glen, Virginia

Advice for the Brave and the Solos

D.C. Bar President Kim M. Keenan gives a plethora of advice for solo practitioners in her November 2009 column, including the John Paul Jones quotation:

> It seems to be a law of nature, inflexible and inexorable, that those who will not risk cannot win.

After a career of 53 years as a solo spread across the states of Maryland and Missouri and the District of Columbia, may I offer this quotation:

> Only those lawyers with extraordinary determination, aggressiveness, independence, courage, and talent should endeavor to become solo.

—Bill D. Burlison
Advance, Missouri

Let Us Hear From You

Washington Lawyer *welcomes your letters. Submissions should be directed to Washington Lawyer, District of Columbia Bar, 1101 K Street NW, Suite 200, Washington, DC 20005-4210. Submissions are also accepted by fax at 202-626-3471 or by e-mail at communications@dcbar.org. Letters may be edited for clarity and space.*

from the president

By Kim M. Keenan

Jacqueline Hicks

Taking Charge of Our Future: D.C. Bar Rolls Out Strategic Plan

"Strategic planning is worthless—unless there is first a strategic vision."

—John Naisbitt

Strategic planning is not a sexy subject. Whether you envision squishy topics or lofty but unreachable goals, strategic planning is usually not at the top of our "things to do" list. Luckily for the D.C. Bar and its members, Immediate Past President Robert J. Spagnoletti is a man with a plan. In the fall of 2008, at his request, the Bar's Board of Governors created a special committee chaired by Amy L. Bess and James W. Jones and charged with formulating our first strategic plan.

To understand the plan, it is helpful to understand the process. With the help of an experienced association professional, the Bar gathered input from all of its constituents; members representing diverse practice areas; Bar leaders and staff; pro bono, sections, and voluntary bar leaders; and representatives from the courts. In sum, everyone in our universe. The result is a document that will serve as the touchstone for the best use of the Bar's resources within the confines set by the District of Columbia Court of Appeals and our membership. Using the context and goals of the plan, we will be able to track and measure our success.

The strategic planning process included focus groups, telephone interviews, and a survey of members, past presidents, and staff. The results provide insight into the unique stature of our Bar. For instance, our most familiar service is the production and publication of *Washington Lawyer* magazine, followed closely by our Web site, www.dcbar.org. But what's more telling is the fact that neither of our next two most popular services is supported by Bar dues—the Continuing Legal Education (CLE) Program, which is widely utilized by members, and the award-winning Pro Bono Program, which sponsors, among other things, advice and referral clinics in both English and Spanish, as well as several successful resource centers at the Superior Court of the District of Columbia. Other recognized services and programs include our member benefit products and services, section membership, Lawyer Assistance Program, and Legal Ethics advice line.

The Strategic Plan, as approved by the Board of Governors, is available in its entirety online at www.dcbar.org and can be accessed using the keywords "Strategic Plan" in the search field. At the heart of the plan we lay out our "Envisioned Future" where the D.C. Bar "is recognized as the national leader in the legal profession for professional excellence, preeminent programs, and exemplary public service." With a membership nearing the six-figure range and a core of local attorneys representing every practice area while providing cutting-edge pro bono service, we already are poised to make our envisioned future a reality.

The strategic planning process included focus groups, telephone interviews, and a survey of members, past presidents, and staff. The results provide insight into the unique stature of our Bar.

In a city where "lawmaking" is at the core of daily life, our mission to serve the professional interests of members, improve the administration of justice, and promote access to justice is even more relevant.

Seven goals, which track the mission of the Bar, provide the foundation for the plan:

- We will maintain our leadership in implementing innovative programs and strategies designed to enhance access to justice. By collaborating with the courts, legal services providers, and lawyers, we maximize the effectiveness of our pro bono activities.
- We will brand the Bar based on the unique composition of its membership, the depth and breadth of its services, and its culture of public service.
- We will enhance our membership with programs and services that advance and support professional integrity and conduct.
- We will regularly engage members through multiple channels and fully utilize technology to enhance the effectiveness of member communications.
- We will continue to expand our online delivery of educational programs and resources.
- We will recognize the integral role of the Bar's sections in providing relevance and value to our core membership.
- We will provide the Bar with financial stability and the ability to fund new initiatives consistent with the strategic plan.

Adopting this strategic plan is just the beginning of the story. We have begun the work of reviewing our programs and evaluating their utility in light of our goals. Next, we will determine our priorities in light of our financial position. Finally, we will set benchmarks so that our progress is measurable. With this foundation firmly in place, we will achieve our vision of the Bar's future.

Like any plan, there will be twists, turns, and adjustments, but with this process firmly in place, our Board of Governors can focus on how and whether its decisions fit into the overall direction of the Bar. At the end of the day, we must serve our members bigger, better, and faster using collaboration, innovation, technology, and of course, leadership. As we begin a new year, we already are testing leadership training with the voluntary bar associations at our monthly meetings. Nothing in the plan changes our motto: Service, Integrity, and Leadership.

One of my mentors is always talking about having a plan. To him, everything begins with your plan. If you do not have a plan, you will never reach your goals. One thing is for sure: If you have the right vision, the right plan will take you anywhere you want to go.

Kim M. Keenan can be reached at kkeenan@dcbar.org.

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Perspectives on Corporate eDiscovery and Social Media

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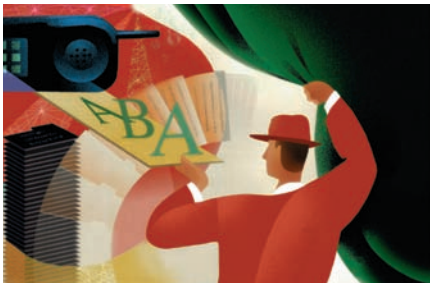
An ALM Event

bar happenings

By Kathryn Alfisi



Mick Wiggins

Mediation, Ethics of Social Media Among January CLE Offerings

In January the D.C. Bar Continuing Legal Education (CLE) Program will hold two new courses on mediation and ethics.

"Effective Mediation Advocacy" on January 11 offers practical information and practice tips to help attorneys achieve the best possible results for their clients. Faculty will discuss the key skills needed for an effective mediation—from selecting a mediator to closing the mediation.

Courtesy of McGuireWoods LLP

Thomas E. Spahn

Participants also will learn how to better prepare clients for their roles in mediation and to make persuasive opening remarks. The course will explore the techniques for conveying offers and counter-offers, how to gain assistance from mediators to achieve client goals, the advantages and disadvantages of various mediation strategies, and important ethical issues in the mediation context, including confidentiality, conflicts of interest, and ethics issues for lawyers in court-ordered mediation.

Geoff A. Drucker of The McCammon Group and former D.C. Superior Court Chief Judge Rufus G. King III, who is now affiliated with McCammon, will lead this class.

The course takes place from 6 to 9:15 p.m. and is cosponsored by the D.C. Bar Litigation Section.

On January 20 attorneys will get the opportunity to learn the ethical limits of new communication technologies through the course "Ethics of E-Mail, Blogs, Twitter, and Other Social Networks."

Thomas E. Spahn, a partner at McGuireWoods LLP, will use hypothetical scenarios to explore the ethical implications of working with service providers and discarding electronic files, the duty to retain electronic communications when anticipating litigation, and the rules governing communications with adversaries.

The course takes place from 6 to 8:15 p.m. and is cosponsored by the D.C. Bar Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Environment, Energy and Natural Resources Section; Family Law Section; Labor and Employment Law Section; Law Practice Management Section; Litigation Section; and Real Estate, Housing and Land Use 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 Office at 202-626-3488 or visit www.dcbar.org/cle.

Two CLE Courses Tackle Business Basics

The D.C. Bar Continuing Legal Education (CLE) Program will offer in January two courses focusing on business issues for lawyers.

"Financial Accounting Basics for Lawyers" on January 14 will tackle the fundamentals of reading financial statements. This course offers a primer on the three types of financial statements: income statement, balance sheet, and statement of cash flows.

Participants will learn the different components of each type of financial statement and how they are interrelated, as well as a variety of technical accounting matters that attorneys encounter in their practice.

The course takes place from 6 to 8:45 p.m. with Howard Scheck, a partner at Deloitte Financial Advisory Services LLP, serving as faculty.

It is cosponsored by the D.C. Bar Corporation, Finance and Securities Law Section; Criminal Law and Individual Rights Section; Estates, Trusts and Probate Law Section; Family Law Section; Health Law Section; Labor and Employment Law Section; Law Practice Management Section; Litigation Section; and Taxation Section.

On January 26 Nicholas G. Karambelas of Sfikas & Karambelas LLP will teach the course "Choosing and Forming a Business Entity in the D.C. Metro Area," an introduction to the issues attorneys need to consider when starting their own law practice or advising business clients.

Participants will learn the differences among various business entity forms (corporate and noncorporate) as well as the legal concepts, organizational principles, advantages, and attributes of C and S corporations, statutory close corporations, limited liability companies (LLCs), partnerships, limited liability partnerships, and the Maryland business trust.

This class will conclude with a discussion on the drafting of an entity agreement, including drafting considerations and principles for shareholder agreements, partnership agreements, LLC operating agreements, and governing instruments of business trusts. Basic drafting techniques such as the structure/organization of the written entity agreement and use of particular language will be explored.

The course takes place from 6 to 9:15 p.m. and is cosponsored by the D.C. Bar Arts, Entertainment, Media and Sports Law Section; Corporation, Finance and Securities Law Section; District of Columbia Affairs Section; Family Law Section; Law Practice Management Section; and Real Estate, Housing and Land Use 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 Office at 202-626-3488 or visit www.dcbar.org/cle.

Medical Malpractice Course Offers Litigation Practice Pointers

On January 7 the D.C. Bar Continuing Legal Education (CLE) Program will provide attorneys up-to-date advice on how to handle medical malpractice litigation from both the plaintiff and defense perspective.

"How to Litigate a Medical Malpractice Case" features experienced medical malpractice practitioners and a sitting judge who will give practical pointers on discovery, litigation strategy, obtaining experts, mediation, settlement, and pretrial and trial matters.

Courtesy of Bruce J. Klores & Associates, P.C.

Bruce J. Klores

Participants will learn how to practice within the requirements of the Medical Malpractice Act of 2006 and be updated on important case law developments involving experts, jury instructions, and ex parte contact with witnesses.

At the end of this course, attorneys will learn how to find top-flight experts and correctly prepare a case for trial. Attendees also will be given an opportunity to consider the court's view of participants and malpractice cases.

Faculty includes D.C. Superior Court Judge Melvin R. Wright; Steven A. Hamilton of Hamilton Altman Canale & Dillon, LLC; and Bruce J. Klores of Bruce J. Klores & Associates, P.C.

The course takes place from 6 to 9:15 p.m. at the D.C. Bar Conference Center, 1101 K Street NW, first floor. It is cosponsored by the D.C. Bar Litigation Section and Tort Law Section.

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

Series Provides Overview of Health Law Practice

The D.C. Bar Continuing Legal Education (CLE) Program will kick off in January the six-part "Introduction to Health Law 2010" series, which is designed for lawyers entering the health law practice and seeking an overview, as well as for experienced practitioners looking to expand their ability to represent clients in the health care industry.

The series begins on January 21 with "Introduction to the U.S. Health Care System," which will cover the critical trends affecting U.S. health law. Faculty will discuss the growing problem of the uninsured, trends in employer-sponsored health coverage and public sources of health insurance such as Medicare and Medicaid, developments in the health care marketplace, health information technology and its implications, and key areas of federal and state regulation of the health care sector.

This session will be led by H. Guy Collier, a partner at McDermott Will & Emery, LLP, and Sara Rosenbaum, health law and policy professor at The George Washington University School of Public Health and Health Services.

Part two, "Introduction to Medicare" on January 28, will discuss Medicare administration, financing, eligibility, coverage, provider/supplier participation, and payment methodologies. Apart from basic information, this session also will highlight current issues on Medicare Parts A (hospital, inpatient services); B (physician and some outpatient services); C (Medicare Advantage–managed care); and D (Prescription Drug Program).

John F. Lessner, counsel at Erickson Retirement Communities, and Susan A. Turner, a principal at Ober|Kaler, will serve as faculty.

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

The series is cosponsored by the Hirsh Health Law and Policy Program of The George Washington University School of Public Health and Health Services and the D.C. Bar Health Law Section and Labor and Employment Law Section.

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

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

SAVE THE DATE! 2010 District of Columbia Judicial and Bar Conference

The 2010 District of Columbia Judicial and Bar Conference will be held on April 8 and 9 at the Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue NW. The theme of this year's conference is "Survival Strategies for Modern Legal Times." Please continue to check our Web site at www.dcbar.org/conference as details emerge. For more information, contact Verniesa R. Allen at 202-737-4700, ext. 3239.

speaking of ethics

By Hope C. Todd

Groundbreaking Rules or Breaking Ground Rules?

Mick Wiggins

Question: Lateral Lead Lawyer has represented Little Company for many years at Prestigious & Established, LLP. Up & Coming, LLP represents Big Company in Big vs. Little. *May Lateral Lead join Up & Coming?*

Answer (Choose One):

A. No. The imputation of conflicts rule (Rule 1.10) will prevent Up & Coming from representing Big if Lateral Lead joins the firm.

B. Yes, but only if Lateral Lead is screened from any participation in Big vs. Little *AND certain notifications and certifications are provided to Little by Up & Coming.*

C. Yes, but only if Little gives informed consent (and who are we kidding)?

In February 2009 the American Bar Association (ABA), after much impassioned debate, deliberation, negotiation, and compromise, amended Rule 1.10 (Imputation of Conflicts of Interest: General Rule) of the Model Rules of Professional Conduct to permit a lawyer—without client consent—to move from Law Firm A to Law Firm B, even where the lawyer personally represented Client X while at Firm A, and Firm B continues to represent Client Y *in the same matter* [*X v. Y*].

Under the amended Model Rule, such a lateral move requires: (1) the lawyer switching firms be promptly and effectively screened from the matter in which the lawyer participated at the prior firm,[1] and (2) certain mandatory notifications and certifications be given to the lawyer's former client. Thus, under the ABA Model Rules, B is the correct answer to the above question.

Members of the D.C. Bar may properly ask why they should care about the ABA Model Rules, which apply to no one.[2] However, if there is such a thing as the universal language of legal ethics, the ABA Model Rules is it. They are taught in virtually every American law school, no doubt in large part because it is far more manageable to teach and learn a single set of model rules than 50-plus sets of actual rules,[3] but also because the Model Rules provide a uniform standard of professional conduct—though the various states' ethics rules are far from uniform.

A brief refresher: The Model Rules[4] were adopted, and are amended, by the ABA House of Delegates, a body of lawyers from around the country who represent the diversity of the legal profession. Although each jurisdiction reserves the right to adopt, modify, or reject outright the Model Rules through the promulgation of individual state ethics rules, the existence of model standards of professional ethics, which began more than 100 years ago, continues to have a profound impact on the development and implementation of legal ethics rules countrywide. In all, when substantive changes to the Model Rules are adopted, lawyers are well-advised to pay attention.

Not surprisingly, the national debates that accompany the adoption of amendments to the Model Rules often play out at the local level with various degrees of conviction and persuasion. Also not surprisingly, the Model Rules follow as often as they lead. To the extent that the Model Rules reflect a consensus within the profession, a Model Rule may only garner sufficient votes to be adopted after a similar rule, policy position, or practice has been implemented and found workable in a good number of individual jurisdictions.

Thus, for some of you reading this column and practicing in other jurisdictions, the change in Model Rule 1.10 may reflect little change from your governing ethics rules. At least 24 jurisdictions already have in place some variation of a conflict imputation rule that permits lateral lawyers to be screened without client consent. For others, however, including District of Columbia practitioners, the amendment to Model Rule 1.10 constitutes a wide departure from the conflict imputation rule currently governing lawyers who move between private law firms.[5] Under the D.C. Rules of Professional Conduct, the answer to the hypothetical at the start of this column is A. But, of course, you already knew that!

The D.C. Bar Rules of Professional Conduct Review Committee[6] is considering whether to recommend changes to D.C. Rule 1.10 in light of amendments to Model Rule 1.10. Any specific recommendation will be made available to the membership for public comment through notice on the Bar's Web site and in *Washington Lawyer* magazine. As always, the Bar welcomes and encourages comment on any proposed amendments to the D.C. Rules. Whether passions will run as high here as they did on the ABA House floor remains to be seen. At the ABA, individuals and organizations made compelling arguments both for and against amending the rule, and the final vote was close: 226 to 191.

Legal Ethics counsel Hope C. Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext. 3231 and 3232, respectively, or by e-mail at ethics@dcbar.org.

Notes

1 "'Screened' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." ABA Model Rule 1.0(k).

