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By Anna Stolley Persky

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from the president

By Brigida Benitez

Our Increasingly Global Profession

Patrice Gilbert Photography

Globalization has had a profound effect on the legal profession—and our profession is in the midst of dealing with dramatic changes. Today, a large number of D.C. Bar members are engaging in cross-border practices, serving international clients, and handling matters that involve transactions, tribunals, or laws in other countries.

The D.C. Bar has nearly 1,400 members living outside the United States, in 83 countries around the world. Many others who are based in the District or elsewhere in the United States are affiliated with international firms or otherwise have global practices. As an example of this growing global trend, in 2012, U.S. law firms opened 56 foreign offices—28 in Asia (primarily in South Korea and China), 15 in Europe (principally in Germany and Russia/CIS), 7 in Latin America and the Caribbean, and 6 in the Middle East and Africa.[1]

At the same time, we are seeing greater numbers of lawyers educated in foreign countries seeking admission to practice in the United States. New York has come to be the jurisdiction most open to foreign lawyers, thus becoming their jurisdiction of choice. Not surprisingly, then, New York has seen a continued pattern of growth in the numbers of foreign-educated lawyers taking the bar exam. A record 3,052 foreign lawyers—27 percent of all applicants—took the New York bar exam in July 2014.

In the District of Columbia, Rules 46 and 49 of the Rules of the D.C. Court of Appeals govern the admission of lawyers to practice. There are several ways in which foreign-educated lawyers can apply to practice in the District. A lawyer who has been admitted to practice in a foreign country, has engaged in the practice of law in that country for five years or more, and meets other requirements may be licensed as a "special legal consultant" in the District, with certain limitations on practice. There are about 100 special legal consultants in the District.

Foreign lawyers may also be eligible to take the D.C. bar exam. If they do not have a juris doctor degree from an ABA-approved law school, they can nevertheless qualify if they have taken 26 semester hours of courses concentrated on exam topics. Foreign-educated lawyers can also be admitted on motion—as most D.C. Bar members are—after five years of practice in the United States. And finally, as with domestic lawyers, foreign lawyers authorized to practice in another country may engage in the practice of law in the District temporarily, either by applying for *pro hac vice* admission or when their presence here is only of incidental or occasional duration.

In addition to the District of Columbia, about 27 states allow foreign-educated lawyers to become members of their bar, though the rules of eligibility and admission differ.[2] Foreign lawyers sat for the bar exam in 30 states between 2010 and 2012. About 28 states have provisions for foreign legal consultants, and about 14 states allow foreign lawyers to apply for *pro hac vice* admission.

The regulation of lawyers is also changing elsewhere in the world, which may have an effect on our practice in the United States. For example, the United Kingdom and Australia have taken innovative steps in regulating lawyers and the provision of legal services. Both countries authorize legal services providers that are funded by external equity investments, also known as alternative business structures (ABS). While ABS has not been approved in the United States, many jurisdictions have addressed related issues, such as multi-disciplinary practice and fee-sharing between lawyers and nonlawyers. In fact, the District was one of the first jurisdictions to allow lawyers to practice in a partnership with nonlawyers under certain circumstances.

All of these issues are tied into questions on the best way of regulating lawyers and law firms across borders and ensuring compatible legal ethics standards in a changing legal landscape. State supreme courts and bar associations are taking a close look at these topics. Indeed, the Conference of Chief Justices formed a Task Force on the Regulation of Foreign Lawyers and the International Practice of Law.

This year, the D.C. Bar has assembled a Global Legal Practice Task Force to study and make recommendations about these issues that may have a significant impact on law practice for D.C. Bar members and for the D.C. Bar as an organization. Among the potential areas that the task force will examine are admissions and authorization to practice for foreign lawyers, discipline and other regulation of those who might become authorized to practice, the roles and relationships of regulatory bodies across borders and internationally, and how the Bar can best serve as a resource for its members with international practices, whether in the United States or abroad. Moreover, globalization of legal practice may also define the attractiveness of the District of Columbia as a business climate and market for foreign trade and investment. The globalization of the legal profession raises a number of significant issues that the D.C. Bar should consider, especially given its role as a national leader among bar associations.

The task force will study these issues and review existing rules that regulate the admissions and authorization of practice for foreign lawyers and domestic attorneys who are not D.C. Bar members. We want to ensure that the Bar is responsive to the changes in the legal profession resulting from globalization and that it does so in a manner that maintains the highest professional and ethical standards for our bar and continues to serve its membership in the best way possible.

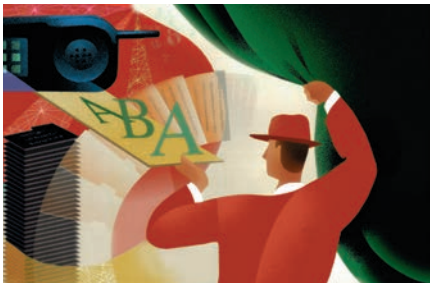
Reach Brigida Benitez at bbenitez@dcbar.org.

Note

1 2013 Report on the State of the Legal Market, Georgetown Center for the Study of the Legal Profession.
2 Judge Gregory E. Mize, *The Challenges Created by Evolving Legal Markets—A July 2014 Perspective.*

bar happenings

By David O'Boyle



Mick Wiggins

D.C. Bar Nominations Committee to Host Public Meeting

On February 18 the D.C. Bar Nominations Committee will host a public meeting for Bar members to speak on their own behalf or on behalf of persons whom they propose for nomination for candidacy in the 2015 Bar elections.

The committee will nominate individuals for the positions of D.C. Bar president-elect, secretary, and treasurer; for five vacancies on the Bar's Board of Governors; and three vacancies in the American Bar Association (ABA) House of Delegates, including a vacancy for attorneys who are either under the age of 36 at the beginning of the term or have been admitted to practice in their first bar within the past five years. All candidates must be active members of the D.C. Bar, and all candidates for ABA House of Delegates positions must also be members of the ABA.

The public meeting will take place at 12:30 p.m. at the D.C. Bar, 1101 K Street NW, Conference Room 207, second floor. (See elections story on page 15.)

Series Explores Legal Impact of Affordable Care Act

The D.C. Bar Continuing Legal Education (CLE) Program will offer its introductory, fully up-to-date, five-part course on health law and the Affordable Care Act (ACA) in January and early February.

The series is designed for lawyers entering the health law practice and seeking an overview, as well as for experienced practitioners looking to expand their ability to represent clients in the health care industry.

Part one, "Introduction to the U.S. Health Care System," on January 8 provides an overview of key areas of both federal and state regulation and highlights the legal and practical ramifications of the ACA.

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

Part two, "The New Insurance Marketplace," on January 15 covers both the system-wide changes in private health plan coverage as well as the more specific questions related to the new coverage pathway through the marketplace.

Courtesy of GWU's Milken Institute School of Public Health Communications Department

Sara Rosenbaum

Courtesy of McDermott Will & Emery LLP

Amy Kearbey

Faculty for this session includes Toni Waldman, senior counsel at Kaiser Foundation Health Plan, Inc., and Taylor Burke, an associate professor at The George Washington University School of Public Health and Health Services.

Part three, "Medicaid Under the Affordable Care Act," takes place on January 22 and highlights the impact of the ACA, particularly with respect to Medicaid expansion by the states. This session focuses on Medicaid eligibility, benefits, provider and plan payment, administration, and financing.

Sarah Mutinsky, founding senior advisor at Eyman Associates; attorney Andrew Schneider; and Judith Solomon, vice president for health policy at the Center on Budget and Policy Priorities, will serve as faculty.

On January 29 the series continues with part four, "Medicare Under the Affordable Care Act," which focuses on Medicare administration, financing, eligibility, coverage, provider/supplier participation, payment methodologies, and more.

This session will be led by Thomas Barker, a partner at Foley Hoag LLP, and Amy Kearbey, a partner at McDermott Will & Emery LLP.

The series will conclude with part five, "Compliance Issues and Health Data Privacy Under the Affordable Care Act," on February 5. This session will provide an overview of key health care laws and fraud and abuse statutes, with a specific focus on federal enforcement initiatives. Barbara Ryland of Crowell & Moring LLP and Heidi Sorensen of Foley & Lardner LLP will serve as faculty for this session.

All sessions take place from 6 to 9:15 p.m. at the D.C. Bar Conference Center, 1101 K Street NW, first floor. The series is cosponsored by the Hirsh Health Law and Policy Program of The George Washington University School of Public Health and Health Services; the D.C. Bar Courts, Lawyers and the Administration of Justice Section; Government Contracts and Litigation Section; Health Law Section; and Labor and Employment Law Section.

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

Women's Bar Examines Strategies for Making Career Transitions

On January 8 the Mentoring Committee of the Women's Bar Association (WBA) of the District of Columbia will hold a panel discussion of optimal strategies for navigating career transitions.

The program "New Year! New Career!" will cover successful moves to or from in-house, government, and corporate careers, as well as transitions to or

from legal and nonlegal careers.

Faculty includes Koren W. Wong-Ervin, counsel for international antitrust for the Office of International Affairs at the Federal Trade Commission; Vanessa Eisemann, attorney for the Office of the General Counsel's Civil Rights, Labor and Employment Division at the U.S. Department of Agriculture; Mary Winter (Legg), president and general counsel for Firm Advice Inc.; and Gina L. Simms, principal of the government and white collar defense group at Ober|Kaler. The panel will be moderated by Joanne W. Young, managing partner at Kirstein & Young, PLLC. The panelists will discuss their choices and transitions among multiple legal career options at different times in their lives. Following the panel discussion, there will be an hour to network with peers and mentors.

The program takes place from 6 to 8 p.m. at Wiley Rein LLP, 1776 K Street NW. The cost with advance registration is $15 for WBA members, $10 for students, and $20 for nonmembers. After January 4, the cost to attend is $20 for WBA members, $15 for students, and $25 for nonmembers.

To register or for more information, contact the WBA at 202-639-8880, admin@wbadc.org, or visit www.wbadc.org.

Save the Date! 2015 District of Columbia Judicial and Bar Conference

The District of Columbia Courts and D.C. Bar will host the 2015 District of Columbia Judicial and Bar Conference on April 17 from 8 a.m. to 8 p.m. at the Ronald Reagan Building and International Trade Center, 1300 Pennsylvania Avenue NW. This event, held in alternating years, brings together members of the judiciary, D.C. Bar leadership, Bar members, and others who are active in the legal community.

The focus of the conference will be mental health issues related to the administration of justice and the practice of law, including their impact on the legal profession, implications in access to justice, and substantive developments in the law. The day will feature a plenary session, keynote luncheon, seminars, an ethics CLE course worth 3.0 credit hours, and two free membership forums.

The conference will close with a judicial reception to honor all judges in the District of Columbia, with special recognition given to judges who have retired or taken senior status in the past year. The judicial reception will also include the presentation of the 2015 Jerrold Scoutt Award.

