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By Kathryn Alfisi

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CONTENTS

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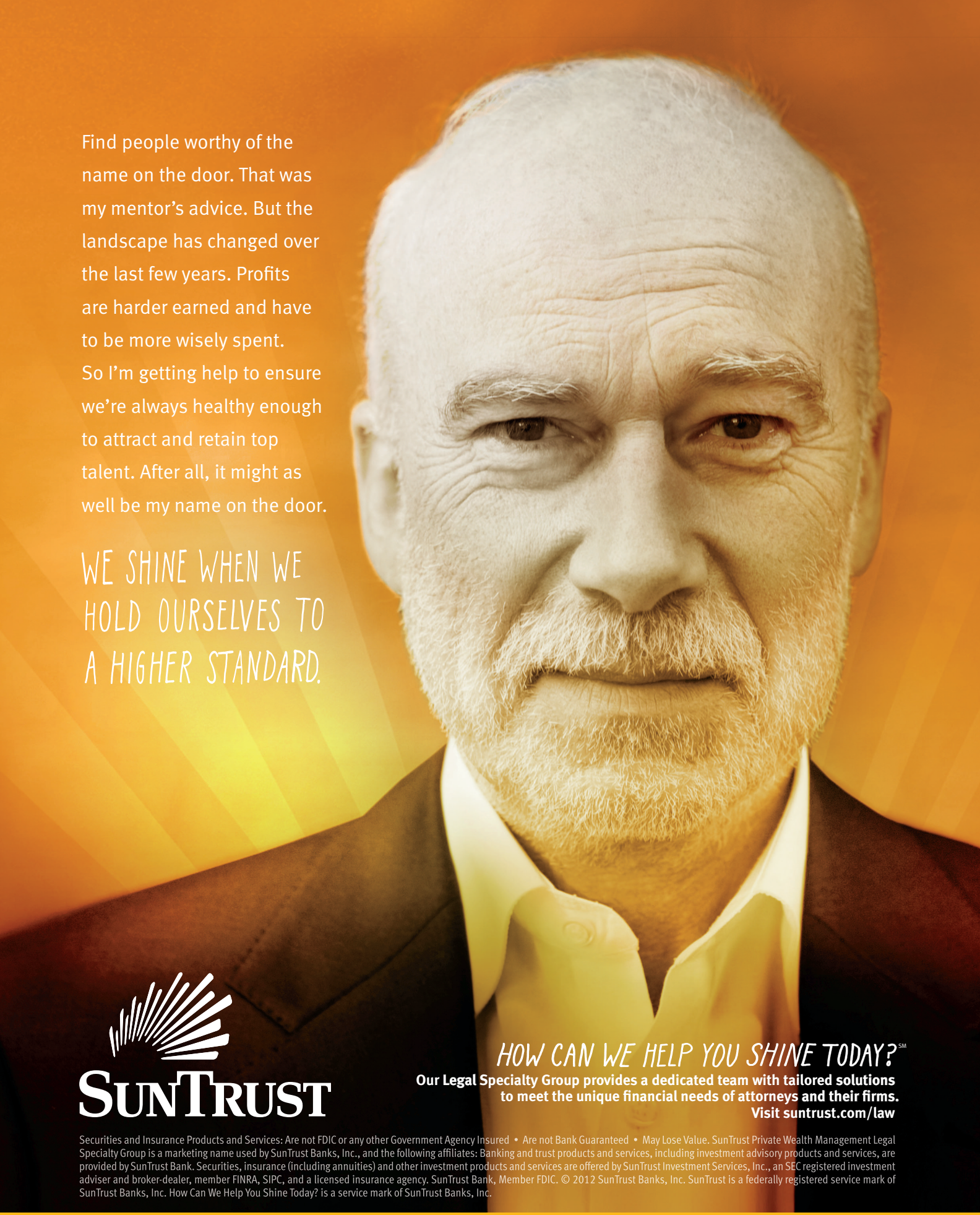

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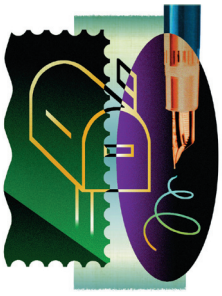

False Theories, Courts' Denial Silence Victims

The *Washington Lawyer*'s June 2012 cover story concerning child abuse reporting laws addressed an important question arising in the wake of the Penn State and Catholic Church sexual abuse scandals. However, the article makes, in passing, troubling statements that require a rebuttal.

In a section titled "False Accusations," the article trots out the old saw about "[d]ivorce proceedings, custody disputes, and other family and relationship battles" as "hotbeds of false accusations," a sentiment attributed to an attorney who specializes in the *defense* of accused child abusers and to a professor at the University of Virginia Law School. In fact, the myth of rampant false child abuse accusations in custody litigation is both pernicious and false.

The only substantial empirical research on the question found that only 12 percent to 14 percent of child sexual abuse allegations in custody litigation were intentionally false. Of these, custodial mothers and children were the *least likely* to fabricate claims (only 14 percent of fabrications), and noncustodial fathers were the *most likely* (43 percent of all fabrications) to make intentionally false reports. In fact, the researchers suggested that "high rates of unsubstantiated maltreatment" was the greater problem. (N. Trocmé and N. Bala, *False Allegations of Abuse and Neglect When Parents Separate*, Child Abuse & Neglect, 2005.)

These data perfectly reflect what those of us working to end abuse know from experience. My organization specializes in appeals on behalf of adult and child victims of abuse. The vast majority of pleas for help we receive (from the District of Columbia and across the country) are from mothers desperate to protect their children from an abusive father while fighting a family court system that refuses to believe the allegations. Often this disbelief persists in the face of multiple expert opinions and additional factual corroboration, even including, for example, genital warts on young children.

Fraudulent theories like "parental alienation syndrome" are routinely used to silence both children and protective parents, leading courts to chalk up abuse claims to a "vengeful" or pathological mother and a "brainwashed" child. Courts' denial of genuine child abuse and of the impact of domestic violence on children is ubiquitous—and it exists in the D.C. Superior Court as well. The phenomenon of "battered women losing custody" based on this systemic denial of abuse has even reached the ears of the U.S. Department of Justice, which last year hosted two roundtables on the subject, and is currently funding several technical assistance and research projects seeking to reform family courts in this respect.

Sophisticated media like *Washington Lawyer* should not disseminate the predictable cry of defense lawyers about false abuse claims, but should listen instead to the cries of children and their protective parents who are being silenced and sacrificed by our own justice system's denial.

—Joan Meier
Director, Domestic Violence Legal Empowerment and Appeals Project, and George Washington University Law School professor

Reproductive Technology and the Catholic Church

Anna Stolley Persky's July/August cover story "Reproductive Technology and the Law" highlighted a number of the challenging legal issues raised by the increasingly common use of assisted reproductive technology (ART), while also exposing areas where current law is inadequate.

Persky did not, however, make a sufficient effort to describe the moral objections to the use of ART. Although aware of the Catholic Church's opposition to certain practices, she did little to explain the basis for the Church's views. This was an unfortunate gap in an otherwise engaging article.

Civil law provides the structural principles for how we live in society. Moreover, laws often play a decisive role in influencing our patterns of thought and behavior. As we consider how to modify the legal framework governing the "flourishing science of creating babies" described by Persky, we would do well to first thoroughly understand the moral basis for objections to the use of ART.

The Vatican's instruction concerning ART, *Dignitas Personae*, which is referenced in Persky's article, begins its analysis with recognition that "[t]he embryonic human body develops progressively according to a well-defined program" from conception to birth, and is, at every point of development, a human being. This established, *Dignitas Personae* then evaluates the use of ART on the basis of whether or not it violates the philosophical imperative that every human being be fully respected, whether near death or prebirth, and treated with the dignity proper to a person.

Whether or not we agree with other Church teachings, such as its conviction that men and women are created in the image and likeness of God, the Church's cogent analysis provides a valuable template for evaluating ART and the laws pertaining to it.

—Thomas A. Wilson
The Law Office of Thomas A. Wilson, PLLC
Oakton, Virginia

Correction

In the September 2012 issue, a "Legal Beat" article about D.C. Superior Court Chief Judge Satterfield's reappointment contained a reference to a candidates' forum *cohosted* by the D.C. Judicial Nomination Commission (JNC). The JNC was the *sole* host of that forum.

Let Us Hear From You

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from the president

By Tom Williamson

Lagging Federal Judges' Salaries: Impending Crisis

Patrice Gilbert

In Washington, D.C., these days there is much concern—indeed, consternation—about the impending "fiscal cliff." This stems from the scheduled expiration of the Bush-era tax cuts in January and the federal budget sequestration agreed to by Congress, which is also scheduled to become effective in January. The sequestration arrangement, across-the-board reductions mandated under the Budget Control Act of 2011, was intended to inspire a bipartisan appropriations "deal" to address the federal debt crisis. The deal did not materialize, and now the focus has shifted to whether and how the country can sustain the massive reductions in federal spending contemplated under the sequestration scheme.

Budget cuts and deficit reduction certainly are pressing issues worthy of our close attention; however, there is at least one area where lawyers need to speak out forcefully on the need to increase federal expenditures, namely, the salaries of federal judges. Even though judicial compensation is an infinitesimally small part of the federal budget, the stakes are high since the failure to address the pay issue adequately will adversely affect both the independence of the judiciary and the diversity of the bench.

The current salary for district court judges is $174,000, and for circuit court judges, $194,000. The eroded value of federal judicial salaries is well known and well documented. In real terms, a federal district judge's salary has declined approximately 31 percent between 1969 and 2012. By contrast, inflation-adjusted wages for the average American worker have risen 19.5 percent over approximately the same period. In 1969 federal judges' salaries were higher than the average salaries of senior faculty members and deans at leading law schools. Today compensation for federal judges has fallen substantially behind the average salaries of senior faculty ($330,000) and deans ($430,000) at those law schools. Further dramatic evidence of the severity of the salary lag is the ironic reality that, in their first year of practice at major law firms, youthful law clerks of experienced federal judges often receive salaries and bonuses that significantly exceed those of the judges who were their revered supervisors and mentors in the previous year.

The relative decline of compensation for federal judges has developed, in large part, because Congress has repeatedly failed to authorize cost-of-living adjustments (COLAs) that should have been appropriated each year under the Ethics Reform Act of 1989. If those COLAs had not been withheld, the salary today for district judges would be $247,086 rather than $174,000, and for circuit judges, $261,968 rather than $194,500—not nearly as sumptuous as the earnings of partners at major law firms, but still more appropriate for the stature of our federal judges.

The legal arguments for ensuring that judicial compensation not be diminished are rooted in the Constitution. Yes, the framers were wise and prescient enough to include the Compensation Clause, which provides that judges "shall . . . receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. Art. III, § 1. The framers understood that insulating judicial compensation from political manipulation was essential to preserve the independence and integrity of the federal judiciary.

The practical arguments in favor of raising judicial pay are rooted in the damaging consequences for the recruitment and retention of federal judges that will flow from maintaining the status quo. The relative diminution of federal judicial salaries has reduced the pool of highly qualified candidates interested in being nominated. Many of those candidates are in the prime of their earning careers in the private sector, and they are understandably reluctant to put at risk their ability to pay college tuition for their children or to finance eldercare for aging family members. In addition, commentators have noted that, increasingly, district court judges are resigning from the bench and taking more lucrative positions at law firms, corporate legal departments, and alternative dispute resolution organizations. This trend prematurely deprives the already short-handed judiciary of judges who have invested years of their lives becoming experienced jurists. In addition, these resignations render these veteran judges ineligible to serve as senior judges, who play a vital role in helping to ease management of the caseloads of existing, understaffed federal courts.

The salary lag also poses a serious threat to efforts to diversify the bench. Justice Stephen Breyer underscored this problem in his 2007 testimony before the House Committee on the Judiciary: "[A] federal judgeship should not be reserved primarily for lawyers who have become wealthy as a result of private practice, or for those whose background is that of a judicial 'professional,' i.e., a state court judgeship or a magistrate position. . . ." This prospect is especially damning for the aspirations of minorities and women who are first-generation legal professionals. They will continue to be underrepresented on the federal bench because many of the most successful and promising candidates cannot reconcile the likely lifetime salary sacrifice of being a federal judge with meeting the full range of responsibilities to their children and older, dependent relatives.

The challenge of increasing federal judicial pay is compounded by the limits on judges as advocates for their own cause. We generally accept as normal and appropriate the myriad associations and organizations that tirelessly and effectively lobby Congress for appropriations funding, yet the judiciary does not have at its disposal any comparably potent lobbying organization. A group of judges is pursuing class action litigation to attempt to rectify Congress' denial of COLAs under the Ethics Reform Act before the U.S. Court of Appeals for the Federal Circuit Court (*Beer v. United States*). Unfortunately, prospects for prevailing

continued on page 21


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bar happenings

By Kathryn Alfisi

Mick Wiggins

Chief Justice Roberts Hosts American Inns of Court Event

United States Supreme Court Chief Justice John G. Roberts Jr. will host the American Inns of Court's annual Celebration of Excellence awards dinner on October 20 at the Supreme Court, 1 First Street NE.

The event pays tribute to individuals who have given their time, energy, and resources to furthering the American Inns of Court's ideals of elevating the level of excellence, professionalism, and ethical awareness among the bench and bar.

This year's recipient of the Sandra Day O'Connor Award for Professional Service is Omar J. Alaniz, a senior associate at the Dallas office of Baker Botts. Deanell Reece Tacha, dean of Pepperdine University School of Law, will receive the A. Sherman Christensen Award, while Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas will be honored with the Lewis F. Powell Jr. Award for Professionalism and Ethics. The Warren E. Burger Prize will be presented to Derek A. Webb, a fellow at the Stanford Constitutional Law Center at Stanford Law School.

For more information, contact Cindy Dennis at 800-233-3590, ext. 104, or cdennis@innsofcourt.org, or visit www.innsofcourt.org.

Dorsen Discusses Judge Friendly Biography at GWU Law

On October 18 the George Washington University Law School will hold a program on Judge Henry Friendly, featuring David Dorsen, author of the recently published biography of the circuit judge.

Dorsen, of counsel at Sedgwick LLP, will talk about his book, *Henry Friendly: Greatest Judge of His Era* (see book review on page 42). Alan B. Morrison, the law school's Lerner Family Associate Dean for Public Interest and Public Service Law, will moderate this first panel discussion.

Dorsen's book is a biography of a man often considered as one of the greatest jurists of the 20th century and whose opinions are still highly regarded and often cited. Judge Friendly sat on the U.S. Court of Appeals for the Second Circuit from 1959 to 1974, and received the Presidential Medal of Freedom in 1977. He took senior status until his death in 1986.

Beverly Rezneck

David Dorsen

Courtesy of the George Washington University Law School

Alan B. Morrison

A second panel, to be moderated by GW Law School dean Paul Schiff Berman, will feature three former clerks of Judge Friendly: Judges A. Raymond Randolph and Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit and Judge William C. Bryson of the U.S. Court of Appeals for the Federal Circuit.

The program starts at 4 p.m. in the Jacob Burns Moot Court Room of the law school, 2000 H Street NW. A reception sponsored by Cleary Gottlieb Steen & Hamilton LLP, the law firm founded by Judge Friendly before he joined the bench, will follow.

For more information, contact Morrison at abmorrison@law.gwu.edu.

CLE Offers Litigation Series on Pretrial Skills, Rules of Evidence

In October the D.C. Bar Continuing Legal Education (CLE) Program will offer two courses that will examine different aspects of litigation.

The revised "Pretrial Skills Series" addresses critical pretrial topics in civil litigation, including depositions and written discovery, with a focus on strategies and effective practice techniques. This course will emphasize the rules, practices, and procedures of the local and federal courts in the Washington metropolitan area.

The series opens on October 11 with "Taking and Defending Depositions," which will explore the practical considerations and tactical techniques available to the litigator in taking and defending depositions, including preparation, use of depositions at trial, and significant cases about depositions. This session also will cover the ethical issues that litigators face in the discovery process.

D.C. Bar legal ethics counsel Saul J. Singer and Michael Williams, a partner at Kirkland & Ellis LLP, will serve as faculty.

Part two, "Effective Use of Interrogatories, Document Requests, and Requests for Admission," on October 18 will focus on effective ways of drafting and responding to written discovery requests, tactical considerations, discovery motions, and use of written discovery at trial.

This session will be led by Catherine D. Bertram of Regan Zambri & Long, PLLC and Thomas P. Murphy, a partner at Hunton & Williams LLP.

The series is cosponsored by the D.C. Bar Antitrust and Consumer Law Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Family Law Section; Labor and Employment Law Section; Law Practice Management Section; Litigation Section; and Real Estate, Housing and Land Use Section.

The new, two-part "Working With

Save the Dates

The **Council for Court Excellence** will hold the program "Police, Protests and Press Coverage" on October 2 from 6:30 to 8 p.m. at Georgetown University Law Center's Hart Auditorium, 600 New Jersey Avenue NW. Patrick Madden of WAMU 88.5 will moderate the program. For more information, call 202-785-5917 or e-mail info@courtexcellence.org, or visit www.courtexcellence.org.

The **National Asian Pacific American Bar** Association will hold its 2012 convention from November 15 to 18 at the JW Marriott Hotel, 1331 Pennsylvania Avenue NW. For more information, visit www.napaba.org.

the Rules of Evidence in Civil Proceedings in the District of Columbia" will tackle the differences between the federal rules and local "rules" governing the District. This course will use interactive exercises and hypothetical fact patterns to help attendees think on their feet so they can present evidence persuasively and object to evidence effectively.

Part one on October 23 will help attendees understand what is included in the definition of evidence and the limits on its admission, including when prejudice exceeds probative value, the necessary steps to get documents admitted into evidence, and hearsay—what it is and when it is admissible.

Part two on October 30 will cover impeachment evidence, including the use of depositions to impeach with prior inconsistent statements, expert witness evidence, and making and defending objections to evidence.

Judge Judith N. Macaluso of the Superior Court of the District of Columbia and Daria J. Zane, special master at the U.S. Court of Federal Claims, will serve as faculty.