2 Except as adopted by a specific tribunal.

3 The risk inherent in this pedagogical approach is that lawyers must learn the ethics rules of the jurisdiction/s in which they ultimately practice. The D.C. Rules of Professional Conduct may be found at www.dcbar.org/ethics.

4 The Model Rules of Professional Conduct is the successor to the Model Code of Professional Responsibility, which was adopted in 1969. The ABA adopted the Model Rules in 1983. Widespread revisions were effected to the Model Rules in 2002 and 2003 as a result of the Ethics 2000 Commission and the Task Force on Corporate Responsibility, respectively.

5 However, the concept of screening lawyers in the District of Columbia is far from new. For example, screening lawyers who leave government service for private practice has been required and available in the District for many years. *See Revolving Door* 445 A.2d 615 (D.C. App. 1982); *see also* D.C. Rule 1.11 and D.C. Bar Legal Ethics Comm. Op. 279 (1998).

6 The Rules Review Committee is charged with regularly reviewing the D.C. Rules and recommending changes to the Bar's Board of Governors, which, in turn, may recommend rule amendments to the District of Columbia Court of Appeals for adoption.

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE JAMES Q. BUTLER. Bar No. 490014. October 16, 2009. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Butler by consent.

Reciprocal Matters

IN RE DESMOND P. FITZGERALD. Bar No. 461613. October 26 2009. In a reciprocal matter from Massachusetts, the Board on Professional Responsibility reprimanded FitzGerald, at the direction of the D.C. Court of Appeals, as identical reciprocal discipline.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE DENISE R. STANLEY. Bar No. 431677. October 29, 2009. The D.C. Court of Appeals reinstated Stanley. The court furthered ordered that prior to practicing law in the District of Columbia, Stanley shall complete the Mandatory Course on the D.C. Rules on Professional Conduct and District of Columbia Practice.

Reciprocal Matters

IN RE DESMOND P. FITZGERALD. Bar No. 461613. October 22, 2009. In a reciprocal matter from Massachusetts, the D.C. Court of Appeals instructed the Board on Professional Responsibility to impose identical reciprocal discipline and reprimand FitzGerald. The Board of Bar Overseers of the Supreme Judicial Court of Massachusetts entered an Order of Public Reprimand against FitzGerald for violating Massachusetts Rules of Professional Conduct pertaining to competence, diligence, failure to reasonably explain the matter to client, conflict of interest, and failure to withdraw as counsel while representing a client in an immigration matter.

IN RE RICHARD J. HAAS. Bar No. 955039. October 1, 2009. In a reciprocal matter from New York, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Haas for three years with fitness.

IN RE HENRY J. USCINSKI. Bar No. 412779. October 1, 2009. In a case involving two parallel disciplinary proceedings—one arising as a reciprocal disciplinary matter that originated in New York, the other arising as a result of Uscinski's criminal conviction—the D.C. Court of Appeals imposed identical reciprocal discipline and remanded this matter to the Board on Professional Responsibility, with instructions to remand it to the Hearing Committee for a determination as to whether or not Uscinski was convicted of an offense involving moral turpitude on the facts. The Supreme Court of the State of New York, Appellate Division, Second Judicial Department, suspended Uscinski for five years, with the equivalent of a fitness requirement. The findings of misconduct by the New York Court are based on the facts underlying Uscinski's conviction of tax evasion.

Interim Suspensions by the District of Columbia Court of Appeals

IN RE IDUS J. DANIEL JR. Bar No. 405077. October 27, 2009. Daniel was suspended on an interim basis based upon the Board on Professional Responsibility's August 3, 2009, recommendation of a one-year suspension, nunc pro tunc to October 15, 2009, pursuant to D.C. Bar Rule XI, § 9(g).

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.dcbar.org/discipline and search by individual names.

IN RE JAMES L. LINDON. Bar No. 465777. On August 31, 2009, the State of Michigan Attorney Discipline Board reprimanded Lindon.

IN RE MICHAEL D. REINER. Bar No. 395402. On August 28, 2009, the Superior Court Judicial District of Litchfield, Connecticut, reprimanded Reiner.

IN RE JOSEPH CORNELIUS RUDDY JR. Bar No. 195230. On October 6, 2009, the Court of Appeals of Maryland reprimanded Ruddy.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE AMAKO NK AHAGHOTU. Bar No. 352237. October 15, 2009. Bar Counsel issued Ahaghotu an informal admonition for failing to notify and pay a third-party medical provider in a timely manner, in connection with several clients, because of a failure to supervise the employees to whom he delegated the accounting functions in his office. Rules 1.15(b) and 5.3(b).

IN RE ARAGAW MEHARI. Bar No. 431595. October 15, 2009. Bar Counsel issued Mehari an informal admonition for failing to timely file a Notice of Appeal while representing a client in an immigration matter. Rules 1.1(a), 1.1(b), 1.3(a), and 1.3(c).

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 on the D.C. Bar Web site at www.dcbar.org/discipline. 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.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*

legal beat

By Kathryn Alfisi and Thai Phi Stone

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

Bar Accepting Résumés for 2010 Elections

The D.C. Bar is accepting résumés from members wishing to be candidates in the 2010 Bar elections. The deadline for receipt of résumés is January 8.

The D.C. Bar Nominations Committee is charged with nominating individuals for the positions of D.C. Bar president-elect, secretary, and treasurer; five members of the D.C. Bar's Board of Governors; and three vacancies in the American Bar Association (ABA) House of Delegates. All candidates must be active members of the D.C. Bar; all candidates for ABA House positions also must be ABA members.

Nominations may be submitted online at www.dcbar.org, keyword: nominations, or mailed to the D.C. Bar Nominations Committee, Attn: Katherine A. Mazzaferri, 1101 K Street NW, Suite 200, Washington, D.C. 20005-4210.

For more information, contact D.C. Bar Executive Director Katherine A. Mazzaferri at 202-737-4700, ext. 3220, or executive.office@dcbar.org.

Bar Sections Announce Steering Committee Openings

The D.C. Bar Sections Office is seeking Bar members interested in Steering Committee positions for all 21 sections. Members wishing to be considered should submit a Candidate Interest Form and résumé to the Sections Office by 5 p.m. Eastern Time on February 4. Candidate Interest Forms were mailed and also are available online.

Steering Committee vacancies are for three-year terms. Each section has two or three available positions.

The Sections' Nominating Committees will review all Candidate Interest Forms to find the best-qualified, diverse candidates. Two to three candidates will be nominated for each position. Previous leadership experience with voluntary bar associations or with the Bar's sections is highly desirable.

The elections will take place in the spring of 2010, and the results will be announced in June. The winning candidates will assume their new Steering Committee roles on July 1, 2010.

For more information about the elections or to view the complete list of vacancies, visit www.dcbar.org/for_lawyers/sections/section_elections/index.cfm.

Bar Sets Forth 5-Year Outlook With Release of First Strategic Plan

The D.C. Bar Board of Governors has adopted the organization's first strategic plan clarifying its mission and vision and setting seven goals on which to focus its energies in the next five years.

The plan was developed under the direction of a special committee chaired by D.C. Bar members Amy L. Bess of Sonnenschein Nath & Rosenthal LLP and James W. Jones of Hildebrandt International. After undertaking a review of the Bar's history and soliciting feedback from a wide range of Bar leaders and members, the committee drafted a document that sets forth the organization's core ideology, a vision of its long-term future, seven goal areas, and a set of objectives under each of those goals to help the organization achieve measurable results.

"Our strategic plan was developed by a special committee that undertook significant research about our history as well as our members' and leaders' opinions about our current operations and future direction," said D.C. Bar President Kim M. Keenan in transmitting the plan to the chief judges of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia.

"The result is a document that will serve as the touchstone for the best use of the Bar's resources within the confines set by the District of Columbia Court of Appeals and our membership," she added.

In addition to Bess and Jones, the

Adoption at Last

Courtesy of the Children's Law Center

McDermott Will & Emery LLP pro bono attorneys Joanne Ludovici-Lint (left) and Robert W. Zelnick flank their Children's Law Center client Paula Lancaster and her newly adopted daughter Zuri at the 23rd Annual Adoption Day ceremony on November 21 at the H. Carl Moultrie Courthouse. The event, which was cohosted by the Superior Court of the District of Columbia and D.C. Child and Family Services Agency, featured 36 official adoptions being finalized. Courts across the country hold similar ceremonies to celebrate National Adoption Day, which is aimed at bringing attention to the plight of children in foster care.—*K.A.*

Strategic Planning Committee included Rawle Andrews Jr. of AARP Legal Counsel for the Elderly; Brigida A. Benitez of WilmerHale LLP; Stephen I. Glover of Gibson, Dunn & Crutcher LLP; Andrew H. Marks of Crowell & Moring LLP; Darrell G. Mottley of Banner & Witcoff, Ltd.; Laura A. Possessky of Gura & Possessky, P.L.L.C.; Robert J. Spagnoletti of Schertler & Onorato, L.L.P; and Annamaria Steward of the University of the District of Columbia David A. Clarke School of Law. Representing the D.C. Bar staff on the committee were Executive Director Katherine A. Mazzaferri, Assistant Executive Director for Programs Cynthia D. Hill, Assistant Executive Director for Administration and Finance Joseph P. Stangl, Pro Bono Program Director Maureen Thornton Syracuse, and Communications Director Cynthia G. Kuhn.

Bar to Conduct Judicial Evaluations

The D.C. Bar Judicial Evaluation Committee has kicked off its 2009 evaluation program. Selected attorneys are invited to provide feedback on the performance of 32 judges who preside over the District of Columbia Court of Appeals and Superior Court of District of Columbia.

This year, more than 5,000 attorneys were provided the opportunity to participate in the evaluation program. These attorneys have appeared before the judges in the 24-month period (July 1, 2007 to June 30, 2009) prior to the evaluation. Attorneys can submit a hard copy or online response. All participants will remain anonymous. The deadline for submissions is January 15, 2010.

The following D.C. Court of Appeals judges will be evaluated: Chief Judge Eric T. Washington; Senior Judges John M. Ferren, Warren R. King, Theodore R. Newman, William C. Pryor, Frank E. Schwelb, and John A. Terry; and Associate Judge Stephen H. Glickman.

The following D.C. Superior Court judges will be evaluated: Chief Judge Lee F. Satterfield; Senior Judges Mary Ellen Abrecht, Bruce D. Beaudin, Leonard Braman, Frederick Dorsey, Stephen F. Eilperin, Eugene N. Hamilton, Ronald P. Wertheim, and Patricia A. Wynn; and Associate Judges Jerry S. Byrd, Stephanie Duncan-Peters, Brook Hedge, Brian Holeman, Craig Iscoe, William M. Jackson, Ann O'Regan Keary, Cheryl M. Long, Judith N. Macaluso, Robert E. Morin, Hiram E. Puig-Lugo, Judith E. Retchin, Robert I. Richter, Michael Ryan, and Fern Flanagan Saddler.

Judges are evaluated in their 2nd, 6th, 10th, and 13th year of service, and senior judges are evaluated once before the end of each term.

Each evaluated judge, along with the chief judge of each court, will receive a copy of the survey results. Evaluation results of senior judges and judges in their 6th, 10th, and 13th year of service also will be sent to the D.C. Commission on Judicial Disabilities and Tenure.

Labor Department Receives Federal Agency Pro Bono Leadership Award

On October 29 the U.S. Department of Labor was honored with the Federal Agency Pro Bono Leadership Award by the Interagency Pro Bono Working Group for having demonstrated the most significant growth in and commitment to encouraging and facilitating pro bono work among its employees.

Judge Paul Friedman of the U.S. District Court for the District of Columbia presented the award during the Federal Government Pro Bono Recognition Reception at the E. Barrett Prettyman United States Courthouse. Friedman recounted the tremendous efforts by the department over the past two years, including hosting multiple events to build support among its employees for pro bono projects. The agency also revised its pro bono policy and instituted a progressive administrative leave policy for pro bono work.

In addition, the department's employees have regularly staffed the D.C. Bar Pro Bono Program Advice & Referral Clinic and held a special pro bono volunteer recognition reception in January 2009, which recognized each volunteer with a Certificate of Appreciation.

The Department of Labor's commitment to pro bono work also extends to Chicago, where it has actively supported the development of the Federal Government Pro Bono Program by serving on the program's steering committee.

Deputy Solicitor for National Operations Carol De Deo and Pro Bono Coordinators Kathy Easmunt and Liz Goldberg accepted the award on behalf of the Department of Labor.

Held by the District of Columbia Circuit Judicial Conference Standing Committee on Pro Bono Legal Services, this year's reception was hosted by Chief Judges David Sentelle of the U.S. Court of Appeals for the District of Columbia Circuit and Royce Lamberth of the U.S. District Court for the District of Columbia. U.S. Solicitor-General Elena Kagen was among the attendees at the event, which drew general counsels, solicitors, judge

EQUAL JUSTICE ADVOCATES

Reflections Photography, Inc.

The Hispanic Bar Association of the District of Columbia (HBA-DC) presented D.C. Superior Court Judge Laura A. Cordero (center) with its Judge Ricardo M. Urbina Lifetime Achievement Award during its 2009 Equal Justice Awards Reception on November 12. Cordero is flanked by Kenia Seoane Lopez and Marlon Quintanilla Paz, president-elect and president, respectively, of HBA-DC. The reception also featured the presentation of the Hugh A. Johnson Jr. Memorial Awards to the Latino Student Fund and to American University Washington College of Law professor Anthony E. Varona, as well as the Rising Star Award to Troutman Sanders LLP associate Jordi de Llano.—*K.A.*

advocate generals, and other agency leaders who came out to show their support for the pro bono work of government attorneys.

The Federal Agency Pro Bono Leadership Award was established in 2007 and is presented every other year to honor and promote pro bono efforts by federal government agencies.—*T.S.*

Board of Governors Approves New Leadership Task Force

The D.C. Bar Board of Governors approved the creation of a Leadership Initiative Task Force at its November meeting.

The task force, proposed by Bar President Kim M. Keenan, will explore ways to promote leadership within the Bar. It will be chaired by Alfreda Robinson Bennett, an associate dean at The George Washington University Law School, and David J. Cynamon, a partner at Pillsbury Winthrop Shaw Pittman LLP.

"Leadership is a core value of our Bar. When we invest in developing leaders, we invest in the profession," Keenan said.

During its year-long existence, the task force will identify the skills of successful leaders, determine current training mechanisms at the Bar, research outside leadership institutes and training modules, examine how to strengthen leadership skills in existing Bar leadership groups, and explore the feasibility and cost of developing a leadership training institute and/or providing leadership training opportunities at the Bar.

The task force will present its findings and recommendations in a final report to the Board of Governors.—*K.A.*

Court of Appeals' Pilot Project Targets Caseload Management

The District of Columbia Court of Appeals will launch a six-month pilot project aimed to help manage its caseload more efficiently and effectively.

Beginning January 2010, oral arguments on regular and summary calendars will be limited to 15 minutes per side, which may only be extended under the court's discretion. The court has reminded attorneys that they do not need to spend their allotted time reciting the facts because judges will have already read their briefs prior to the oral arguments.

In addition, requests for arguments in summary calendar cases will no longer be routinely granted by the clerk. All requests must be made by motion demonstrating good cause and granted only if the assigned merits panel determines that oral arguments will be helpful.

The pilot project also makes changes to requests for argument in summary calendar cases and suspends D.C. App. Rule 34(g)(1) regarding cases scheduled for argument from January 1, 2010, to June 30, 2010.

Throughout the pilot project, the clerk will collect data to help evaluate whether the pilot project will continue or be modified.—*T.S.*

Court Requests Input on Revisions to Rules Governing IOLTA

The District of Columbia Court of Appeals has set a deadline of January 4 2010, for written comments on proposed revisions to the D.C. Rules of Professional Conduct Governing Interest on Lawyers' Trust Accounts (IOLTA). The changes, if adopted by the court, will boost funds distributed by the D.C. Bar Foundation to local legal services providers by increasing revenue from D.C. IOLTA and interest paid by banks on funds held in D.C. IOLTA. The revisions also provide greater clarity to trust account ethics rules. The D.C. Bar forwarded the proposed amendments to the Court after considering a study and review by the D.C. Bar's Rules of Professional Conduct Review Committee and the D.C. Bar Foundation.

Under the proposed revisions, all D.C.

Bar members receiving IOLTA-eligible funds would be required to participate in the IOLTA program, except when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices. In addition, banks that wish to qualify as approved depositories in which D.C. Bar members are permitted to hold client funds must agree to provide certain interest rates on IOLTA.

A proposed provision seeking to monitor D.C. Bar members' participation in the IOLTA program by the D.C. Bar Foundation was not forwarded to the Court, but reserved for further study by the D.C. Bar's Regulations/Rules/Board Procedures Committee.