For more information about the conference, contact Verniesa R. Allen at 202-737-4700, ext. 3239, vallen@dcbar.org, or visit www.dcbar.org and follow the "Annual Events" link under "About the Bar." Additional details about the Judicial and Bar Conference will be posted online as they become available.

CLE Covers Ethics for Tax Lawyers, Reviews Year in Attorney Discipline

The D.C. Bar Continuing Legal Education (CLE) Program will offer two courses in January focusing on ethics, one examining ethics rules specific to tax practitioners, the other covering the latest developments in attorney discipline.

Courtesy of Morgan, Lewis & Bockius LLP

Alexander Reid

On January 13 the CLE Program will offer the course "Ethics for Tax Lawyers: Circular 230 and the Rules of Professional Conduct," which will cover the dual sets of ethical duties and restrictions that tax practitioners must understand.

The course will guide practicing tax attorneys on their duties and restrictions under the Rules of Professional Conduct and Circular 230 governing practice before the Internal Revenue Service (IRS); issues of confidentiality, conflicts of interest, and ethics issues that come up in opinion writing and IRS audits; and the disciplinary process and penalties for violations under both ethics regimes.

Alexander Reid, of counsel at Morgan, Lewis & Bockius LLP; Armando Gomez of Skadden, Arps, Slate, Meagher & Flom LLP; Karen L. Hawkins, director of the Office of Professional Responsibility, Operations & Management branch at the IRS; and Thomas B. Mason of Zuckerman Spaeder LLP, will serve as faculty.

The course takes place from 1 to 3:15 p.m. and is cosponsored by the D.C. Bar Taxation Section.

"Disciplinary Year in Review: District of Columbia, Maryland, and Virginia" on January 26 features bar counsel from the three jurisdictions who will discuss the areas where attorneys got into disciplinary trouble during the past year, from neglect of client matters to mishandling of client funds. The program will also highlight where the three local jurisdictions differ and where they share similar disciplinary concerns.

Faculty includes Edward L. "Ned" Davis, Virginia State Bar counsel; Glenn Grossman, bar counsel for the Maryland Attorney Grievance Commission; and W. Gene Shipp Jr., D.C. bar counsel. Mindy L. Rattan, of counsel at McKenna Long & Aldridge LLP, will serve as moderator.

The course takes place from 11 a.m. to 2:15 p.m. and is cosponsored by all sections of the D.C. Bar.

Both courses will be held at the D.C. Bar Conference Center, 1101 K Street NW, first floor. For more information, contact the CLE Program at 202-626-3488 or visit www.dcbar.org/cle.

George Mason Law Hosts 13th Annual Public Service Career Fair

On January 23 law students and employers will gather for the Washington, D.C./Baltimore Public Service Career Fair, from 9 a.m. to 5 p.m., at George Mason University School of Law, 3301 Fairfax Drive, Arlington, Virginia.

The career fair brings participants together to discuss local public interest and government job opportunities. Participating organizations and agencies will conduct interviews, hold table talks, and accept résumés.

The fair is sponsored by the American University Washington College of Law, Catholic University of America Columbus School of Law, Federal Bar Association, George Mason University School of Law, Howard University School of Law, University of the District of Columbia David A. Clarke School of Law, and University of Maryland Francis King Carey School of Law.

For more information, contact Joanna Bettis Craig at 703-993-8020 or lawcareer@gmu.edu, or visit www.law.gmu.edu/career/employerservices/job_fair.

D.C. Bar to Welcome New President at 2015 Celebration of Leadership

The 2015 Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting will be held on June 16 in the Mayflower Renaissance Hotel's Grand Ballroom, 1127 Connecticut Avenue NW.

Courtesy of Sidley Austin LLP

Timothy K. Webster

The evening will open with the D.C. Bar Pro Bono Program Presidents' Reception at 6 p.m., followed by the Celebration of Leadership dinner and awards

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speaking of ethics

By Hope C. Todd

Mick Wiggins

Lies, Damn Lies: Pretexting and D.C. Rule 8.4(c)

The act of pretexting, sometimes called dissemblance, generally describes an attorney's participation in, or direction or supervision of others involved in, deception for the purpose of uncovering evidence of unlawful conduct that might otherwise be unattainable. Examples of pretexting include employing "testers" who misrepresent their identity or purpose, or both, to apply for housing or job openings to uncover discriminatory practices; or directing investigators to pose as business customers to identify potential trademark infringement activities taking place in the day-to-day operations of a target company.

Over the past 15 years, lawyers, Bar ethics committees, and courts nationwide have increasingly been called upon to interpret and apply Rule 8.4(c) when an attorney's conduct involves pretexting.[1] The results have been widely divergent and largely irreconcilable.[2]

D.C. Rule 8.4(c) and LEO 323: A Narrow Exception?

D.C. Rule 8.4(c) broadly provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Rule applies to attorney conduct at all times regardless of whether the attorney is acting in a personal or professional capacity. On its face, there would appear to be no exceptions—not for lawyers engaging in general law enforcement activities or seeking to uncover unlawful discrimination, or proving trademark infringement, counterfeiting, or other intellectual property encroachments; or for preventing fraud; assuring truthfulness in advertising; ensuring consumer health or safety; or even preventing substantial bodily harm. Facially, there is no exception because a particular omission is small or because the potential harm that might result from one's failure to deceive is significant.[3]

The District of Columbia Court of Appeals has not directly addressed the ethical propriety of pretexting under Rule 8.4(c).[4] In 2004, however, the Legal Ethics Committee, considering whether attorneys acting as intelligence officers violate the D.C. Rules if they engage in fraud, deceit, or misrepresentation in the course of their non-representational official duties, concluded that,

> Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.[5]

The committee viewed such misrepresentations as permitted and not within the intended scope of Rule 8.4(c) for three reasons: First, because the committee determined 8.4(c) applies "only to conduct that calls into question a lawyer's suitability to practice law." Second, because it analogized the "authorized by law" language found in Rule 4.2[6] as "expressing a general approval of lawful undercover activity by government agents."[7] The committee supported the proposition that "when an attorney employed by the federal government uses lawful methods . . . as part of his or her intelligence or covert activities, those methods cannot be seen as reflecting adversely on the attorney's fitness to practice law."[8] Third, because the committee recognized that for some official intelligence activities, the law intentionally prohibits the agent/lawyer's disclosure of his or her identity or purpose, and such disclosure would also likely compromise the personal safety of the lawyer or others. The committee concluded that any interpretation of Rule 8.4(c) that would mandate such disclosure was unreasonable.

The committee emphasized "the narrow scope" of its opinion and, significantly, did not reach the broader questions of government attorneys pretexting or directing dissemblance in a representational capacity, or engaging in otherwise lawful deception either in the absence of specific law authorizing the misrepresentations or for nonofficial reasons, nor did it address the question of whether private attorneys could engage in, direct, or supervise any dissemblance whatsoever.

Lack of Judicial Consensus in Interpreting Rule 8.4(c)

A small number of court and ethics opinions and a handful of disciplinary cases have examined questions of whether, and when, a lawyer may permissibly engage in deception, or instruct others to do so, to obtain information that would otherwise be unavailable.[9]

In *Apple Corps Ltd. v. Int'l Collectors Soc'y*, the leading trademark infringement case, the United States District Court for the District of New Jersey found that plaintiff's counsel and investigators' misrepresentations as to their identity and purpose were "necessary to discover defendants' violations . . . and did not constitute unethical behavior."[10] Liberally citing Isbell and Salvi's law review article,[11] the court adopted the authors' "fitness to practice law" interpretation of Rule 8.4(c) and found that posing as a "normal customer" to gather evidence otherwise unavailable about the defendant's "day-to-day practices in the ordinary course of business" did not under such a construction, implicate deceit.[12]

Several other trademark and intellectual property cases have followed the reasoning articulated in *Apple Corps Ltd.* and held that attorneys engaged in pretexting were not engaged in unethical conduct.[13] In *Midwest Motor Sports, Inc.*, however, the 8th Circuit disagreed and, among other things, affirmed sanctions against counsel for deceptive conduct and interviews under false pretenses under Rule 8.4(c).[14]

The Oregon Supreme Court was the first to consider an attorney's pretexting activities in a disciplinary case under DR 1-102(A)(3), Oregon's then-equivalent to Rule 8.4(c).[15] Attorney Gatti suspected ongoing fraud by a medical review company and an insurance company and,

to gather evidence in support of this allegation, he telephoned the medical review company and falsely claimed to be a medical doctor who saw patients and reviewed case files, and falsely represented that he was interested in working for the medical review company and in educational programs for insurance claims adjusters. The court found, among other violations, that Gatti had violated DR 1-102(A)(3) and it flatly refused to find either an investigatory or prosecutorial exception to the rule for either private or government attorneys.[16] In response to *In re Gatti*, Oregon amended its ethics rules to provide a safe harbor for lawyers who advise or supervise others engaged in lawful covert activity in investigations of violations of civil or criminal law or constitutional rights.[17]

To date, the Colorado Supreme Court has taken the most unyielding stance on a lawyer's duty of truthfulness embodied in Rule 8.4(c). Chief Deputy District Attorney Mark Pautler impersonated a public defender in order to secure the surrender of a murder suspect who had brutally bludgeoned three women to death with a wood-splitting maul. The suspect, making clear that he would not surrender without legal representation, asked to speak with an attorney. Attorney Pautler spoke to the suspect while leading him to believe that Pautler was a public defender who represented him. Rejecting the attorney's "noble motive" and his claim of "imminent public harm" as defenses, the court minced no words in its final analysis of Rule 8.4(c):

> Until a sufficiently compelling scenario presents itself and convinces us our interpretation of Colo. RPC 8.4(c) is too rigid, we stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so.[18]

In direct contrast, the Wisconsin Supreme Court rejected such a broad interpretation of Rule 8.4(c). Criminal defense attorney Stephen Hurley represented a defendant who was charged with two counts of sexual assault of a child, two counts of exhibiting harmful material to a child, and sixteen counts of possession of child pornography. These offenses were punishable by imprisonment, with a maximum sentence approaching a life term.[19] Hurley doubted the victim's credibility, believed he was lying about the allegations against his client, and believed that the victim had an independent interest in and ability to access the material he accused his client of showing to him. As such, Hurley, through the use of deception, devised and supervised an otherwise lawful undercover investigation to gather potentially exculpatory evidence from the victim's home computer.