The series is cosponsored by the D.C. Bar Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Family Law Section; Government Contracts and Litigation Section; Health Law Section; Labor and Employment Law Section; Law Practice Management Section; Litigation Section; Real Estate, Housing and Land Use Section; and Tort Law Section.

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

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

Equal Justice Works Holds Two Annual Events in October

Equal Justice Works, an organization dedicated to advancing public interest law and pro bono work, will hold both its annual awards dinner, and conference and career fair in October.

At its October 25 dinner, Equal Justice Works will honor Randal S. Milch, executive vice president and general counsel of Verizon, with its Scales of Justice Award for his commitment to equal justice.

Courtesy of Verizon

Randal S. Milch

The event, which will be held at the Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue NW, begins with a reception at 6 p.m., followed by dinner and program at 7:15.

The conference and career fair, the largest public interest law fair in the country, will take place on October 26 and 27 at the Crystal Gateway Marriott, 1700 Jefferson Davis

Highway, Arlington, Virginia. The fair connects more than 1,200 students from 200 law schools with nonprofit organizations and government agencies from around the country.

In addition to skill-building and career-advising opportunities, the fair will feature a conversation between U.S. Supreme Court Justice Sonia Sotomayor and Judge David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit.

For more information on either event, visit www.equaljusticeworks.org. For more details on the awards dinner, contact Equal Justice Works at 202-466-3686, ext. 116, or events@equaljusticeworks.org.

Law Firms Go Casual for Justice on National Pro Bono Week

The National Pro Bono Week Celebration returns this month, and in the District of Columbia, the legal community is bringing back its Go Casual for Justice fundraiser on October 26 as one of the week's highlights.

Now in its fourth year, the Go Casual for Justice campaign allows attorneys and staff at participating law firms, corporate law departments, and other offices to wear jeans to work for a day in exchange for a small donation. Funds raised go toward the D.C. Bar Foundation's Poverty Lawyer Loan Repayment Assistance Program, which helps attorneys serving the District's most vulnerable residents meet their educational debt payments while earning a public servant salary.

Last year 96 participating firms and other workplaces raised $84,000. This year's goal is to have more than 100 workplaces raise $100,000.

For more information on Go Casual for Justice, contact Paul Lee at 202-261-3428 or paul.lee@dechert.com. To know more about the National Pro Bono Week Celebration, which runs from October 21 to 27, visit www.probono.net/celebrateprobono.

October CLE Offerings Cover Wide Range of Ethics Issues

The D.C. Bar Continuing Legal Education (CLE) Program has lined up several ethics courses in October that address a wide range of topics, from avoiding malpractice and bar complaints to government attorneys having to comply with dual sets of rules to knowing the ethical pitfalls of changing law firms.

The October 4 course "When Lawyers Change Law Firms: Ethical, Practical, and Legal Issues" will help attorneys understand how changes in employment can trigger a multitude of legal and ethical concerns and how they can navigate these job transitions properly.

Led by Arthur D. Burger, director at Jackson & Campbell, P.C. and chair of the firm's Professional Responsibility Practice Group, and Hamilton P. "Phil" Fox III of the Office of Bar Counsel, this course will provide guidelines to help attorneys avoid missteps that can lead to bar discipline or civil liability.

Faculty will discuss when attorneys should alert clients and what they may tell clients, when their current legal employer must be given notice, the proper balance between the need to disclose and confidentiality, fiduciary duties of partners to their current firms, rights to fees in pending matters, and prohibitions on penalizing lawyers who compete with their old firms.

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

Courtesy of Carr Maloney P.C.

Dennis J. Quinn

On October 10 the CLE Program will offer the course "Ethics and Professional Conduct for Government Attorneys: Complying With Dual Sets of Rules," a practical guide for government lawyers on how to comply with the dual schemes of ethical obligations imposed upon them. Not only do government attorneys have to comply with the same ethics rules as their private practitioner counterparts, they also must deal with the ethical rules and considerations applicable only to those in government service.

Faculty members Jerri U. Dunston, director of the Professional Responsibility Advisory Office at the U.S. Department of Justice, and Peggy Love, attorney and former deputy ethics official at the U.S. Environmental Protection Agency, have many years of experience with the ethics rules and their applicability to government practice. Both experts will discuss the D.C. Rules of Professional Conduct and will examine government ethics rules that affect the ethical obligations of lawyers in government service.

This class also will explore what ethics rules govern, the duty of confidentiality, ethics rules that apply to outside activities such as pro bono work, and conflicts of interest. The course takes place from 6 to 8:45 p.m. and is cosponsored by all sections of the D.C. Bar.

The October 15 course "Litigation Ethics: Duty to Disclose Unfavorable Facts and Law and Other Court Issues" is an interactive class that will use hypotheticals to examine ethical issues related to litigation.

Thomas E. Spahn, a partner at McGuireWoods LLP, will discuss issues such as disclosing unfavorable facts, the prosecutors' duty to disclose, disclosing directly adverse law, disclosing unpublished case law, disclosing statutory law and affirmative defenses, timing of disclosure obligations, ex parte communications with the court, manipulating the choice of judges, and triggering the recusal of judges.

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; Government Contracts and Litigation Section; Labor and Employment Law Section; Law Practice Management Section; Litigation Section; and Real Estate, Housing and Land Use Section.

The CLE Program also will teach daily practice and risk-prevention techniques with the course "Avoiding Malpractice and Bar Complaints" on October 24. This class will provide experienced attorneys with practical new ideas to implement and, for newer attorneys, the skills they can use throughout their legal careers.

From choosing clients and cases to avoiding conflicts, communicating effectively, and handling client funds properly, faculty members will provide examples and practical advice to help attorneys focus on problem areas that so often lead to complaints. The major differences in relevant ethics rules in the District of Columbia, Maryland, and Virginia also will be discussed.

Julia L. Porter, senior assistant Bar Counsel, and Dennis J. Quinn, a member of Carr Maloney PC, will serve as faculty.

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

All 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.

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

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bar counsel

By Joe Perry

A Recommitment to Education for Newer and Experienced

Mick Wiggins

In August the American Bar Association (ABA) held its annual meeting in Chicago where President Laurel G. Bellows, in accepting her new post, stated that "lawyers matter."[1] She further praised members of her profession for being "the first responders when liberty and justice are imperiled."[2]

Meanwhile, outgoing ABA President Wm. T. Robinson III took the opportunity to focus on law students and young lawyers beginning their careers. Robinson reaffirmed the ABA's commitment to improving legal education, and he noted that "law students and young lawyers are understandably concerned as they begin their careers in such a difficult economy and feel especially vulnerable to downward shifts in the marketplace."[3]

A troubled economy is only one component of the brave new world young lawyers face. For many, cross-border practice is becoming an inescapable reality, and much of the recent work of the ABA appears to address this development. At the annual meeting, the House of Delegates amended the ABA Model Rule for Admission by Motion, shortening the amount of time an attorney is required to practice in a foreign jurisdiction before gaining admission.[4] The House also approved a new Model Rule allowing lawyers to practice for up to a year in a new jurisdiction, pending admission.[5] Comment [1] of the new Model Rule explains that the "rule recognizes that a lawyer admitted in another jurisdiction may need to relocate to or commence practice in this [other] jurisdiction, sometimes on short notice."[6]

The work of the ABA demonstrates that, in addition to being mobile, lawyers—both young and formerly young—are faced with the need to be technologically savvy. Perhaps most notably, the House of Delegates approved new commentary to ABA Model Rule 1.1, which states that lawyers must keep abreast of changes in the law and its practice, "*including the benefits and risks associated with relevant technology*."[7]

Although Bar Counsel cannot speculate as to how any of the specific changes put forth by the ABA might one day be reflected in our own Rules of Professional Conduct, we, like anyone else, can observe that these changes reflect new realities. And as realities change, so, too, must the lawyer. Even attorneys who choose to stay put are finding that the nature of today's practice is dragging them into other jurisdictions, leading to questions on unauthorized practice and conflicts of laws. Meanwhile, as fast as our practice expands, technology develops; whatever the minimal amount of technological aptitude required to be ethically competent, those unwilling to learn can expect to face a loss of clientele.

As to the latter concern, at least, the profession can seek help within its ranks. For many attorneys, younger colleagues often understand more about technology, and those working on the same caseload are in a particularly good position to provide relevant advice. Put another way, we have reached a point where the relationship between a young lawyer and his or her seasoned mentor is more symbiotic than ever.[8]

Something to think about if you can actually keep a young lawyer in your jurisdiction long enough for a tutorial. It is hard to imagine a future where lawyers still "matter" and are the "first responders" to threatened rights if we, as a profession, fail to educate ourselves about and master the newest forms of communication.

Joe Perry is a senior staff attorney in the Office of Bar Counsel.

Notes

1 *See* Cassens Weiss, D., *'Lawyers Matter,' ABA President Laurel Bellows Tells House of Delegates*, bit.ly/UgFffN (last visited Aug. 17, 2012).

2 *Id.*

3 *See* Cassens Weiss, D., *Outgoing ABA President Emphasizes Commitment to Young Lawyers*, bit.ly/PSkQNI (last visited Aug. 17, 2012).

4 *See House of Delegates Resolution 105E*, www.abanow.org/2012/06/2012am105e (last visited Aug. 17, 2012).

5 *See House of Delegates Resolution 105D*, www.abanow.org/2012/06/2012am105d (last visited Aug. 17, 2012).

6 *Id.*

7 *See* Cassens Weiss, D., *Lawyers Have Duty to Stay Current on Technology's Risks and Benefits, New Model Ethics Comment Says*, bit.ly/Tcnduq (last visited Aug. 17, 2012).

8 Bar Counsel notes that the new James Bond movie is only weeks away. Longtime fans might notice that for the first time in history, Q, the man who provides the world's greatest superspy with all of his technical gadgets, is *younger* than his charge. It may be that a younger actor sells more tickets, but this sudden change in the Bond legacy could be easily viewed as a case of art imitating life.

Editor's Note

The text contained in End Note 4 of the July/August 2012 "Bar Counsel" column has been slightly revised. To view the modified text, visit bit.ly/NVeHh0.

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE AMAKO N. K. AHAGHOTU. Bar No. 352237. July 20, 2012. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Ahaghotu for reckless misappropriation, in addition to other rule violations. The violations stemmed from Ahaghotu's handling of his escrow account and his representation of a client in a personal injury matter. Specifically, Ahaghotu violated Rules 1.15(a) (commingling, failure to maintain adequate escrow records, and misappropriation); D.C. Bar R. XI, § 19(f); former Rule 1.17(a) (whose prescriptions are now found at Rule 1.15(b)) (improperly designated escrow account); and Rule 1.3(c) and former Rule 1.15(b) (now redesignated as Rule 1.15(c)) (delayed disbursement of client funds).

IN RE PAUL SHEARMAN ALLEN. Bar No. 167940. July 13, 2012. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Allen by consent.

IN RE STEPHANIE Y. BRADLEY. Bar No. 288910. July 31, 2012. The Board

continued on page 46

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legal beat

By Kathryn Alfisi and Thai Phi Le

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

Superior Court Opens Southwest Juvenile Drop-In Center

A little rain did nothing to dampen the spirits of those in the community who came out on September 6 to celebrate the grand opening of the latest Balanced and Restorative Justice Drop-In Center (BARJ), this time, in Southwest, D.C.

The center, located along South Capitol Street, between N Street and M Street SW, was decorated with purple and yellow balloons. Chief Judge Lee F. Satterfield of the D.C. Superior Court; Deputy Mayor Paul Quander; Councilmember Tommy Wells of Ward 6; Family Court Presiding Judge Zoe Bush; Terri Odom, director of the court's Family Court Social Services Division of the Superior Court; Andrew Fois, deputy D.C. attorney general for public safety; Ron McBee, Advisory Neighborhood Commission Ward 6 commissioner; Nancy M. Ware, director of the Court Services and Offender Supervision Agency for the District of Columbia; and members of the Metropolitan Police Department were on hand to offer their congratulations during the ribbon-cutting ceremony.

"Often we demonize young people and we say, 'One strike and we want you out.' The problem is that they come back. This is their home. This is their neighborhood. Oftentimes they come back tougher, rougher, and ready to do worse," Councilmember Wells said. "We have to be smarter . . . This is a smart program."

The Southwest BARJ center can have up to 45 youth offenders on any given day participating in the numerous programs offered. It is the third center created by the Superior Court of the District of Columbia in an attempt to find new methods for working with the juvenile offender population. The first opened in 2007 in Southeast.

All three centers in the Southeast, Northeast, and Southwest locations offer core programs for court-supervised youths. The centers are an alternative to detention for juvenile offenders waiting for their court date and who need increased supervision. Probation officers lead discussions on a variety of issues, including analysis of hip hop as it relates to crime, drug and health education, and anger management, as well as take them on field trips to see the city outside their neighborhood. Previous events at other centers included a day at the Washington Nationals ballpark and visits to historical District landmarks. In their downtime, youths enjoy the multipurpose room that houses ping pong tables, arcade games, and a television.

Thai Phi Le

Nancy M. Ware, director of the Court Services and Offender Supervision Agency for the District of Columbia; Councilmember Tommy Wells; D.C. Superior Court Chief Judge Lee F. Satterfield; and Terri Odom, director of the court's Family Court Social Services Division, cut the purple-and-yellow ribbon to mark the grand opening of the Southwest, D.C., Balanced and Restorative Justice Drop-In Center.

The Southwest center also is equipped as a vocational center, allowing kids to learn new skills that could help them in the future. Computers are on hand for those interested in learning Web design, while an entire room is full of silk screen equipment. There also is a large kitchen that will be home to the "Real Men and Women Cook" program, where the kids learn how to prepare meals from start to finish. The center is open Monday through Saturday.

"We cannot give up on the children of our city," added Fois, the deputy D.C. attorney general for public safety. "We're the prosecutors. People think of us as wanting to lock up the kids and put them in jail and throw away the key at least until they're 21. Sometimes you have to do that, but most of the time, for the first exposure, we still have a chance to get to these kids and turn their lives around. That's what BARJ is all about."—*T.L.*

District of Columbia Practice Manual, 2012 Edition, Is Available for Purchase

The D.C. Bar and its sections have released the *District of Columbia Practice Manual, 2012 Edition*, a two-volume, soft-cover guide covering the basics of law in the District of Columbia (see ad on page 43).

Produced with the assistance of Thomson Reuters, this easy-to-use format brings together the collective knowledge of hundreds of experienced practitioners in 33 chapters.

A must-have resource and the starting point for every D.C. practitioner, the new manual has an introductory chapter on Finding the Law in the District of Columbia, followed by specific chapters covering Administrative Procedure, Alternative Dispute Resolution, Antitrust, Appellate Practice in the D.C. Court of Appeals, Art

Law, 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, Human Rights, Intervention Proceedings, Juvenile Law and Practice, Landlord and Tenant Practice, Legal Ethics and Lawyer Discipline, Mental Health Proceedings, Partnerships, Personal Injury, Real Property, Small Claims, Superior Court Civil Practice, Taxation, U.S. District Court Civil Practice, Wills and Estates, Workers' Compensation, and Zoning and Historic Preservation.

The title is available for $300 and may be ordered from the D.C. Bar Member Services Center, 1101 K Street NW, Suite 200, Washington, DC 20005-4210. Credit card orders may be placed by secure fax to 202-942-9752. Individuals purchasing the new edition automatically qualify for subscription pricing discounts on subsequent editions.

For more information about the title, contact the D.C. Bar Communications Office at communications@dcbar.org.

Associates' Campaign Raises $900,000 for Legal Aid

To celebrate the 80th anniversary of the Legal Aid Society of the District of Columbia, law firms aimed to raise $800,000 for the organization through the Generous Associates Campaign, a fundraiser run by law firm associates. By the end of the 2012 campaign, 70 firms combined to smash the goal, bringing in $901,000.

"It is truly extraordinary that D.C.'s generous associates are able to raise one-fifth of the operating budget of the District's largest general poverty law program," said Eric Angel, executive director of Legal Aid.

By sending personal e-mails encouraging donations and firm matches, associates led the campaign to its most successful year ever since it began 22 years ago. WilmerHale LLP and Latham & Watkins LLP had exceptional success at their firms, raising $90,000 and $80,000, respectively.

"More than one in three residents living East of the [Anacostia] River is living in poverty. And when we say poverty, we meant it: A single mother with a child making $15,200 a year is *not* considered poor according to federal poverty guidelines," Angel said. "The success of the Generous Associates Campaign will make a huge difference in our ability to make justice real for the District's most vulnerable residents."—*T.L.*

Two D.C. Lawyers Among 2012 Margaret Brent Awardees

On August 5 the American Bar Association's Commission on Women in the Profession honored five lawyers, two of whom are from the Washington metropolitan area, who have shown great leadership in their respective fields and blazed the path for other female attorneys.

The commission presented its 2012 Margaret Brent Women Lawyers of Achievement Award to Tani G. Cantil-Sakauye, chief justice of the Supreme Court of California; Marcia Devins Greenberger, founder and co-president of the National Women's Law Center; Joan M. Hall, a retired partner at Jenner & Block LLP; Arlinda Locklear of Arlinda Locklear Law Office; and Amy W. Schulman, executive vice president and general counsel of Pfizer Inc. and president and general manager of Pfizer Nutrition. Both Greenberger and Locklear are members of the D.C. Bar.

Courtesy of Marcia Devins Greenberger

Courtesy of Arlinda Locklear

Marcia Devins Greenberger Arlinda Locklear

The awardees were honored during the ABA annual meeting in Chicago.

Greenberger founded the National Women's Law Center in 1972, devoting her career to advocating for women's rights. She has worked on major legislation that offered stronger legal protections for women, including the Lilly Ledbetter Fair Pay Act, the Civil Rights Act of 1991, and the Pregnancy Discrimination Act, and secured victories in numerous sexual discrimination cases before the U.S. Supreme Court.