Ten copies of any comments should be sent to the Clerk, D.C. Court of Appeals, 430 E Street NW, Suite 209, Washing-

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 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 on-site fee is $279. Course dates are January 9, February 2, March 6, April 13, May 8, June 8, and July 10. Advanced registration is encouraged.

For more information or to register online, visit www.dcbar.org/mandatorycourse.

Learning the Law

Kathryn Alfisi

High school students participating in the National Youth Leadership Forum on Law visited the D.C. Bar headquarters on November 6 to hear firsthand about careers in the law from legal practitioners. The National Youth Leadership Forum, which has been helping young people prepare for professional careers since 1992, offers forums on a wide variety of career fields, including national security, law, medicine, and technology. The Law Forum takes place over a 60-day period in Washington, D.C., where students interact with legal scholars and practitioners and visit law schools, law firms, and the courts. This year the students visiting the D.C. Bar learned about the legal profession from Michele Meitl, staff attorney and training manager for the D.C. Bar Pro Bono Program; Bar Counsel Gene Shipp; and sports attorney Ellen Zavian.—*K.A.*

ton, D.C. 20001. Comments submitted to the court will be available to the public.

To view both the court notice and proposed revisions, visit www.dcbar.org, keywords: IOLTA comments. For a hard copy, contact Duane Tolson at 202-737-4700, ext. 3358, or dtolson@dcbar.org.—*T.S.*

Amendments Made to Superior Court Rules of the Probate Division

The Board of Judges of the Superior Court of the District of Columbia has approved amendments to Superior Court Rules of the Probate Division 311, 321, 322, 324, 325, and 350, regarding aspects of guardianship, conservatorship, and protective proceedings.

The changes will affect the service of petition and notice of hearings by consolidating the requirements into one rule. They also modify procedures to proceedings for appointing and terminating guardianship or conservatorship.

The amendments will take effect January 4, 2010.

To view Promulgation Order 09-06, visit www.dcbar,org, keywords: probate division. —*T.S.*

Mendelsohn, Weinberg Receive 2009 Pursuit of Justice Award

On December 3, inside the historic chambers of the United States Supreme Court, the American Association of Jewish Lawyers and Jurists presented attorneys Martin Mendelsohn and Robert L. Weinberg with the prestigious 2009 Pursuit of Justice Award.

Associate Justice Stephen G. Breyer delivered the welcoming remarks to a room full of legal notables, including deans from area law schools and judges

from around the country. "Equal justice under law means something to every American," said Breyer. "To see people come here and resolve their issues under the law instead of on the street with guns is a treasure."

D.C. Bar President Kim M. Keenan, who introduced Weinberg, spoke of the latter's strength as a leader and his desire to teach the next generation of lawyers. "Bob grows us as a profession," she said. "He combines his love for advocacy of justice with grace."

"The whole concept of the pursuit of justice is an ancient one. One pursues justice for a long time, but never fully achieves it," said Weinberg, whose tremendous career illustrates his deep commitment to the law. Weinberg is a retired founding partner of Williams & Connolly LLP, and former president of both the D.C. Bar and the Bar Association of the District of Columbia.

On the other hand, Frederick Lawrence, dean of the George Washington Law School, called Mendelsohn a fighter, a counselor, a dealmaker, and an inspiration for everyone in the legal community. Most notably, Mendelsohn served as chief of the U.S. Department of Justice's special litigation unit responsible for the prosecution of alleged Nazi war criminals living in the United States.

"This honor is one of those rare things that really touch my core," Mendelsohn said. "Nothing we do can bring back the [Holocaust] victims, but everything we do should honor their memories and sacrifice."

The evening was capped off by a stirring performance by cantor Moshe Taubé.—*T.S.*

Susie Constantino

Martin Mendelsohn (fifth from left) and Robert L. Weinberg (seventh from left) were presented with the 2009 Pursuit of Justice Award by the American Association of Jewish Lawyers and Jurists (AAJLJ) during a ceremony that included (from left) Rhonda Lees, vice president and chair of the AAJLJ D.C. chapter; cantor Moshe Taubé; Jack H. Olender of Jack H. Olender & Associates, P.C.; Stephen R. Greenwald, former president and now trustee and consultant of the Metropolitan College of New York; Associate Justice Stephen G. Breyer; and Alyza D. Lewin of Lewin & Lewin, LLP.

Bar Publishes 18th Edition of *D.C. Practice Manual*

The 18th edition of *The D.C. Practice Manual* is available to purchase for $265.

This two-volume manual is an important resource that provides information on the basics of practicing law in the District of Columbia and includes citations to key statutes, regu-

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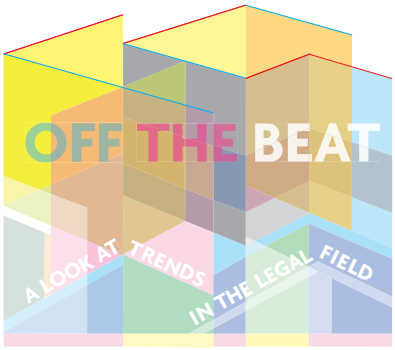

Is Lockstep Losing Its Merit? Law Firms Rethink Hiring System

With red bag in hand, Jay Leno delivered his famous 1980s line: "Crunch all you want. We'll make more." Leno was hawking Doritos at the time, but for Dr. Larry Richard, vice president and head of Hildebrandt International's leadership and organization development practice group, the famous comedian might as well have been talking about the legal industry's lockstep compensation system.

"The model behind the promotion system was the Doritos model," Richard said as he described how law firms traditionally have churned out associates. The strategy included hiring more associates than necessary at the same pay scale, investing in training, and watching as many leave the firm. Wash. Rinse. Repeat. "A much more efficient way would be to hire fewer, hire better," he added.

Over the years some law firms have modified the model by adding performance-based bonuses, but most are still functioning on at least a partial lockstep—a system where associates' salaries are based on class year, regardless of background, talent, or experience. "I can't think of a business [except the legal industry] where people get promoted automatically every year," Richard pointed out.

It was time for change, said Eileen Billinson, chief of human resources and attorney programs at Howrey LLP. "There was a lot of wining and dining going on across firms with summer programs. We made the decision that our approach to associate development and career management had to be much different. We were going to put the emphasis on where we think it belongs, which was the development of experience and expertise."

Client-Friendly Performance Yardstick

At Howrey, the transition was a gradual one. In 2003, under the leadership of Managing Partner and Chief Executive Officer Robert Ruyak, the firm implemented a competency model that defined the core characteristics associates need to succeed and the training programs to help them develop those skills. By late 2007 Howrey began discussing the move from the lockstep compensation model to a potential tier system, where each tier has a set of skills associates must master before advancing.

After several focus groups and studies, Howrey unveiled its five-tier model in January 2009. "The reality is that turning the page of a calendar just doesn't make you a better lawyer. The idea to tie your advancement to competency is frankly a no-brainer," said Sean Beaty, a senior associate at Howrey. He did, however, concede that associates were anxious about the process.

Beaty's colleague, Sonia Williams-Murphy, echoed the same sentiments: "We knew coming in the door that this is what I'm going to make as a first-, second-, third-, or fourth-year [associate]. All of a sudden, that was wiped out."

Another big law firm, Orrick, Herrington & Sutcliffe LLP, also overhauled its compensation system. The global firm went off of lockstep in July 2009 after more than a year of evaluation. Its new structure, called the Talent Model, has three tracks: partner track associates, career attorneys, and custom track associates. The partner track is broken down further into three levels—associate, managing associate, and senior associate.

"This is about helping associates grow at their rate and not having an artificial pressure of class year dictate when they're going to have certain expectations to produce," said Adam Goldberg, a partner at Orrick's Washington, D.C., office. "At the same time, because somebody has grown a day older does not necessarily mean their billing rates should increase."

Dan DiPietro, client head of Citi Private Bank's law firm group, also spelled out how the merit-based system benefits clients. "It's more aligned with the way clients think about the way to reward people," DiPietro said. "It's more client-friendly." Additionally, clients will no longer have to bear the cost of training young associates.

Moving Away From Tradition

But are firms saving clients money on the backs of associates? Many fear that firms will reduce associate salaries across the board, while just a select few will earn top dollar. For Beaty and Williams-Murphy, that concern is a moot point. "The general sense is that everyone [at Howrey] is at or above market," Beaty said.

"I'd be concerned that I'd take a pay decrease if I left and went somewhere else," Williams-Murphy, said. "They'd put me right back on lockstep and they'd say, 'Okay this is what our so-and-so years make.'"

DiPietro, however, allayed the fears of a pay reduction on a merit-based system, saying, "If you are truly a top performer and you compared what a lockstep firm would offer you in total compensation versus the firm that has the right kind of program, you'd be able to earn more."

In an industry seen as resistant to change, the transition off of lockstep—the pillar of the legal community—is a scary one. "I think lawyers, both based on their training and to some extent, their DNA, have a built-in level of caution and risk averseness," DiPietro said. "A change of this magnitude and that is this profound is going to get a lot of questions at all levels."

The key to easing associate fears is creating a strong competency model and accurate evaluation process, Richard said. He urges firms to take a scientific approach instead of the typical one that involves partners meeting in a room to determine the necessary criteria for evaluation. "There's no link between what the partners come up with in the discussion and the actual ability to have those variables predict performance later down the road. It's a crapshoot."

In a scientifically derived competency model, a firm would do an experiment by identifying criteria that have actually produced successful people compared to ones that do not. From there, it would form a hypothesis and test it empirically to obtain statistics that can tell it approximately what the risks are of making a hiring mistake.

"That more scientific approach is done all the time in the corporate world," Richard said. "I can count on one hand the number of law firms that actually use that approach." Each law firm should do its own tests. While more than half of the competencies would be universal, the remaining factors are unique to the firm.

To alleviate concerns about unfair evaluations, partners must try to ensure that raises are normalized in various offices so that an associate in Utah is not receiving a higher raise with a similar evaluation as an associate in California. Another hurdle to a robust evaluation system is complete buy-in from all partners, who now have to spend a significant amount of time providing feedback to their associates. But if done correctly, everyone benefits because associates can target the skills they need to improve and, in turn, increase their value to the firm and its clients.

Buy-in must also come from associates as well, who may feel their career tracks are in jeopardy. For both Howrey and Orrick, associate involvement was critical to getting the idea off the ground. At Howrey, associates participated in focus groups, offering their opinions on everything from the amount of tiers to a need for even greater transparency. In addition to monthly all-attorney meetings, Orrick had a formal committee that traveled to each office addressing concerns and ideas about the transition with partners and associates.

Zero-Sum Equation With Long-Term Benefits

Howrey's Billinson, however, stressed that the economy did not drive the firms' decision to break away from lockstep. In fact, many firms trying to penny pinch by switching to a merit-based system are realizing that creating a well-devised, scientifically derived competency model can be quite expensive.

"At the end of the day, this is probably a zero-sum game, meaning that you probably want to allocate the same kind of bonus money, maybe an even larger pool, but divvy it up differently based upon performance," DiPietro said.

A firm, however, can save money on turnover. Since Husch Blackwell Sanders, LLP (previously Blackwell Sanders) made the transition in 2001, it has had a dramatic reduction in turnover, Richard noted. "It's very expensive for a firm to lose and then have to hire and retrain a new associate."

With a decrease in turnover, firms will be able to create an environment of loyalty. "The principle benefit [of a merit-based system] is that it forces a firm to act more like a unified enterprise and take responsibility for managing the development of its talent instead of saying, 'Each person to themselves, and we're a bunch of solos who share the same letterhead,'" Richard added.

"The lockstep system really fails every constituency," Billinson said.

Richard agreed. "The [merit-based system] is a design change that brings law firms into the modern world. It makes them much more like well-run businesses than before, and that benefits everybody."—*T.S.*

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lations, court rules, and cases, as well as relevant forms.

The 18th edition includes 25 revised chapters covering a range of topics: administrative procedures, alternative dispute resolution, antitrust, appellate practice in the District of Columbia Court of Appeals, art, child abuse and neglect, commercial law, consumer protection, corporate practice, criminal law and practice, criminal traffic offenses, domestic relations, employment law, environmental law, government contracts, Health Maintenance Organization Act, intervention proceedings, legal ethics and attorney discipline, mental health proceedings, partnerships, personal injury, taxation, United States District Court practice, wills and estates, and workers' compensation.

To purchase the 18th edition of *The D.C. Practice Manual*, call 202-737-4700, ext. 3268, or visit www.dcbar.org/publications.

Reach D.C. Bar staff writers Kathryn Alfisi and Thai Phi Stone at kalfisi@dcbar.org and tstone@dcbar.org, respectively.

Financial Crisis 2008:

Where Were the Lawyers?

By Sarah Kellogg

By most measures, the United States remains in the grip of a prolonged financial crisis: unemployment is dreadfully high, the stock market has the feel of a roller-coaster ride, consumer confidence is low, and the public's disheartened spirits could use a good dose of strong economic growth. More than a year after the bottom fell out of the U.S. economy, the masterminds on Wall Street and in Washington continue to struggle.

All photographs courtesy of Photodisc

While much of the frantic finger-pointing has shifted to chronic, partisan grumbling, it seems likely that the possible onset of a "double dip" recession would gin up a wave of public outrage. In the meantime, there is ample, lingering resentment directed toward those involved with the 2008 debacle. Subprime borrowers, high-risk lenders, reckless investors, complex derivative traders, the credit industry, the rating agencies, Wall Street bankers, the U.S. Securities and Exchange Commission (SEC), the secretary of the U.S. Department of the Treasury, and the Federal Reserve are all among the favored targets of angry critics. In the long list of potential bad actors in the financial crisis, accountants, analysts, and lawyers have been among those who have come in for sharp criticism.

There is no doubt that in-house and outside counsel played a vital role in the corporate decision making that resulted in the collapse. Lawyers were advising their clients when critical decisions on financial transactions were being made. For the most part, however, that legal advice remains confidential. Meanwhile, unanswered questions regarding what attorneys said and did have left a lingering feeling that lawyers were somehow complicit in the collapse.

"I think there are a substantial number of questions about where the lawyers were, and [those questions] haven't been answered yet," says Benjamin W. Heineman Jr., former senior vice president and general counsel for General Electric. "In contrast to Enron and WorldCom where there were senior people at the top of the corporation committing fraudulent acts and who basically blew the systems apart and cowed everyone, here in the financial crisis, it's fair to say all systems failed. I think it will turn out to be more of a question of negligence than of intentional acts, though."

Not everyone would agree that the attorneys' actions lacked intent. Critics have suggested that professionals in accounting and law may have used their expertise to conspire with corporate chiefs to either design or justify irresponsible schemes. Unfortunately, the facts are not known and may never be.

"The big banks have huge legal departments, and they also have huge law firms on retainer," says John Dunbar, coauthor of the Center for Public Integrity report titled "Who's Behind the Financial Meltdown: The Top 25 Subprime Lenders and Their Wall Street Backers." "These big banks were lousy with lawyers, so where were all the lawyers when this was going down? I think it's possible they played a role in this, so I think it really is fair for all of us to ask, Where were all the lawyers as the system was crashing right in front of them?"

Dunbar is not the first to ask this question, and he won't be the last. But the answer may be far more difficult to tease out than finding wrongdoing in the work of accountants and analysts. After all, lawyers have a unique relationship with their clients, one that is protected from public view by attorney–client privilege.

"Because of ethical rules on confidentiality, we don't know a lot about what advice lawyers were giving to clients," says Deborah L. Rhode, a visiting professor of law at Columbia Law School in New York and a legal ethics scholar. "We don't have the kind of evidence that we had, for example, with Enron about what the lawyers' roles were.

"It's possible that ethical rules may have given lawyers license to participate in financially irresponsible transactions, many of which were not just at the fringes of fraud but may have stepped over the line," Rhode adds.

Yet even Rhode admits it may be hard to divine whether there was fraudulent activity since the attorney–client privilege keeps legal advice from public review. That is why, she suspects, the public, the legal profession, and government regulators may have to wait for their answers, or not get them at all.

For Rhode and others, a more effective line of exploration may be discovering how the profession has reached this crossroads again. It was just a few short years ago that, in the wake of the Enron disaster, lawyers received the equivalent of a regulatory spanking by Congress and the SEC when rules were enacted to require new reporting by attorneys—reporting that does not appear to have had any impact on the current financial crisis. How have lawyers turned out to be participants, or at the very least interested bystanders, in another financial train wreck? Experts say that a number of key factors has contributed to this latest legal collision, and that some of these factors—competitive and economic pressures inside the legal profession, evolving relationships between corporate clients and attorneys, and the legal requirement that lawyers be both client guardian and public gatekeeper—may be difficult for lawmakers, regulators, or even law firms to change.