The court limited the applicability of Rule 8.4(c) to deceptive conduct that reflects on the lawyer's fitness to practice law. Taking care to expound upon the particular pressures faced by criminal defense attorneys and right of criminal defendants to effective assistance of counsel, the court noted that Hurley had "a reasonable, factually supported, and good faith belief that [the] home computer contained exculpatory evidence"[20] and was "the lynch pin of [the defendant's case]"[21] and that any prior notice to the victim would have likely resulted in the "destruction of the sought-after evidence." The court not only found that the attorney's deception did not "impact negatively upon his fitness to practice law"[22] but went even further:

> Mr. Hurley faced an extremely difficult calculus: risk violating a vague ethical Rule or risk breaching his duty zealously to represent his client and violating his client's constitutionally protected right to effective assistance of counsel. The decision Mr. Hurley made was not an unfit one; it was a necessary one.[23]

Both the Massachusetts and Vermont Supreme Courts have also addressed attorney deception under Rule 8.4(c) in disciplinary matters and reached opposite conclusions.[24]

Conclusion

The ethical propriety of pretexting under Rule 8.4(c) is an unsettled question in a vast majority of jurisdictions, including the District of Columbia. Courts that have decided the issue have reached conflicting conclusions. The District of Columbia Court of Appeals may ultimately be persuaded by the analysis of the case law and ethics opinions in those jurisdictions that have addressed issues of lawyer pretexting and found certain deceptions permissible under Rule 8.4(c). However, for now, D.C. lawyers who consider engaging in, or directing others to engage in, deception in circumstances falling outside of those narrowly defined in Opinion 323, should exercise great care to carefully weigh the risk of violating the D.C. Rules of Professional Conduct.[25]

Legal Ethics counsel Hope C. Todd, Saul Jay Singer, and Erika Stillabower are available for telephone inquiries at 202-737-4700, ext. 3231, 3232, and 3198 respectively, or by e-mail at ethics@dcbar.org.

Notes

1 The question of whether attorneys can ethically supervise or direct investigators or testers who engage in otherwise legal dissemblance as to identities/purposes or both, solely to gather evidence, was first broadly explored by David B. Isbell and Lucantonio N. Salvi in their seminal law review article published in 1995. David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791 (1995). The article posits and concludes that such behavior is ethical and "justified in the search for truth." The authors' conclusion is premised largely on the theory that Rule 8.4(c) misrepresentations should be narrowly construed as "[applying] only to conduct of so grave a character as to call into question the lawyer's fitness to practice law." *Id.* at 816.

2 Attorney pretexting often implicates other ethics rules, most commonly Rules 3.7, 4.1, 4.2, 4.3, and 5.3. Space limitations preclude a discussion of those rules here; however, attorneys must also assess pretexting under those rules. The court decisions, articles, and ethics opinions cited herein provide fertile ground for such analysis.

3 Admittedly, carrying the language of Rule 8.4(c) to an extreme would prohibit a lawyer from lying, for example, to avoid a social engagement or from providing a false

reason for not returning a spouse's phone call. However, such a conclusion would evidence a lack of common sense, much less reasonableness. *See also* D.C. Legal Ethics Comm., Op. 323 (2004); Isbell & Salvi, *supra* n. 1; *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009).

4 *In re Richard B. Sablowsky*, 529 A.2d 289 (D.C. 1987). The Court of Appeals reprimanded the Office of Bar Counsel for deputizing two private lawyers to go undercover to negotiate with Mr. Sablowsky to facilitate catching him in the act of selling witness testimony. The court held that it was not the function of Bar Counsel to engage in this type of undercover work, but rather, "Bar Counsel has a responsibility to educate the bar with the hope of preventing violations, if possible, not of encouraging them." *Sablowsky*, 529 A.2d at 291. This case did not address Rule 8.4(c) (or its predecessor DR 1-102(A)(3)); rather, it focused on the lack of authority for OBC to deputize others to engage in covert activities under the court's Rules Governing the D.C. Bar (citing D.C. Bar R. XI § 4(3)(b)).

5 D.C. Legal Ethics Comm., Op. 323 (2004).

6 "This rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The 'authorized by law' proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time." D.C. Rules of Prof'l Conduct R. 4.2 cmt. [12].

7 "We do not think that the Court of Appeals intended to authorize legitimate law enforcement activity while proscribing covert activity in the aid of our national security." D.C. Legal Ethics Comm., Op. 323 (2004).

8 *Id.* (quoting Va. Standing Comm. on Legal Ethics, Op. 1765 (2004)). In 2003, Virginia expressly amended Rule 8.4(c) to prohibit "dishonesty, fraud, deceit or misrepresentation which reflects adversely on a lawyer's fitness to practice law." Va. Rules of Prof'l Conduct R. 8.4(c).

9 *See, e.g.*, *In re Gatti*, 8 P.3d 966 (Or. 2000); *In re Pautler*, 47 P.3d 1175 (Colo. 2002); *In re Hurley*, No. 07 AP 478-D, 2008 Wisc. LEXIS 1181 (Wis. Feb. 5, 2008); *In re Crossen*, 880 N.E.2d 352 (Mass. 2008); *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009); N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 737 (2007); Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009); Va. Standing Comm. on Legal Ethics, Op. 1765 (2004); Va. Standing Comm. on Legal Ethics, Op. 1845 (2009); Oregon Legal Ethics Comm., Op. 2005-173 (2005); Alabama State Bar Office of Gen. Counsel, Op. 2007-05 (2007); Arizona Comm. on the Rules of Prof'l Conduct, Op. 99-11 (1999); Utah Ethics Advisory Op. Comm., Op. 02-05 (2002).

10 *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 471 (D. N.J. 1998).

11 *See* Isbell & Salvi, *supra* n.1.

12 *Apple Corps Ltd.*, 15 F. Supp. 2d at 475.

13 *See Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 136 (S.D.N.Y. 2000); *A.V. By Versace, Inc. v. Gianni Versace, S.p.A*, 87 F. Supp. 2d 281 (S.D.N.Y. 2000); *Design Tex Group, Inc. v. U.S. Vinyl Mfg. Corp.*, No. 04 Civ. 5002, 2005 WL 357125 (S.D.N.Y. Feb. 14, 2005); *Chloe v. Designersimports.com USA, Inc.*, No. 07-CV-1791, 2009 WL 1227927 (S.D.N.Y. Apr. 30, 2009). For a fuller discussion of these cases, and general considerations for engaging in dissemblance in this area, *see* Phillip Barengolts, *The Ethics of Deception: Pretext Investigations and Trademark Cases*, 6 Akron Intell. Prop. J. 1 (2012). *See also*, Jeannette Braun, *Comment: A Lose-Lose Situation: Analyzing the Implications of Investigatory Pretexting Under the Rules of Professional Responsibility*, 61 Case W. Res. L. Rev. 355 (2010).

14 *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003).

15 The language of Oregon DR 1-102(A)(3) provided: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

16 The United States Attorney for the District of Oregon, appearing as *amicus curiae*, stated that the U.S. Department of Justice "regularly supervises and conducts undercover operations in Oregon that necessarily involve a degree of deception" and argued strenuously that public policy favors such an exception. *In re Gatti*, 8 P.3d 966, 975 (Or. 2000).

17 Oregon Rules of Prof'l Conduct R. 8.4(b); *see also* Oregon Legal Ethics Comm., Op. 2005-173 (2005). Other jurisdictions have also amended their rules to expressly permit certain behaviors involving dissemblance or deception under Rule 8.4(c), including Alabama, Florida, Iowa, Virginia, Alaska, Tennessee, and North Carolina.

18 *In re Pautler*, 47 P.3d 1175, 1182 (Colo. 2002). The language of Colo. RPC 8.4(c) is the same as D.C. 8.4(c).

19 *In re Hurley*, No. 07 AP 478-D, 2008 Wisc. LEXIS 1181 (Wis. Feb. 5, 2008).

20 *Id. at *20.*

21 *Id. at *25.*

22 *Id. at *26.*

23 *Id.* at *25–26.

24 *See In re Crossen*, 880 N.E.2d 352 (Mass. 2008) (Finding attorneys' pretexting violated Rule 8.4(c)); *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009) (Finding attorneys' deception did not violate Rule 8.4(c)).

25 Although not the focus of this article, the issues of self-help discovery and investigations through social media have been increasingly addressed in legal ethics opinions. *See* N.Y. City Bar Comm. on Prof'l Ethics, Op. 2010-2 (2010); N.Y. State Bar Comm. on Prof'l Ethics, Op. 843 (2010); Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009); New Hampshire Bar Ass'n Ethics Comm., Op. 2012-13/05 (2012); San Diego Cnty. Bar Legal Ethics Comm., Op. 2011-2 (2011); PA Formal Opinion 2014-300 (2014). These opinions often conclude that deception in name and/or purpose in this context is an omission that rises to a misrepresentation which violates various ethics rules, including 4.1, 4.2, 4.3, and 8.4(c).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE JOHN M. GREEN. Bar No. 476592. October 20, 2014. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Green for 90 days, with 30 days stayed, and impose a one-year probation with conditions. While retained to represent a client following an automobile accident with an uninsured motorist, Green failed to respond to his client's insurance company's repeated inquiries regarding settlement and did not attempt to negotiate a settlement with the insurer. In addition, although Green filed suit in D.C. Superior Court against both the driver and the owner of the other car in the accident, he failed to timely serve either defendant, and the case was dismissed for failure to prosecute. Green then made no effort to reinstate the case and failed to communicate with the client regarding the status of the matter. Rules 1.1(a), 1.1(b), 1.2(a), 1.3(a), 1.3(b)(1), 1.3(c), 1.4(a), 1.4(b), 1.15(a), 1.16(d), and D.C. Bar R. XI, § 19(f).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE ADRIAN CRONAUER. Bar No. 427503. October 9, 2014. The D.C. Court of Appeals disbarred Cronauer by consent, effective forthwith.

IN RE CHARLES MALALAH. Bar No. 978801. October 30, 2014. The D.C. Court of Appeals disbarred Malalah. As a condition of reinstatement, Malalah shall return to his client $33,333.33 plus interest at the legal rate of 6 percent calculated from the date he withdrew the funds from his IOLTA account. Malalah intentionally misappropriated client funds and violated other rules of professional conduct. Rules 1.4(a), 1.5(c), 1.15(a), 8.4(c), and 1.19(a).

IN RE HERBERT T. NELSON. Bar No. 254730. October 23, 2014. The D.C. Court of Appeals granted Nelson's petition for reinstatement.

IN RE JOSEPH J. O'HARA. Bar No. 362581. October 23, 2014. The D.C. Court of Appeals disbarred O'Hara. O'Hara pleaded guilty in the United States District Court for the Western District of Texas to one count of conspiracy to commit mail fraud and the deprivation of honest services, in violation of 18 U.S.C. §§ 1341, 1346, and 1349. The court previously has held that violations of 18 U.S.C. §§ 1341 and 1346 involve moral turpitude *per se* for which disbarment is mandatory under D.C. Code § 11-2503(a)(2001).