"I was absolutely thrilled to be selected as one of this year's Margaret Brent Award winners. Having admired and learned from so many Brent Award winners over the years, being part of such an extraordinary group was humbling at best. But, most important for me was that the award reflected the support I have received, both personal and professional, from lawyers in D.C. throughout the over 40 years that I have been a member of the Bar," Greenberger said. "The strong friendships, superb pro bono help, and gifted colleagues that the Bar has provided infuse the work of the National Women's Law Center and my own legal career in ways I could never adequately express." Locklear, part of the Lumbee Tribe, has dedicated more than 35 years of her career to Native American law. During the 1984 *Solem v. Bartlett* trial, she became the first Native American woman to argue a case before the U.S. Supreme Court.

The Margaret Brent Award was created in 1991 in honor of the first female lawyer in the United States. In an eight-year timespan, Brent tried and won all 124 cases in which she was involved.—*T.L.*

D.C. Bar Partners With Capital One for Exclusive Credit Card Offers

The D.C. Bar has recently partnered with Capital One, giving Bar members access to three exclusive credit card offers that feature different options to fit individual needs.

Capital One's credit building card can help Bar members build credit through responsible use. The card comes with free

fraud liability, low introductory APR, and manageable credit limits. The low introductory rate card allows Bar members to save more with its low introductory APR on purchases and balance transfers, nonexistent annual fee, and free fraud liability. With the rewards card, Bar members can earn 1.25 miles for every dollar spent on purchases. Miles earned are redeemable for flights, hotels, car rentals, and more.

Bar members can choose from three credit card designs, all of which featuring the D.C. Bar logo and name.

For more information, visit www.capitaloneconnect.com/dcbar.—*K.A.*

Washington Council of Lawyers Seek Nominations for Annual Awards

The Washington Council of Lawyers (WCL) is now accepting nominations for its 2012 Presidents' Award and Outstanding Government Pro Bono Service Award that will both be presented at the organization's annual Awards Reception on December 4.

The Presidents' Award honors an individual whose work exemplifies the values of pro bono and public service that the WCL seeks to promote. It recognizes an individual whose work benefits low-income or marginalized residents of the Washington metropolitan area and supports the D.C. public interest community's efforts to improve access to justice.

In particular, the WCL is looking for nominees who have worked to bring together the public interest, pro bono, and government legal communities to improve the quality and availability of free legal services.

For the Outstanding Government Pro Bono Service Award, the WCL is looking for government attorneys who have demonstrated a commitment to providing all types of pro bono service, including involvement in establishing or implementing an agency pro bono program, in increasing the level of pro bono service by agency attorneys through the promotion or facilitation of pro bono opportunities, in the mentoring or training of agency lawyers handling pro bono matters, in litigating cases or providing non-litigation legal services to low-income people or entities, or in participating regularly in pro bono clinics.

Nominations for both awards must be received by October 10. Submissions for the Presidents' Award should include a one- to two-page statement describing the nominee, his or her work, and the

reasons the nominee should receive the award. If possible, include the nominee's résumé or curriculum vitae, or a general outline of his or her recent career. Nominations should be sent to WCL President Golda Philip at goldap@gmail.com.

Submissions for the Pro Bono Service Award should include both the nominator's and nominee's contact information, including position title, agency name and division (if applicable), regular mail and e-mail addresses, and phone numbers. Submissions should also state the nominating person's relationship to the nominee.

Nominations should include a description of the program or services upon which the nomination is based; the number of attorneys or other staff persons who participated and, if applicable, the clientele served; and the period covered by the pro bono activities. A description of the impact of the nominee's work on the client(s), the community, or the agency should also be included. For nominations of individuals, attach a résumé if possible. E-mail Pro Bono Service Award nominations to WCL Executive Director Nancy Lopez at NALopez@wclawyers.org.

The WCL awards reception will be held at Arnold & Porter LLP, 555 12th Street NW, with Harold Koh, legal adviser to the U.S. Department of State, as keynote speaker.—*K.A.*

Bar Members Must Complete Practice Course

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

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

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

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

The preregistration fee is $219; the onsite fee is $279. Upcoming dates are October 16, November 17, and December 11. Advanced registration is encouraged.

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

Leventhal Lecture Tackles Legal Implications of Climate Change

Climate change is a hot button issue today, but will it continue to affect the legal industry a hundred years down the road? According to Professor Richard J. Pierce Jr. of The George Washington University School of Law, the answer is yes.

Courtesy of The George Washington University

Richard J. Pierce Jr.

Pierce, who delivered this year's Harold Leventhal Lecture on August 22, spoke about the legal implications of climate change, focusing on the potential ways to alleviate the problem. "The task of effectively mitigating climate change is somewhere between extremely difficult and impossible," said Pierce at the beginning of the program. The biggest obstacles are political and economic, which are deeply intertwined.

Over the years several potential methods to mitigate climate change have been proposed, among them a carbon tax, litigation, regulation by the U.S. Environmental Protection Agency under the Clean Air Act, smart energy meters and real-time electricity pricing, mandatory efficiency requirements, subsidies and mandates for renewable fuels, using gas instead of coal, and reducing black carbon and methane emissions. Of these options, Pierce advocates for a carbon tax, noting that it is the "most effective and least expensive method of mitigation."

"There is an obvious impediment to a carbon tax that is high enough to be effective . . . a public aversion to taxes. That word is not a big seller at the moment. The U.S. now has one political party that says 'I don't want to tax anyone anywhere,' and another that says 'I only want to tax millionaires, billionaires, and big oil companies,'" Pierce said. "A carbon tax would be paid by everyone." Implementing a carbon tax, however, would likely have to wait until global economies stabilize.

Pierce said developing countries play a key role in reducing climate change, but pointed out that until the United States adopts a method of its own, such as imposing a carbon tax, it will continue to lack credibility among and the ability to negotiate with other nations.

"Whatever path we take to address climate change, there is no doubt that climate change will be a dominant factor in the world of law for the foreseeable future," concluded Pierce. "Every lawyer in the country will encounter climate change and its legal implications in myriad contexts for at least a century."

The luncheon program was held in the ceremonial courtroom of the U.S. Court of Appeals for the Federal Circuit. It was sponsored by the D.C. Bar Administrative Law and Agency Practice Section and cosponsored by the Corporation, Finance and Securities Law Section; Family Law Section; International Law Section; Law Practice Management Section; Litigation Section; Taxation Section; and Tort Law Section.—*T.L.*

Study: Superior Court's Community Court Cuts Recidivism by 60 Percent

The Superior Court of the District of Columbia's East of the River Community Court (ERCC) has reduced recidivism by as much as 60 percent, according to a study by Westat, Inc. released in August.

The study tracked 4,046 defendants who entered the ERCC from 2007 to 2009, examining the rate of their successful completion of ERCC programs and their reoffending activity in D.C. and Maryland about a year later. Of those defendants, 21 percent participated in at least one of the ERCC diversion programs, out of which approximately 60 percent successfully completed their program. Nine percent of those who entered the ERCC were sent to other problem-solving courts, and 70 percent either opted out of or were not offered diversion programs or treatment courts.

The study also compared the defendants who successfully completed their ERCC diversion programs to a similar group of defendants in the Metropolitan Police Department's (MPD) Fifth District. While their cases were ongoing, defendants participating in an ERCC diversion program were 60 percent less likely to reoffend compared to the MPD Fifth District defendants, and were 42 percent less likely to reoffend 12 months after their case is closed.

"When we saw the preliminary results of the study, we knew that we had to expand the community court to all neighborhoods in the city. This approach reduces recidivism, makes our neighborhoods safer, provides communities with restitution for the damage done, and helps address the underlying problems that cause defendants' criminal behavior," D.C. Superior Court Chief Judge Lee F. Satterfield said in a press release.

The ERCC was created in 2002 as a pilot community court in response to high levels of poverty, crime, and disorder in neighborhoods east of the Anacostia River. It adjudicates all misdemeanor cases, except those involving domestic violence, in the MPD's Sixth and Seventh districts (Wards 7 and 8).

In 2010 the Superior Court commissioned Westat to conduct the study to determine the effectiveness of the ERCC. Based on the success of the ERCC, Judge Satterfield expanded the community court program to all eight wards (seven police districts) of the city in January this year.

"We were pleased to be able to expand this approach to communities throughout the city and help reduce low-level crimes. Superior Court is part of this community and our role is not just to process cases, but to dispense justice in a way that improves the quality of life for all D.C. residents," Satterfield said.

Community courts act as an alternative to traditional case processing and offer defendants with minor offenses the opportunity to participate in diversion programs where they perform community service. These programs also try to address the underlying causes of crime such as homelessness, drug addiction, joblessness, and mental illness.

To read the whole report, visit bit.ly/Nf5nad. To learn more about the D.C Superior Court's community courts, visit bit.ly/OTF1J3.—*K.A.*

Bar Members Get Access to New Liability Coverage Option

USI Affinity, the D.C. Bar's endorsed lawyers professional liability (LPL) broker, now offers a new liability coverage option for Bar members.

Through its Lawyers Professional

Council for Court Excellence Updates 'Victim's Guide'

The Council for Court Excellence has updated its booklet "A Victim's Guide to the D.C. Criminal Justice System," which was last published in 2002.

The booklet outlines the steps involved in bringing a case to trial and the victim's role in it, and it explains how the courts, defense, police, and prosecution work.

Booklets are distributed at libraries and at the Superior Court of the District of Columbia; they also can be viewed online at www.courtexcellence.org.—*K.A.*

Complete Program, USI Affinity offers Bar members access to insurance and benefit solutions not available to the general public. The program, which covers law practices of all sizes, provides comprehensive protection and affordable rates, limits of liability up to $10 million for qualified firms, and a number of available coverage enhancements. The new option is also backed by an A-rated insurance company.

"We are very excited to bring this new insurance offering to legal professionals in D.C. and the surrounding area. As the endorsed broker for the D.C. Bar, it is our goal to provide Bar members the best products and the very best possible service and guidance with their insurance decisions," said Arnie Kaplan, president of USI Affinity's Professional Insurance Solutions Group. "We are already having good success this year in the D.C. area with the new program, saving firms at least 10 [percent] on their LPL coverage and often improving their protection at that same time."

For more information, contact USI Affinity at 855-874-0100 and enter 706 when prompted for your PIN code. Bar members can also send an e-mail to LPLCoverage@usiaffinity.com or visit www.mybarinsurance.com/dcbar.—*K.A.*

Husch Blackwell Raises Starting Salaries for Associates in 8 Offices

In September Husch Blackwell LLP raised the starting salaries for associates at eight of its offices nationwide, including Washington, D.C.

"To effectively serve our great clients, we must also consistently attract and retain top talent. Toward that end, we regularly review associate salaries. Recently we determined that we needed to raise starting salaries in certain markets to assure that our compensation for associates is competitive," said Greg Smith, chief executive officer and managing partner at the firm, in a press release. "We have always been committed to attracting and keeping the very best talent, and these salary adjustments help to ensure our continued top performance for clients."

Sixteen recent law school graduates started at Husch Blackwell in September.

Associate compensation is also being evaluated firm-wide, and some associates will receive market increases. At its D.C. office, the starting salary for an associate rose to $150,000, one of the largest salary adjustments among the eight offices.

Like many firms, Husch Blackwell was affected by the recession, and in 2009 it lowered starting associate salaries in four of its markets and froze salary levels at the rest of its offices.

"The time is now right to step up our commitment to top talent. We're energized about our future, one that depends on our people, and we consider this an investment in our future," said Smith.

Other Husch Blackwell offices that saw an increase in starting salaries were

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UPCOMING OCTOBER AND NOVEMBER COURSES

OCTOBER

3 I-9 Compliance: A Practical Approach to the New I-9 Form and I-9 Audits
4 When Lawyers Change Law Firms: Ethical, Practical, and Legal Issues
9 & 31 Real Estate Litigation in the District of Columbia: Current Issues and Practice Guide Series
10 & 17 Introduction to the Taxation of Financial Instruments Series
10 Ethics and Professional Conduct for Government Attorneys 2012: Complying With Dual Sets of Rules
11 Adoption Law and Process in the District of Columbia, Maryland, and Virginia
11 & 18 Pretrial Skills Series
12 Effective Writing for Lawyers Workshop
15 Litigation Ethics: Duty to Disclose Unfavorable Facts and Law and Other Court Issues
16 Changing Currents in Employment Law 2012: Recent Trends and Developments
17 Beginner's Guide to Publishing Law and Publishing Agreements
22 Update on Handling DUI Cases in the District of Columbia
23 & 30 Working with the Rules of Evidence in Civil Proceedings in the District of Columbia Series
24 Avoiding Malpractice and Bar Complaints 2012
25 IP Basic Training: Patents, Trademarks, and Copyrights
25 Preventing and Litigating Will Contests in the District of Columbia, Maryland, and Virginia
26 Appellate Advocacy 2012
26 Effective Writing for Lawyers Workshop
29 Negotiating and Drafting LLC Agreements in the District of Columbia

NOVEMBER

1, 8 &15 Introduction to Bank Regulatory Law Series
2 Deposing the Artful Dodger: Advanced Deposition Techniques
5 ERISA Basics Series, Part 1: ERISA Introduction
7 Bankruptcy 101 for Non-Bankruptcy Lawyers: Spotting the Issues
8 Advising Foreign Nationals on Starting a Business in the United States
13 ERISA Basics Series, Part 2: Minimum Standards and Plan Design
14 Withdrawing From a Client Representation: Breaking Up Is Hard to Do
14 Estate Planning for Artists, Authors, and Collectors
19 ERISA Basics Series, Part 3: Problems in Plan Administration
26 ERISA Basics Series, Part 4: Fiduciary Responsibility and Participant Rights
27 Ethics and Lawyer Trust Accounts
28 Litigating Immigration Cases in Federal Court
29 Pretrial Motions in the District of Columbia: TROs, Preliminary Injunctions, and More
30 Effective Writing for Lawyers Workshop

To REGISTER ONLINE or for more course information,
please visit us at www.dcbar.org/cle, or call the D.C. Bar CLE Program at 202-626-3488.

Global Impact

Photo by Ashley Gilbertson of VII Photo Agency

Kenyan Chief Justice Willy Mutunga (right) talks with Mark Bellamy, former U.S. ambassador to Kenya who recently stepped down as director of the Africa Center for Strategic Studies, at a reception held in September by the American Bar Association (ABA) Center for Human Rights and Steptoe & Johnson LLP to honor Mutunga. In his remarks, Mutunga talked about how the ABA and American lawyers have supported Kenyan attorneys and advocates working for democracy and rule of law in his country.—*K.A.*

Chattanooga and Memphis in Tennessee; Chicago; Kansas City and St. Louis in Missouri; Omaha, Nebraska; and Phoenix, Arizona.—*K.A.*

Zuckerman Spaeder Starts Employment Disputes Blog

Zuckerman Spaeder LLP is examining issues that arise in disputes between companies and their senior executives in its new blog Suits by Suits at www.suitsbysuits.com.

"Our aim in launching Suits by Suits is to illuminate current issues involving . . . an area that has escaped the attention of other blogs on litigation and employment law. Our goal is to make this subject matter accessible and entertaining for both lawyers [and] readers without a legal background," said Ellen D. Marcus, a partner at the firm and contributing editor of the blog.

Fellow Zuckerman Spaeder attorneys Jason M. Knott, William A. Schreiner Jr., and P. Andrew Torrez also are contributing editors of Suits by Suits. The blog covers recent court cases and overlooked aspects of employee–employer disputes, particularly those involving high-level executives.

Blog topics include litigation over employment contracts, golden parachute agreements, severance and non-compete agreements, stock and other compensation plans, and issues related to executives' fiduciary duties, indemnification, and directors' and officers' insurance. Contract and common law disputes as well as federal and state labor, antitrust, and nondiscrimination laws relevant to the executive–employment context are also explored in the blog.

"By concentrating on disputes involving companies and their top executives, Suits by Suits provides timely, insightful, and engaging analysis of the key issues at the heart of such sorts of conflicts," said firm chair and managing partner Graeme W. Bush. "The blog enables us to demonstrate and share the firm's experience—not only in litigating disputes between top-level executives and companies but also in counseling companies and executives about how best to avoid disputes or work them out without having to resort to costly and protracted lawsuits—while at the same time educating readers on important and often subtle aspects of the intersection between litigation and employment law."

The blog's contributing editors have extensive experience representing plaintiffs and defendants in complex civil litigation involving companies and corporate executives, as well as on issues that often arise in such disputes.—*K.A.*

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

President's Message

continued from page 6

are complicated by an unfavorable U.S. Supreme Court precedent. The American Bar Association and other bar associations have made valiant attempts to assist by lobbying and filing amicus briefs, but, to date, those efforts have fallen short of achieving the hoped-for goals.

The call for more spending to increase the salaries of federal judges does not lend itself to a catchy sound bite, and the cause is unlikely to mobilize mass popular support. Rather, this is an area where lawyers, as a professional community, bear a special responsibility to be vocal and vigilant in support of increased judicial pay. That responsibility encompasses both educating the public about the linkage between judicial pay and judicial independence and becoming more assertive and resourceful about creating nonpartisan coalitions dedicated to persuading Congress that increasing federal judicial salaries are in the best interest of the American people, the federal deficit notwithstanding.

Reach Tom Williamson at twilliamson@dcbar.org.

Illustration by Richard Tuschman/illustrationsource.com

Campaign Finance Frenzy Post-Citizens United

By Sarah Kellogg

It has been more than two years since the U.S. Supreme Court issued its controversial decision in *Citizens United v. Federal Election* Commission. And while the constitutional right of corporations, unions, and individuals to give money to influence elections may be settled law, speculation about the long-term effect of the ruling is as fresh today as it was the day the High Court handed down its 5–4 decision.

In the last two years *Citizens United* has become a political shorthand of sorts. For conservatives, the decision was an injection of constitutional sanity into an unpredictable and biased campaign funding system; for progressives, it triggered a campaign spending "arms race" that could bring democracy to its knees by handing control of elections to corporations and the wealthy. The vast middle ground is rarely visited territory, although some commentators and legal scholars see *Citizens United* as an evolutionary rather than a revolutionary decision.