"I think there are a substantial number of questions about where the lawyers were, and [those questions] haven't been answered yet. In contrast to Enron and WorldCom where there were senior people at the top of the corporation committing fraudulent acts and who basically blew the systems apart and cowed everyone, here in the financial crisis, it's fair to say all systems failed. I think it will turn out to be more of a question of negligence than of intentional acts, though."

Benjamin W. Heineman Jr.

Déjà Vu, All Over Again

When the Financial Crisis Inquiry Commission (FCIC) held its first meetings in the fall of 2009, beginning in earnest its late-to-the-party investigation into the causes of the financial market collapse, many outsiders hoped the panel would focus the spotlight on the guilty parties and powerful interests associated with the crisis—most of whom have so far eluded punishment or even moderate public disgrace.

If any group is primed to unearth the role of lawyers in Wall Street's failure, it is the FCIC, with its subpoena power and broad charge to investigate every corner of the crisis. Chaired by Phil Angelides, the former treasurer for the state of California, the 10-member, bipartisan FCIC has been compared to the National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission), which investigated the causes and failures that led to the attacks of September 11, 2001.

In his opening remarks at the FCIC's first public meeting, Angelides said his panel would "leave no financial stone unturned," noting that the commission's work would have the same sweeping impact as the Pecora Commission hearings during the Great Depression. "We have been called upon to conduct

a full and fair investigation in the best interests of the nation—pursuing the truth, uncovering the facts, and providing an unbiased, historical accounting of what brought our financial system and our economy to its knees," Angelides said.

The Pecora Commission set off on a similar mission in the 1930s when it was charged with investigating the Great Crash of '29 and recommending legislative solutions such as the far-reaching Glass–Steagall Banking Act of 1933, a comprehensive reform of the financial services sector. The Glass–Steagall Act truly was groundbreaking for any era. It segregated commercial banks from the credit markets, and established the Federal Deposit Insurance Corporation (FDIC), facilitated the eventual establishment of the SEC, and enhanced the regulatory powers of the Federal Reserve over banks.

"Our job is not as we see it to embarrass people but to produce facts," Angelides told a group gathered for a conference of the New America Foundation, a nonpartisan public policy group that invests in new ideas, in November. "And if facts embarrass people, so be it. And if in fact they unveil wrongdoing, so be it. . . . The most important thing that we can do is to shed light, and not heat. To unveil what happened, so that Americans can have a clear understanding of history, so we do not repeat it."

Not repeating history has been the goal of any number of well-meaning commissions, judges, and lawmakers in the past, but still Wall Street and Washington seem consigned to repeat past lessons. In the past two decades alone, financial and corporate scandals have prompted observers to investigate the role of lawyers in the savings and loan crisis of the 1980s and 1990s, and then again in 2001 when Enron's backroom deals and risky leveraging bankrupted the company.

After the government took over the failed banks, including Lincoln Savings and Loan Association, during the savings and loan crisis, Charles Keating Jr., chief executive officer of Lincoln's parent company, challenged the move. In rejecting the challenge, Judge Stanley Sporkin of the United States District Court for the District of Columbia asked: "Where . . . were the outside accountants and attorneys when these transactions were effectuated? What is difficult to understand is that with all the professional talent involved [both accounting and legal], why at least one professional would not have blown the whistle to stop the overreaching that took place in this case."

Investigators asked the same questions in 2001 when billions of dollars in debt from unsuccessful projects and investments resulted in the ruin of Enron, and, eventually, triggered the largest bankruptcy in history, up until that time. Enron's executives had misled its board, employees, and investors by using accounting loopholes and poor financial reporting to hide the company's rotting core.

Lawyers in both the savings and loan scandal and Enron bankruptcy paid the price for their wrongdoing with prison terms and financial penalties. Enron's downfall also impelled Congress to approve the Sarbanes–Oxley Act of 2002, prompting the promulgation of new rules that set stricter financial reporting for public companies. Along with provisions for tougher penalties for defrauding shareholders and increased accountability for auditing firms, language was inserted into the act requiring attorneys to report "up the ladder" to senior executives if they know or fear a company is doing something that is not legal.

"The reporting-up process, which is really intended to make sure the board can perform its oversight role, is a very worthwhile process," says Linda L. Griggs, a partner at Morgan, Lewis & Bockius LLP and the former counsel for the SEC's chief accountant. "That process is a good process. The lawyer shouldn't have knowledge about some potential violation of the law without taking some individual action. The lawyer needs to be sure that he or she is able to do the job."

Many have argued that the legislative and regulatory responses to the Enron abuses were little more than symbolic, and they will likely be the same in the FCIC investigation. "A lot of the requirements that companies jump through—a lot of the paper hoops that are required—may or may not accomplish anything substantive," Griggs adds. "It's a great full-employment program for lawyers and auditors. It's not at all clear, in many cases, that it accomplishes the purpose of the regulation."

There is some curiosity about what could come out of a massive investigation into the financial crisis, including peeling back the layers of confidentiality to reveal the role attorneys played. So far, many of the lawyers going to jail or being sanctioned for their advice are those who worked to contrive fraudulent tax shelters, for example, as in the case of the attorneys who devised tax evasion schemes for auditing firm KPMG. "The organized bar and law firms make it very costly for regulators and prosecutors to go after lawyers. They're very well connected. They're very powerful and have a lot of capacity to make life miserable," says Robert W. Gordon, the Chancellor Kent Professor of Law and Legal History at Yale Law School. "All lawyers talk about the noble vocation of the lawyer

who stands up for clients against the power of the state, as if it's a lonely and heroic vocation. They're a powerful lobby, and they've been pretty immune."

The one group that is willing to take on lawyers is the state attorneys general, many of whom have been rapid in their pursuit of financial services companies in hopes of recovering lost investments for their states and citizens. Chief among them is New York State Attorney General Andrew Cuomo, who is the prosecutor for Wall Street's home state and who has been dogging law firms and lawyers to bring more and more of these problems to light, including those involving both AIG and Bank of America.

Many in the legal profession feel that corporate counsel needs to take a more expansive view of their functions to ward off further run-ins with the agencies. It is possible to comply with the technical requirements of the law but still drive a corporation into bankruptcy. Enron is often used as an example of this behavior. What Enron was doing in creating its financial devices was asking lawyers to decide if they complied with the law.

"I basically think the lawyers saw their roles as just giving remotely plausible legal arguments for whatever it was the clients wanted to do, and they believed they had discharged their duty," Gordon says. "I think that's a serious misconception."

Still, there are a number of factors that may have contributed to that perception and, ultimately, to the financial crisis. These factors may demand new thinking to ensure that they do not result in similar misfortune in the future.

A Business In Flux

Today, more than ever, corporate lawyers find themselves in a tenuous position. Corporate America is constantly evolving, and the multifaceted transactions that are the fabric of the financial services industry demand a level of knowledge that surpasses the skills of even the savviest corporate counsel. More importantly, clients often require lawyers to produce a business judgment as well as a legal judgment. In those cases, lawyers are at a serious disadvantage: forced to keep abreast of the financial developments to carefully weigh the legal considerations for any transaction or agreement, while having to balance the legal concerns in relationship to those pertaining to business.

Georgetown University Law Center professor Milton C. Regan Jr. wrote about this problem in a 2005 article titled "Teaching Enron," which appeared in the *Fordham Law Review*. In the article, Regan postulated that when it comes to the intricacies of business, a lawyer may not "fully understand, and is not responsible for understanding, the business purposes that animate and the economic consequences that flow from a given transaction. The lawyer is entitled to assume that the client has a good business reason for wanting to enter into the transaction, and need not become an expert in the intricacies of the company's business operations." Yet he points out that the most effective corporate lawyers understand their clients' businesses and goals, if only to keep their clients as their clients.

But Stephen Gillers, a professor at New York University School of Law and an expert in legal ethics, argues that lawyers have a responsibility to be more than the blank slate upon which their clients can write. He adds that being a lawyer is more than acting "lawyerly," and that the test of a principled attorney is how he or she behaves when there is no accountability and when no one is watching.

"Honor, shame, and empathy, then, make up the glue of civilization," Gillers said in a speech at the Central Synagogue's Jethro Shabbat Program and Dinner in New York City in February 2009. "Without them, things will fall apart. And as bad: when the public sees a loss of honor in how institutions and professionals behave, we have a loss of trust. That is what we see happening now."

But some worry that in the quest for the guilty by activist attorneys general, Congress, the FCIC, or federal investigators, the attorney–client privilege—a vital component of any corporate client relationship—will be roughed up in the process. It is not a right embodied directly in the U.S. Constitution, but it has been a part of common law and an integral safeguard for attorney–client relations for more than 400 years. "I think it's most at risk during crises," says Stan Anderson, senior counsel to U.S. Chamber of Commerce President Thomas J. Donohue. "The people or prosecutors say they want to get to the bottom of whatever they're looking at, and they decide a person is not going to testify, and they're going to force them to do it.

"To make society work, you have to have the balances. We've got to make sure that even though in these crises that are legitimate crises, and where the abuses are clearly abuses, you still need to make sure there's fundamental fairness."

Partner v. Gatekeeper

Since lawyers play such a pivotal role in public accountability, they carry with them enormous responsibility. The law puts them in the business of assuring third parties—investors and regulators such as the Internal Revenue Service—that their cli-

ents are in compliance with the law. They get paid, in effect, for engaging in the business of being a gatekeeper.

"Lawyers want to be partners with the company, but they also have a larger responsibility to society and to the profession—not just in a technically ethical sense, but in a more broad ethical sense," says Heineman, the former senior vice president and general counsel for General Electric. "They don't have to lie down on the rug. They should at least have enough guts to be wise counselors. Where are the statesmen who see something smelly and can go up to the senior lawyer or the general counsel and speak the truth to them?"

Post-Enron, many lawyers object to being forced to play the role of the reliable gatekeeper. They do not want to snitch on their clients, so they often buck the job requirement of serving as crucial intermediaries between the legal system and their clients. Still, lawyers are the means by which the law is strained and diffused. They are the instruments of compliance with the law.

"The role of the lawyer is very complex. Lawyers are not like other gatekeepers and other service providers, like audit firms. Audit firms have a very clear public responsibility. Their duties run to the public, they are public accounting firms," says Arthur Laby, an associate professor at Rutgers University School of Law–Camden who has written on this topic. "The lawyer's fidelity generally must be to the client and not to the public. Some gatekeepers are independent, and they have to act independently from their clients.

"Auditors and analysts are examples—they look at a situation and analyze it independently from their own clients," Laby adds. "Lawyers are dependent gatekeepers. They depend on the client to determine the nature and purpose of their work. They have to be confidential loyal advisors and advocates for their clients."

Lawyers are strategically situated to do a great deal of good for their corporate clients as well, experts say. Their good judgment provides an additional value to clients, and it is both a logical and ethical conclusion of their relationship with the client. In serving this function, a lawyer's prime goal is to ensure the well-being of the client's company. That good health is determined not just by the legal prowess a lawyer brings to his or her post, but also by the ability to recognize pitfalls lying ahead and to encourage a client to avoid them. "If the lawyer is to avoid the good and to encourage executives or clients to take huge risks with other peoples' money, that really seems like a perversion of the lawyer's function," says Gordon, the Yale Law School professor.

"All we're trying to do is give a view of the law, but then you say the view of the law is hardly an objective view. It's one that is stretched and slanted in favor of your client," Gordon adds. "Objective legal advice has to assume that some outside eyes are going to be focused on this transaction, and the client has to know how the relevant outside world is likely to react to a transaction."

Evaluating the success or failure of an attorney or law firm in its most basic sense comes down to whether the firm is able to keep the client out of trouble, some observers say. Those attorneys who would focus exclusively on the technical aspects of the law risk imperiling their clients—corporate boards and shareholders. If a venture requires a huge legal or business risk, then it is hard to

see how a lawyer is adequately able to discharge his or her duty by smoothly assisting the client into a collapse.

A Competitive Atmosphere

There is a certain nostalgia in the corporate legal community for the "old days," when the custom was to give objective legal advice based on a long-term relationship with a client that often encompassed that client's entire line of business. By encouraging a long-term association, the firm got a chance to befriend the client in a way that is not possible today. Clients almost never switched firms, and this partnership created an environment where candid advice was shared without negative consequences for the law firm because no one feared losing their standing.

Today's competitive business climate—and this was true before the economy faltered—makes it tricky to sustain long-term relationships between clients and outside counsel, or even in-house counsel for that matter. It also makes it difficult to give advice to clients who may not want to hear it. "It's a lot harder than it used to be to stand up to clients and tell them there are serious risks entailed by the course they want to embark on, and they should reconsider," Gordon says. "Every lawyer wants to give positive advice to clients. It's part of their job to help clients. In the past, law firms and top executives in the firms knew each other personally, so it was easier to deliver bad news."

The hallmark of those relationships was the substantial amount of trust and confidence shared between lawyers and clients. What has replaced that camaraderie is fragmentation. Lines of business are auctioned off to different law firms, and there is much less opportunity for attorneys to become knowledgeable about a company's business plan. This new type of relationship produces narrower guidance that is confined to technical issues, and often divorced from the political and public relations consequences of certain business activities.

That was the case with Enron, where executives were adept at spreading their business around so broadly that nobody, including its own general counsel, had a clear picture of the whole field of the operation. Enron's executives were skilled at seeking advice for discrete transactions, thus blocking anyone from taking an objective, comprehensive look at the entire business plan. Many observers believe the same thing happened during the financial crisis, but again they say that the attorney–client privilege may obscure all of that from view.

With all this as a backdrop, it is no wonder that lawyers have a tendency to pull in their horns, focusing their advice on technical legal requirements in an effort to dodge tough questions about broader risk. If clients want to take a business or political risk, that is a decision for them to make. "I do think that more and more lawyers are simply playing the role of an obliging butler to their clients who believe their function is to serve up whatever their clients want to hear," Gordon says. "With the apparent competition among lawyers for clients, clients do feel enabled to shop around for law firms that will give advice they want to hear. We know that happened in the Enron case. I think this is a casualty of the increasing competition for lawyers' services, and the tendency of clients to shop around for very compliant advice."

> "It's possible that ethical rules may have given lawyers license to participate in financially irresponsible transactions, many of which were not just at the fringes of fraud but may have stepped over the line."
>
> **Deborah L. Rhode**

The Boom Mentality

It would be too easy to fault lawyers for experiencing their own "irrational exuberance" in the past decade as they watched stock values climb to altitudes never before experienced. After all, the boom mentality spread throughout corporate America like a virus, obliterating even the mightiest sense of caution or reserve. "In the boom market, everybody thinks that being creative and aggressive is the way to go. In such an atmosphere, there's no room for traditional lawyers and their conservative approach to business and risk," Gordon says. "Traditionally, some of the value lawyers added to market and business transactions was the invaluable role of the doom-and-gloom guys."

In decades past, lawyers were the people who were there to encourage their clients to think about the things that could go wrong. In fact, lawyers were the specialists in knowing about things that could go wrong. In the boom market, clients were less interested in listening to people who brought bad news to the table. Faced with clients looking for fair-weather friends, law firms chose to shed their old-fashioned décor of responsibility and solidarity, redecorating, instead, with the same buccaneering and risk-taking approach as their clients.

Over the past five years, this became a potent combination. Before the housing bubble burst, anything seemed possible, both for corporations and their legal counsels. The only problem for the buccaneer attorneys, of course, was that they also were expected to keep an eye on their adventurous clients. Gillers, in his February 2009 speech, said:

> Most American lawyers are not trial lawyers. They are counselors or advisers, operating where there is no judge and no adversary. No one is watching. And there may never be. Then, the temptation is to push the limits, sift the language of the law, find hidden meanings. Now, our social understanding is that law is not endlessly pliable in this way. But the problem is this: It can be made to be because law, after all, is only a language and language is pretty pliable. In the hands of a creative, motivated lawyer, with a demanding client, the language of the law can have astonishing elasticity. Through interpretation, the rule of law can be turned into what it is not. A fine exercise perhaps if you are interpreting Shakespeare or Kafka. But not for law.

With lawyers matching the mood of their clients, it is possible they failed to sufficiently warn the latter of the downside risks and adverse consequences of exotic derivatives and other transactions—that is if they knew what those even were. The motto for the boom times was: Next year, I'll be gone and you'll be gone. That proved especially prescient in a negative way at the end of 2008 and the first half of 2009, as corporations and law firms ejected their staffs by the hundreds.