Informal Admonitions Issued by the Office of Bar Counsel

IN RE RICHARD E. ST. PAUL. Bar No. 494622. October 3, 2014. Bar Counsel issued St. Paul an informal admonition. In a personal matter in family court, St. Paul failed to obey court orders to appear and to pay child support. Rules 3.4(c) and 8.4(d).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted at www.dcattorneydiscipline.org. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.

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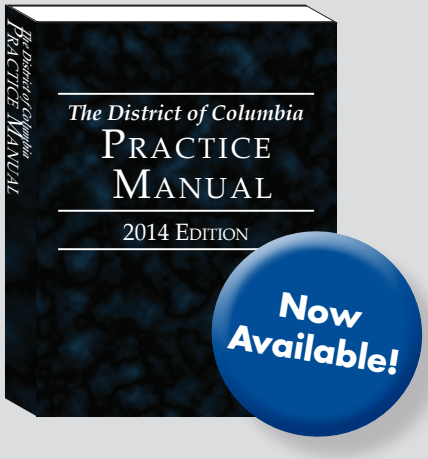

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legal beat

By David O'Boyle

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

Bar Makes Final Push for Nominees as Rosenberg, Brennan Deadline Nears

The D.C. Bar is calling for nominations for its 2015 Beatrice Rosenberg Award for Excellence in Government Service and its 2015 William J. Brennan Jr. Award. Both awards will be presented at the Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting on June 16.

The Rosenberg Award is presented annually to a D.C. Bar member whose career exemplifies the highest order of public service. The Bar established the award in honor of Beatrice "Bea" Rosenberg, who dedicated 35 years of her career to government service and performed with distinction at the U.S. Department of Justice and the U.S. Equal Employment Opportunity Commission. She also served as a member of the Board on Professional Responsibility.

In keeping with the exceptional accomplishments of Ms. Rosenberg, nominees should have demonstrated outstanding professional judgment throughout long-term government careers, worked intentionally to share their expertise as mentors to younger government lawyers, and devoted significant personal energies to public or community service. Nominees must be current or former employees of any local, state, or federal government agency.

The William J. Brennan Jr. Award recognizes a member of the D.C. Bar who has made extraordinary efforts and has shown commitment and initiative in pursuing equal justice and opportunity for all Americans.

The award was established in 1993 and is presented in alternating years as the William J. Brennan Jr. Award or Thurgood Marshall Award. The D.C. Bar seeks a strong candidate who exhibits qualities beyond what is required in the normal course of legal advocacy and who has made a significant, positive impact on the quality or administration of justice.

Information for both awards can be found at www.dcbar.org/awards.

John Harrington

Law Librarian of Congress David S. Mao, Princess Anne of England, and Librarian of Congress James H. Billington take part in a ribbon-cutting ceremony marking the opening of the exhibition, "Magna Carta: Muse and Mentor," which runs through January 19.

The deadline for submissions is Friday, January 30. Nominations for both the 2015 Rosenberg and Brennan awards may be submitted in one of the following ways: (1) online through the Bar's Web site at www.dcbar.org/awards; (2) by e-mail attachment to rosenbergaward@dcbar.org or brennanaward@dcbar.org, respectively; or (3) in hard copy to Katherine A. Mazzaferri, Chief Executive Officer, District of Columbia Bar, 1101 K Street NW, Suite 200, Washington, DC 20005-4210. Electronic submissions are encouraged.

Bar Seeks Nominations for Annual Awards at Celebration of Leadership

The D.C. Bar is seeking nominations for outstanding projects and contributions by Bar members that will be recognized at the 2015 Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting. The deadline for submissions is March 27.

Bar members are encouraged to submit nominations for the following: Bar Project of the Year/Frederick B. Abramson Award, Section of the Year, Pro Bono Award Law Firm of the Year, and Laura N. Rinaldi Pro Bono Lawyer of the Year Award.

Nominations may be submitted in one of the following ways: (1) online at www.dcbar.org/awards; (2) by e-mail to annualawards@dcbar.org; or (3) by mail to Katherine A. Mazzaferri, Chief Executive Officer, District of Columbia Bar, 1101 K Street NW, Suite 200, Washington, DC 20005-4210. Electronic submissions are encouraged.

The winners will be honored on June 16 at the Bar's Celebration of Leadership at the Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW.

Library of Congress Celebrates Opening of Magna Carta Exhibition

In November the Library of Congress opened its new 10-week exhibition celebrating the 800th anniversary of Magna Carta. "Magna Carta: Muse and Mentor," which runs through January 19, features the 1215 Lincoln Cathedral Magna Carta, one of four surviving copies of the document from 1215.

The Library of Congress marked the opening of the exhibit with high-profile events, including a discussion on November 5 between U.S. Supreme Court Chief Justice John G. Roberts Jr. and former Lord Chief Justice of England and Wales Lord Igor Judge. The program was moderated by Law Librarian of Congress David S. Mao.

Judge and Roberts discussed the legal legacy of Magna Carta and some of the principles within the document now embedded in the legal systems of the United States and the United Kingdom. According to Roberts and Judge, Magna Carta laid the foundation for such principles as the rule of law, separation of powers, and the right to trial by jury, among others.

Judge emphasized the importance of Clause 61 of Magna Carta, which held that if the king breached the agreements of the charter, a council of barons would take over the administration of the kingdom.

"This is a fantastically important moment," Judge said. "Suddenly, the king is answerable on earth, not just in heaven, and from this we derive constant reference through the Middle Ages to a king not being above the law."

Mao asked the justices why someone might cite Magna Carta in a legal argument, and whether or not it is primarily used as a symbol by lawyers. Both Judge and Roberts agreed that any lawyer before their respective courts would be on thin ice if they were relying on the document to make their legal arguments.

"If you're citing Magna Carta in a brief before the Supreme Court of the United States, or in an argument, you're in pretty bad shape," Roberts said. "We like our authorities to be a little more current, and a little more directly on point."

However, Judge did agree that the document serves as a useful reminder of the basic principles in the constitutions and bills of rights of both countries that stemmed from Magna Carta.

Both Judge and Roberts said that they hope to see Magna Carta continue as a symbol of the rule of law, and emphasized its importance in establishing the social contract between the people and the government. Roberts, especially, emphasized the importance of a government made valid by the people.

"The most imposing, the most impressive, the most expansive list of rights that I have ever read was found in the constitution of the Soviet Union," Roberts said. "The words that we're talking about, whether in our Bill of Rights, or in Magna Carta, can be mere parchment barriers . . . unless they are supported by the people."

On November 6 the Library of Congress held a ribbon-cutting ceremony for its exhibition and hosted a gala dinner that included remarks from the Very Reverend Philip Buckler, Dean of Lincoln Cathedral; James H. Billington, Librarian of Congress; Princess Anne of England; and a keynote address by U.S. Supreme Court Associate Justice Antonin Scalia. The evening also included musical performances by the Temple Church Choir and mezzo-soprano singer Denyce Graves-Montgomery.

Billington highlighted Magna Carta as a symbol of a special American-British relationship and touched on why it is important to celebrate the anniversary of the document.

In Scalia's keynote address, he gave a history of Magna Carta and the principles set forth by the document. Scalia touched on Magna Carta's influence on such principles as the rule of law, due process of law, trial by jury, proportionality of punishment, habeas corpus, and the right to petition the government.

"Magna Carta profoundly influenced—indeed, gave birth to—many of the most recognized, critical elements of American law," Scalia said. "It is with us every day."—*D.O.*

A Month in the Life

Jennifer Pocock

Paul S. Lee of Dechert LLP buys supplies from shop owner Marcia Maack of Mayer Brown LLP while Venable LLP's Wenning Xu looks on. The transaction was part of the Washington Council of Lawyers' Poverty Simulation in November, where more than 30 lawyers role-played a month in the life of a person living below the poverty level. The event raised awareness for the types of issues faced by the clients of pro bono lawyers.

D.C. Bar Looks to Fill Vacancies on Committees, Board for 2015

The D.C. Bar Board of Governors is accepting applications from D.C. Bar members who are interested in serving on the D.C. Bar Foundation's Board of Directors (DCBF). The deadline to apply for these vacancies is February 10. Consideration will be given to individuals who have experience with or knowledge of fundraising, finance, and the D.C. community and its legal services providers.

Additionally, the Bar is seeking candidates for appointment this spring to the Attorney/Client Arbitration Board, Clients' Security Fund, Judicial Evaluation Committee, Legal Ethics Committee, and Board on Professional Responsibility (BPR) of the D.C. Court of Appeals. The deadline to apply for these vacancies is March 13.

Applicants for attorney vacancies must be members of the D.C. Bar. For openings on the BPR, three individuals will be selected for each vacancy and forwarded to the D.C. Court of Appeals for final appointment. Preference is given to individuals with experience on BPR hearing committees. Bar members interested

in being considered for BPR hearing committee vacancies that arise periodically should send a letter of interest and résumé to the Board on Professional Responsibility, 430 E Street NW, Suite 138, Washington, DC 20001.

To apply for a board or committee opening, please submit a résumé and a cover letter stating the committee(s) or board(s) on which you would like to serve and a description of relevant work or volunteer experience. Applications that do not include the requisite cover letter with a description of relevant experience will not be considered. Leadership experience with other D.C. Bar committees, voluntary bar associations, or the Bar's sections is highly desirable. Descriptions of the committees and links to the DCBF and BPR Web sites can be found online at www.dcbar.org, keyword: 2015 committee and board vacancies.

Submit materials by e-mail to executive.office@dcbar.org or by mail to D.C. Bar Executive Office, 1101 K Street NW, Suite 200, Washington, DC 20005-4210.

Bar's Judicial Evaluation Committee Invites Feedback Through Jan. 11

On November 18 the D.C. Bar Judicial Evaluation Committee began conducting its 2014–2015 performance evaluation of judges who preside over the D.C. Court of Appeals and D.C. Superior Court.

Attorneys who had cases pending before one or more of the judges listed below during the period between July 1, 2012, and June 30, 2014, have been asked to provide feedback. The survey is conducted online only, and all responses and comments will remain anonymous. Evaluations are due by January 11.

The following Court of Appeals judges will be evaluated this year: James A. Belson, Warren R. King, Roy W. McLeese III, Frank Q. Nebeker, Inez Smith Reid, Vanessa Ruiz, and John M. Steadman.

The following Superior Court judges will be evaluated this year: Geoffrey Alprin, Ronna Lee Beck, John M. Campbell, Erik Christian, Linda K. Davis, Marisa J. Demeo, Todd Edelman, Stephen F. Eilperin, Gerald I. Fisher, Henry F. Greene, Gregory Jackson, Anita Josey-Herring, Kimberley S. Knowles, Milton C. Lee Jr., Lynn Leibovitz, Richard Levie, Bruce S. Mencher, Zinora Mitchell-Rankin, Truman A. Morrison III, Thomas J. Motley, Stuart Nash, Maria Elizabeth Raffinan, Maurice Ross, Nan R. Shuker, Judith Smith, Robert S. Tignor, and Curtis E. von Kann.