There is no disagreement, however, on the ferocity of the reaction to the opinion. It unleashed a wave of vehement attacks on the Court's majority that continues to this day and that has been magnified, in part, by the cash deluge in this year's presidential campaign. Campaign finance reformers remain especially critical of the Court's decision to award "personhood" to corporations to solidify their free speech rights, and they wait for

This article is the first in a two-part series exploring the effect of Citizens United *in the 2012 election cycle.*

the proverbial other shoe to drop on corporate personhood.

What the Supreme Court did in *Citizens United* was block congressional efforts to limit the contributions of individuals, labor unions, and corporations to outside interest groups. These independent expenditures were deemed expressions of free speech and not political donations to be regulated by the Federal Election Commission (FEC) because these outside interest groups were not affiliated with candidates or political parties. The opinion crystallized the Court's thinking on campaign finance law and drew a bright yellow line in the sand for Congress: Trespass beyond this line at your own risk.

Since the Court acted, some of the critics' dire predictions have come true (record-breaking amounts of money have been dumped into the presidential campaign in 2012) while others have not materialized (corporate America secretly hijacking elections). Some say it's too soon to see the horizon on *Citizens United*, others say the nation has slammed head first into the reality of the decision. Of course, the challenge in weighing the impact of *Citizens United*, even at this stage, is that the two sides are so far apart on how they view the ruling.

"I think the situation is far worse than people could have anticipated," says Melanie Sloan, executive director of Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit government watchdog organization. "There's way more money coming in and more secret money coming in. Plus, I think there's a lot more coordination going on than anybody knows between these groups and the candidates, and it's been made worse because of the lax enforcement by the FEC. It is an absolute mess."

Others see it very differently, of course. "This is the most competitive, turbulent, vibrant, speech-oriented election that we've had in this country since before the Federal Election Campaign Act in the 1970s," said Robert Kelner, a partner at Covington & Burling LLP, during a briefing on *Citizens United* hosted by the think tank Bipartisan Policy Center in late July. "There is a tremendous increase in the competitiveness of this election, both in primaries and now even in the general election, a much greater pluralism of speech and activism, and that is a positive development."

Senator John McCain and former Senator Russ Feingold

Given these competing views, it is no wonder that *Citizens United* remains a Rorschach test for U.S. political and legal experts who are still trying to tease out its potential impact two years after the decision came out.

Ultimately, *Citizens United* may not go down in history as the Supreme Court's most important decision on campaign finance, but it will certainly be viewed as one that established a new era in campaign finance jurisprudence and policy, both in terms of the role of campaign contributions in American politics and the authority of Congress to regulate them.

Campaign Finance Overhaul

The *Citizens United* ruling dates back to 2010, but its seeds can be traced to 2002 and the congressional debates around—and the ultimate passage of—the Bipartisan Campaign Reform Act (BCRA), also known as the McCain–Feingold law for its main cosponsors, Sen. John McCain of Arizona and former Sen. Russ Feingold of Wisconsin. Talk to any campaign finance expert, and they will say the story of *Citizens United* really started there.

"The reality is that although there have been some changes in the legal landscape in the last few years, by far the most dramatic change in the campaign finance system was the McCain–Feingold law," Kelner said. "It fundamentally changed the way our campaign finance system worked."

A favorite among reformers, the BCRA was the solution to a problem that had surfaced in the 1990s as the use of "soft money" by political parties became near epidemic. While donations to candidates and political action committees (PACs) were considered "hard money" and were strictly regulated and capped, soft money contributions had no limits, could come from unions and corporations as well as individuals, and were used for party building and outreach activities. The contributions could not, however, be spent directly on candidates for federal office.

To combat soft money flooding the system, the BCRA banned the contributions completely. Donations to national parties and candidates would have to come in the form of hard money and would be subject to strict contribution limits, effectively tying the hands of political parties and candidates and giving outside interest groups a clear path ahead. The campaign finance race was on again.

"With the infusion of unlimited corporate money…, the average citizen candidate would be unable to compete against the corporate-sponsored candidate, and Montana citizens . . . would be effectively shut out of the process." —Montana Chief Justice Mike McGrath

Photograph by Corbis

"What's really happened is that Congress overreached in McCain–Feingold and they got away with it for a while, and then the courts finally stepped in." — Cleta Mitchell, Foley & Lardner LLP

As Congress approved the BCRA, there were already concerns about its constitutionality. Even as President George W. Bush signed the bill into law, he questioned whether it could withstand judicial scrutiny. Despite those concerns, the bill became law and the court challenges soon followed.

"What's really happened is that Congress overreached in McCain–Feingold and they got away with it for a while, and then the courts finally stepped in," says Cleta Mitchell, a partner at Foley & Lardner LLP. "The reformers are responsible for what we're seeing now."

In the years since its passage, however, the BCRA has become the Jenga of campaign finance. The courts have slowly pulled away at its bones, questioning the constitutionality of its provisions and discarding them as they saw fit. Aided by a phalanx of conservative attorneys and right-wing groups, the courts have invalidated much of the law. Its disclosure requirements, endorsed by *Citizens United*, remain intact for so-called super PACs, political parties, and candidates, although there are pending efforts to overturn them as well.

While the BCRA may have played a central role in campaign finance policy in the last decade, that does not diminish the importance of *Citizens United*, say observers. "There have been but few decisions in the history of the Supreme Court that have excited as much outrage and sustained fury from citizens across the political spectrum as has *Citizens United*," said Lawrence Lessig, a professor at Harvard Law School, in his testimony before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights during a hearing in July on *Citizens United* and the rise of super PACs. "[People] have lost the faith that their government is responsive to them, because they have become convinced that their government is more responsive to those who fund your campaigns."

Legal Challenges

Experts say the most profound reverberations from *Citizens United* have been in the transformative effect of its precedent. Already the lower courts have reviewed cases in light of *Citizens United*, building out on the original decision and giving activists new avenues to challenge. All this activity is making campaign reformers even more fearful of the final shape of campaign finance law in the United States.

"I view this as a moment of high danger for democracy," says Jamin Raskin, a professor of constitutional law at American University Washington College of Law and a Maryland state senator.

One of the widely reviled byproducts of *Citizens United* are the super PACs, independent committees that can raise and spend money to support or oppose political candidates, as long as they don't coordinate their activities with the candidate. The controversial super PAC was borne out of a critical lower court decision in *SpeechNow.org v. Federal Election Commission.*

SpeechNow.org challenged federal regulations imposing contribution limits, disclosure requirements, and the registration of political committees, noting that the law restricting contributions was stifling its right to political speech. The group also said that the reporting requirements were too burdensome.

Photograph by Getty Images

On March 26, 2010, the U.S. Court of Appeals for the District of Columbia Circuit struck down limits on contributions based on its reading of *Citizens United*. "[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations," the appeals court wrote. "No matter which standard of review governs contribution limits, the limits on contributions to SpeechNow cannot stand."

The appeals court rejected SpeechNow.org's challenge to the disclosure requirement, however. "But the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures," wrote the court. "Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals."

The result of the decision was that SpeechNow.org, which was organized as a 527 organization, could receive unlimited contributions, although it will have to register as a political committee and disclose financial information to the FEC. Before the decision, 527 organizations were limited to $5,000 in individual donations.

Where *SpeechNow.org* expanded the fundraising clout of independent groups, *American Tradition Partnership, Inc. v. Bullock* extended *Citizens United*'s landscape from federal elections to state and local ones. It also showed a clear schism between the Supreme Court and some state courts, many of which had upheld limits on state campaign spending through the years.

Such was the case in Montana. With the *Citizens United* decision looming over, the Montana Supreme Court ignored the justices' opinion and demonstrated in a detailed opinion that the state's 1912 law, setting limits on spend-

ing by corporations in state political campaigns, was needed to battle the corrupting influence of money in politics.

"With the infusion of unlimited corporate money in support of or opposition to a targeted candidate, the average citizen candidate would be unable to compete against the corporate-sponsored candidate, and Montana citizens, who for over 100 years have made their modest election contributions meaningfully count would be effectively shut out of the process," wrote Chief Justice Mike McGrath in the court's 5–2 decision on December 30, 2011.

As the case made its way to the High Court, progressives, including several sitting justices, hoped that the Court would use it as a vehicle to reverse *Citizens United* in full or in part. They believed that a properly chagrined Supreme Court, having watched money flood into state and national political campaigns in 2010 and 2012, would revisit *Citizens United* with new eyes.

Instead the majority decided to stand firm. It squashed the Montana Supreme Court ruling and struck down the state's century-old law, issuing a per curiam opinion without a full briefing or oral argument. "The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does," wrote the majority. "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."

The liberal members of the Supreme Court responded forcefully and left little doubt of their opinion of *Citizens United*. "[E]ven if I were to accept *Citizens United*, this Court's legal conclusion should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana," wrote Justice Stephen Breyer. "Given the history and political landscape in Montana, that court concluded that the State had a compelling interest in limiting independent expenditures by corporations. Thus, Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United*, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so."

The judicial community continues to be divided on the ruling. In an April 2012 blog post, Judge Richard Posner, a conservative on the U.S. Court of Appeals for the Seventh Circuit in Chicago, questioned the justices' reasoning in *Citizens United*, focusing on the proposition that the risk of the corrupting influence of campaign donations would be less if the money were given to independent groups like super PACs rather than to the individual candidate.

Posner noted that super PACs that favor a candidate are particularly effective at carrying the candidate's "negative" message forward and disparaging an opponent, although most super PACs stay away from the more difficult messaging around positive ads, which would require more coordination with the candidate that is taboo in this new legal construction.

"It thus is difficult to see what practical difference there is between super PAC donations and direct campaign donations, from a corruption standpoint," Posner wrote. "A super PAC is a valuable weapon for a campaign, as the heavy expenditures of Restore Our Future, the large super PAC that supports [Mitt] Romney and has attacked his opponents, proves; the donors to it are known; and it is unclear why they should expect less quid pro quo from their favored candidate if he's successful than a direct donor to the candidate's campaign would be."

Rise of the Super PACs

The influential role of super PACs is on display in the 2012 presidential contest, the first test of the post-*Citizens United* campaign finance regime on a national campaign. Republican presidential candidates have benefited the most from

"A super PAC is a valuable weapon for a campaign … the donors to it are known; and it is unclear why they should expect less quid pro quo from their favored candidate if he's successful than a direct donor to the candidate's campaign would be."

—Seventh Circuit Judge Richard Posner

Photograph by Getty Images

"Gingrich lasted a lot longer in the Republican primary than he would have but for the very significant contribution of the super PACs that allowed him to stay alive." —Floyd Abrams, Cahill Gordon & Reindel LLP

the new rules, watching an avalanche of money enter the process.

Awe inspiring as it was, the wave of new money in the GOP primary was not determinative. No single candidate was able to rely on outside groups to "buy" the Republican nomination. In reality, the new money empowered even the weakest of the backbenchers to extend their candidacies. Armed with vast sums of money from super PACs, even former House Speaker Newt Gingrich and former Pennsylvania Sen. Rick Santorum, the first among the obvious underdogs, were able to sustain their challenges to Romney deep into the primary race despite the former Massachusetts governor's sizeable financial and organizational advantage.

Former Pennsylvania Senator Rick Santorum, Republican Presidential nominee Mitt Romney, and former House Speaker Newt Gingrich.

"Gingrich lasted a lot longer in the Republican primary than he would have but for the very significant contribution of the super PACs that allowed him to stay alive," says Floyd Abrams, a partner at Cahill Gordon & Reindel LLP. "In my point of view, it allowed the public to have more choices for a longer period of time. That's a good thing, not a bad thing."

The super PACs have certainly made their mark in 2012. The campaign watchdog Center for Responsive Politics (CRP) reported that as of August 29, there were 812 super PACs nationally in this election cycle, up from 83 in 2010, and that these groups had raised some $350 million in contributions. Restore Our Future, a super PAC supporting Romney, was the most moneyed of the group, raising $89.6 million so far this cycle. Priorities USA Action, the Obama-oriented super PAC, was No. 2 on the list with $25.5 million, and Winning Our Future, the super PAC favoring Gingrich, was third with $23.9 million in contributions.

Overall contributions to the presidential race totaled $696.8 million as of late August. Democrats raised $356.7 million and Republicans pulled in $337.3 million, according to the CRP. The U.S. Senate races raised $444 million, while contributions to the U.S. House of Representatives contests reached $782.5 million as of August 29.

Campaign ad spending in the presidential race hit a record-breaking level by mid-August. An NBC News/Smart Media Group Delta analysis showed that by August 16 total campaign spending had surpassed the $500 million mark, about the same amount of money spent on advertising in the entire 2008 general election. Nearly half of the spending—some $238 million—was done by outside groups, such as super PACs, and the vast majority of that money ($205 million) went to support Romney or to attack President Obama. Ad spending by outside groups that support Obama reached $33 million, accounting for just 14 percent of the total ad spending made on behalf of the president.

As of mid-August, the top five entities in ad spending in this general election were the Obama campaign, $207 million; Crossroads groups (pro-Republican), $105 million; the Romney campaign, $67 million; Americans for Prosperity (conservative-leaning group), $42 million; and Restore Our Future, $29 million. While the Obama campaign may be the biggest spender, Romney's allies, combined with his own campaign, spent a total of $273 million, whereas Obama and his supporters spent $239 million in advertising efforts.

While campaign finance activists decry the money race, conservatives belittle the notion that spending $1 billion or more on a presidential campaign is something to fear. "We spend more money advertising potato chips in this country than on the presidential race," says Mitchell, the campaign and election expert at Foley.

Names Behind the Numbers

The money men behind the presidential candidates have both been cheered and derided for the influence they wield on the presidential contest. Most intriguing of the group has been billionaire casino magnate Sheldon Adelson, who gave more than $20 million to a Gingrich-focused super PAC. As Gingrich's campaign failed, Adelson was able to jump horses and join the Romney camp. The move was a super PAC-fueled version of musical chairs.

"The question isn't whether Gingrich succeeds, the question is whether Sheldon Adelson succeeds," says Raskin, the constitutional law professor at American University. "He's been handed off from one candidate to the next. He's already promised to spend $100 million to elect Mitt Romney. Does anyone think that his independent spending won't influence the Romney campaign?"

Adelson has become the left's bogeyman of campaign finance for a reason. Along with the money to support Gingrich, the casino mogul has given another

Photograph by Corbis

$10 million to the pro-Romney super PAC Restore Our Future. Adelson has committed to spend as much as $100 million to defeat the president.

As to Romney's fealty to Adelson, the question goes unanswered for now, although the Romney campaign did have U.S. Rep. Paul Ryan, its freshly minted vice presidential candidate, make a pilgrimage to Las Vegas in August to visit Adelson and other donors four days after being announced as Romney's running mate.

"I don't think it helped the Republicans to show Congressman Ryan flying out to kiss Adelson's ring," says Abrams, the First Amendment lawyer at Cahill Gordon. "The other reality is, in a presidential race, including this one, I don't think there is any doubt that both parties will have plenty of money to get their messages out."

Conservatives find the criticism of Adelson and his club of GOP high rollers especially galling. Democrats have for years had their own "sugar daddies," among them investor George Soros, insurance executive Peter Lewis, and mortgage lenders Herb and Marion Sandler, who all wrote large checks and helped finance the campaigns of various presidential candidates such as U.S. Sen. John Kerry of Massachusetts in 2004 and a little-known senator from Illinois, Barack Obama, in 2008.

This year top Democratic donors such as DreamWorks Animation chief executive officer Jeffrey Katzenberg ($2.1 million) and Chicago media mogul Fred Eychaner ($3.2 million) have given millions of dollars to outside groups to support the Obama campaign, although Soros has given only $1.1 million.

"The Democrats can't stand the idea that conservatives might want to fight back and have the resources to do it," says Mitchell. "That's why they're so focused on Sheldon Adelson and other Republican contributors, but they weren't making the same complaints when George Soros or Peter Lewis were writing big checks to Democratic candidates. What *Citizens United* has done is really level the playing field, and they don't like it."

The Making of a Corporate State?

The Democrats' objections to *Citizens United* have resulted in a slew of legislative proposals at the federal, state, and local levels to reverse the Supreme Court's decision, either through statute or constitutional amendment. Local and state lawmakers in 40 states have introduced or approved

Senator Richard Durbin

resolutions asking Congress to overturn the decision. Seven state legislatures—California, Hawaii, Maryland, Massachusetts, New Mexico, Rhode Island, and Vermont—have officially called on Congress to act.

"I think the change will have to come from the bottom up, rather than the top down," says Sloan of the government accountability watchdog CREW on reversing *Citizens United*. "At the local and state level, they have reacted to this, but I'm not sure we'll see anything happen in Washington without pressure from below."

In these resolutions the critiques focus on everything from the corporate "personhood" determination to concerns that money coming into the elections will have a corrupting influence. Ultimately, the underlying concern is that the voice of the individual citizen will be drowned out by the rich and powerful.

"Since the Supreme Court's decision on *Citizens United*, we have seen the rapid rise of super PACs and unprecedented influence buying by wealthy individuals seeking to advance their agendas," U.S. Sen. Richard Durbin (D–Ill.) said at the July Senate Judiciary subcommittee hearing. "This year, election spending by outside groups will likely shatter previous records."

Durbin believes that congressional measures such as the Fair Elections Now Act, which would replace campaign fundraising with various public funding mechanisms, and the DISCLOSE Act, which would establish a more vigorous reporting regime, are both admirable, but they won't have as much success in trimming back the decision as his proposed constitutional amendment. Nearly two million people nationwide have signed a petition calling for a constitutional amendment to enshrine campaign finance protections.

The prospects for the DISCLOSE Act ever finding its way to the president's desk are unlikely. The bill would require corporations, unions, and other groups to report campaign contributions of more than $10,000 to the FEC. It failed to gain the support of the full Senate twice in July as Republicans blocked its advance. Senate Majority Leader Harry Reid, during the debate on the Senate floor, accused the GOP of protecting their rich cronies. "[T]here is nothing free about an election purchased by a handful of billionaires," said Reid, a Nevada Democrat. "It is obvious Republicans' priority is to protect a handful of anonymous billionaires . . . willing to contribute hundreds of millions of dollars to change the outcome of a close presidential contest. But today they'll have an opportunity to reconsider that backwards priority and stand up for the average voter instead. I hope they join Democrats as we work to ensure all Americans—not just the wealthy few—have an equal voice in the political process."