Despite the hard-won lessons of the past year, everyone still seems to be focusing on grabbing as much bonus money or as many fees as they can, forgoing any long-term payoff. "What we keep running into is the casino mentality of our stock market, but that casino mentality is not sustainable," says Griggs, the

Morgan Lewis partner. "Short-term thinking isn't good for law firms. You have a much more sustainable practice if you develop a long-term relationship with clients. Maybe its not as much fun because you're not involved in the sexy, new derivatives markets. Short-termism remains a huge problem in our economy."

A Cautionary Tale

Short-term thinking was likely at the heart of the deal—and the subsequent troubles plaguing the deal—between Bank of America and Merrill Lynch & Co., Inc., a merger that has turned out to have all the twists and turns of a John Grisham potboiler, with its firings, secrets, rogue judges, and obsessive prosecutors.

Bank of America agreed to acquire Merrill Lynch more than a year ago for $50 billion in stock at the height of the financial meltdown. The deal was controversial for a number of reasons, most prominent among them the government's intense pressure on Bank of America to buy Merrill Lynch to avert an even greater economic disaster if the latter were to fail. What has only become clear with the subsequent SEC investigation is that Bank of America failed to inform shareholders, before they approved the deal, that Merrill Lynch was scheduled to pay up to $5.8 billion in bonuses before the deal closed. Bank of America also was allegedly keeping projections from its shareholders that Merrill Lynch likely would hemorrhage more than $10 billion in the fourth quarter of 2008. (It eventually lost some $21.5 billion.) Those losses hurt Bank of America's bottom line, and the company was able to collect another $20 billion in U.S. government bailout funds to offset the losses.

"The deal was in the best interest of the financial system, the economy, and the country," Brian T. Moynihan, Bank of America's president of consumer and small business banking, told the U.S. House of Representatives Committee on Oversight and Government Reform at a hearing on November 17, 2009. "… The failure of Merrill Lynch, particularly on the heels of the failure of Lehman [Brothers] and other firms, could have exacerbated the systemic havoc the country faced."

After months of investigation, the SEC reached an agreement to fine Bank of America $33 million for withholding the bonus information. But all bets were off when Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York rejected the settlement in October 2009, noting that it "suggests a rather cynical relationship between the parties: the SEC gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger, the bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators. And all this is done at the expense, not only of the shareholders, but also of the truth." The trial is scheduled for February 2010.

Meanwhile, there are a number of lawsuits pending against Bank of America for not sharing information about the growing losses at Merrill Lynch in the fourth quarter of 2008. "Recent testimony to Congress suggests that [Bank of America] executives knew that Merrill Lynch was suffering billions of dollars of widening losses before the shareholder vote, yet improperly withheld this information from investors," said Ohio Attorney General Richard Cordray, lead plaintiff in a shareholder class action lawsuit against Bank of America, in a written statement.

Meanwhile, the House Oversight Committee has been dis-

secting the merger for most of the past year, holding its fourth hearing in November. Three of the key executives active during the merger were there to defend themselves and the company's decisions. A fourth witness was former Bank of America general counsel Tim Mayopoulos who now serves as general counsel for Fannie Mae. Mayopoulos was fired on December 10, 2008, without explanation and just days after telling the bank's executives that they did not have a good legal case to invoke an escape clause in the merger due to Merrill Lynch's anticipated losses. In testimony, executives claimed Mayopoulus was a surprise victim of a 10 percent reduction in Bank of America executive staff.

Lawmakers were skeptical. "I want to make an observation, with regards to Mr. Mayopoulos, who was abruptly fired in the middle of this transaction. He does not know why he was fired. His boss, Mr. Moynihan, says he does not know why he was fired. The board members present don't know why he was fired. Either it was divine intervention or someone didn't like his legal advice," said Edolphus Towns (D–N.Y.), who chairs the House Oversight Committee. "Being I'm from Brooklyn, I'm leaning towards that last one. It looks to me like [former Bank of America CEO] Ken Lewis and others at the company weren't about to tolerate someone who might get in the way of what they had planned to do at this shotgun wedding."

To complicate the story, Bank of America agreed to waive attorney–client privilege and work-product protection in the pending trial on Merrill Lynch's bonuses to argue that it was just following in-house and outside counsel's recommendations when it put information about the bonuses in a secret, undisclosed schedule, a standard industry practice. The decision to drop the attorney–client privilege after asserting it earlier in the year is viewed by many as an opportunity to chip away at the privilege.

In the past decade, it has become progressively more common for prosecutors, the SEC, and judges to pry open the sanctity of the attorney–client privilege and work-product protections. Investigators have felt especially emboldened because the cases involve massive amounts of fraud. "When you have prosecutors coming in and sitting down and saying they're going to throw the book at you unless you waive the privilege, that's problematic," says the U.S. Chamber of Commerce's Anderson.

It may prove problematic for Bank of America as well, since it has waived the privilege on the bonuses but retains it for Merrill Lynch's losses, as a myriad of lawsuits move forward this year.

Lessons to Be learned

Even as the beleaguered attorney–client privilege faces assaults from prosecutors and investigators alike, it remains strong enough to impede a panoramic view of the financial collapse of 2008. Whether lawyers did their jobs, went beyond the call of duty in alerting their clients to the dangers ahead, or stood by and quietly refused to act, the answer remains an unknown. "We don't know how many times the general counsels of some of the firms that imploded may have advised quite strongly about the potential risk and advised executives and boards against it," Laby says. "We may never know because of the attorney–client privilege and client confidentiality. That's definitely the tradeoff of our venerable privilege."

Despite the void of vital information, there are still some clear lessons to be learned from the calamity, even if the exact dimensions of the crisis' origin and lifespan are not yet clear. "I think the lessons we have learned as attorneys is to try to look at the worst-case scenario and try to imagine what would happen next. Maybe people didn't do that enough, and maybe that's what we all need to learn," says Griggs, who encourages colleagues to trust their instincts and to be vigilant. "Hopefully everybody has learned to imagine the worst and operate with that knowledge. Will we continue to remember that when the economy improves? I don't know."

Going forward, some have suggested that the best way to handle these ethical issues in corporate America is to have higher expectations of attorneys—demand that their advice on financial transactions be informed by a wider knowledge of complex accounting principles and a deeper understanding of how to balance their roles as guardian and gatekeeper. But others reject such suggestions, saying that lawyers are first and foremost legal experts, and that their focus must always be on the law and their clients' needs.

Unfortunately, Bank of America may be the only company required to share its legal secrets with the world, making it nearly impossible to pick apart the role of lawyers during the crisis. This prospect has some worried. "Not only have we not necessarily managed to punish anybody, we haven't made a whole heck of a lot of progress in learning exactly what happened," says Dunbar, who authored the Center for Public Integrity's investigative report. "People have short memories, and we're losing our window of opportunity. Where are we right now? We're in the same position we were a year ago, and any damn thing could still happen."

Sarah Kellogg wrote about the Obama administration in the March issue of Washington Lawyer.

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ACCESS TO JUSTICE:

Helping Litigants Help Themselves

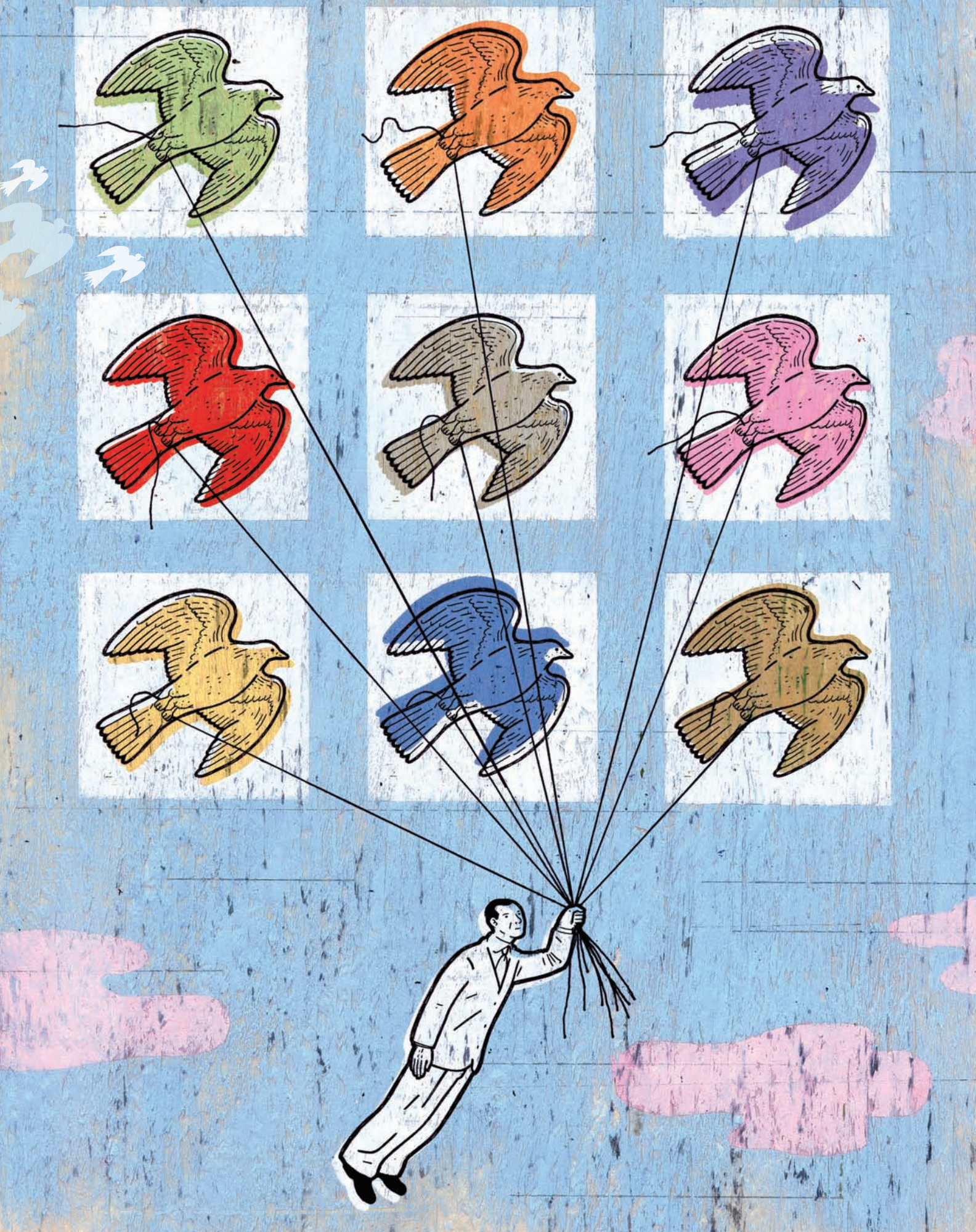
By Kathryn Alfisi

As head of the Family Court Self-Help Center at the Superior Court of the District of Columbia, Avrom Sickel routinely sees the burdens that a lack of legal representation places on litigants and the court system.

To a nonrepresented litigant unfamiliar with the legal system, even the most basic legal ideas or terminologies—the difference between a plaintiff and a defendant, for example—can be confusing, and that, in turn, can slow down the legal process. "In many ways we are the translators from legalese to English," Sickel says.

In recent months staff and volunteers at the center, which provides free information and guidance on family court matters, have had to translate for a growing number of visitors. In August 2009, 623 people sought out the

Illustration by Dan Page



center's assistance, the highest number of monthly visitors the center has had since it opened in 2002. As of early December, the average number of visitors per month for 2009 was 509; in 2008 that number was 394, a jump from 378 clients in 2007. (Although the term *self-represented litigants* connotes a choice not to have counsel, in the District of Columbia, the population in the court is more likely to be unrepresented because it cannot afford to have counsel. In this case, the only choice is self-representation.)

The issue of self-represented litigants (and their growing presence) is not limited to the District. It's a phenomenon that is being replicated in courts across the country. "It's certainly the case that the impact of self-represented litigants on the courts has been continuously increasing and, of course, is increasing again now with the economic crisis. There were always a lot of self-represented litigants in the courts, but they tended to be in areas where nobody paid them much attention, like family law, small claims, or landlord/tenant. What's very clear is that in the last 15 or so years, it has spread into more of the court system. That's part of why it's getting more attention, which is long overdue," says Richard Zorza, coordinator of the Self Represented Litigation Network (SRLN), a grouping of national organizations working to improve access to justice for the self-represented. The SRLN, launched in 2006, is hosted at the National Center for State Courts (NCSC) and brings together courts and access to justice organizations in collaborative efforts.

"It's certainly the case that the impact of self-represented litigants on the courts has been continuously increasing and, of course, is increasing again now with the economic crisis. There were always a lot of self-represented litigants in the courts, but they tended to be in areas where nobody paid them much attention, like family law, small claims, or landlord/tenant." **Richard Zorza**

A 2009 SRLN report, "Access to Justice: Economic Crisis Challenges, Impacts, and Responses," showed that between 50 and 60 percent of approximately 100 judges surveyed reported an increase in cases involving self-represented litigants. The report, written by Zorza, appeared in the NCSC series *Future Trends in State Courts 2009*. Judges and self-help center staff recently surveyed by SRLN also claimed seeing more middle-class people going to court without legal counsel and small financial disputes—those of businesses pursuing cases they normally would not, or of people defending against claims rather than paying—becoming more common.

When asked whether the Family Court Self-Help Center's increasing number of clients is a result of the economic crisis, Sickel says it is hard to say. He does, however, have the impression that the reason the center is seeing more motions to modify child support is because people are losing their jobs or having their hours cut back.

No matter the cause, there has been a continuing focus on making the legal system more accessible to self-represented litigants—whether they can't afford an attorney or prefer not to have one—at the D.C. Superior Court and at courts nationwide.

According to Greg Hurley, administrator for SelfHelpSupport.org, a Web site that serves as a clearinghouse of information for self-help practitioners, the surge of interest in creating resources at the courts for self-represented litigants was born out of necessity. While, unfortunately, statistics on self-represented litigants are hard to come by, Hurley says there seems to be a general consensus pointing to the poor state of the economy to explain why more people are foregoing counsel and choosing to represent themselves.

Not that there hasn't always been a certain percentage of the population who either could not afford an attorney or think it does not make economic sense to hire one. "The recession hasn't changed the fact that the financial considerations of a case are a factor in the decision whether to hire a lawyer. When a relatively small amount of money is at issue, it may not be rational to hire an attorney even if the litigant could afford it. The problem is that many people cannot afford to hire a lawyer even when the stakes are high. So, while the economics of many cases hasn't changed, I think we are seeing more people in court with financial difficulties that have contributed to their legal problems," says D.C. Bar Pro Bono Program managing attorney Dan Clark, who oversees the Landlord Tenant Resource Center at the D.C. Superior Court.

It's often not economically feasible for people to retain legal counsel in civil cases and, unfortunately, those sometimes include high-stakes cases. "The raw reality is that even the worst attorney is going to benefit self-represented litigants in some aspects of their case, but the flip [side] of that is, if you have a lower value civil case or a divorce where you don't have many assets, it may not be cost-effective to hire an attorney," Hurley says.

Courts have taken various steps to address the hurdles faced by self-represented litigants, including the creation of self-help resource centers, training for judges and court staff, and efforts to make court documents more user-friendly. Apart from the Family Court Self-Help Center (which the D.C. Bar Pro Bono Program helped create and ran initially), the D.C. Superior Court also hosts several information and assistance centers (Landlord Tenant Resource Center, Small Claims and Consumer Law Resource Center, Probate Resource Center, and Tax Sale Resource Center) as well as legal clinics (Pro-Se-Plus Divorce Clinic and Pro-Se-Plus Custody Clinic) being run by the Pro Bono Program. These programs can provide any self-represented litigant with some

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amount of legal advice and they can also refer low-income litigants to legal services providers for further assistance.

The D.C. Superior Court has informational materials and forms available throughout the courthouse and online. But even with these efforts, any self-represented litigant may still find him- or herself at a disadvantage and face unfavorable outcomes in the courtroom. Some people argue that recognizing the right to counsel for low-income, self-represented litigants in civil cases would be more beneficial than self-help resources alone.

"In some situations where you have a population that can get to the courthouse, a self-help center might be the ideal way to go. If you have a bar association that's interested in helping, you can have some pro bono programs, and if you don't have that, you could have Justice Corp volunteers." **Greg Hurley**

Little Things, Big Difference

Self-represented litigants have long been familiar fixtures at landlord and tenant and family law courts. In 2003 more than 99 percent of tenants named in some 48,000 summary eviction actions filed at the D.C. Superior Court were unrepresented, while 14 percent of the landlords appeared without counsel.

As Clark points out, "If someone is sued for nonpayment of rent, [he or she is] not going to pay a lawyer more than the amount in dispute even where there is a valid defense." Clark adds that the District's landlord and tenant court is busier than average as it is located in an urban area with comprehensive laws.