A First for D.C.

David O'Boyle

Karl A. Racine, attorney general-elect for the District of Columbia, discusses his transition into the Office of the Attorney General during a November D.C. Bar Sections Council meeting. Racine spoke to Sections Council members about the "angst-inducing" election campaign and his plans as the District's first elected attorney general.

Judges are evaluated in their 2nd, 6th, 10th, and 13th year of service. Senior judges are evaluated during the second year of their four-year terms, and once during their two-year terms.

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

Attorneys who appeared before one or more of the judges being evaluated and who did not receive an e-mail notification on November 18 can request a unique link directly from Research USA, the independent research organization administering the survey, at dcbarjudicialevaluation@researchusainc.com.

Judge Dixon Retirement Opens Vacancy on Superior Court

The District of Columbia Judicial Nomination Commission has announced a vacancy on the Superior Court of the District of Columbia created by the retirement of Judge Herbert B. Dixon Jr. The deadline for submitting application materials is January 23.

Judge Dixon's retirement takes effect April 28.

The commission will send three nominations for the position to President Obama for consideration. Qualified candidates should be a citizen of the United States; an active member of the D.C. Bar who has been engaged in practicing law, has been a faculty of a law school in the District, or has been employed as a lawyer by the U.S. or District government for five years immediately preceding the nomination; a bona fide resident of the District; recommended to the president by the commission; and has not served, within a period of two years prior to the nomination, as a member of the D.C. Commission on Judicial Disabilities and Tenure or the Judicial Nomination Commission.

Instructions and application materials are on the commission's Web site at www.jnc.dc.gov. Applications should be sent to Kim Whatley, Executive Director, Judicial Nomination Commission, 515 Fifth Street NW, Suite 235, Washington, DC 20001.

Incomplete or outdated application materials will not be considered. Letters of recommendation, support, or endorsements are not required. However, applicants who want to send those in must do so before close of business February 13.

All questions concerning the judicial vacancy application process should be directed to the Judicial Nomination Commission's executive director at 202-879-0478 or dc.jnc@dc.gov.

Capital Pro Bono Honor Roll Deadline Closes January 31

The District of Columbia Court of Appeals and the Superior Court of the District of Columbia, with the support of the D.C. Access to Justice Commission and the D.C. Bar Pro Bono Program, are calling for applications for the fourth annual Capital Pro Bono Honor Roll, which recognizes and celebrates the pro bono work done by members of the D.C. Bar and those otherwise authorized to practice law in the District of Columbia. Application forms must be submitted by January 31.

The D.C. Courts established the honor roll as part of the 2011 National Pro Bono Celebration. The honor roll is published on the D.C. Courts Web site. It includes lawyers who have performed 50 or more hours of pro bono service during the calendar year. Lawyers who performed 100 or more hours of pro bono service are placed in a higher recognition category. In 2013, more than 4,000 honorees were rec-

ognized for their pro bono service.

Eligible lawyers can submit the online application form, which includes a declaration that they provided the requisite number of pro bono hours in the calendar year, at www.probono.net/dc/honor-roll.

Lawyers may register themselves or confer with their firm's pro bono officer. Many firms submit bulk registrations on behalf of all of their eligible pro bono attorneys.

For questions about the Capital Pro Bono Honor Roll, contact Lydia Watts, deputy director of the D.C. Access to Justice Commission, at 202-236-8935 or lydia.watts@verizon.net.—*D.O.*

Bar Sections Seek Candidates to Join 2015 Steering Committees

The D.C. Bar sections are seeking members interested in steering committee positions for all of the Bar's sections. Members wishing to be considered should submit a Candidate Interest Form and résumé to the Sections Office by 5 p.m. eastern time on Thursday, February 5. All section members have been notified about the availability of Candidate Interest Forms, which can be found online by going to www.dcbar.org/sections and clicking on the "Elections" option.

Nearly all steering committee vacancies are for three-year terms. Each section has either two or three available positions. A list of vacancies is available online.

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

The elections will take place in the spring of 2015, and the results will be announced in late May. The winning candidates will assume their new steering committee roles on July 1.

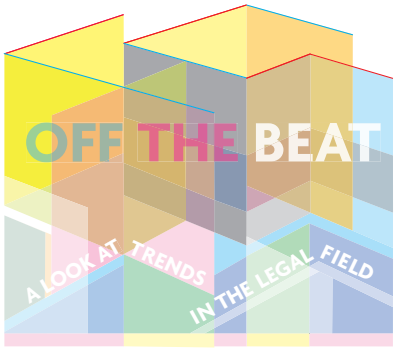
Bar Extends Deadline for 2015 Election Nominations

The D.C. Bar is accepting nominations from members wishing to be candidates in the 2015 Bar elections. The deadline for receipt of nominations has been extended to January 16.

The D.C. Bar Nominations Committee is charged with nominating individuals for the positions of D.C. Bar president-elect, secretary, and treasurer; five members of the D.C. Bar's Board of Governors; and three vacancies in the American Bar Association (ABA) House of Delegates, including a vacancy for attorneys who are either under the age of 36 at the beginning of the term or who have been admitted to practice in his or her first bar within the past five years. All candidates must be active members of the D.C. Bar, and all candidates for ABA House of Delegates positions must also be ABA members.

Individuals interested in being considered for any of these positions should submit their résumé and a cover letter stating the position for which they would like to be considered and a description of relevant work or volunteer experiences. Nominations that do not include a description of relevant experience will not be considered. Leadership experience with other D.C. Bar committees, voluntary bar associations, or the Bar's sections is highly desirable. Nominations materials may be e-mailed to executive.office@dcbar.org or mailed to the D.C. Bar Nominations Committee, Attention: Katherine A. Mazzaferri, Chief Executive Officer, 1101 K Street NW, Suite 200, Washington, DC 20005-4210.

Reach David O'Boyle at doboyle@dcbar.org.



Legal Community Leaders Look Into 'Low Bono'

Over the past 50 years, the population of the United States grew by 74 percent. During that same period, the number of lawyers in the United States increased by 431 percent. One might assume that the dramatic increase in the number of people entering the legal profession would mean that most of the legal needs in the country are met on a consistent basis.

Unfortunately, those percentages have not translated into the provision of legal services for everyone who needs them. In 2012, according to the American Bar Association, the legal needs of 944,376 people went unmet due to insufficient resources. During the same year, only 56 percent of graduating law students had found long-term jobs in the legal profession.

In October leaders from the legal community and "low bono" legal services pioneers met to discuss the justice gap faced by those of modest means and some successful programs across the United States serving persons of modest means. The program marked the kickoff of a yearlong discussion sponsored by the Washington Council of Lawyers and the D.C. Bar Courts, Lawyers and Administration of Justice Section on the unmet legal needs of persons of modest means in the District of Columbia and what can be done to meet those needs.

In his opening remarks, D.C. Court of Appeals Chief Judge Eric T. Washington said that over the past 10 to 15 years, the focus of the legal community has been on the working poor and providing them with access to justice. Recently, though, middle-class litigants began "flooding our courtrooms and yet were making too much money to qualify for provisional legal services by our outstanding legal services providers."

According to rankings by the World Justice Project, the United States ranks behind Estonia, Ghana, Iran, and Nigeria in access to civil justice, and lowest among industrialized nations. "With all due respect to those countries, we can and should do much, much better," Judge Washington said.

The discussion, moderated by the Legal Aid Society for the District of Columbia's Barbara McDowell Appellate Advocacy Project Director Jack C. Keeney Jr., included three leaders from the national legal community who focus on providing legal services to people of modest means.

The Role of Incubators

Frederick Rooney, director of the Touro College Jacob D. Fuchsberg Law Center International Center for Post-Graduate Development and Justice, is credited with creating the first business incubator model for lawyers. Rooney got the idea to start an incubator for lawyers after years of struggling to set up and maintain a small firm practice.

After graduating from the City University of New York (CUNY) School of Law, Rooney recognized that he did not have the education and training required to practice or to manage a small law firm. After a few years of working with a consortium of law schools focused on providing postgraduate education and training for lawyers interested in solo or small firm practice, Rooney decided in 2007 to adopt a model similar to incubators for graphic designers, bakers, and startup companies.

Rooney's first incubator consisted of 10 CUNY School of Law graduates. Participants were provided a controlled environment and all of the resources they required to establish a law practice.

"Once the crisis in legal education hit, law schools were really interested in looking for opportunities for many graduates who had no job options, so incubators became an important idea," Rooney said.

In 2013, Rooney joined Touro Law Center to set up an incubator program. Participants enroll in the program for 18 months and pay $300 for office space and all of the amenities typical of a law office.

"We provide [participants] with the support that they need to develop their skills as business owners, entrepreneurs, and also as professionals," Rooney said.

Help From a Hotline

Jan Allen May, executive director of the AARP Legal Counsel for the Elderly (LCE), spoke about LCE's implementation of the first legal advice hotline in the United States. The hotline, in addition to providing legal information and advice, is used as an intake system, which involves referrals to LCE's Reduced Fee Panel.

The LCE's Reduced Fee Panel serves people with legal needs whose income falls between 200 percent and 400 percent above the poverty level, providing legal services at a lower cost.

About 60 percent to 70 percent of people who call the hotline do not need legal representation, so the model allows for hotline attorneys to "separate the wheat from the chaff," May said. By the time a case reaches an attorney from the Reduced Fee Panel, it has been vetted, leading to less burnout among participating attorneys.

'Unbundled' Legal Services

Luz Herrera, assistant dean for Clinical Education, Experiential Learning, and Public Service at the University of California, Los Angeles School of Law, spoke about "unbundled" legal services, or limited-scope representation, which allows lawyers to charge flat rates for specific services for clients who might not be able to afford full representation, and reduced fee services.

Herrera said that charging flat rates for specific legal services is more comfortable for the average consumer of legal services who might not understand or like the hourly rate model, which can seem prohibitively expensive.

Herrera also tries to avoid the term "low bono" in discussing legal services for people of modest means because the term could be wrongly associated with a lower quality of legal services. To avoid negative associations, Herrera uses the term "reduced fee services."

Additionally, Herrera reminded the audience that "[charging] a lower fee, or even no fee, does not eliminate or reduce the ethical obligations of lawyers.—*D.O.*

For more information, visit www.dcbar.org, keyword: Low Bono Report.

continued from page 7

presentation at 7:30.

The Presidents' Reception will honor incoming Bar president Timothy K. Webster of Sidley Austin LLP and will benefit the Pro Bono Program, which is supported entirely by voluntary contributions.

The Celebration of Leadership dinner will feature Webster's swearing-in ceremony, the announcement of the 2015 D.C. Bar election results, and the presentation of awards to Bar sections, committees, and projects, and to individuals who have served the bar and its community.