Critics of *Citizens United* still maintain that the justices have been naive at best and brazenly and unforgivably political at worst, unleashing a torrent of corrupting cash and elevating corporations to a powerful constitutional status that will be hard to curb in the future. While campaign donations in 2012 are getting all the attention, experts fear that the long-term impact will be felt most around the protections handed to corporate America.

"The majority said that speech is

Photograph by Corbis

"Since the Supreme Court's decision on CITIZENS UNITED, we have seen the rapid rise of super PACs and unprecedented influence buying by wealthy individuals seeking to advance their agendas."

—U.S. Sen. Richard Durbin (D-Ill)

protected and not the speaker, as if the speech exists metaphysically outside the material and social context of the speaker," says Raskin. "That just can't be right. I feel we're headed into a kind of political regime that looks like a corporate state, and it begs the question: Who is best served by this decision?"

A number of constitutional amendments have been introduced to counter *Citizens United*. One sponsored by U.S. Sen. Bernie Sanders (I–Vt.) and U.S. Rep. Ted Deutch (D–Fla.) would deal emphatically with the corporation question. It would exclude for-profit corporations, limited liability companies, and other private entities established for business purposes from the rights given to natural persons in the U.S. Constitution.

"[T]he democratic foundations of our country are now facing the most severe attack, both economically and politically, that we have seen in the modern history of our country," said Sanders at the Senate Judiciary subcommittee hearing. "Tragically, we are well on our way to where America is moving toward an oligarchic form of government—where virtually all economic and political power rest with a handful of very wealthy families. This is a trend we must reverse."

Conservatives say complaints about corporate spending will eventually be proved to be little more than partisan grandstanding and fear mongering. "It will be viewed for what it is, a political effort to profit by raising a nonexistent issue," says Abrams. "That's not limited to the Democrats, by the way."

Restoring Public Faith

The chronic resistance to the ruling often stems from the justices' contention that corporate money does not have a corrupting influence, and that appearances of influence don't affect public attitudes about their elected officials. In *Citizens United*, Justice Anthony Kennedy wrote for the majority: "[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. . . . And the appearance of influence or access will not cause the electorate to lose faith in this democracy."

Critics of the decision have long belittled this notion, suggesting that the justices live in a fairytale land not inhabited by real people and rough politics—and the public would likely agree with the critics.

Survey after survey shows that the American public has lost confidence in the government, so the battle over *Citizens United* may seem like an effort to fix the door after the horse has bolted the barn. Part of that public cynicism reflects government's frequently ineffectual and partisan behavior. It also indicates voters' keen understanding of the connection between campaigns, contributions, and constituency. They know that the Jeffrey Katzenbergs and Sheldon Adelsons of Corporate America are giving generously to candidates, and not necessarily to build a better democracy.

"On January 20, 2010, the day before *Citizens United* was decided, our democracy was already broken," said Lessig, the director of the Edmond J. Safra Center for Ethics at Harvard, when he testified before the Senate Judiciary subcommittee in July. "*Citizens United* may have shot the body, but the body was already cold. . . . We must find a way to restore a government 'dependent upon the People alone' so that we give 'the People' reason again to have confidence in their government."

Two years after *Citizens United*, the rhetoric hasn't cooled, the wounds are still raw, and the long-term constitutional effects remain uncertain. Despite all the debate, and after living, albeit briefly, under the *Citizens United* regime, the jury is still out on the lasting impact of the ruling on the nation's elections, office holders, and, most important, citizens.

Sarah Kellogg is a frequent contributor to Washington Lawyer.

Paying the Price of Disclosure

By Robert J. McCarthy

Federal law requires government employees to report fraud, waste, and abuse while promising to protect them from retaliation. Sadly, 30 years after whistleblower legislation was first adopted, it has neither curbed government malfeasance nor kept workers who act on the false promise of protection safe from reprisal. As a result, Americans often learn too late, if at all, about tragic government abuses such as false rationalizations for illegal wars. Meanwhile, many conscientious government employees are shocked to find their careers destroyed and lives thrown into crisis.

A whistleblower's descent into the nightmare of retaliation begins with a disclosure of agency wrongdoing. Often denigrated as "leaks," such disclosures are in fact mandated by a variety of laws and regulations. An executive order and a federal regulation both proclaim that "[e]mployees shall disclose waste, fraud, abuse, and corruption to appropriate authorities." Federal employees also have a statutory obligation to report criminal wrongdoing by other employees, and there are a variety of other statutes and regulations that mandate particular types of reporting and reporting by certain categories of employees.

Recognizing that an employee who blows the whistle on corrupt officials risks retaliation, Congress included whistleblower protections in the Civil Service Reform Act of 1978 (CSRA), making it illegal for a federal agency to fire, demote, or take other adverse personnel actions against an employee

"Taking the Stand" appears periodically in Washington Lawyer *as a forum for D.C. Bar members to address issues of importance to them and that would be of interest to others. The opinions expressed are the author's own.*

Illustrations by Dan Page/theispot.com

in reprisal for disclosing illegality, waste, or corruption. The CSRA also created the U.S. Office of Special Counsel (OSC) and the U.S. Merit Systems Protection Board (MSPB). Congress charged the OSC with both investigating disclosures and defending whistleblowers against retaliatory personnel actions before the MSPB.

A 1994 Senate report observed that a decade after the CSRA was passed, the "OSC had not brought a single corrective action case since 1979 to the [MSPB] on behalf of a whistleblower." Congress attempted to remedy the situation with the passage of the Whistleblower Protection Act (WPA) in 1989, granting whistleblowers the right to pursue their own cases before the MSPB, although the OSC retained its obligations to assist whistleblowers and investigate disclosures. Further amendments in 1994 sought to clarify and strengthen the OSC's responsibilities to protect whistleblowers.

The WPA contemplates that a disclosure will be made to the OSC, but it may also be made to a superior, an inspector general, Congress, or even to a news reporter. It is "protected," however, only if made to someone other than the wrongdoer, even if that is the agency management. Additionally, if it is the regular duty of the employee to make the disclosure in question, and the disclosure is made through the usual channels employed in the performance of those duties, then the disclosure is not protected.

Excluded from the WPA's coverage are employees in some confidential or policy-making positions. Although not mentioned in the WPA, government lawyers are covered by the Act. The WPA does not protect employees in the military, at the U.S. Postal Service, the Government Accountability Office (GAO), and the Federal Bureau of Investigation (FBI), although other statutes offer varying degrees of protection to whistleblowers at these agencies. In addition, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) administers the whistleblower provisions of 21 laws covering U.S. workers. None of these laws are adjudicated by the MSPB, and the OSC has no role in their enforcement.

Also statutorily excluded from the protection of the WPA are employees at intelligence agencies. An alarming ruling by the U.S. Court of Appeals for the Federal Circuit, issued August 17, 2012, effectively expands the "national security" exemption to encompass any position designated as "sensitive" by any agency. Unless reversed on review or by Congress, the ruling in *Berry v. Conyers* allows an agency to designate the basis for the removal of an employee as "ineligibility to occupy a sensitive position," thereby precluding MSPB and judicial review of the merits of the action, as well as of claims of retaliation, discrimination, and other constitutional and statutory violations.

Protection Promise Falls Short

A 2010 MSPB survey of more than 40,000 federal employees found that more than 10 percent of the workers had personally observed "illegal or wasteful activities" in their own agencies in just the prior 12 months. Yet a mere 1.1 percent of those who observed wrongdoing said they reported it to the OSC, 0.6 percent said they reported it to the GAO, 1.5 percent made disclosures to law enforcement, and 5.1 percent said they reported the misconduct to an agency inspector general.

The main reason for not reporting unlawful activity is the belief that "nothing would be done," with fear of retaliation a close second. Indeed, the OSC has done little to instill faith in whistleblowers either that their disclosures will be investigated or that they will be protected against retaliation. What is far more appalling is that the MSPB has virtually guaranteed federal employers that they may retaliate against whistleblowers with impunity.

The OSC reported that it "processed and closed" a total of 1,006 whistleblower disclosures in fiscal year 2010. However, 94 percent of those disclosures were closed without the slightest attempt at investigation. The OSC referred 24 disclosures to agency heads for internal investigation (a procedure unlikely to comfort a whistleblower), and sent just two disclosures to agency inspectors general for further inquiry. The OSC "substantiated" whistleblowers' disclosures in only 62 cases, and found the disclosures in just five cases "unsubstantiated."

The WPA charges the OSC with the duty to receive allegations of prohibited personnel practices (PPPs), including reprisal against whistleblowers, and to investigate such allegations, as well as to conduct an investigation of possible PPPs on its own initiative absent any allegation. The OSC received 2,431 PPP complaints in fiscal year 2010, and carried over an additional 769 complaints from the previous year, yet the agency filed zero corrective action complaints with the MSPB in 2010. The OSC filed no corrective action complaint in 2008 and 2009, and only one each in 2006 and 2007.

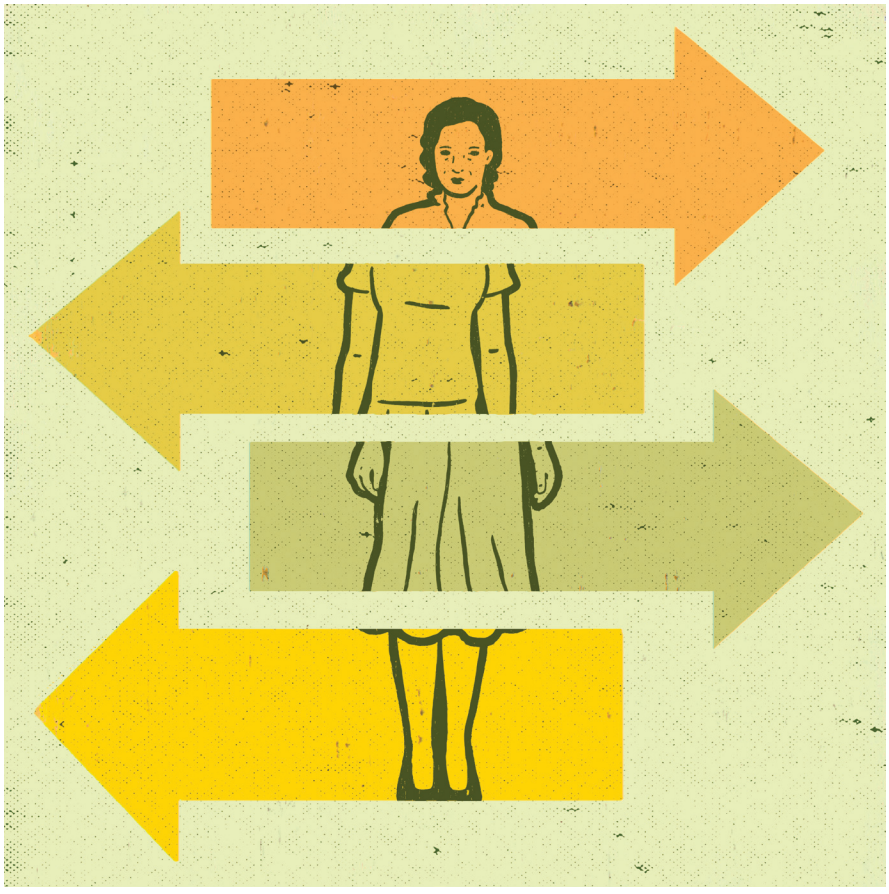
If it is the regular duty of the employee to make the disclosure in question, and the disclosure is made through the usual channels employed in the performance of those duties, then the disclosure is not protected.

The OSC may also seek disciplinary action against an agency official who has committed whistleblower retaliation or another PPP; however, the OSC has been loath to use this power as well. The OSC filed no disciplinary action complaint with the MSPB against the perpetrators of PPPs in 2009 and 2010, three complaints in 2008, and none in 2006 or 2007.

Although some must first "exhaust" remedies at the OSC, all whistleblowers ultimately may file appeals on their own behalf with the MSPB, which is governed by three bipartisan board members appointed by the president. The board, in turn, employs a large cadre of "administrative judges" who hold hearings in whistleblower and other personnel appeals and who issue "initial decisions." An initial decision may be appealed to the board for a "final decision" or, alternatively, an appellant may allow the initial decision to become final for the MSPB. Either way,

the federal circuit has exclusive jurisdiction over appeals from MSPB final decisions.

Most MSPB appeals are from adverse actions unrelated to whistleblowing, including performance-based or conduct-based firings, demotions, suspensions, and reductions in grade or pay. Discrimination allegations fall within the board's jurisdiction only if made in connection with matters that are appealable to the board, otherwise they are the province of the U.S. Equal Employment Opportunity Commission.



Retaliation is raised as an affirmative defense in an MSPB appeal of an adverse action. The appellant must prove by "preponderant evidence" that he or she made a protected disclosure, and that the disclosure was a "contributing factor" in the agency's decision to take the personnel action. If the appellant meets this burden of proof, the agency can still prevail if it proves by "clear and convincing evidence" that it would have taken the same personnel action absent the disclosure.

MSPB administrative judges issued 6,536 initial decisions in fiscal year 2010, of which a staggering 95 percent favored the agencies involved and denied the employees' claims. The way the MSPB records its cases makes it difficult to identify all of those that involve whistleblowing, but an examination of those appeals that raised no issues other than retaliation reveals that over 98 percent of initial decisions in such cases were decided in favor of the agencies. On further appeal, the full board affirmed an estimated 97 percent of the initial whistleblower decisions and 85 percent of other personnel decisions.

The federal circuit court decided just 21 whistleblower appeals in fiscal year 2010, ordered zero corrective actions, and remanded three cases for further proceedings. The MSPB boasts that 98 percent of its final decisions were "left unchanged" by the circuit court, exceeding its more modest goal of 92 percent.

The Government Accountability Project (GAP), a leading whistleblower advocacy group, notes that the court "has a 3–219 track record against whistleblowers since Congress last reaffirmed the law in 1994."

Eviscerating Employee Rights

For whistleblowers and other federal employees alike, this elaborate civil service appeals process looks like a giant rubber stamp for approving adverse personnel actions. Notwithstanding occasional victories by beleaguered litigants, including some especially notable appellants represented by lawyers at the nonprofit Public Employees for Environmental Responsibility (PEER), the wholesale rejection of whistleblower complaints and other personnel appeals cries out for both explanation and remedy. The simple explanation is that those in power have consciously designed the system to penalize the whistleblower. The remedy will necessitate mobilizing sufficient support for a truly meaningful change.

Initial adjudication by MSPB administrative judges is at the root of the situation, and continues to stymie all efforts at reform. Despite the deceptive similarity in titles, MSPB administrative judges are not *administrative law judges* (commonly referred to as ALJs), an entirely separate classification of independent, highly skilled, and carefully screened judicial officers defined by the Administrative Procedure Act (APA). The APA actually makes no reference to administrative judges, nor does the MSPB organic statute, which does refer to administrative law judges. MSPB administrative judges, it turns out, are a creation of the MSPB itself.

Although the APA generally mandates that an adjudicatory hearing on the record be held before an ALJ, cases involving "the selection or tenure of an employee" are exempt. The CSRA grants an employee or applicant for employment a hearing on the record, but permits the board to hear the appeal itself, or to assign it to an ALJ or to an "employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge."

Seizing on the flexibility permitted by these statutes (while ignoring the precatory language regarding ALJs), the MSPB adopted regulations that define "judge" to include "[a]ny person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board." While thus coining the disingenuous title "administrative judge," the MSPB has largely

dispensed with ALJs. The "judge" label is misleading for another reason, since the MSPB itself uses the term "attorney-examiner" for performance evaluations of its so-called administrative judges, who actually are the agency's own lawyers.

Presumably the MSPB sought to save money when it decided to deprive federal employees of the opportunity to be heard by an ALJ, since the more qualified ALJs make higher salaries than do the board's attorneys. Yet the board's rules grant MSPB employees, including the board members themselves, the right to a hearing before an ALJ. The right to an ALJ hearing is also extended to officials accused of violating personnel laws, including retaliation against whistleblowers.

The MSPB's 30-year-old regulations have effected a quiet evisceration of employee rights because the board's lawyers are far less likely than ALJs to dispense justice fairly and with a modicum of due process. Indeed, a record of rulings over 30 years suggests that the MSPB and its cut-rate hearing officers have undermined the entire civil service merit system. MSPB regulations and board precedent accord these ersatz judges broad discretion to determine legal and factual issues, to control discovery, to admit or deny evidence and witnesses, and to rule on objections—in essence, to manipulate the record that is before the reviewing tribunal.

The board and, in turn, the federal circuit defer to factual findings if there is "substantial evidence" in the record to support them. More significantly, findings concerning the credibility of witnesses are deemed "virtually unreviewable." Ironically, these highly deferential standards are taken directly from the APA standards of review as applied to hearings conducted by ALJs, and from appellate court rules regarding findings by U.S. district court judges. Such deference assumes competence, independence, and lofty judicial ethics, yet MSPB administrative judges are held to no standards remotely comparable to those that apply to ALJs, let alone Article III federal judges.

Slim Chances of Success

ALJs are far from perfect, and in fact they are frequently accused of pro-agency bias. U.S. Coast Guard ALJs, for example, were the subject of congressional hearings in 2007 regarding allegations of extreme bias in favor of the agency. A class action lawsuit filed in 2011 in New York alleges systematic bias by U.S. Social Security Administration ALJs against low-income, disabled individuals seeking disability benefits. The presumed motive for such suspected bias is that despite their statutory independence, ethical standards, and professional qualifications, ALJs are likely to identify with their employer, the government, and with the government attorneys and officials who most often appear before them.

Agencies also may attempt to pressure ALJs to issue favorable rulings. Indeed, some ALJs have claimed exactly this type of agency interference in their judicial independence in whistleblower appeals filed with the MSPB. Some ALJs may find it easier not to resist such pressures, and some may even seek to curry favor with parties for whom they might like to work or consult when they leave the bench. ALJs may also be influenced by latent biases such as political views, class, gender, and race that may result in subtle discrimination against many appellants. Lacking ALJs' legal protections and judicial qualifications, MSPB lawyers and other non-ALJ hearing officers are far more likely to indulge such inclinations.