The resource center can, among other things, provide free information to unrepresented tenants and landlords about court proceedings and how to retain counsel and obtain a continuance, make referrals to legal services providers, and coach litigants on how to best make their case before a judge—but it still cannot take the place of an attorney. "Little things, simple questions, can make a big difference in a case, so someone who doesn't know the law can really be at a disadvantage," Clark says.

For example, a person going into the landlord and tenant court without an attorney is not likely to know that while loss of employment is not a valid defense to a nonpayment of a rent case, a landlord's failure to maintain the property is.

An attorney can also be invaluable in complex domestic relations cases such as a divorce that includes property or children, or both. Sickel of the Family Court Self-Help Center says divorce is actually the second most frequent domestic relations issue that people ask about at the center; the first is child custody, and the third is child support. Like the Landlord Tenant Resource Center, the Family Court Self-Help Center can only provide information and assistance related to family law cases, but not legal advice.

"Our role is relatively limited; we're putting the information out there so people can make the right decisions, but ultimately there is a lot of need for representation," Sickel says. In divorces, for example, Sickel says "using the self-help center to start is one thing, but once you're in litigation, you really need to be doing discovery and to find out how big his pension is and what other property there is, and doing that yourself is not a great idea."

Self-help centers can be helpful for litigants who are voluntarily taking on a fairly simple civil case by themselves. Hurley of SelfHelpSupport.org thinks these centers will become more common once the courts' budgets improve. "When you put in a self-help center, you make the courtroom more efficient, you make the clerk's office more efficient, and you save litigants and the court time and money," he says.

Clark describes the resource centers at the D.C. Superior Court, staffed by approximately 500 volunteers a year, as "one piece of a whole continuum of services. It's a point of entry for self-represented litigants. The centers can refer people to other resources that may help them, whether it's a social worker, legal services provider, or another resource center."

Self-help centers and clinics can take out some of the bewilderment that comes with navigating unfamiliar legal jargon and rules and procedures, because even seemingly straightforward actions can trip people up. It is not uncommon for people to search for court forms online without realizing that the forms have to be jurisdiction-specific in order to be valid.

On more than one occasion Sickel has had a self-help center visitor tell him that he or she had already filed a complaint, but what that person has really done was hand in the intake papers to the center's front desk.

Burden on the Courts

Lack of legal representation also presents problems to judges, lawyers, and court administrators. Clark says this is what drives a lot of the court reforms regarding self-represented litigants. Not only can there be simple frustration among attorneys and judges in interacting with unrepresented litigants unfamiliar with the legal system, there are also ethical and professional considerations.

Attorneys often find themselves in an adversarial position in their dealings with unrepresented litigants. They can be faced with the challenge of zealously representing the interests of their clients while not taking unfair advantage of a self-represented party.

Litigants without legal counsel also can put judges in a delicate position. A judge must find the right balance between impartiality and the duty to adequately assist self-represented litigants so that

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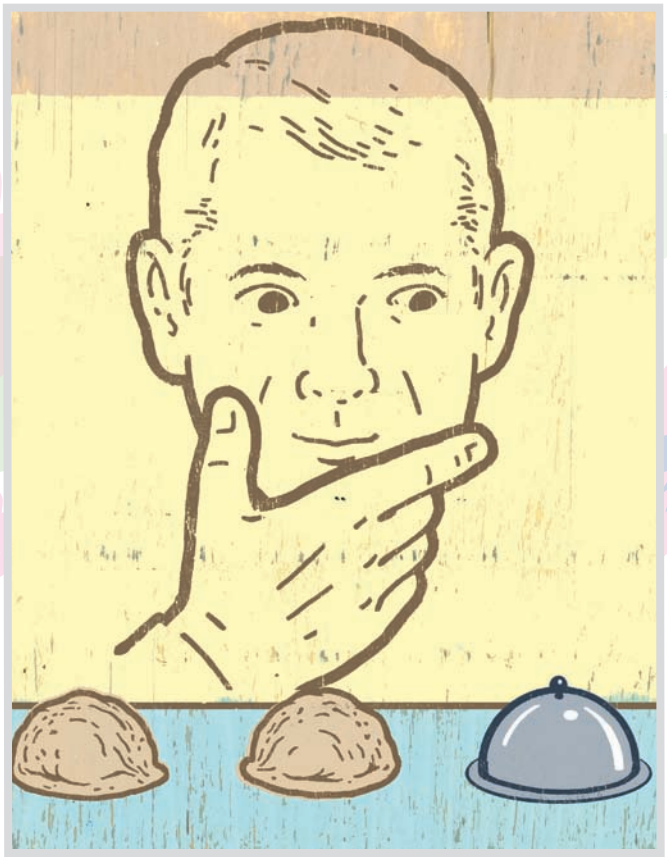

information can be provided and the case decided in a timely manner. With proper training, Zorza of SRLN says judges should have no problem accommodating self-represented litigants without actually advocating for them.

"Provided that judges are transparent, treating everybody equally doesn't require being absolutely passive. You can engage with both sides as much you need to in order to decide the case based on the facts of the law and everybody will understand that that is actually neutral and appreciate it," he says.

"The truth is that it's necessary—you can't move these cases without being engaged and the only question is, how do you do it in a way that you feel comfortable? Judges don't get disciplined for being engaged as long as they're [not] blatantly not neutral, so people see it as a danger area but it's actually not."

SRLN has created a judicial curriculum package—"Access to Justice in the Courtroom for the Self-Represented" and "An Overview of Judicial Leadership in Access to Justice for the Self Represented"—for judges on how to deal with self-represented litigants in the courtroom. Zorza says SRLN launched the curriculum in November 2007 at the National Judicial Conference on Leadership, Education and Courtroom Best Practices in Self Represented Litigation at Harvard Law School, which drew 35 teams nominated by the state courts' chief justices to attend.

It can also be important to provide training for court clerks so that they understand the difference between providing legal information, which they are allowed to do, and giving legal advice, which they are not. Hurley of SelfHelpSupport.org says one of the great aspects of self-help centers is that they offer a place for court clerks to refer people when they cannot answer a particular question.

"The issue of providing civil right to counsel didn't start with *Gideon*, but that really laid the groundwork for saying, 'Look, if we're going to provide counsel in these situations, then we ought to look at the civil context where there are equally important rights at stake.'" **John Pollock**

Self-Help Efforts

Self-help centers and training curricula are just two of several cost-effective ways courts and legal services providers are using to provide more access to justice for self-represented litigants.

As a collection point for everything and anything self-help-related, SelfHelpSupport.org, launched in 2004 and also hosted by NCSC, offers numerous resources for courts and legal aid programs, from its online library to its forum wherein people involved in providing legal assistance can share best practices and innovations. Hurley calls the site one of the main entry points for the self-represented community to get information and communicate with one another.

Whereas SelfHelpSupport.org is geared toward practitioners assisting self-represented litigants, LawHelp.org/DC—a project of the D.C. Bar Pro Bono Program with the support of the D.C. Consortium of Legal Services Providers and funding from the D.C. Bar Foundation—is a resource for litigants themselves. Here, litigants can find information on civil legal matters like employment, immigration, public benefits, family law, and housing.

SRLN, on the other hand, is now working with public libraries around the country to train librarians on the proper way to assist people seeking online legal information on library computers. It has also been working on a diagnosis protocol that provides courts a low-cost way to implement self-assessments that would help them improve the way they manage cases.

Hurley says there are numerous methods that states are employing to provide more assistance to self-represented litigants, although part of what influences a state's efforts is geography.

"In some situations where you have a population that can get

Illustration by Dan Page

to the courthouse, a self-help center might be the ideal way to go. If you have a bar association that's interested in helping, you can have some pro bono programs, and if you don't have that, you could have Justice Corp volunteers. Then there's Montana's solution of using phone-based or Internet-based services. The answer depends on your population and what the attorneys in your area are willing to do," he says.

Zorza, the SRLN coordinator, says a lot of states have initiatives to get unbundled legal services (or discrete tasks representation) in place, allowing a client to hire an attorney to handle certain legal services but not provide full representation.

"It's a very good thing for the courts to be working on because it doesn't cost them anything in the long term and actually saves them money. [It will] particularly [help] the middle-income group that is too poor to afford a lawyer but not poor enough to get legal aid," he says.

Clark, the Landlord Tenant Resource Center managing attorney, says that while there are no rules in place preventing the unbundling of legal services in the District, there are difficulties concerning attorney appearance rules. Usually an attorney can only leave a case if the court allows it, and, according to Clark, judges like to see the same lawyer involved in all parts of the case.

SRLN has found that unbundling has not been prohibited, except in a small number of jurisdictions where there had been a misinterpretation of their respective Rules of Professional Responsibility. "The anxiety over [unbundling] comes from previous patterns of lawyers taking all the money they can from clients and then ditching them, but that pattern is very different from unbundling, which is based on a prior and detailed agreement of what is going to be done," Zorza says.

There have been some adjustments made for low-income litigants. At the D.C. Superior Court, legal services attorneys are allowed to file a temporary appearance in the landlord and tenant court, as part of a new Attorney of the Day Project.

Civil Right to Counsel

Self-help resources have been set up across the country (and online) to provide legal assistance to unrepresented litigants involved in all types of civil cases, but some of those who work in access to justice issues believe that courts should go further and provide attorneys in civil cases to litigants who cannot afford them.

In October 2009 California became the first state to recognize the right to counsel for low-income residents in civil matters such as custody and foreclosure when Governor Arnold Schwarzenegger signed into law the Sargent Shriver Civil Counsel Act.

The right to counsel in criminal cases has been in place since the 1963 U.S. Supreme Court decision in *Gideon v. Wainwright.* However, in 1981 the Court ruled in *Lassiter v. Department of Social Services* that unlike in criminal cases, state courts are not required under the Sixth Amendment to provide counsel in civil cases for indigent defendants.

Despite the Supreme Court's decision, several states have passed statutes adding right to counsel in certain civil matters, and those involved in what is known as the "civil Gideon movement" hope to see more of this type of law in the future. In 2006 the American Bar Association (ABA) adopted a resolution urging federal, state, and territorial governments to provide legal representation to low-income people in cases where "basic human needs are at stake."

"The issue of providing civil right to counsel didn't start with *Gideon*, but that really laid the groundwork for saying, 'Look, if we're going to provide counsel in these situations, then we ought to look at the civil context where there are equally important rights at stake,'" says John Pollock, the recipient of the two-year ABA Civil Gideon Fellowship with the Baltimore-based Public Justice Center.

Pollock says a lot of states have passed right to counsel statutes relating to parental rights and delinquency cases, but there's hardly anything in place outside of family law, even in cases where a lot can be at stake such as evictions, foreclosures, and denial of Medicare or Medicaid.

While civil *Gideon* advocates are happy about the California law (which is being funded by a $10 allocation of existing court fees), that legislation certainly won't change things overnight. The Sargent Shriver Civil Counsel Act allows for the creation of pilot projects that will be funded on two three-year cycles, as well as a judicial council to establish eligibility criteria, the scope of the projects, and where they will operate. Proponents hope the projects will help answer questions such as when does a person in a civil case need a lawyer to reach a fair result, or what is the most cost-effective way to provide legal services.

Pollock, however, thinks some critics of the law have misinterpreted it to mean that there will now be a right to counsel for everybody in the state, which would be impossible. He says the act only applies to selected courts in the state and it's not so much about creating a right to counsel as it is about extending the ability of legal service delivery programs to provide more services than they currently do.

As for claims that states cannot afford to provide more self-represented litigants with counsel, Pollock says it's the alternative that's too expensive. "It can wind up becoming very difficult and inefficient for the courts trying to deal with so many self-represented plaintiffs or defendants, especially when they have legitimate claims or defenses… It's costing the courts a fortune in terms of time and money, and it's also costing the state a lot in terms of consequences when people lose," he says.

"You only have to look at the foreclosure crisis to see what happened. More than half of the people going into foreclosure are unrepresented, people being evicted and losing their homes, and many of them could have avoided this if they had had an attorney to assert claims. The consequence on cities is that they have had massive vacancy rates, increased crime, and loss of property tax revenue."

Pollock hopes the California program would demonstrate that money spent now on the self-represented population will translate into money going back to the state later, whether through emergency services, health care, or law enforcement. Although Zorza's work at the SRLN is focused on helping self-represented litigants help themselves, he says it's exciting to see a governor and a legislature show interest in working with the courts on the issue. Zorza is also hopeful that the California program will provide information for courts to narrow down the areas where attorneys are needed, and to provide alternative services in places where they're not.

"We're spending about a billion dollars a year on civil legal services now, and according to civil needs surveys, we're only meeting about 20 percent of the need…. We have to develop alternate mechanisms like self-help," he says. "The [legal] system has become much too complicated. I think we have to simplify the system and reduce the costs of using the courts for everybody, regardless of whether they have a lawyer."

Pollock agrees that self-help resources play an important role in assisting self-represented litigants. "All the different approaches are critical because there is always going to be a need that has to be filled. The courts play an important role in providing justice to self-represented litigants and law firms donate tremendous amounts of pro bono time, and these are both important parts of the same puzzle…. There is always going to be a need for additional lawyers and it's never going to be the case where everyone who needs a lawyer has one. There's been a lot of work done by the court system and other agencies to promote self-help materials and that is just an important part of solving the problem," he says.

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

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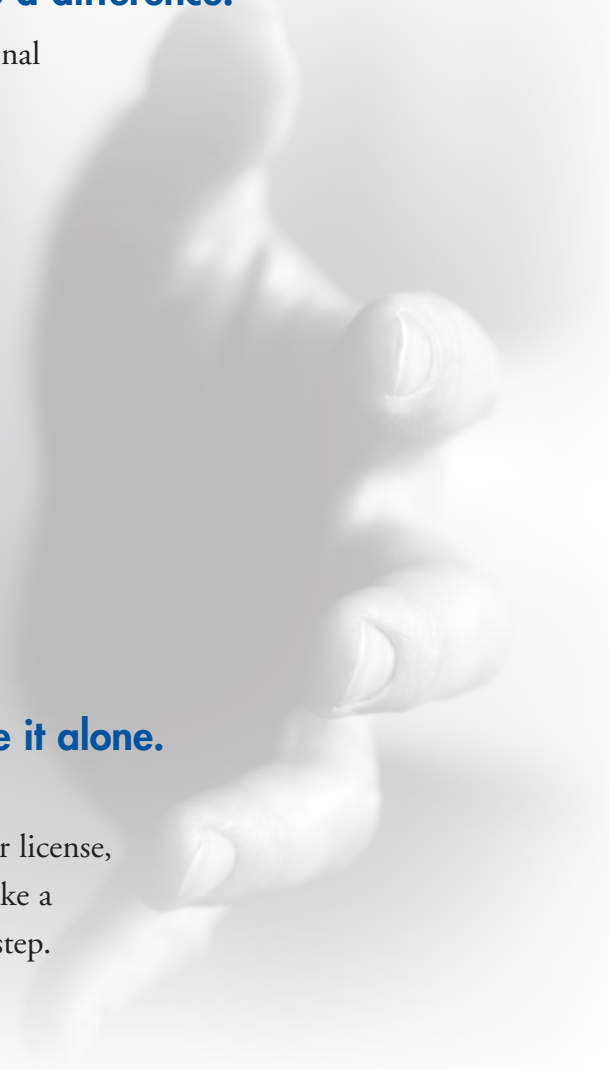

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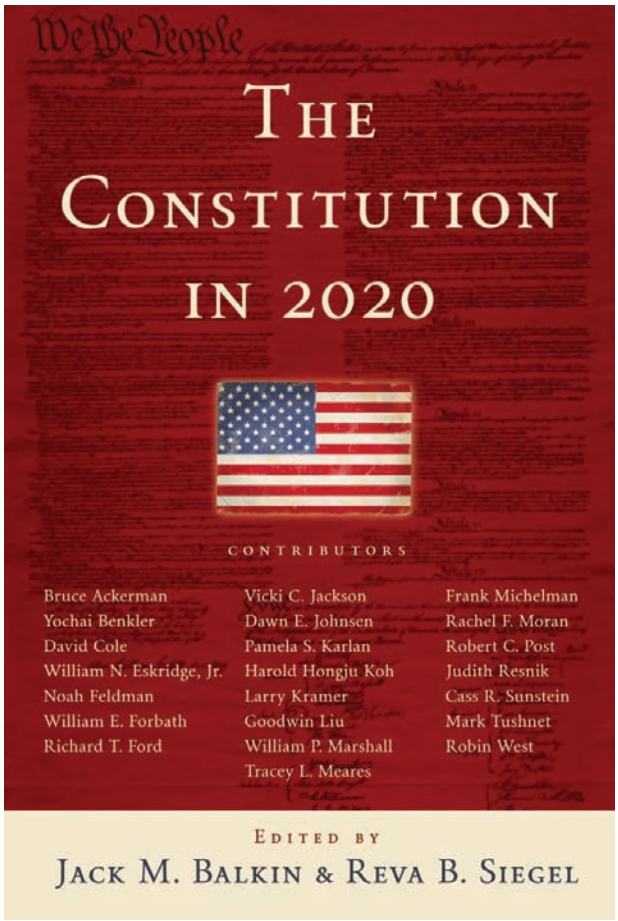
books in the law



The Constitution in 2020
Edited by Jack M. Balkin and Reva B. Siegel
Oxford University Press, 2009

REVIEW BY RONALD GOLDFARB

In May 2008 I reviewed a book about the rise of the conservative legal movement during the last decades of the 20th century. In *The Constitution in 2020*, 22 legal scholars and two editors attempt to launch a comparable progressive movement through essays proposing the elements of a new vision of the Constitution. If, indeed, the Constitution is an aspirational work in progress, subject to cultural and political mobilizations, what should a progressive, 21st-century American civil society look like? How do legal decision makers connect modern practices with historic principles? When circumstances change, how should laws be altered? These provocative questions are discussed by a group of academic experts who offer an intellectual blueprint for reforming a constitutional government in the new century.