The event will also include the presentation of the Bar's 2015 Beatrice Rosenberg Award for Excellence in Government Service and William J. Brennan Jr. Award.

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

Save the Date! 16th Annual Youth Law Fair

The Superior Court of the District of Columbia and the D.C. Bar Litigation Section will present the 16th annual Youth Law Fair, from 10:30 a.m. to 2 p.m., on March 21 at the H. Carl Moultrie Courthouse, 500 Indiana Avenue NW. This free, educational event brings together students, lawyers, judges, educators, and community leaders to explore issues facing students in the Washington metropolitan area. For more information, contact the D.C. Bar Sections Office at 202-626-3463 or outreach@dcbar.org.

Statute and Regulation Drafting Workshop Among New Offerings

In January the D.C. Bar Continuing Legal Education (CLE) Program will cover statute and regulation drafting through a new workshop series.

This series is designed for lawyers who seek legislative or regulatory solutions to client problems or who are involved in drafting statutes, regulations, or proposing revisions to regulatory language. It uses hypothetical scenarios to walk participants through the process of drafting a piece of federal legislation for consideration by Congress and drafting agency regulations.

Part one, "Statute Drafting," on January 20 will provide a guide on how to approach the legislative drafting process and how to frame issues; the difference between legislating by act or by resolution; and the different forms of bills and resolutions. Course materials include a legislative drafting manual. Part one takes place from 5:30 to 8:45 p.m.

Part two, "Regulation Drafting," on January 27 will introduce relevant administrative law principles that affect the drafting of regulations, including the informal rulemaking process under the Administrative Procedures Act; the "anatomy" of a rule, including preamble requirements; common drafting issues for regulation text; and options available in the drafting process. Part two takes place from 5:30 to 7:45 p.m.

Faculty for both sessions includes Judith Starr, general counsel for the Pension Guaranty Corporation, and V. David Zvenyach, general counsel for the Council of the District of Columbia.

Both sessions take place at the D.C. Bar Conference Center, 1101 K Street NW, first floor. The series is cosponsored by the D.C. Bar Administrative Law and Agency Practice Section; Antitrust and Consumer Law Section; and District of Columbia Affairs Section.

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

Reach David O'Boyle at doboyle@dcbar.org.

SAVE THE DATE

2015 District of Columbia Judicial and Bar Conference

Meeting Mental Health Challenges in Our Legal System

Friday, April 17, 2015

Ronald Reagan Building and International Trade Center
1300 Pennsylvania Avenue NW
Washington, DC

To learn more about the conference or to register early, visit www.dcbar.org.
Go to "Annual Events" under "About the Bar."

DC BAR

ANNUAL JUDICIAL EVALUATIONS

Dear Colleague:

We urge you to participate in the annual evaluation of selected judges serving on the D.C. Court of Appeals and the Superior Court of the District of Columbia. Your voice truly matters in this process.

Completed evaluations are an important tool for the Chief Judges and the D.C. Commission on Judicial Disabilities and Tenure to use in maintaining and improving the administration of justice in the District of Columbia.

You should participate if:

- You had a case pending before one or more of the judges scheduled for evaluation (http://www.dcbar.org/judicial-evaluations.cfm); **and**
- Your case was pending during the 24-month evaluation period (July 1, 2012–June 30, 2014)

Eligible participants should have received an invitation in mid-November from Research USA, an independent research organization administering the survey. If you did not receive the invitation and are eligible to participate, please request a link to the survey directly from Research USA at dcbarjudicialevaluation@researchusainc.com.

Evaluations are due by 11:59 p.m. eastern time on January 11, 2015.

Thank you for your participation.

Mary Ann Snow, Chair, D.C. Bar Judicial Evaluation Committee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CAN *ROE v. WADE* SURVIVE?

By Anna Stolley Persky

It's been more than four decades since the landmark abortion decision of *Roe v. Wade*, generally regarded as one of the most culturally divisive cases in American history.[1]

In 1973, against the backdrop of civil unrest and a growing feminist movement, the majority on the U.S. Supreme Court sculpted what it described as a fundamental right to privacy, part of a number of rights protected by the Bill of Rights. In so ruling, the High Court relied on a prior decision in *Griswold v. Connecticut*, which held that limiting access to birth control violated the right to privacy.[2] In *Roe v. Wade*, the majority on the High Court concluded that state laws banning access to abortion violated the right to privacy.

The 7–2 decision in *Roe v. Wade* set off a wave of protests, and, eventually, state and federal efforts to restrict the Supreme Court's decision. Decades later, the question of abortion and how much access women should have to it continues to be at the center of bitter political and legal feuding.

"*Roe* is certainly one of the most important cases in American history," says Jessica Waters, a professor specializing in reproductive rights at American University's School of Public Affairs and an adjunct professor at the university's Washington College of Law. "There are critics who say that, by stepping in when it did, the Supreme Court polarized the issue even more than it was before. Certainly, the country is more divided than ever on many reproductive rights issues, and *Roe* was hardly the final word on the question of access to abortion."

In *Roe v. Wade*, the Supreme Court spelled out a framework to allow for varying degrees of state regulation over abortion based upon the stage of pregnancy. The decision established a strict scrutiny standard for reviewing laws or government conduct affecting abortion, then divided the pregnancy period into three trimesters. States could not impede access during the first trimester of pregnancy. After that, in the second trimester, states could establish regulations "reasonably related to maternal health."

In the final trimester, which the court described as the time a fetus was viable beyond the womb, states could regulate and even prohibit abortions, except "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

But years later, in *Planned Parenthood v. Casey*, the Supreme Court found, 5–4, that the standard established in *Roe v. Wade* was too rigid. The Supreme Court allowed a variety of restrictions on first trimester abortions, including the requirement of informed consent and a 24-hour waiting period. The appropriate standard of review, according to the majority, was whether the regulation created an "undue burden" on the woman seeking an abortion.[3]

Over the years, the Supreme Court has revised and limited its ruling in *Roe v. Wade*, lowering the standard by which

Photographs courtesy of Getty Images

it examines restrictions on abortion access. In the aftermath, states have passed and viewed as constitutional a variety of laws redefining the manner in which women can receive abortion services.

Advocates on both sides of the issue and legal experts predict the Supreme Court is likely to reexamine, perhaps sometime soon, the question of state regulation of abortion.

"The fight will be over what an 'undue burden' means when it comes to access to abortion," says Marcia D. Greenberger, co-president of the National Women's Law Center in Washington, D.C. "In the past, what is considered undue has been in the eye of the beholder, and the justices have disagreed as to whether particular restrictions actually constitute burdens that are undue."

But abortion opponents like Mat Staver say they are hopeful that the Supreme Court, if and when it addresses abortion issues head on, could overturn *Roe v. Wade.*

"*Roe v. Wade* is an aberration in the law," says Staver, founder and chair of Liberty Counsel, a nonprofit dedicated to preserving religious freedom and the sanctity of life. "It is becoming more and more isolated on an island by itself."

Most recently, in mid-October, the Supreme Court intervened in a Texas case, temporarily blocking enforcement of some portions of the Lone Star State's controversial abortion law. The Court, in a 6–3 decision, found that Texas couldn't enforce a portion of the law requiring clinics to meet the standards of ambulatory surgical centers across the state. The U.S. Fifth Circuit Court of Appeals had found that the provision could be enforced immediately, despite the law being challenged in court.

State Laws

Since 2011 state legislatures have passed more than 200 regulations affecting the ability of women to gain access to abortion services in their communities, according to the Center for Reproductive Rights.

States like Virginia have passed or attempted to pass laws requiring women to undergo specific procedures such as vaginal ultrasounds. Reproductive rights advocates say the additional procedure is unnecessary and degrading, but anti-abortion advocates describe it as an important safety procedure.

In addition, state legislatures have passed mandatory waiting periods for women attempting to terminate their pregnancies. Some states have laws requiring that women be informed of alternatives to abortions such as adoption.

In the past few years, state laws have also focused increasingly on regulating abortion clinics and doctors, according to legal experts on abortion and other women's health issues. Specifically, state legislatures are passing an increased number of laws targeting the safety standards of abortion clinics and doctors. The regulations vary in detail, with some requiring that abortion clinics meet the building requirements of ambulatory surgical centers.

Another spate of state laws focuses on the status of the doctors performing the abortions, requiring them to have admitting privileges at nearby hospitals. And some states have passed laws focusing on the use and decimation process of abortion-inducing drugs.

To advocates of reproductive rights, state laws regulating abortion services impede a protected right. In addition, supporters of abortion rights, often called pro-choice advocates, say that abortions are safe nonsurgical procedures. State laws purportedly aimed at ensuring the health and safety of women terminating their pregnancies are, they say, barely disguised attempts at regulating clinics out of business.

"We've seen an unprecedented number of state abortion restrictions being passed in the past few years," says Gretchen Borchelt, senior counsel and director of state reproductive health policy for the National Women's Law Center. "It seems like many legislators and some courts don't care how many burdens a woman must face or how many hoops a clinic must jump through to stay in business. [Abortion rights supporters] are trying to ensure that the right to abortion doesn't exist in name only."

But to individuals who oppose abortion, also called pro-life advocates, recent laws serve to protect women from risky medical procedures and from making uninformed choices. In addition, organizations fighting abortion access aim to ultimately prevent abortions.

"The unborn child is a living member of the human family and has a right to life," says Mary Spaulding Balch, a lawyer and director of state legislation for the National Right to Life Committee in Washington, D.C. "Our ultimate goal is to protect unborn children under the law."

Certainly, the number of abortions has decreased in recent years. To most legal experts, the drop in abortions is a direct result of recent state laws on the topic.

According to the Centers for Disease Control, there were 765,651 legally performed abortions reported in 2010. The number represents a 3 percent decrease from the prior year, however, at least 3 states did not provide reports to the federal government.

The total number of abortions appears to have dropped since the 1980s, when reported abortions hit 1.3 million annually.

And advocates on both sides of the issue say that new state laws, if allowed to stand, likely will result in a significant decrease in overall abortion numbers.

Says Nancy Northup, president and chief executive officer of the Center for Reproductive Rights in New York: "With less providers available, women who do not have the financial means to travel to other states or long distances will be denied access."

But Balch sees the decline in abortions as indications that the laws being passed in the states "are having a positive impact on mothers who are finding themselves unexpectantly pregnant."

"Some mothers are choosing life, and others aren't getting pregnant," Balch says.

Back Alley Abortions

Generally, abortion, or the termination of a pregnancy, can occur spontaneously or it can be purposefully induced. A spontaneous abortion is called a miscarriage. Doctors can facilitate the deliberate, also called elective, termination of a pregnancy by conducting a surgical procedure or by providing particular abortion-inducing medication. Vacuum aspiration in the first trimester is one of the most popular types of surgical abortions. Abortion practitioners consider vacuum aspirations to be the safest method of surgical abortion.