Under laws comparable to the WPA that mandate hearings before ALJs, appellants routinely prevail in far greater numbers than do those whose hearings are held by MSPB attorney-examiners. For example, GAO examined the success rate of whistleblowers in approximately 1,800 complaints filed in fiscal year 2007 under the array of statutes administered by OSHA. GAO found that appellants prevailed in up to a third of initial administrative appeals before ALJs. Aided by reasonably fair and full administrative records, those denied relief by ALJs still prevailed in fully half of further appeals taken to OSHA's Administrative Review Board (ARB). (GAO did not examine reversal rates on appeals to the federal courts.)

Notwithstanding an overall record of awarding relief that far outstrips the MSPB, OSHA has been widely criticized as being hostile to whistleblowers. For example, a 2007 study looked at OSHA's handling of whistleblower complaints under the Sarbanes–Oxley Act, which protects corporate employees from reprisal for disclosing securities fraud. On initial administrative appeal, OSHA ALJs reversed 6.5 percent of agency decisions denying complaints of retaliation. (Although ALJ decisions may be further appealed for discretionary review by the ARB, and then the circuit courts, the study did not include the third and fourth level of review.) Despite reporting a record more than three times as favorable to whistleblowers than that of the MSPB, the study's author was highly critical of OSHA. Leading whistleblower advocacy groups, such as PEER, have called for OSHA to be stripped of responsibility for whistleblower protection.

> Workers are encouraged to blow the whistle on government fraud and are promised protection from retaliation, but the promise is hollow. An elaborate appeals system obscures the reality in an expensive costume of faux due process.

Studies involving other types of administrative appeals suggest that appellants who have hearings before ALJs are much more likely to succeed at the initial and even subsequent levels of appeal than appellants whose journeys start before non-ALJ hearing officers. For example, a 2002 study of Social Security disability determinations found that more than half of agency decisions were reversed by ALJs. Unsuccessful claimants who pursued further appeal through the Social Security Appeals Council had significant success, and those who persisted through appeals to the district courts prevailed in an astounding 50 percent of the cases.

Federal immigration judges provide

a striking example of the converse. Like MSPB judges, they lack the statutory protections and qualifications of ALJs. As a result, they are subject to agency political pressures and are unlikely to possess the judicial independence and character of ALJs. In 2007 the *Chicago Sun-Times* reported the dismissal of more than a dozen immigration judges by the executive branch for an alleged failure to deport aliens at a fast enough pace. Critics charge that immigration judges are hired on the basis of partisan politics rather than competence, and are beholden to the U.S. Department of Justice. In a welcome distinction from the relation between the federal circuit and the MSPB, several circuit courts have denounced such alleged bias.

Unimpaired by one-sided administrative records prepared by unqualified or prejudiced initial decision makers, appellants of all stripes typically enjoy rates of success in both administrative and judicial forums that far exceed those experienced by MSPB appellants. For example, a 2002 study cited data stating that, between 1992 and 1999, disability claims denials by the Department of Veterans' Affairs had a reversal rate of 18 percent before the Board of Veterans Appeals (BVA), whereas the U.S. Court of Veterans Appeals reversed 50 percent of BVA decisions.

A series of studies of federal court employment discrimination cases over three decades found that employment discrimination plaintiffs, like all types of plaintiffs, won up to 40 percent of trial adjudications and 10 percent of appeals from defendants' trial court victories. Some studies report that the U.S. Courts of Appeals affirmed 90 percent of all cases they decided from 1995 to 2005. Other studies suggest an overall affirmation rate for all types of federal civil appeals to be about 80 percent.

'Baited Trap' for Whistleblowers

The confounding record of affirmance for adverse personnel actions that has been racked up by MSPB judges, the MSPB board, and the federal circuit simply has no analogue. The sheer futility of the appeals process suggests the entire MSPB bureaucracy serves little valid purpose (and the OSC even less). As for the WPA, it is a cruel hoax on federal employees and the American public. Workers are encouraged to blow the whistle on government fraud and are promised protection from retaliation, but the promise is hollow. An elaborate appeals system obscures the reality in an expensive costume of faux due process. It would be less hypocritical and more humane simply to rescind the WPA in its entirety and to stop luring innocent federal workers into a baited trap.

Whistleblowers who appeal retaliatory personnel actions find that their employers engage in extensive character assassination in order to create the strongest possible case for sustaining adverse action. In turn, the MSPB decision frequently recites only the evidence that supports the judgment. Under such conditions, even a "successful" appellant will have his or her reputation ruined with baseless charges. How low will they go? A vengeful employer may seek not only to remove the whistleblower from federal service, but also to make it all but impossible for the whistleblower to find employment elsewhere. Criminal prosecutions of whistleblowers are increasingly common, especially for any disclosure that implicates national security, no matter how attenuated the link.

Some whistleblower advocates have applauded President Obama's recent appointments to the MSPB board and his selection of a new special counsel. Perhaps these developments augur some greater degree of access to justice for federal workers. The new special counsel has staked out some encouraging policy positions, although aggressive advocacy is not yet apparent. The new MSPB board gives far less cause for optimism.

The MSPB currently is revising its rules and regulations for the first time since its creation in 1978; however, the proposed rules changes (posted on the agency's Web site) consist mainly of technical housekeeping amendments to procedures, perhaps best characterized as rearranging the deck furniture on the Titanic. To the extent that the changes affect the substantive rights of appellants, the new rules would further restrict those rights. For example, in a pathetic proposal that seems designed both to diminish the role of the OSC and to limit the rights of appellants who first consult the OSC, such appellants would be restricted to raising the issue of retaliation, and they would be barred from raising other issues in their appeals, such as whether the agency proved its charges and the reasonableness of the penalty. They would likewise forfeit the right to raise other affirmative defenses, such as harmful procedural error and discrimination, all because they sought assistance from the OSC before filing an appeal.

New Wave of Reforms

Responding to demands from a broad bipartisan coalition led by groups such as GAP and PEER, Congress is once again considering legislation to strengthen protections against retaliation. The Whistleblower Protection Enhancement Act of 2012, which has passed the Senate, would, among other things, allow certain whistleblowers to request jury trials in federal district court, under a five-year pilot program; allow whistleblowers to appeal decisions on their cases to any federal court of appeals, also subject to a five-year sunset; provide whistleblowers with a forum to challenge retaliatory security clearance determinations; expand protections available to employees in national security agencies and at the Transportation Security Administration; add specific protections for scientific freedom; and once again strengthen the ability of the OSC to assist whistleblowers and prosecute wrongdoers.

Despite its proposed improvements in the law, the legislation unfortunately would leave the vast majority of whistleblowers at the mercy of MSPB administrative judges. Under the jury trial provision, for example, relatively few cases are expected to be heard outside the MSPB forum due to the cost and complexity of court proceedings.

The single reform that would have the greatest impact is missing from all of the current proposals. The MSPB's use of administrative judges, attorney-examiners, or whatever else they might be called, should be eliminated in favor of initial adjudication by fully-qualified, independent ALJs. Such basic due process should be extended not just to whistleblowers but to all federal employees, at the very least in cases where they face loss of employment.

Robert J. McCarthy has served as field solicitor for the U.S. Department of the Interior and as general counsel, U.S. Section, for the International Boundary and Water Commission. The Oklahoma Bar Association honored him in 2008 with its Fern Holland Courageous Lawyer Award for helping to expose the Interior Department's mismanagement of $3.5 billion in Indian trust resources. He is the author of "Blowing in the Wind: Answers for Federal Whistleblowers," published in the spring 2012 issue of the William & Mary Policy Review, *from which this article is adapted.*

D.C. Bar Launches Leadership Academy to Identify, Train Potential Leaders

By Kathryn Alfisi

Volunteers have always been essential to the D.C. Bar, assuming leadership roles in various committees, task forces, and working groups, but each year volunteers are appointed and reappointed to these positions without any methods for ensuring high levels of leadership.

This will change starting in March 2013 with the introduction of the D.C. Bar Leadership Academy, the official goal of which is "to identify, inspire, and educate D.C. Bar members to be leaders of the Bar and to encourage them to use their leadership skills in professional settings, local bar associations, and community organizations."

"The program has two interrelated goals: to identify potential leaders of the Bar and of the larger community and to develop skills and techniques that we think are best associated with effective leaders," says D.C. Bar past president Philip Lacovara, senior counsel at the New York City office of Mayer Brown LLP and chair of the Bar's Leadership Development Committee (LDC). "We think the best Bar leaders will have these skills, and that people who have these skills can become the best Bar and community leaders. . . . We expect this to be a useful training ground and observation mechanism to get an enlarged pool of truly well-qualified people for leadership positions at the Bar."

D.C. Bar President Tom Williamson, senior counsel at Covington & Burling LLP, also has high expectations for the academy.

"The D.C. Bar Leadership Academy is one of the most exciting and innovative initiatives that will be coming to fruition during the current fiscal year. We view the initiative as an opportunity to train lawyers who are seeking to become Bar leaders, as well as to enhance the skills of lawyers who have already demonstrated leadership potential. We expect that, as classes go through the academy, we will be able to tap the graduates to serve in the multifaceted leadership structure of the Bar."

Culture of Leadership

The leadership endeavor began in late 2009 when NAACP general counsel Kim Keenan was Bar president. A Leadership Task Force was created to make recommendations to the D.C. Bar Board of Governors on how to improve the quality and quantity of leadership activities within the Bar. Among the task force's recommendations, as approved by the Board of Governors, was the creation of the LDC.

In her May 2010 "From the President" column, Keenan wrote that the committee was created "to identify and recruit potential leaders for the range of positions within the Bar. Another recommendation is to offer leadership skills training for leaders throughout the Bar and for voluntary bar association leaders."

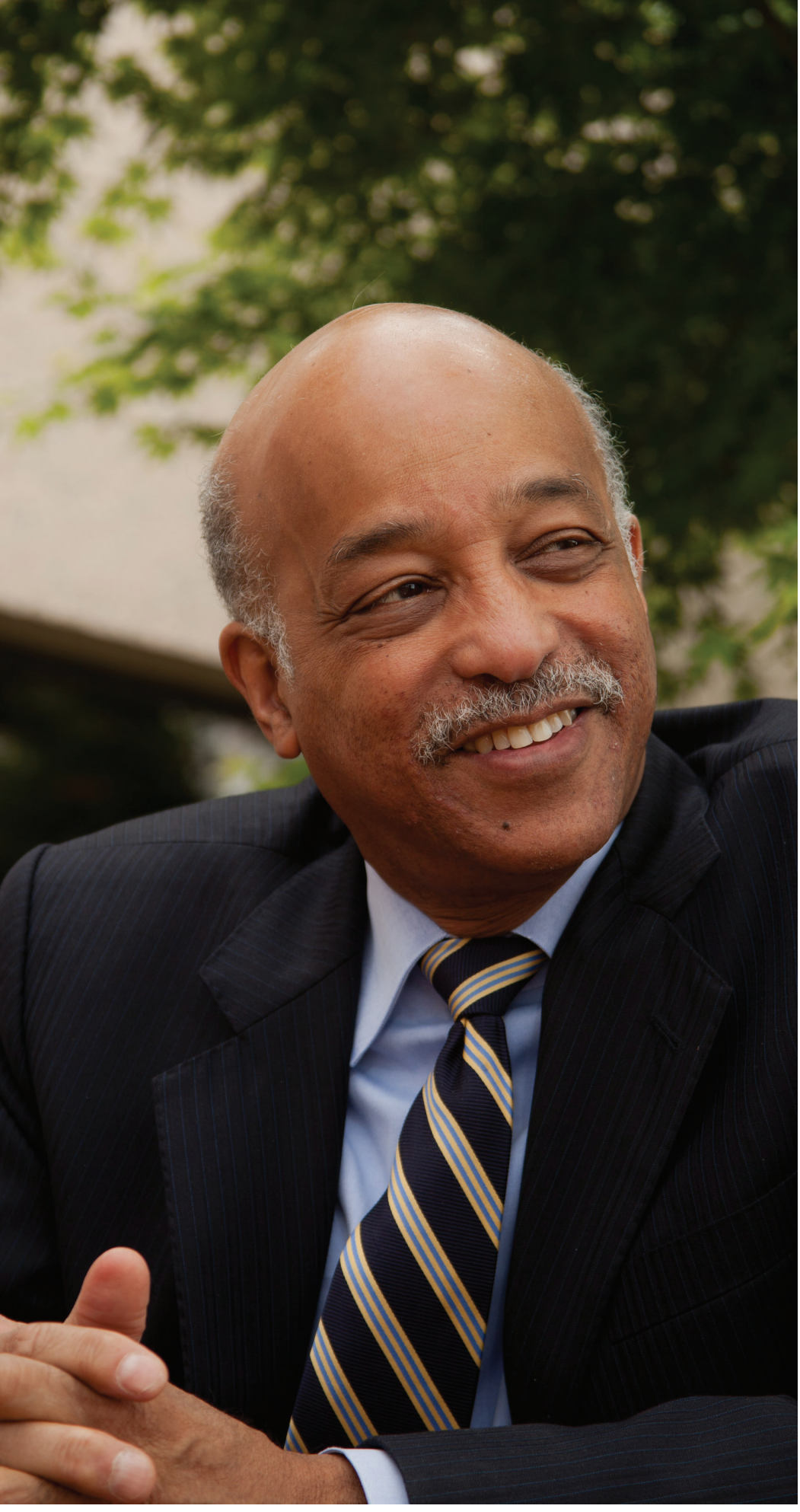
"What the Bar realized is that just because somebody is a great lawyer, it doesn't necessarily mean they have great leadership skills. Whether or not you're on the Board of Governors or involved in Sections, leadership skills are really important within the Bar because you're dealing with a volunteer group of board members and section members," says Annamaria Steward, associate dean of students at the University of the District of Columbia David A. Clarke School of Law and one of the members of the LDC.

From fall 2010 to spring 2011 the LDC held a series of meetings and ultimately decided to focus on three priority areas: the recruitment and training of potential leaders, the orientation and ongoing training of existing D.C. Bar volunteer leaders, and the development and strengthening of the Bar's sections leadership. The LDC then created three subcommittees to address these priority areas.

The Potential Leaders Subcommittee was charged with designing and implementing a program to recruit and train potential leaders, the D.C. Bar Leaders Subcommittee was tasked to develop a comprehensive curriculum to orient and train newly elected and appointed Bar leaders, and the Section Leaders Subcommittee was assigned to develop mechanisms to strengthen volunteer leadership in the Bar's sections.

In December 2011 the LDC approved the curriculum, structure, and budget for the Leadership Academy as proposed by the Potential Leaders Subcommittee. Subsequently, the Board of Governors approved the academy's budget in April 2012 with its

Photographs by Patrice Gilbert



"We view the initiative as an opportunity to train lawyers who are seeking to become Bar leaders as well as to enhance the skills of lawyers who have already demonstrated leadership potential."

—Tom Williamson

adoption of the Bar's overall budget for fiscal year 2012–2013. In June 2012 the Leadership Academy was officially created.

Multiple, Long-Term Benefits

In its report presented at the Board of Governors' June meeting, the LDC gives insight into why the Leadership Academy was created. The LDC states that the academy would help "to address the current challenges that the Bar faces in developing effective volunteer leaders and in dealing with ineffective leaders." The LDC further explains that "[b]y teaching the knowledge and skills necessary for successful Bar leadership and by evaluating the leadership potential of the program participants . . ., the Bar would be able to create a strong pool of potential candidates for leadership positions."

By training with the academy, Lacovara says potential and existing leaders will have a better understanding of how they can effectively serve the Bar.

"What we've found is that while the Bar has a wonderful array of people who have served in various leadership roles, there have been some problems with the personality approaches that people bring to these positions," Lacovara explains. "What we're trying to do is to make sure that people who are good candidates for Bar leadership positions have an understanding of Bar policies as well as the collegial nature of a volunteer organization like the D.C. Bar, which is different from a hierarchical environment in which many lawyers may usually function. We want to make sure we have lawyers who are adequately trained in Bar policy, Bar procedures, and also in the personality skills and traits of effective leaders in a volunteer organization."

Attorneys who attend the academy also stand to gain leadership skills they can apply outside the Bar. "The idea is that the skills they will learn will also benefit them within their practice areas; it'll add value across the board. You're getting skills that you can use not only in your practice area and your place of employment, but also within any volunteer organization you participate in," says Steward, chair of the LDC's Potential Leaders Subcommittee.

D.C. Bar past president and Banner & Witcoff, Ltd. principal shareholder Darrell G. Mottley, who worked on the LDC while serving as the Bar's president-elect and president, says it's important for attorneys to possess leadership skills, especially as they advance in their careers and have to manage people and multiple projects.

"What you learn at the academy is a skill set that you're more likely to develop in business school, not law school," Mottley says. These skills also will be useful to new Bar volunteers who are not used to working in a more public environment and dealing with multiple stakeholders, he adds.

Curriculum Features

The academy's curriculum consists of three full-day sessions at the D.C. Bar headquarters beginning March 2013. Participants also will volunteer with the D.C. Bar Pro Bono Program's Advice and Referral Clinic.

In creating the academy's curriculum and structure, the Potential Leaders Subcommittee relied on input from D.C. Bar Chief Executive Officer Katherine A. Mazzaferri and Chief Programs Officer Cynthia D. Hill about the attributes of former successful Bar leaders. The subcommittee then identified the specific knowledge, skills, and traits of successful Bar leaders and determined how these could be taught or observed in a program setting.

"We brainstormed on these issues and then worked backwards, asking, if these are our goals and these are the skills we think leaders should have, how are we going to transfer them to our participants?" Steward says. "We decided that a volunteer in an entry-level position at the D.C. Bar should have knowledge, skills, and traits, and a volunteer at a high-level position should have additional knowledge, skills, and traits, and then we looked at how to help people learn these things."

"What you learn at the academy is a skill set that you're more likely to develop in business school, not law school." —Darrell Mottley

Subcommittee members, in drafting the curriculum, also designed the sessions to be interactive, consistent with adult learning theory, and allow faculty and staff to see the participants in action.