Jack M. Balkin, a Knight Professor of Constitutional Law and the First Amendment at Yale Law School, contributes several essays to the collection he and his colleagues (most from elite law schools—Georgetown, Harvard, Stanford, and Yale) have written. His introductory essay focuses on the debate among scholars over originalism (associated predominantly with Justice Antonin Scalia) and constitutional evolution. Balkin concludes that the choice between original meanings and a living, changing document is a false one. Living constitutionalism and original meaning, he advocates, "are two sides of the same coin."

Text and principle are both essential to constitutional interpretation. The precise constitutional requirement that our president be at least 35 years old cannot be changed by courts to 55 because we live longer in the 21st century. But defining what "cruel and unusual" punishment is may change as modern standards often do. Later generations might decide that our prison sentences should become more punitive to deal with new levels of crime, or that capital punishment is unacceptable even though it was permitted in the late 18th century.

In Balkin's view, if the Constitution states a standard, it should be applied; if it states a general principle, it, too, should be applied. But in the latter case, original intentions are the beginning of the answer, not the end of it.

Stability of precedents must sometimes concede to overriding, new social standards. How the law treated married women or interracial marriages in the 18th century is not the standard for our practices today. Social movements such as the civil rights struggle led to changes to constitutional interpretation—*Plessy v. Ferguson* and *Brown v. Board of Education* are examples. Such a perspective of constitutional law keeps scholars and law professors, as well as institutional lobbyists, busy analyzing which political and social movements (abortion or gay marriage, for instance) warrant new constitutional doctrines, or what "writings" are protected by the copyright laws in a digital age.

Balkin makes another important and relevant point: Most constitutional law does not come from the courts, but from constitutional construction by national and local executive officials and legislators. These government officials take note of successful social and political movements that eventually become reflected in laws as well as constitutional constructions of those laws as new standards enter the mainstream. That's how generations upon generations make the Constitution "our own."

Georgetown University Law Center professor Robin L. West supports Balkin's thesis. Core constitutional law in recent history—labor laws, civil rights codes, and age and disability rules, among them—came from legislatures more so than the courts. Legislators increasingly must act under their constitutional mandates. West argues that the Fourteenth Amendment's Equal Protection Clause should not be viewed as a way to protect people *from* the application of laws, but rather as a basis to actively use laws to protect people from various evils. Legislatures should deal with what the laws *ought* to be, while the courts deal with what they truly are. The art of legislation, West argues, should deal with moral imperatives to act on behalf of the people, not merely to protect them against discriminatory uses of laws. That view is the positive value of law, and it should respond to substantive inequality. In this view, a legislative Constitution should be the basis for a progressive jurisprudence for the future.

Several commentators propose a non-judicial, structural approach to constitutional reform—relying on legislatures rather than the courts to invigorate constitutional rights. Judicial activism in the mid-20th century (the Warren Court era) interposed constitutional rights defensively to prevent states from doing wrong by citizens. Needed now, these professors argue, are proactive approaches that are better done by legislatures to invigorate inchoate constitutional rights of citizens.

Some of the authors advocate applying the Fourteenth Amendment's equal protection and privileges and immunities clauses to reach out to cure entrenched inequalities in voting, housing, education, and health care. National citizenship should include the active development of new opportunities—entitlements and redistributions—to eliminate fundamental disparities among citizens. One writer focuses on national identity and the various prejudices inherent in the lives of immigrants. Reversing the perversities of recent applications of constitutional rights in cases involving affirmative action and the First and Second Amendments, for example, is suggested by several writers. Departing from elitist conceptualizations of constitutional rights and focusing on practical, local movement politics is recommended by another contributor—a move from "abstruse moral rhetoric to commonsense morality."

Various authors focus on their favorite areas of reform. One calls for a Third Reconstruction to deal with new forms of voter disenfranchisement such as the return of voting rights to ex-offenders and undoing gerrymandering along racial lines. Another notes the misuse of classic First Amendment protection of communication to maintain democracy, with courts applying the amendment to undermine campaign finance laws, hate speech prohibitions, pornography suppression, and regulation of commercial transactions (advertising). Yet another advocates more sensitivity to continuing racial problems, including those in the criminal justice system. Still others suggest taking a page from the conservative agenda by recognizing the power of religious values while respecting the institutional separation of church and state, and easing the tensions between secularism and the religious culture.

Yale law professor Bruce Ackerman proposes three reform measures he believes would invigorate citizenship: a new national holiday—Deliberation Day—when citizens would have time to focus on election issues, a grant of $50 to all citizens to spend on elections to diminish the power of large contributors, and the creation of a Stakeholder Society wherein each American will be given an $80,000 stake for his or her education.

University of Texas law professor William Forbath pursues solving the "hazards of modern marketplace life" by addressing the needs of the economy—education, healthcare, and housing. The state must act positively in the public interest, not merely to prohibit discrimination, he argues. Other contributors discuss internationalism as a source for insights, inspiration, and precedent in a global world—"the best ideas of all systems and of every age" as one U.S. Supreme Court opinion suggested.

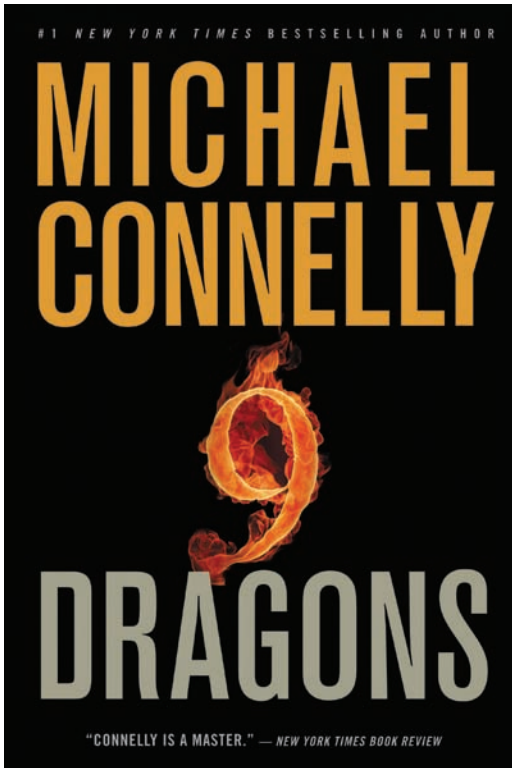
Several contributors, Georgetown's David Cole for one, discuss the special needs of the current national security state, which is neither likely to subside nor be controlled by reluctant executive or legislative officials. Cole hopefully looks to transnational regulations and international human rights influences as solutions. If we are to avoid becoming a society portrayed in the movie *The Lives of Others*, Cole's plea must be taken seriously.

Harold Koh, former Yale Law School dean, reminds readers that the Framers of the Constitution recommended "decent respect to the opinions of mankind" in the Declaration of Independence. Media, nongovernmental organizations, and citizens must demand and oversee the balance of power within our government and with other nations in an increasingly global world.

One book does not a movement make. As my earlier review of the conservative legal movement noted, a combination of think tanks, politics, grass roots organizing, public education, test cases, judicial appointments, and political rhetoric is needed to take ideology into the jurisprudential and public Zeitgeist. The authors reviewed here call upon organizations such as the American Constitution Society to facilitate a movement to create what the Federalist Society did for conservatism in the recent past. Movements begin with a blueprint, and this book provides a rich and articulate intellectual approach for those who agree and decide to implement it.

Ronald Goldfarb is a Washington, D.C., attorney, author, and literary agent whose reviews appear regularly in Washington Lawyer. *Reach him by e-mail at rglawlit@aol.com.*

Nine Dragons
By Michael Connelly
Little, Brown, 2009



REVIEW BY PATRICK ANDERSON

I went on record several years ago as believing that Michael Connelly's Harry Bosch novels are the finest crime series any American has written. That means I rate the Bosch series superior to those written by Raymond Chandler, John D. MacDonald, Ed McBain, George Pelecanos, James Lee Burke, and others one might mention. I base this view on the depth and seriousness Connelly has brought to his characterization of Bosch, the excellence of his plotting, the precision of his writing, his unsurpassed grasp of the police culture, and the moral gravity of his work. Plus, let it be said, the novels are a pleasure to read.

Connelly's *Nine Dragons*, the 15th Bosch novel, does nothing to lessen my admiration for the series, but it underscores my belief that the books have been changing. The recent novels are different from Connelly's earlier books, both in tone and content. They are not necessarily better or worse, just different. Bosch himself has been changing, too, as he has aged in real time, from 40 to his late 50s, in the 17 years since we first met him.

Before discussing the new novel, I would like to take a look back at the series. If you have never read Connelly, *Nine Dragons* is a perfectly good place to start, but to fully appreciate his achievement you should read several of his earlier novels. They are all interconnected and part of the long chronicle of a haunted man seeking to save his soul by fighting crime.

Let's start with a brief look at Connelly's career. His father and grandfather were in the construction business, and when Connelly went off to the University of Florida, he intended to follow in their footsteps. But he hated the courses he was taking, and one day he wandered into a showing of director Robert Altman's quirky film version of Chandler's *The Long Goodbye.* He loved the movie and quickly devoured all of Chandler's novels. This led to a bold plan. He would change his major to journalism, become a police reporter, and use reporting as a launching pad to writing novels like Chandler's. Connelly did precisely that. He became an award-winning police reporter in Florida and then was hired by the *Los Angeles Times*. There, in Chandler's city, he published his first novel, *The Black Echo* (1992), in his mid-thirties. It won the Edgar Award for Best First Novel presented by the Mystery Writers of America, and Connelly was off and running.

When we first glimpse Bosch in *The Black Echo*, a telephone call awakens him from a nightmare that harks back to his service as a "tunnel rat" in Vietnam. The call rouses him at 8:53 on a Sunday morning as he is sleeping, fully clothed, on a chair in front of a television set that is still on, surrounded by empty beer bottles and cigarette packs. He is 40 years old and, although he is a good detective, he is also a wreck. Aside from his work, booze and classic jazz are his main consolations.

The murder of Bosch's mother when he was 11, the harsh foster homes he lived in thereafter, and the carnage in Vietnam have left him a self-destructive, tormented man, a detective in constant conflict with incompetent and corrupt superiors in the Los Angeles Police Department (LAPD). The early Bosch novels are angry stories about an angry man. The lethal darkness of the tunnels in Vietnam has been replaced by the darkness of the mean streets of Los Angeles.

As the novels unfold, Connelly introduced a cast of characters who often reappear in later Bosch novels. In *The Black Echo* a Federal Bureau of Investigation (FBI) agent named Eleanor Wish becomes his lover; in a later novel they are married and she returns in *Nine Dragons*. In the fourth Bosch novel, *The Last Coyote* (1995), Bosch investigates the murder of his mother, who was a prostitute. His search leads him to meet his dying father and to discover that he has a half-brother, who will reappear years later. The seventh novel, *A Darkness More Than Night* (2001), is possibly the darkest of the Bosch series. Bosch is suspected of murder and is almost killed. Discussing this novel, Connelly mentions philosopher Friedrich Nietzsche's comment that when you look into the abyss, the abyss looks into you. "Probably no other thought more inspires or informs my work," Connelly says. "Harry Bosch has spent most of his life looking into the abyss, into the darkness of the human soul. What has this cost him?"

After the bleakness of *A Darkness More Than Night* (a title borrowed from Chandler), the mood of the novels begins to lighten—it could hardly have become darker. In *City of Bones* (2002), Bosch is nearing 50 and shows signs of mellowing. He has his drinking and smoking under control and has achieved an uneasy peace with his superiors. Bosch has embraced what he calls "the blue religion." Police work is, for him, a one-man war against the world's evil—and can be, he believes, his path to salvation.

Lost Light (2003) is another of the key Bosch novels. Near its end, Eleanor Wish reappears. After leaving Bosch, Wish quit the FBI and became a professional gambler. Now she introduces Bosch to Madeline, the daughter he never knew he had. Bosch immediately has two thoughts: that this child can save him, but that he is now vulnerable in ways he had never been vulnerable before. That vulnerability will soon be tested, but first Connelly produced several novels—*The Narrows* (2004), *The Closers* (2005), and *Echo Park* (2006)—in which the new, calmer Bosch works fairly contentedly for the LAPD. His contentment reflects Connelly's respect for William J. Bratton, who became the real-life LAPD's chief in 2002. Bratton was a fan of Connelly's books, opened doors for him in the department, and in Connelly's opinion, did much to eliminate the corruption that Bosch had battled against earlier in the series.

Connelly has always sought innovations that would keep the Bosch series interesting both to himself and to his readers. He has written non-Bosch stand-alones; the first, *The Poet* (1996), remains one of his

best novels. In one novel he switched from a third-person narrative to writing in the first person, and in another he had Bosch quit the LAPD—only to soon return. In *The Lincoln Lawyer* (2005), Connelly made another bold departure. The novel stars Mickey Haller, a smart, colorful, somewhat shady defense lawyer who is known for working not out of an office but out of his Lincoln Town Car as it moves between Los Angeles courthouses. The kicker is that Haller is the half-brother that Bosch learned about, but had never met, back in *The Last Coyote*. In *The Brass Verdict* (2008), the half-brothers team up on a case.

All of these bring us to the current *Nine Dragons*. Wish has taken Madeline, who is now 13, to Hong Kong where she works as a gambler in a casino. Bosch is investigating the murder of a Chinese American who operates a liquor store in Los Angeles. When he arrests a member of a Chinese crime gang, or triad, his daughter is kidnapped in Hong Kong in apparent retaliation. Bosch immediately tells Wish not to call the local police—he does not trust them—and catches a plane to Hong Kong. He will, he vows to Wish and others, find and save his daughter from gangsters who may intend to sell her into sex slavery.

Bosch's quest seems all but impossible, although Connelly gives Bosch a couple of good clues to lead him to the girl and also gives him a formidable Chinese sidekick to help out. If I have any objection to the novel, it is that Bosch shows signs here of advancing from obsessive cop to superhero. However, the fact remains that *Nine Dragons* is one of Connelly's most suspenseful novels, a superlative read. As Connelly's style has evolved, his later books have become less dense, more lean, and more easily accessible to the mass audience he now commands, but without sacrificing the anger and realism that drew us to Bosch in the first place. Connelly writes with such skill and conviction that we accept Bosch's needle-in-a-haystack heroics in Hong Kong.