In the early part of this country's history, abortion was not considered a criminal offense. Drugs, called "female monthly pills," were available to women wanting to terminate unwanted pregnancies.

Connecticut established the first statutory abortion regulation in 1821. Other states followed suit. And in 1873, the Comstock Act banned access to information about abortion and birth control.

"There were a variety of factors going into states deciding to ban abortions," says Waters, who previously worked as a litigator and lobbyist for reproductive issues at WilmerHale LLP in Washington, D.C. "There was pushback as women were also struggling to get the right to vote and other rights. There was fear and there were questions as to what role women would play in society."

During this time, many women resorted to illegal abortions, also called back alley abortions. But generally women, including those fighting for the right to vote, did not speak out about access to abortion, even when they were willing to discuss access to birth control, Waters says.

"We've seen an unprecedented number of state abortion restrictions being passed in the past few years. It seems like many legislators and some courts don't care how many burdens a woman must face or how many hoops a clinic must jump through to stay in business. *[Abortion rights supporters]* are trying to ensure that the right to abortion doesn't exist in name only."

Gretchen Borchelt, National Women's Law Center.

By 1967, abortion was classified as a felony in 49 states and Washington, D.C.

Nobody knows how many abortions occurred in the United States during the time it was largely illegal. By some accounts, there were between 200,000 and 1.2 million abortions in the 1950s and 1960s. Certainly, there were some women dying from poorly done "back alley" abortions.

With the 1960s came a decade of civic unrest and social change. Many participants in the women's rights movement geared up to fight for access to their reproductive choices. In that battle, they pushed back on state laws barring them from access to contraception. In a key legal case, *Griswold v. Connecticut*, Estelle Griswold, then executive director of the Planned Parenthood League of Connecticut, contested her arrest and conviction for providing contraception. The case made its way to the Supreme Court, where the majority held the Connecticut law unconstitutional.

In a 7–2 ruling, the Court found that in addition to the enumerated rights in the Constitution and Bill of Rights, there was an implied right to privacy. As Justice William O. Douglas explained in the majority opinion, certain protected rights have "penumbras, formed by emanations from those guarantees that help give them life and substance."

"*Griswold* is the mother of all cases," says Sara Rosenbaum, a lawyer and professor of health policy at The George Washington University's School of Public Health and Health Services. "It estab-

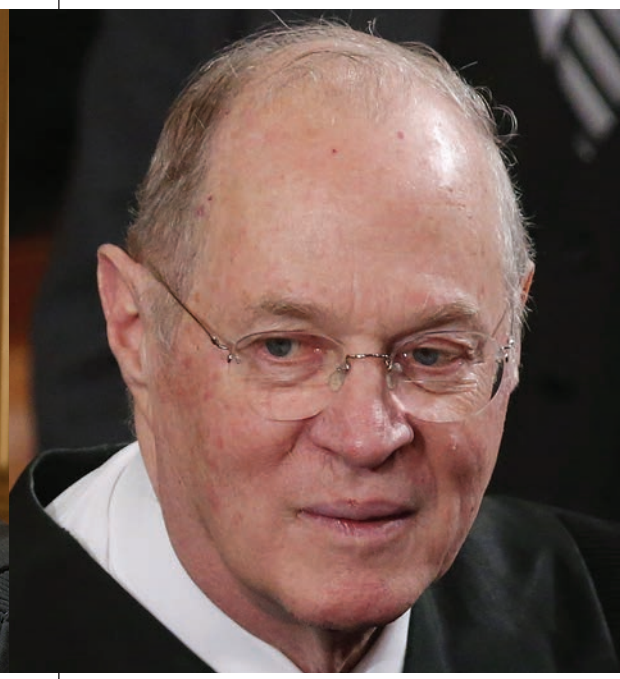
lished that people have a right to privacy in their most personal choices."

Right to Privacy

The focus, especially within the feminist movement, turned to legalizing abortion and then galvanizing *Roe v. Wade*. The case centered on Norma L. McCorvey, who discovered she was pregnant, but did not want a third child. McCorvey lived in Texas, which had outlawed abortions except upon medical advice to save the mother's life.

Under the alias "Jane Roe," McCorvey filed suit in federal court against Dallas County District Attorney Henry Wade, who represented the Texas government.

Justice Sonia Sotomayor



Justice Anthony Kennedy

Eventually, the district court ruled in favor of McCorvey, finding the law violated the Ninth Amendment.

When the case hit the Supreme Court, the majority found the Texas abortion ban infringed upon the right of personal privacy.

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," wrote Justice Harry Blackmun for the majority.

In his dissent, Justice Byron R. White wrote, "I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its actions, invests that right with sufficient substance to override most existing state abortion statutes."

By all accounts, abortion rates increased after the *Roe* decision, peaking in the 1980s, and then decreasing ever since. Public opinion, meanwhile, has been divided on the ruling, and the concept of access to abortion. According to *The Washington Post*, *Roe* saw its highest approval ratings in the early 1990s, which is also when the Supreme Court decided another important decision on the issue, in *Planned Parenthood v. Casey*.

'Undue Burden'

To many legal observers, the 1992 decision in *Planned Parenthood v. Casey* depicts the Supreme Court's ambivalence toward legalized abortion. In a plurality ruling, the Court upheld the basic constitutional right to abortion, but revised its standard of review.

The Court found that restrictions should not place "undue burden" on women seeking abortions before fetus viability. In so ruling, the plurality, jointly written by Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter, upheld Pennsylvania's 24-hour waiting period, and requirements for informed consent and parental consent for minors seeking abortions, but rejected the state's requirement for spousal consent.

"*Casey* was an important decision, but it was a conflicted decision," Borchelt says. "It

reaffirmed *Roe*, but it also took away some of the protections that *Roe* had put into place. It is responsible for the patchwork of restrictive state laws that exist today."

In 2000 the Supreme Court reviewed a case—*Stenberg v. Carhart*—challenging the constitutionality of a state law prohibiting partial birth abortions.[4]

The Nebraska law made it a felony to terminate a pregnancy late in the second trimester by partially extracting a fetus from a uterus.

In *Stenberg v. Carhart* the Supreme Court ruled, 5–4, that the partial-birth abortion law violated the Constitution. The majority found that the statute placed an undue burden on a woman's right to have an abortion and failed to allow for exceptions in cases of the health of the mother.

Chief Justice John G. Roberts Jr.

But in 2003 Congress passed, and President George W. Bush signed into law, the federal Partial-Birth Abortion Ban Act. In 2007, the Supreme Court then upheld the federal ban by a 5–4 vote in *Gonzales v. Carhart*. Justice Kennedy, generally considered the current swing vote on the issue of abortion bans, wrote the majority opinion.[5]

Most recently, in 2014, the Supreme Court ruled unanimously in *McCullen v. Coakley* that a Massachusetts law banning protestors within 35 feet of abortion clinics violated the First Amendment. The decision affected other "fixed-buffer" state laws, but it also established a framework for restrictions on clinic demonstrations.[6]

"A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency," wrote Chief Justice John G. Roberts Jr. for the unanimous court.

Variety of Restrictions

Over the years, but especially since 2010, states have carved out a variety of regulations circumscribing abortions, doctors, clinics, and women seeking abortions.

Forty-two states prohibit non-medically necessary abortions after a specific point in pregnancy, usually at the time of fetal viability, according to the Guttmacher Institute, a nonprofit research organization.

Seventeen states use their own funds to pay for all or most medically necessary abortions for women enrolled in Medicare.

Nine states restrict coverage of abortion in private insurance plans. Forty-six states allow healthcare providers to refuse to participate in abortions, and forty-three states permit institutions to refuse to perform abortions, according to the Guttmacher Institute.

"These laws disproportionately affect low-income women, the people who have the most difficulty securing their own funds to cover the cost," Greenberger says. "It should be a priority to make sure there is fairness and equity in the healthcare system."

Seventeen states mandate that women get counseling before an abortion is performed, including, depending on the state, information about the purported link between abortion and breast cancer, the ability of a fetus to feel pain, and the long-term mental health consequences for women who undergo abortion procedures. Some states have mandated transvaginal ultrasounds prior to abortions.

Some states, like Arizona, have enacted laws specifically regulating medical abortions, which are achieved through the use of abortion-producing drugs like RU-486.

In 2012 the Arizona legislature approved regulations restricting the use of RU-486. Under the new rule, women are prohibited from taking the drug after the seventh week of pregnancy, in accordance with specifications by the U.S. Food and Drug Administration (FDA). In addition, the new state rule requires that the two doses of the drug be administered at a clinic, and both doses must be within the FDA-approved dosage.

"Women need information before making this life-and-death decision. In any other circumstance dealing with surgery that doesn't involve another living being, you have a waiting period. Here, the consequences are graver."

Mary Spaulding Balch, National Right to Life Committee

The dosage on the label, however, is no longer routinely followed. Doctors have found that lower doses are just as effective when combined with a second drug, which can be taken at home, according to reproductive rights advocates.

The Ninth U.S. Circuit Court of Appeals issued a temporary restraining order staying the rule pending a court battle. But the state's top prosecutor filed a cert petition with the U.S. Supreme Court. As of press time, it was unclear whether the Supreme Court would intervene in the case. Similar legislation passed in North Dakota, Ohio, Oklahoma, and Texas.

Several states, including Arizona, have enacted laws prohibiting abortions after a certain time frame, most often 20 weeks, when, some abortion opponents assert, an unborn child or fetus can feel pain. Reproductive-rights groups argue that scientific evidence doesn't support the theory of fetal pain before at least 26 weeks of development.

The Ninth U.S. Circuit Court of Appeals struck down the Arizona law and, earlier this year, the Supreme Court refused to intervene in the case.

Waiting Periods

More than half the states require waiting periods between the initial meeting at an abortion clinic and the actual process or procedure itself. The majority of these waiting periods specify a 24-hour time frame, specifically found constitutional by the Supreme Court in *Casey*.

But some states, such as South Dakota and Utah, have opted for a waiting period longer than a single day. In 2014 Missouri passed a law requiring a 72-hour waiting period for women seeking abortions. In South Dakota, holidays and weekends aren't included in the mandatory 72-hour waiting period, potentially extending the amount of required delay between

appointment and procedure.

Under Missouri's new law, women seeking abortions must first have an in-person appointment at the state's only abortion facility in St. Louis, and then wait three days before returning for the procedure. Missouri lawmakers have not included exceptions for rape or incest.

In passing the law, the state legislature overrode the governor's veto.

Abortion rights supporters say the extended waiting period will drive up the costs for women seeking abortions by forcing them to go to other states for their procedures, for example. In addition, the extended waiting period could force women to wait even longer to terminate their pregnancies, reproductive rights advocates say.

But abortion opponents say that it is common sense that a woman should have a chance to mull over such an important decision and think about its implications.