In addition to drafting the academy's curriculum, the subcommittee was tasked to identify potential faculty members. "We started with the idea that even though you may be a phenomenal leader, you may not know how to teach others to be a phenomenal leader," Steward says.

After the subcommittee identified a number of potential faculty candidates, the D.C. Bar sent out a Request for Proposal this past April, eventually choosing Leadership Outfitters, which has worked with other bar associations, and Paul Meyer of Tecker

The Leadership Development Committee was created "to identify and recruit potential leaders for the range of positions within the Bar. Another recommendation is to offer leadership skills training for leaders throughout the Bar and for voluntary bar association leaders."—Kim Keenan

International, who has worked with the Bar on its strategic plan and with the Leadership Initiative Task Force.

The curriculum begins with an overview of the D.C. Bar, including its mission and strategic plan. The sessions will cover topics such as lessons learned in leadership roles, communication skills and styles, teamwork, how to conduct effective meetings, problem solving and strategic thinking, civility and professionalism, pro bono service, and application of leadership skills.

Participants will be given assignments before each session and will also take several self-assessment mechanisms to allow faculty and staff to learn more about the participants and to determine small groups based on personality types and leadership styles.

"Participants can learn more about themselves, while faculty and staff can learn more about the participants and gauge whether or not a participant was interested in the self-assessment and whether or not he or she can take criticism and feedback," Steward says.

Application Process

Approximately 30 people will be selected for the Leadership Academy's inaugural program through an application process that begins in November.

Attorneys interested in attending the academy need to submit an application that includes a current résumé; a typed statement of no more than 500 words explaining why the applicant believes he or she should be selected, why the applicant wants to participate in the academy, and what the applicant hopes to gain from his or her participation; and two references. The application form is in PDF format for applicants to fill out, save, and submit electronically along with the required attachments.

"It's extensive enough to make sure that people who are interested in attending are serious about making a commitment, and extensive enough to allow us to make an informed judgment on whether or not the applicants are likely to be effective and appropriate participants, but we didn't want to make the application process so daunting that it would discourage people," Lacovara says.

Lacovara and Steward also stress that diversity is an important part of the academy, adding that they want to see representatives from different practice areas and from large firms, small firms, government agencies, and other practice settings, as well as diversity in terms of gender and ethnicity.

"We tried to structure the program so that we could be inclusive not only in terms of the nature of the law practices that applicants are currently involved in, but also to pursue the Bar's general interest in diversity. The issue of diversity and balance will be one of the factors that enter into the final selection of applicants who will be asked to attend the program," Lacovara says.

The tuition for applicants accepted into the program will be $1,200, with reduced fees available based on demonstrated need. The LDC put a great deal of thought into whether there should be a fee for the program, and if so, how much.

"We really worked hard at keeping the cost down as much as possible, but there's serious value in it and we want people to invest in it and participate fully in it," Steward says. "I think this is going to be amazing; I think we're going to create a core of leaders that is going to benefit the Bar, voluntary bars, and the community in general."

For more information on the D.C. Bar Leadership Academy and how to apply, contact Rebecca Gilliam at 202-737-4700, ext. 3234, or rgilliam@dcbar.org.

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

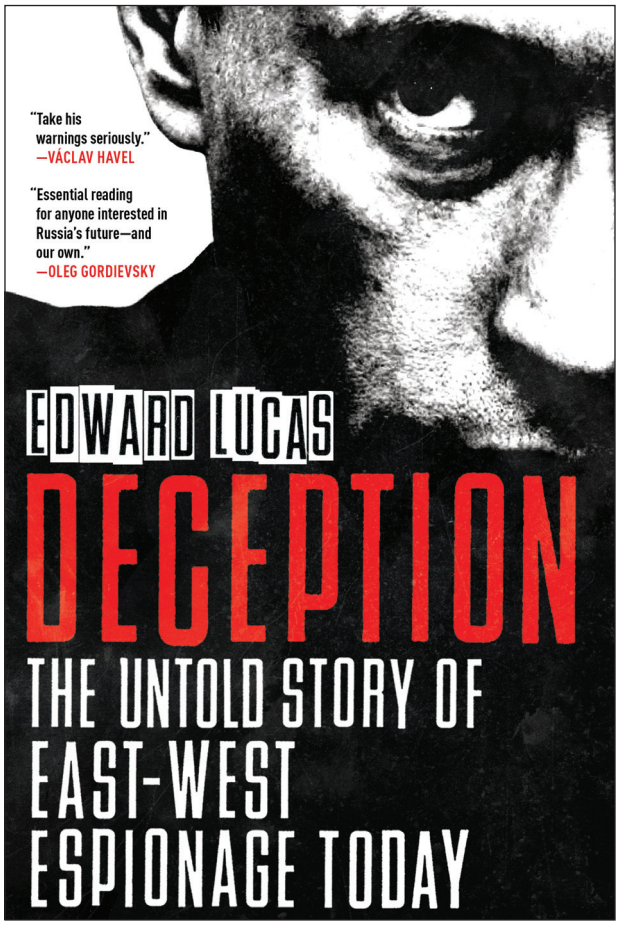
LEADERSHIP ACADEMY 2013 INAUGURAL CLASS

Session 1: March 1, 9 a.m.–5:30 p.m.

Session 2: March 22, 9 a.m.–5 p.m.

Session 3: April 12, 9 a.m.–5:15 p.m.

All classes will be held at the D.C. Bar.



Deception: The Untold Story of East–West Espionage Today
By Edward Lucas
Walker & Company, 2012

Review By Joseph C. Goulden

The collapse of the Soviet Union touched off a land-rush scramble of U.S. law firms to establish footholds in Moscow, hoping to benefit from the riches that would presumably flow as the economic system shifted from communism to a form of capitalism. Russia's petroleum wealth, and its emerging strength in the world commercial market, encouraged the firms' enthusiasm, as did a promise by leader Vladimir Putin that the country would have a viable legal system and operate under the rule of law. Western lawyers were somewhat encouraged that Putin studied international law at Leningrad State University before deciding to make his career with the KGB, the Soviet intelligence agency.

Now the international legal community has a sobering reason to take a second look at the so-called "Russian justice." The precipitant is a case in which a young Russian attorney, working for a Moscow law firm established by two American lawyers, was thrown in jail on flimsy charges that his clients were engaged in a tax scam. According to the prison diary kept by the lawyer, Sergei Magnitsky, his brutal treatment was beyond Kafkaesque.

In his final days, as he was dying from various internal ailments, he was handcuffed and beaten by prison guards wielding batons. He died at age 37, leaving a wife and two small children.

The case has drawn strong protests from the International Bar Association and many human rights organizations. Congress is considering retaliatory legislation that would bar Russian officials involved in the episode from entering the United States.

Why is the death of a lawyer—however horrible—and the manipulation of the Russian legal system discussed in a book on espionage? Author Edward Lucas contends that much of the commercial thuggery endemic in today's Russia is carried out in conjunction with the *Federal'naya Sluzhba Bezopasnosti*—the Federal Security Service, or FSB, successor to the KGB. Lucas writes with authority; he has covered Russia

and other parts of Eastern Europe for *The Economist* for more than a quarter century, focusing in recent years on what he terms the "petrofascism" of the Putin regime.

The affair that resulted in Magnitsky's death begins with an American-born financier, now a British citizen, named William Browder (ironically for a capitalist, his grandfather was Earl Browder, long the president of the Communist Party USA). In the 1990s, Browder sensed opportunities in the Russian economy. Granted, "the rule of law was weak, property rights flimsy, political stability uncertain, the economy rocky, and crime and corruption pervasive," the author writes. But Browder felt that the companies and shares on sale "were not valueless, just cheap."

If market perceptions improved only a tad, Browder reasoned, investors could reap huge returns. "Suppose, for example, the investors reckoned that an ill-run Russian oil company, instead of being worth a mere one percent of a comparable foreign one, was instead worth ten percent. That would raise the values of its shares tenfold—meaning a colossal profit for someone who bought before the perception changed."

Browder created an investment company, Hermitage Capital Management, and pursued a three-prong strategy. He bought companies that owned underlying assets such as oil, gas, or minerals. Second, Browder talked up Russia as an investment destination, "insisting that it was merely 'bad' instead of downright 'horrible.'" And—perhaps unwisely, in retrospect—he highlighted abuses of shareholder rights by management. When he sensed evidence of fraud or waste, he filed lawsuits and launched media campaigns.

Browder succeeded. Hermitage and its associated companies had an increased investment value of thirty-five-fold. As Lucas writes, "Few in the history of finance can boast such a record."

But success brought him into conflict with the government. Lucas writes, "The Putin regime's longer-term aim was not to promote good corporate government and shareholder value but to seize money and power for itself."

As its legal and audit adviser, Hermitage relied on a law firm, Firestone Duncan, which had been established in 1993 in Moscow by two recent American law school graduates—Jamison Firestone from Tulane University and Terry Michael Duncan from The George Washington University. (Tragically, after only four months in Moscow, Duncan was killed by a gunshot to the head while trying to aid a *New York Times* reporter–photographer who was injured during a demonstration outside a radio/TV complex.)

The stated purpose of Firestone Duncan was to "service the specialized legal and audit needs of foreign ventures doing business in Russia with Russian partners." More than a dozen large U.S. firms ranging through the alphabet, from Akin Gump to Winston & Strawn, have outposts in Moscow.

The Putin government moved against Hermitage under the pretext of a tax claim against one of its relatively small companies, Kameya, which had paid $135 million in taxes in 2006. (By comparison, Aeroflot, the country's largest airline, paid $130 million.) In May 2007 Kameya received a federal tax audit notice that "all taxes had been paid in full and none was owed."

Nevertheless, a month later, 25 Interior Ministry officers, led by Lieutenant Colonel Artyom Kuznetsov, raided the Hermitage offices in Moscow and seized documents, computers, and other materials relating to Kameya and other companies. Next, the Kuznetsov raiders descended on Firestone Duncan, confiscating two vanloads of documents and corporate seals. A lawyer who protested was beaten so badly he spent two weeks in the hospital.

Browder, by now self-exiled to London for his own personal safety, reached out to Magnitsky—"a notable figure in the field of tax law"—to recover the seized materials and to resolve the tax dispute. But early on he was notified that an "arbitration court" had returned judgments totaling millions of dollars against Hermitage. Further, "lawyers acting for Hermitage" had accepted full liability on behalf of the company. And finally, the Hermitage companies had been re-registered under new owners by lawyers using the seized documents and corporate seals. In a complaint, Hermitage stated that it "had no prior knowledge of, or acquaintance with, these lawyers . . . never hired or appointed them and . . . never authorized or ratified their appointment as attorneys or agents of any kind."

Magnitsky fought on doggedly, filing numerous complaints against Kuznetsov and other officials. Kuznetsov retaliated by starting a criminal case against Magnitsky and other lawyers, claiming that they did not have genuine powers of attorney to represent Hermitage. As Lucas comments, "In effect, he was saying that the only person who could legally represent the company was the person who stole it. That marked a grim step to lawlessness. A lawyer is an officer of the court, bound to do his professional best to make his client's case clearly and convincingly. It is a sure sign of a rotten legal and political system when lawyers are punished for the crime of representing their clients."

In November 2008 officers came to Magnitsky's home and arrested him in front of his wife and two children. In recounting Magnitsky's fate, Lucas warns that "squeamish readers may wish to skip what follows." Let me just summarize some grisly happenings. During his first months, Magnitsky was confined to a cramped holding cell, with four beds for eight prisoners, and glaring lights 24 hours a day. He was shuffled from cell to cell, his papers and other belongings "going missing" during the moves.

He began to experience severe abdominal pains, and he lost some 40 pounds. Doctors determined his ailments were caused by untreated gallstones and prescribed surgery within a month's time. But nothing was done, even as Magnitsky suffered increasingly severe pain.

Painkillers were to no avail. So Magnitsky was strapped into a straitjacket and taken away for "psychiatric treatment." "Eight guards from a special disciplinary squad arrived. They handcuffed the dying man, beat him with rubber batons and took him to an isolation cell, where he lay handcuffed on the floor by the side of a bed. He was found dead an hour and a half later," Lucas recounts. The Russian contention is that Magnitsky was an out-of-shape drunk who died of natural causes. (Lucas writes that he was a teetotaler.)

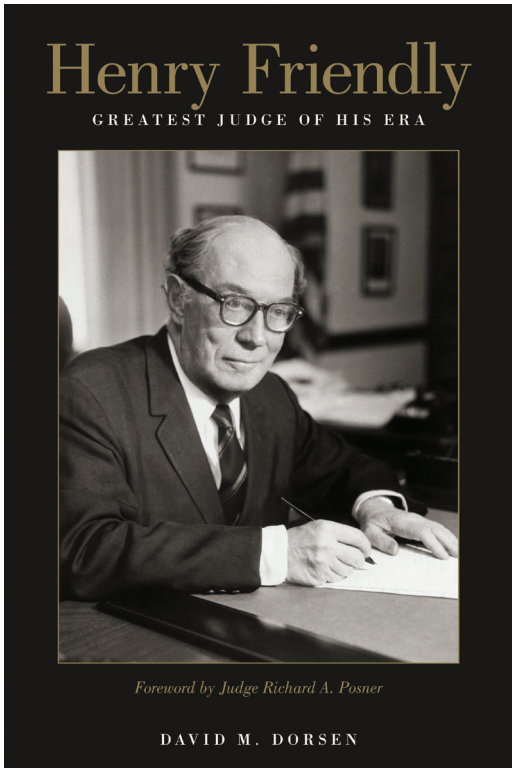
Jamison Firestone withdrew to London in December 2011; he fears arrest if he returns to Moscow. Browder now lives in London. Other lawyers in the case report vandalism of their offices and homes.

Lucas reports widespread belief in Moscow that Kuznetsov "is in fact an FSB officer, making sure that his masters' interests are served." (The officer and his family registered as owners of properties valued at $3 million in the period following the Hermitage seizure.) As Lucas writes, "The FSB acts as the regime's enforcer, punishing the brave and bullying the cowardly to head off any credible political or economic challenge. In return, it has a license to loot, using both the tools of espionage and a veneer of legality in which criminal actions have the force of law."

Lucas has a warning for American lawyers who are thinking about a Moscow practice: "[T]ruth is that the law in Russia is a trap for the brave, not a weapon for the weak. By challenging the authorities in court, you leave yourself open to their retribution. The idealistic Mr. Magnitsky [learned] this the hard way."

Joe Goulden's most recent book is The Dictionary of Espionage: Spyspeak Into English.

Henry Friendly: Greatest Judge of His Era
By David M. Dorsen
Belknap Press/Harvard University Press, 2012



Review by Leonard H. Becker

In his foreword to David M. Dorsen's biography of Judge Henry J. Friendly, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit observes that as a general rule, judicial biographies do not make for great reading. Judge Posner acknowledges that a recounting of the life and work of Judge Friendly would not have seemed likely to depart from that rule. But Judge Posner rightly confesses error with regard to Dorsen's masterful presentation. The author has brought an otherwise distant, forbidding figure to life and demonstrated Judge Friendly's lasting contributions to federal law.

Henry Friendly was born in 1903, into a moderately well-off family, in Elmira, New York, and grew up there. (His forebears, from Germany, originally bore the name "Freundlich.") Friendly's brilliance as a scholar impressed itself on his professors at Harvard College and Harvard Law School, from each of which he graduated *summa cum laude*. He served as president of the *Harvard Law Review* and attained the highest overall grade at the law school since Louis Brandeis. Professor Felix Frankfurter, later a Supreme Court justice, arranged for Friendly's clerkship with Justice Brandeis and thereafter strove, without success, to lure Friendly back to Harvard to join the law school's faculty.

Instead, Friendly entered private practice, going to work at a Wall Street law firm. In 1928 a successful career at such a place was far from a sure thing for a Jewish boy, no matter how bright he was. Friendly's talents overcame the ethnic disadvantages in those times; he became a partner eight years after he joined the firm. (One of his partners at the firm was John Marshall Harlan II, who preceded Friendly to the Second Circuit and went on to serve on the Supreme Court.)

Friendly's most significant accomplishment while in private practice was to take on the representation of Pan American Airways and its head, Juan Trippe, for whom Friendly ably handled numerous administrative agency proceedings involving route certifications and rate settings.

In 1946, with new leaders in Friendly's law firm no longer holding out the assurance that Jews there would be treated evenhandedly, Friendly joined several of his colleagues in founding Cleary, Gottlieb, Friendly & Cox, where he continued his representation of Pan American, serving both as a partner at the law firm and as vice president and general counsel of the airline. By the 1950s, growing bored with private practice and wearying of the demands imposed by his client Trippe, Friendly commenced to angle for an appointment to the Second Circuit, encountering the usual infighting among the various contenders. In 1959 he secured the prize, in part through the involvement of Herbert Brownell Jr., President Dwight Eisenhower's attorney general.

Virtually from the outset of his judicial career, Friendly impressed colleagues and litigants with his sheer brilliance. In an age that preceded word processors and ghost writers, Friendly's output was astonishing. He drafted his own opinions in longhand with two legal pads before him (one for text, the other for footnotes), and left it to his law clerks to fill in the occasional blanks. Even the most complicated cases rarely took more than a day or two of his time to turn out a circulating draft. Often contained within his elegant prose was a barbed hook that sank into the rhetorical victims before they knew what had hit them. Among the many samples offered by Dorsen is this opening to a diversity-of-citizenship case with a choice-of-law twist:

> Our principal task . . . is to determine what the New York courts would think the California courts would think on an issue about which neither has thought. They have had no occasion to do so. But . . . the court seised of the case is obliged, as best it can, itself to blaze the trail of the foreign law that it has been directed to follow.

Dorsen provides telling anecdotes of Friendly's interactions with law clerks, fellow judges, and members of the bar. To all, Friendly came across as austere, distant, and at times terrifying. His attitude toward his clerks was stern, in the mode of "I pay you to correct my mistakes, not to make fresh ones of your own." (In this regard, he sounds a lot like Brandeis.) Of a particularly bright, loquacious law clerk, Friendly observed he had a lot of ideas, but Friendly hadn't used any of them.