So what's next for Harry Bosch? Connelly has spoken of ending the series because his hero is nearing 60, a bit long in the tooth for a detective. But he is also a tremendously popular fictional character and there are various ways the author can keep Bosch active—and almost certainly will. What we can be sure of, after 15 Bosch novels, is that the tormented rebel of the early novels has evolved into an avenging angel, a kind of saint. The series, we can see now, has an arc—it has become

continued on page 46

attorney briefs

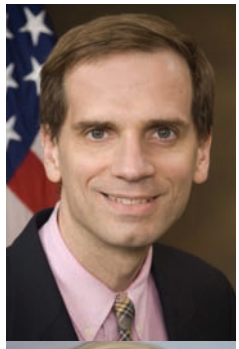
By Thai Phi Stone

Honors and Appointments

Judge **Cheryl M. Long** of the Superior Court of the District of Columbia and **Barbara A. Moulton**, assistant dean for public interest programs at the Georgetown University Law Center, were honored with Georgetown's annual Paul R. Dean Award… **William S. Boshnick**, a partner at Greenblum & Bernstein, P.L.C., has been appointed vice chair of the International and Foreign Law Committee of the American Intellectual Property Law Association… **Catherine Anne Chess Chen**, assistant general counsel for the Federal Bureau of Investigation, has received the Attorney General's Award for Outstanding Contributions by a New Employee… **Atinuke O. "Tinu" Diver**, an attorney in the Office of Chief Counsel at the U.S. Department of Transportation's Research and Innovative Technology Administration, John A. Volpe National Transportation Systems Center, in Cambridge, Massachusetts, received the Secretary's Award for Equal Employment Opportunity during the department's 42nd Annual Awards Ceremony… **Christopher A. Glaser**, a shareholder at Bean, Kinney & Korman, PC, was appointed to the Industrial Development Authority of Fairfax County, Virginia, as member… The following attorneys have been inducted into the American College of Trial Lawyers as fellows: Jenner & Block LLP partner **David A. Handzo,** Morrison & Foerster LLP partner **Adam S. Hoffinger**, and **Bruce J. Klores** of Bruce J. Klores & Associates, P.C.… **Sarah H. Lamar**, a partner at Hunter, Maclean, Exley & Dunn, P.C. in Savannah, Georgia, was elected chair of ALFA International… **Robb A. Longman**, a senior associate at Joseph, Greenwald & Laake, has been selected by the Maryland State Bar Association's Tax Section to expand the section's award-winning pro bono program nationally with the American Bar Association… **Deborah Luxenberg** of Luxenberg, Johnson, & Dickens, PC has received the Charles A. Horsky Award from the Council for Court Excellence for her exemplary contributions to the council as chair of its Children in the Courts Committee from 2001–2009… **Roderick H. Morgan,** a partner at Bingham McHale LLP in Indianapolis, has been elected president of the Indiana State Bar Association for the 2009–2010 term… **Martin Perlberger** has been appointed to the Beverly Hills Unified School District Citizens' Oversight Committee for the $342 million Measure E bond issues… **David L. Roll**, a partner at Steptoe & Johnson LLP, has been named a 2009 Purpose Prize Fellow, an honor for social entrepreneurs over 60 who use their experience and passion to take on society's biggest challenges… **Theodore W. "Ted" Small Jr.** has been appointed to the American Bar Association's Standing Committee on Pro Bono and Public Service for a three-year term and became president-elect of the board of directors of Florida Legal Services, Inc.… **Lisa D. Taylor** of Stern & Kilcullen, LLC in Roseland, New Jersey, has been certified as a mediator by the International Mediation Institute… **Lawrence Roberts** has been named chief of staff to Democratic National Committee Chair Timothy Kaine... **Barry D. Walters** has been appointed to the position of Chief Freedom of Information Act and Privacy Act Officer for the U.S. Securities and Exchange Commission… **Stephanie Tsacoumis** has been appointed vice president and general counsel of Georgetown University.

On the Move

Christopher C. Campbell has joined the intellectual property litigation practice at Cooley Godward Kronish LLP as partner… **Todd B. Castleton**, **Paul M. Hamburger**, **Eugene M. Holmes**, and **James R. Napoli** have established the District of Columbia employee benefits practice at Proskauer Rose LLP… **Thomas Z. Cheplo** has been elected partner and **Charles E. Wagner** has been elevated to of counsel at Blank Rome LLP... **Christopher T. Cloutier** and **Stephanie A. Webster** have been made partner at King & Spalding LLP… Securities lawyer **Robert V. Cornish Jr.** has joined Dilworth Paxson LLP as of counsel… **Laura Effel**, a licensed private investigator, is now performing workplace investigations in California… **Stephen Gurwitz**, who served as senior trial attorney for the Federal Trade Commission and as special assistant U.S. attorney for the Southern District of Florida, has retired after 34 years of federal service and has joined Renzullli & Associates in Alexandria, Virginia, as a senior financial investigator for the U.S. Department of State, diplomatic security section… **John K. Harrop** has joined the intellectual property practice at Thompson Coburn LLP as partner… **Mark R. Heilbrun** has joined Edwards Angell Palmer & Dodge LLP as partner in its public policy and government relations department… **Jeffrey J. Lorek** has accepted a direct commission to the U.S. Air Force Judge Advocate General's Corps as a military prosecutor and chief of operations and international law. He also was promoted to the rank of captain



Gregory G. Katsas, former assistant attorney general for the Civil Division of the U.S. Department of Justice, has returned to Jones Day as partner.

Sheila Slocum Hollis, a partner at Duane Morris LLP, has been chosen as a finalist for the Lifetime Achievement Award as part of the Platts Global Energy Awards.

Gary D. Anderson has joined Greenberg Traurig, LLP as a shareholder, specializing in complex civil litigation, white collar crime, and government enforcement actions.

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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.

JANUARY 5

So Little Time, So Much Paper: Effective Time Management Techniques for Lawyers
6–9:15 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section, Criminal Law and Individual Rights Section, Environment, Energy and Natural Resources Section, Family Law Section, Health Law Section, Labor and Employment Law Section, Law Practice Management Section, Litigation Section, and Real Estate, Housing and Land Use Section.

JANUARY 7

How to Litigate a Medical Malpractice Case
6–9:15 p.m. CLE course cosponsored by the Litigation Section and Tort Law Section.

JANUARY 11

Effective Mediation Advocacy
6–9:15 p.m. CLE course cosponsored by the Litigation Section.

JANUARY 12

How to Litigate a Patent Infringement Case
6–9:15 p.m. CLE course cosponsored by the Arts, Entertainment, Media and Sports Law Section, the Intellectual Property Law Section, and the Litigation Section.

JANUARY 13

2009 Criminal Law Highlights
2–5:15 p.m. CLE course cosponsored by the Criminal Law and Individual Rights Section.

JANUARY 14

Financial Accounting Basics for Lawyers
6–8:45 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section, Criminal Law and Individual Rights Section, Estates, Trusts and Probate Law Section, Family Law Section, Health Law Section, Labor and Employment Law Section, Law Practice Management Section, Litigation Section, and Taxation Section.

JANUARY 20

Ethics of E-Mail, Blogs, Twitter, and Other Social Networks
6–8:15 p.m. CLE course cosponsored by the Courts, Lawyers and the Administration of Justice Section, Criminal Law and Individual Rights Section, Environment, Energy and Natural Resources Section, Family Law Section, Labor and Employment Law Section, Law Practice Management Section, Litigation Section, and Real Estate, Housing and Land Use Section.

JANUARY 21

The New D.C. Vacant Property Tax, Part 5
12–1:45 p.m. Sponsored by the Estates, Trusts and Probate Law Section.

Introduction to Health Law 2010, Part 1: Introduction to the U.S. Health Care System
6–9:15 p.m. CLE course cosponsored by the Health Law Section and Labor and Employment Law Section.

JANUARY 22

Effective Writing for Lawyers Workshop
9:30 a.m.–4:30 p.m. CLE course cosponsored by all 21 sections of the District of Columbia Bar.

JANUARY 26

Choosing and Forming a Business Entity in the D.C. Metro Area
6–9:15 p.m. CLE course cosponsored by the Arts, Entertainment, Media and Sports Law Section, Corporation, Finance and Securities Law Section, District of Columbia Affairs Section, Family Law Section, Law Practice Management Section, and Real Estate, Housing and Land Use Section.

JANUARY 27

Essentials of Representing Nonprofits and Foundations: Tax and Election Law for Public Policy, Part 1
9 a.m.–3:30 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section, Litigation Section, Real Estate, Housing and Land Use Section, and Taxation Section.

Introduction to Department of Defense Security Clearance Cases
6–9:15 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section, Criminal Law and Individual Rights Section, Government Contracts and Litigation Section, International Law Section, Labor and Employment Law Section, and Litigation Section.

JANUARY 28

Essentials of Representing Nonprofits and Foundations: Tax and Election Law for Public Policy, Part 2
9 a.m.–3:30 p.m. See listing for January 27.

Introduction to Health Law 2010, Part 2: Introduction to Medicare
6–9:15 p.m. See listing for January 21.

FEBRUARY 2

Essential Trial Skills, Part 1: Jury Selection
6–9:15 p.m. CLE course cosponsored by the Criminal Law and Individual Rights Section, Family Law Section, Labor and Employment Law Section, Law Practice Management Section, Litigation Section, Real Estate, Housing and Land Use Section, and Tort Law Section.

FEBRUARY 4

Introduction to Health Law 2010, Part 3: Introduction to Medicaid
6–9:15 p.m. See listing for January 21.

and is stationed in Europe… **Seth A. Mailhot** has joined Nixon Peabody LLP as counsel in the firm's life sciences and health services practice groups… **Carlos G. Muñiz** has joined Bancroft Associates PLLC as managing director… **Jennifer Ngai** has joined the Legal Aid Society of the District of Columbia as an Equal Justice Works AmeriCorps Recovery Fellow working on foreclosure prevention… Communications transactional and regulatory attorney **Richard Rubin** has joined Winston & Strawn LLP as of counsel… **Steven Eichorn, Jeffrey R. Hamlin,** and **Rachel Hirsch** have joined Ifrah PLLC as associates.

Company Changes

Regina A. DeMeo, who became president of the Collaborative Divorce Association, Inc., has merged her solo practice with **Joseph, Greenwald & Laake** at 111 Rockville Pike, suite 975, in Rockville, Maryland… Eric M. Ellsley has formed **Ellsley Sobol, P.A.,** a civil trial law firm located at Pine Island Professional Centre, 111 North Pine Island Road, suite 103, in Plantation, Florida. The firm specializes in personal injury and wrongful death matters… A. Jeff Ifrah has opened **Ifrah PLLC** at 1627 I Street NW, suite 1100, in Washington, D.C., representing white collar defendants in civil and criminal matters, with an emphasis on government investigations, litigation, and contracts… Lesley Anne Moss has become a principal at Steven H. Oram, Chartered, which is now known as **Oram & Moss, Chartered**, located at 4600 North Park Avenue, Plaza South, in Chevy Chase, Maryland… Christine L. Gresham, Heather Mays-France, and Daniel A. Rudolph have formed **Rudolph, France and Gresham, P.C.**, located at 8 Granite Place, suite 34, in Gaithersburg, Maryland.

Author! Author!

John A. C. Cartner and **Richard P. Fiske** of Cartner & Fiske, LLC and **Tara L. Leiter** of Blank Rome LLP have written *The International Law of the Shipmaster*, published by Informa Professional… **Mary E. Goulet** has coauthored the paper "Predatory Mortgage Lenders and Retiree Borrowers," published by the Society of Actuaries... **Fred Hopengarten** has written the book *Antenna Zoning—Professional Edition*, published by Focal Press in conjunction with the Society of Broadcast Engineers... **Elizabeth Langer** has written "Seizing the Moments: The Beginnings of the *Women's Rights Law Reporter* and a Personal Journey," which appeared in volume 30, spring/summer 2009 issue, of the *Women's Rights Law Reporter*… **Julia Luyster**, an attorney for Rutherford Mulhall, P.A., has written *A Father's Right to Custody*, which chronicles the successful journeys of real men who navigated the court system... Mystery writer **Judith O'Sullivan's** "Death of a Cougar" has been included in the *Deadly Ink 2009 Short Story Collection*, published by Deadly Ink Ltd…. **Brien A. Roche** of Johnson & Roche, **John K. Roche** of Perkins Coie LLP, and **Sean Patrick Roche** of Cameron/McEvoy PLLC have coauthored *Law 101: An Essential Reference for Your Everyday Legal Questions*, published by Sphinx Publishing… **Andrew J. Sherman**, a partner at Jones Day, has coauthored the 2010 edition of the William M. Crilly classic *The Due Diligence Handbook*, published by AMACOM Books. He also has written the third edition of *Mergers and Acquisitions From A to Z*, due for release early this year, and the inspirational book *Road Rules: Be the Truck, Not the Squirrel*, published by Elevate… **Richard Verville**, a founding principal at Powers Pyles Sutter & Verville PC, has written *War, Politics, and Philanthropy: The History of Rehabilitation Medicine*, which discusses the legal history of the field of disability and rehabilitation medicine, published by the University Press of America.

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. E-mail submissions to D.C. Bar staff writer Thai Phi Stone at tstone@dcbar.org.

Books in the Law

continued from page 43

a classic story of rebirth and redemption, and Bosch is a spiritual descendant of the knights of Arthurian legend. At the end of *The Closers*, in which Bosch investigates long-unsolved murders, he vows "to carry on the mission … always to speak for the dead." Connelly, in his early 50s, has the time and talent to move his career in many directions, but one must hope he won't soon lose interest in Bosch and his tireless crusade for justice in a sinful world.

Patrick Anderson is a Washington, D.C.–based novelist and journalist. He regularly reviews crime fiction for The Washington Post.

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legal spectator

By Jacob A. Stein

The Super Supers

"Many a man's reputation would not know his character if they met on the street."
—Elbert Hubbard

Here is our plan. We start up a company called Lawyers Limited. It will identify and designate 30 egomaniacal self-promoters in each of the country's big cities. Each lawyer will be awarded the Super Super designation. Each lawyer will be given an impressive certificate announcing and confirming his or her achievement. The certificate and the lawyer's photograph will be placed in a gilt frame, ready for mounting in the Super Super lawyer's office. The cost is reasonable—just $4,500. Extra copies, $2,500.

Furthermore, the Super Super lawyer's name will appear in a special insert in the Sunday paper of general circulation in each city where he or she practices. Not only will the Super Super lawyer's name be included in the special insert, but his or her photograph will appear, along with a description of the lawyer's career, ghosted by Lawyers Limited. The special insert will be designed to look like a part of the Sunday paper itself rather than the paid-for advertisement it is.

A full front page will cost $50,000; a full back page, $11,000. Interior pages at reduced prices.

A Super Super lawyer will be given reduced rates at any hotel in the world that has the word "Ritz" in its title.

Special arrangements have been made with Cole Porter (he attended law school) for use of a knockoff of his song "You're the Top," for whatever purpose the Super Super lawyer chooses:

I'm the top!
I'm the Spy Museum.
I'm the top.
I'm the Coliseum.
I'm the one to see with the Do Re Mi.
I'm Franklin D.
I'm Muhammad Ali.
Yesiree,
I'm the top.

Well, there it is. The law practice has become as competitive as Coca-Cola versus Pepsi-Cola, and Wal-Mart versus Amazon. We have let ourselves be exploited by public relations firms and ad agencies. For a price—a big price—they will manufacture a made-to-order reputation and ship it C.O.D.

Years ago, a lawyer publicized himself by connecting with journalists who, for a tip here or there, would play up the lawyer in the newspapers. There were a few ethical rules against self-promotion techniques. Some people said the big firms did their self-promoting efforts at country clubs and golf courses, and then used their influence to enact ethical rules against advertising.

As early as 1942, Judge Learned Hand declared that:

> [P]ublicity is a black art; but it has come to stay, every year adds to its potency and to the finality of its judgments. The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it. (*Proceedings in Memory of Justice Brandeis*, 317 U.S. xv (1942).)

In the 1970s the United States Supreme Court extended the commercial speech doctrine to the law practice. Justice Harry Blackmun said it was anachronistic to assert that lawyers are somehow above "trade."

I have noticed that doctors post in their waiting rooms certificates, like Super Super lawyers do. The doctor is proclaimed to be a Super doctor. I spoke with a friend of mine who was, for years, the doctor's doctor here in Washington. He was the person to call (and still gets the call) to get the name of a good orthopedist, or a good cardiologist, or a good general surgeon.

I asked how he knew who was good and who was not so good. He said:

> Let's take an orthopedist. Some have manufactured a reputation, and it is known within the profession. The way I made a determination was speaking with nurses who assisted the orthopedic surgeons in the operating room. They knew the good from the bad. They knew the ones who were gifted and those who were not.

Is self-promotion inherent in the practice of law? I am afraid it is. The Duc de la Rochefoucauld (1613–1680) spent a lifetime studying self-promotion and self-interest. Here are a few words on the topic:

> Self-love is the love of one's self, and of every thing on account of one's self; it makes men idolize themselves, and would make them tyrants over others if fortune were to give them the means. It never reposes out of itself, and only settles on strange objects, as bees do on flowers, to extract what is useful to it. There is nothing so impetuous as its desires, nothing so secret as its plans, nothing so clever as its conduct. . . .
>
> We cannot sound the depths, nor penetrate the darkness of its abysses. There it is concealed from the keenest eyes, it goes through a thousand turns and changes. There it is often invisible to itself; it conceives, nourishes, and brings up, without being conscious of it, a vast number of loves and hates. Some of these it forms so monstrous, that when brought to light it is unable to recognize them. . . . (*Moral Reflections, Sentences and Maxims of Francis, Duc de la Rochefoucauld,* (1851).)

Oh, for a few years of nonpromotional, dignified leisure and two large estates to administer.

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

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