Friendly was withering in his contempt for many of the district judges in the courts overseen by the Second Circuit, an attitude that he put on display in his internal decision memoranda to his brethren on the Court of Appeals and, on occasion, in his published opinions. He refrained from taking lunch in the judges' dining room at the federal courthouse in Manhattan because he preferred not to socialize with the trial judges or to be roped into discussions of pending cases. He occasionally reversed trial court judgments on grounds not raised by the parties, either below or before his own court. He held a dim view of the reasoning capabilities of the Warren Court, and often was dubious about its results as well. (At first he disapproved of the High Court's reapportionment decision in *Baker v. Carr*, but he came around after several years.)

A large segment of Dorsen's book is devoted, necessarily, to a review of Friendly's judicial opinions. This is stuff only a lawyer could love, but Dorsen handles the material astutely in providing a thorough overview of Friendly's accomplishments.

Friendly's interactions with his family ran somewhat along the same track as that involving his clerks and fellow judges. In 1930 Friendly married Sophie Stern, the daughter of a prominent Pennsylvania jurist; the couple had three children. He

continued on page 46

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attorney briefs

By Thai Phi Le

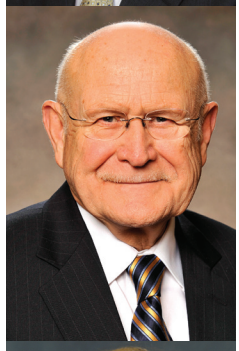
Honors and Appointments

Corrine Propas Parver, a retired partner at Dickstein Shapiro LLP and founder of the Health Law and Policy Project, under the Program on Law and Government, at American University Washington College of Law, recently received the law school's 2012 Women and the Law Leadership Award… Former ambassador **Stuart Eizenstat**, head of Covington & Burling LLP's international practice group, was recognized by the Anti-Defamation League with its inaugural Abraham H. Foxman Exceptional Leadership Award for his commitment to public service and his outspoken advocacy for human rights and the welfare of Jewish people, especially Holocaust victims… **Susan G. Braden**, a judge of the U.S. Court of Federal Claims and past president of the Giles S. Rich American Inn of Court, received the Linn Inn Alliance Distinguished Service Medal in recognition of her leadership in supporting the American Inns of Court, with a focus on intellectual property… **Joseph M. Hanna**, a partner at Goldberg Segalla LLP, was honored by Leadership Buffalo with its Diversity Award for his efforts to advance diversity within the legal profession and in the greater Western New York community… **Gerald H. Acker**, a senior partner at Goodman Acker, P.C. in Southfield, Michigan, has been elected president-elect of the Michigan Association for Justice for the 2012–2013 term… **Stephen Gurwitz**, a senior asset forfeiture investigator for the Defense Criminal Investigative Service of the Office of the Deputy Inspector General at the U.S. Department of Defense, received a Certificate of Appreciation from U.S. Attorney for the District of Columbia Ronald C. Machen Jr. for his contribution to the investigation of a multimillion-dollar procurement fraud and public corruption prosecution.

On the Move

Steven J. Tave has joined Gibson, Dunn & Crutcher LLP as of counsel, focusing his practice on FDA and health care compliance, enforcement, and litigation with regard to pharmaceutical and medical device issues… **Robert N. Weiner** has rejoined Arnold & Porter LLP as partner after having served as associate deputy attorney general at the U.S. Department of Justice since 2010. Insurance and legislative attorney **Charles Landgraf** has joined the firm as partner… **Robert F. Hoyt** has been appointed general counsel of PNC Financial Services Group, Inc.… Real estate attorney **William H. Roberge Jr.** has joined Stein Sperling Bennett De Jong Driscoll PC as of counsel… **Deana Cairo**, **Seamus Curley**, **Eric Eisenberg**, and **Jeremy Lustman** have been promoted to partner at DLA Piper LLP… **Kimberly A. Wilson** has joined Smith, Currie & Hancock LLP as associate… **Thomas L. Hanley** has joined Stradley Ronon Stevens & Young LLP as partner, advising public and private companies on corporate and securities law issues. Corporate and transactional lawyer **Erin Troy Clinton** has joined the firm as associate… **B. Joyce Yeager** has joined the Consumer Protection Division of the Missouri Attorney General's Office where she will be working on complex, multistate consumer protection matters… **Jason File** has joined the Office of the Prosecutor of the United Nations International Criminal Tribunal for the Former Yugoslavia in The Hague as a trial attorney… **Wade J. Callender** has been appointed general counsel and vice president for legal affairs at Gearbox Software in Texas… **Melvin S. Schwechter** has joined Baker & Hostetler LLP as partner in the firm's litigation group… **Douglas G. Bonner** has joined Drinker Biddle & Reath LLP as partner in the firm's government and regulatory affairs practice group, and telecommunications and mass media team… **Philip G. Hampton II** and **Bradley J. Olson** have joined Haynes and Boone, LLP as partner, helping the firm expand its intellectual property practice.

Lawrence M. Sung has joined Baker & Hostetler LLP as partner in the firm's intellectual property group.



Milton Cerny has been appointed by the U.S. Department of the Treasury to serve on the IRS' Advisory Committee on Tax Exempt and Government Entities.

Holland & Hart LLP has named partner Kelly Johnson to lead the firm's environment, energy, and natural resources practice.

Company Changes

Andres Benach, Jennifer Cook, and Thomas Ragland have opened **Benach Ragland LLP**, a boutique law firm dedicated to immigration law and immigrant rights. Its office is located at 1333 H Street NW, suite 900 West.

Author! Author!

Alexandra Baj, of counsel at Steptoe & Johnson LLP, has published *The Black Stone Prophecy*, available on Amazon… **Regina A. DeMeo** has written "The History of Collaborative Divorce," an essay published by Foundation Press… **Barton "Barry" Veret** has written the novel *Parallel Tracks: Two Landscapes/Two Journeys*, published by Xlibris.

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

docket

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.

OCTOBER 1

Successful Small Firm Practice, Day 4
6–8 p.m. Sponsored by the D.C. Bar Practice Management Service Committee. Contact Daniel M. Mills, assistant director of the Practice Management Advisory Service, at 202-626-1312 or dmills@dcbar.org.

OCTOBER 2

Corporate Tax, Part 1
12–2 p.m. Sponsored by the Corporate Tax Committee and New Tax Practitioners Committee of the Taxation Section.

Public Benefits: Medicare: Medicare Parts A, B, C, and D and QMB, Part 2
12–2 p.m. Presented by the D.C. Bar Pro Bono Program. Contact Kim DeBruhl at 202-737-4700, ext. 3289.

OCTOBER 3

Exempt Organizations Tax, Part 1
12–2 p.m. Sponsored by the Exempt Organizations Committee and New Tax Practitioners Committee of the Taxation Section.

I-9 Compliance: A Practical Approach to the New I-9 Form and I-9 Audits
5:30–8:45 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Family Law Section; Government Contracts and Litigation Section; International Law Section; and Labor and Employment Law Section.

OCTOBER 4

When Lawyers Change Law Firms: Ethical, Practical, and Legal Issues
6–9:15 p.m. CLE course cosponsored by all sections of the District of Columbia Bar.

OCTOBER 5

Building Momentum: iPad for Lawyers
12–1:30 p.m. Sponsored by the D.C. Bar Practice Management Service Committee. Contact Daniel M. Mills, assistant director of the Practice Management Advisory Service, at 202-626-1312 or dmills@dcbar.org.

OCTOBER 9

Real Estate Litigation in the District of Columbia: Current Issues and Practice Guide, Part 1
6–9:15 p.m. CLE course cosponsored by the Courts, Lawyers and the Administration of Justice Section; Litigation Section; and Real Estate, Housing and Land Use Section.

OCTOBER 10

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

New Tax Practitioners Tax, Part 1
12–2 p.m. Sponsored by the New Tax Practitioners Committee of the Taxation Section.

Tax Audits and Litigation Tax, Part 1
12–2 p.m. Sponsored by the Tax Audits and Litigation Tax Committee of the Taxation Section.

Ethics and Professional Conduct for Government Attorneys 2012: Complying With Dual Sets of Rules
6–8:45 p.m. CLE course cosponsored by all sections of the District of Columbia Bar.

Intro. to the Taxation of Financial Instruments, Part 1
6–9:15 p.m. CLE course cosponsored by the Taxation Section.

OCTOBER 11

Adoption Law and Process in the District of Columbia, Maryland, and Virginia
9:30 a.m.–12:45 p.m. CLE course cosponsored by the Family Law Section.

Pretrial Skills, Part 1
6–9:15 p.m. CLE course cosponsored by the Antitrust and Consumer Law Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Family Law Section; Labor and Employment Law Section; Law Practice Management Section; Litigation Section; and Real Estate, Housing and Land Use Section.

OCTOBER 12

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

OCTOBER 15

Successful Small Firm Practice, Day 5
6–8 p.m. See listing for October 1

Litigation Ethics: Duty to Disclose Unfavorable Facts and Law and Other Court Issues
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; Government Contracts and Litigation Section; Labor and Employment Law Section; Litigation Section; and Real Estate, Housing and Land Use Section.

OCTOBER 16

Changing Currents in Employment Law 2012
6–9:15 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section and Labor and Employment Law Section.

Bar Counsel

continued from page 12

on Professional Responsibility recommends that the D.C. Court of Appeals suspend Bradley for two years with fitness for engaging in ethical misconduct in two unrelated matters. Specifically, in the first matter while serving as a court-appointed guardian, Bradley failed to provide competent representation and to represent the ward with the skill and care commensurate with that generally afforded by lawyers in similar matters, failed to represent the ward with zeal and diligence, intentionally failed to seek the lawful objectives of the ward, failed to act with reasonable promptness, and engaged in conduct that seriously interferes with the administration of justice.

In the second matter, while serving first as a court-appointed guardian and conservator for a ward, then as personal representative to the ward's estate after the ward died, Bradley failed to provide competent representation and to represent the ward with the skill and care commensurate with that generally afforded by lawyers in similar matters, failed to represent the ward with zeal and diligence, intentionally failed to seek the lawful objectives of the ward, failed to act with reasonable promptness, and engaged in conduct that seriously interferes with the administration of justice. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b), 1.3(c), and 8.4(d).

IN RE KENNETH M. ROBINSON. Bar No. 51706. July 31, 2012. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Robinson for seven months. Robinson engaged in negligent misappropriation of client settlement funds, failed to promptly pay a client the settlement funds due her for more than three years, and failed in his duty to supervise his associate to ensure that his escrow account was properly maintained after receiving notice that his trust account was overdrawn. Rules 1.15(a), 1.15(b), and 5.1(a).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE JESSE H. INGRAM. Bar No. 387629. July 5, 2012. The D.C. Court of Appeals disbarred Ingram by consent, effective immediately.

IN RE JACK B. JOHNSON. Bar No. 344291. July 12, 2012. The D.C. Court of Appeals disbarred Johnson based upon his conviction of crimes of moral turpitude per se, for which disbarment is mandatory under D.C. Code § 11-2503(a) (2001). Johnson pled guilty to violating 18 U.S.C. § 1951 (attempted extortion under color of official right) and 18 U.S.C. § 1512(b)(2)(B) (attempted witness and evidence tampering).

Reciprocal Matters

IN RE FREDERICK W. SALO. Bar No. 446236. July 19, 2012. In a reciprocal matter from New York, the D.C. Court of Appeals imposed nonidentical reciprocal discipline and suspended Salo from the practice of law for six months. The New York Supreme Court, Appellate Division, First Judicial Department found that Salo misappropriated entrusted funds, but because his actions were nonvenal by reason of posttraumatic stress disorder, the New York court suspended him from the practice of law for one year with the equivalent of a requirement that he demonstrate his fitness to resume the practice of law.

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.dccourts.gov/internet/opinionlocator.jsf.*

Books in the Law

continued from page 42

was strongly attached to his wife, but distant from his offspring. At home, as at his chambers at court, he buried himself in his private quarters and tolerated minimal if any interruption. As the years passed, he grew close to one his daughters, but not so to his other two children.

For years, Friendly suffered from defective eyesight and underwent numerous surgeries in an effort to improve his vision. His fear of impending blindness after he largely lost the use of one eye, coupled with a congenital disposition toward pessimism that probably qualified as chronic depression, intensified when his wife died in 1985, a few months after she was diagnosed with cancer. Having told a number of people of his wish to be spared further suffering and to avoid burdening others, he took his own life one year after Sophie died. He was 82 years old.

In one relatively minor respect, Dorsen's commanding biography may not live up to its promise. Judging the accuracy of the subtitle, *Greatest Judge of His Era*, depends in part on how you define "era." If you take the relevant period to coincide with Friendly's tenure on the Second Circuit—1959 to 1986—then you necessarily put to one side the iconic figures of Justices Brandeis, Oliver Wendell Holmes, Benjamin Cardozo, Robert Jackson, and (for the most part) Frankfurter. Even then, the relevant category perhaps should be narrowed further to exclude great *trial* judges (which Friendly acknowledged early on he would not have been).

Among the notable appellate judges who did not make it to the Supreme Court, Friendly surely ranks among the highest, arguably equaled, if not excelled, only by Learned Hand. Friendly was a towering figure in the law, his opinions cited with approval not only by his colleagues on the Second Circuit but across the country and in the Supreme Court's decisions as well. His law review articles on administrative law commanded respect from all levels of the judiciary. The standards he set for sustained concentration and the exercise of informed judicial judgment have remained vital, long after his passing. Perhaps the highest tribute paid him is the large number of his clerks who have gone on to judgeships themselves, including the present chief justice of the United States and two members of the federal Court of Appeals for the District of Columbia Circuit.

Len Becker served as District of Columbia Bar Counsel from 1992 to 1999 and as general counsel in the Office of Mayor Anthony A. Williams from 2003 through 2006. In 1968–69, he served as law clerk to Edward Weinfeld, a judge on the U.S. District Court for the Southern District of New York and a close friend of Judge Friendly. Becker resides in Washington, D.C., and may be reached at lenbecker@verizon.net.

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legal spectator

By Jacob A. Stein

Books and Books

In my office there is a collection of Commonplace Books. They take up three shelves, collected over 50 years.

The English author Thomas Fuller, in 1642, defined the words commonplace-book: "A common-place-book contains many notions in garrison, whence the owner may draw out an army into the field."

Rupert Hart-Davis put in his commonplace book the things that "interested, moved or amused me." In his book, this interesting quotation caught my eye:

> I always say you can get your tragedy of any desired length in England, from thirty seconds to a life-time. I had one adorable one of twenty-nine minutes by the watch. At the end of that time I started for my train. Woman I'd had a glimpse of in London—walk. She sat on a stile, I below her, gazing into her eyes—then, 'remember this lane,' 'while memory holds its seat, etc.' 'Adieu.' And I still do and ever shall remember her, and I rather think she does me a little bit. What imbecilities for an old fellow to be talking. But if one knows his place and makes way for younger men when he isn't sure, it is better perhaps not quite to abandon interest in the sports of life.
>
> —*Oliver Wendell Holmes*

I wonder where Hart-Davis found that quote. It is not in Holmes' concise, clear style. Could it be one of Holmes' letters to his personal English friend Frederick Pollock? Holmes did write letters to an Englishwoman, Emily Ursula Clare St. Leger (Lady Clare Castletown), but love letters!!?

Christina Foyle, the daughter of the owner of the famous Foyles bookstore in London, published a commonplace book. Here is an interesting quote:

> Anyone who wants to get to the top has to have the guts to be hated. That applies to politicians, writers, anybody who gets into a certain position. Because that's how you get there. You don't get there by everybody loving you. Everybody in the world wants to be liked by everybody else. That's human nature. But you have to learn to take it.
>
> —*Bette Davis*

I wonder whether Prime Minister William Gladstone could "take it" when Benjamin Disraeli, who also served as prime minister, fired this at short range in one of the commonplace books:

> A sophistical rhetorician [Gladstone], inebriated with the exuberance of his own verbosity, and gifted with an egotistical imagination that can at all times command an interminable and inconsistent series of arguments to malign an opponent and to glorify himself.

Author J. T. Hackett says in his commonplace book that he collected, at odd moments, a quotation of special interest, but "there are two reasons why it may have some special interest. One reason is that it includes passages from a number of authors who appear to have become forgotten, or, at any rate, to be passing Lethe-wards. . . . It must be remembered that this book is not an anthology. A commonplace book is usually a collection of *reminders* made by a young man who cannot afford an extensive library. . . ."

John G. Murray, the London-based publisher, included in his book, *A Gentleman Publisher's Commonplace Book,* this Soviet joke:

> Q. What's the difference between capitalism and communism?
> A. Under capitalism, man exploits man. Under communism, it is exactly the opposite.

And one more in Murray's book appropriate for the times:

> 'Nothing in all the known world of politics is so intractable as a band of zealots, conscious that they are in a minority, yet armed by accident with the powers of a majority.'

R. L. Hines, an English solicitor, noted in his commonplace book that "[i]n our profession one is constantly learning, or one should be learning. Sometimes it is law itself, always it is human nature. . . ."

Here is another:

> It is fatal, of course, to betray any sign of ignorance or incomprehension in the presence of a client. Nothing must disturb
>
> > The keenness of that practised eye,
> > The hardness of that sallow face.

I started my own commonplace book, without knowing it, when I made my first trip to the Mt. Pleasant Public Library. Once there, I borrowed three books. Then, every two weeks, I returned the old and borrowed three more. Later I did what the other commonplacers have done, I kept notes, papers, and scribbling. I never thought I would ever put them in a book, as I am doing now.

In the libraries I investigated over the years, I once toured the stacks in the Library of Congress. I helped a friend in some landlord–tenant litigation. This friend was always short of money. He gambled away whatever he had. He knew of my book addiction, and as gratitude, he got me a 40-day pass to the stacks of the Law Library of Congress, with its thousands of statutes, new and old, and constitutions, new and old. It also has books about biblioklepty, the uncontrollable addiction of book thievery. Does anyone know what medicine you take for that?

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