"Women need information before making this life-and-death decision," Balch says. "In any other circumstance dealing with surgery that doesn't involve another living being, you have a waiting period. Here, the consequences are graver."

Parental Involvement

The Supreme Court has specifically found constitutional state requirements that parents receive notification of a minor's decision to undergo an abortion. Thirty-eight states require some type of parental involvement, and twenty-one of those states require one or more parent consents to the procedure. Five states require both parental consent and notification.

"The vast majority of people are surprised to learn that, absent a law specifically requiring parental involvement, a girl can get an abortion without her parents knowing," Balch says. "It seems reasonable to most people that the parents be involved in this decision."

In October the American Civil Liberties Union challenged an Alabama law that changes the procedure for teenagers seeking to bypass a state requirement for parental permission to get an abortion with a court order.

Under the new law, judges can appoint a guardian to represent the fetus and can allow parents to take part in a court trial on the question of whether the teenager should be permitted to get an abortion.

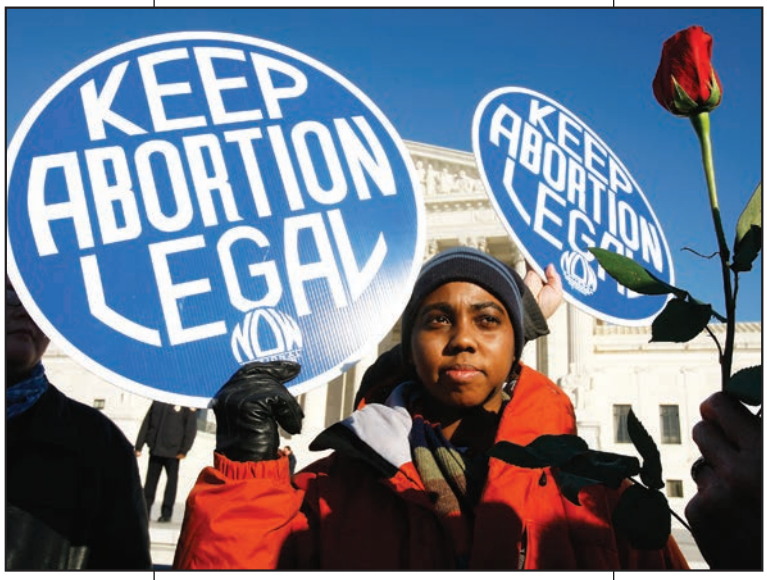
Under the law, the teenager's parents or a court-appointed guardian to the fetus could call witnesses to testify against the teenager and her decision to seek an abortion. The district attorney can also question the teenage girl.

State Representative Mike Jones defended the law as important to ensuring that minors are fully aware of what they are doing when they get abortions.

"This law ensures that if a minor is seeking an abortion without parental consent, they fully understand the ramifications of their decision and prove that they are wholly aware of its impact—it's that simple," Jones said in a statement.

Admitting Privileges

Reproductive rights advocates say the latest anti-abortion trend is an attempt to put abortion clinics out of business. A new round of legislation has hit the states focusing on doctors and clinics.



At present, at least 11 states have passed laws specifically requiring that doctors at abortion clinics have local hospital admitting privileges.

Louisiana, for example, recently passed a law requiring that physicians who perform abortions have admitting privileges at a hospital within 30 miles of the clinics where they work. In August a federal judge in Baton Rouge issued a partial temporary restraining order to block enforcement of the law.

Louisiana's abortion clinics challenged the law. In his order, U.S. District Judge John deGravelles permitted the enactment of the law, but he stayed any punishments or penalties for abortion clinics or doctors.

And in August, a federal judge in Montgomery, Alabama, found that a state law requiring abortion clinic doctors to have admitting privileges at a hospital nearby violated the Constitution.

U.S. District Judge Myron Thompson described as "exceedingly weak" the state's argument that the law would improve the quality of care for women seeking abortions. The state of Alabama is appealing the ruling.

Meanwhile appeals court judges in the Eighth and Fifth Circuits have upheld Missouri and Texas's admitting privileges regulations. But another panel of Fifth Circuit judges blocked Mississippi's admitting privileges law.

Proponents of the laws say that they act as a safety measure to ensure a reasonable standard of care. Staver says that for years abortion clinics were "essentially unregulated" and that there exists the "need to have a certain level of competence for the health and safety of the women going to these clinics."

Opponents of the laws say that admitting privileges are not needed for doctors who perform outpatient procedures. Waters describes the efforts as targeted regulation of abortion providers, or TRAP laws.

"It is important to remember that should anything go wrong, which is rare with abortion procedures, hospitals are not going to turn a patient away just because the doctor doesn't have admitting privileges," Waters says.

Ambulatory Surgical Centers

In addition, 23 states have passed laws regulating clinics that provide abortions as ambulatory surgical centers, requiring them to comply with the particular structural standards, such as specified hallway widths, according to the Guttmacher Institute.

Supporters of the laws say they are holding abortion clinics to building code standards as part of ensuring the health and safety of women who enter the clinics.

Opponents of the laws say that they are regulating providers out of business.

"The vast majority of these clinics are providing services to women that go beyond abortions," Greenberger says. "By shutting down these clinics, these laws are essentially shutting down women's access to other healthcare needs, like access to contraception and screenings for cancer

and basic venereal diseases."

In Virginia, for example, a law requiring abortion clinics to meet new hospital standards has resulted in the closure of at least five of the state's 23 abortion clinics, according to reproductive rights advocates.

In May, Virginia Governor Terry McAuliffe, a Democrat, ordered the state Board of Health to review the regulations affecting abortion clinics.

"I am concerned that the extreme and punitive regulations adopted last year jeopardize the ability of most women's health centers to keep their doors open and place in jeopardy the health and reproductive rights of Virginia women," McAuliffe said.

Supreme Court Potential

In Texas, where *Roe v. Wade* began, the battle over abortion access continues to be waged, and it has already garnered the attention of the Supreme Court.

In 2013 the Texas legislature passed new regulations targeting abortion access and clinic standards. The law required that abortion clinics meet the same building, staffing, and equipment standards as ambulatory centers. The law also required that doctors at abortion clinics have local hospital admitting privileges.

Opponents of the law argue that it creates an undue burden on access to abortion. Texas healthcare clinics providing abortions, unable to meet the new standards, began to close.

Earlier this year, the U.S. Fifth Circuit Court of Appeals upheld as constitutional the part of the law requiring that doctors have local hospital admitting privileges.

Then, over the summer, a federal judge in Austin granted a temporary injunction to block the portion of the law requiring clinics meet the same standards as ambulatory surgical centers. But on October 2, a three-judge panel on the U.S. Fifth Circuit Court of Appeals reversed.

The case landed in the Supreme Court on an emergency petition. Six justices stepped in, staying the appeals court decision that the law be permitted to go into effect while being challenged on its constitutionality. Justices Antonin Scalia, Clarence Thomas, and Samuel Alito said they would have denied the application. In addition, the Supreme Court exempted clinics in McAllen and El Paso from the requirements that doctors have admitting privileges at local hospitals.

The Supreme Court, Rosenbaum says, will likely, eventually, further review either the challenges to the Texas law or other cases addressing whether admitting privileges and clinic licensure statutes constitute an undue burden with the meaning of *Casey*.

In fact, Justice Ruth Bader Ginsburg has already indicated in public her desire to review abortion access laws, such as the one in Texas.

Justice Kennedy is certainly viewed as the swing vote on abortion issues, as he is viewed on other socially charged topics.

"He is very much the swing," Greenberger says. "He has supported *Roe* in the past, but he also has tended to find that restrictions to abortion access are not undue burdens."

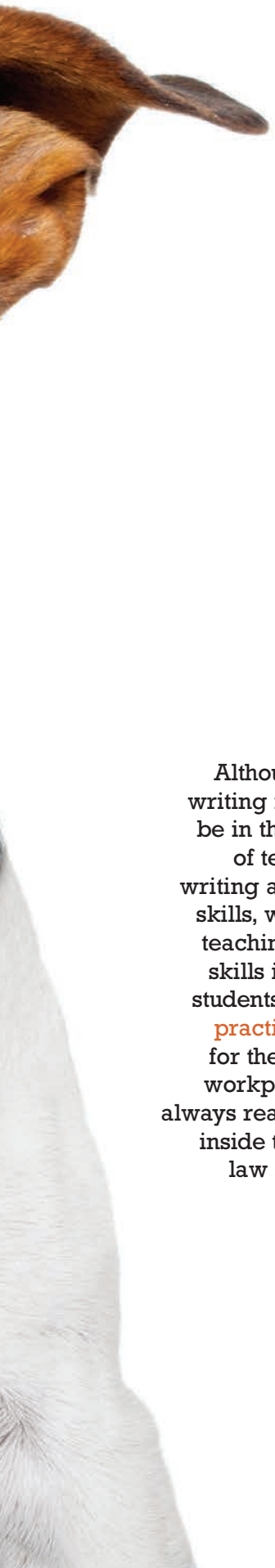
While Rosenbaum agrees that Kennedy, as the key swing vote, is the justice to watch, she adds: "The chief justice himself bears close watching because of his respect for precedent and perhaps his desire not to have a heavily splintered court on matters this profound."

Anna Stolley Persky, a regular contributor to Washington Lawyer, *wrote about the end of campaign finance in the September issue.*

Notes

1 *Roe v. Wade*, 410 U.S. 113 (1973).
2 *Griswold v. Connecticut*, 381 U.S. 479 (1965).
3 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
4 *Stenberg v. Carhart*, 530 U.S. 914 (2000).
5 *Gonzales v. Carhart*, 550 U.S. 124 (2007).
6 *McCullen v. Coakley*, 573 U.S. __.

Javier Brosch/Veer



Are We Listening?

Here's How the Profession Can Advocate for Reforms in Legal Writing Education

By Catherine H. Finn and Claudia Diamond

Although legal writing faculty may be in the business of teaching writing and research skills, whether the teaching of these skills is making students ultimately practice ready for their chosen workplace is not always readily apparent inside the halls of law schools.

With the 2008 economic downturn and continuing changes in the legal hiring marketplace, many law schools have announced new programs and curricular changes under the label of making students "practice ready" and more marketable to potential employers. Although the goal of graduating practice ready law students is laudable, the phrase, practice ready, does not define the specific concrete skills and competencies that one needs to perfect.

In the legal academy, the discussion surrounding the goal of graduating practice ready students has suffered from an echo chamber effect. Legal writing faculty inevitably defines practice ready as having excellent research and writing skills. Members of the faculty who teach traditional "casebook" courses may insist that the Socratic method remains the best way to provide the critical thinking skills necessary for the practice of law. Clinical professors stress hands-on practical experience and client contact as indispensable. Thus, beyond the label itself, little consensus exists in defining practice ready to include a specific set of competencies that must be mastered so that graduates are ready to join firms, the government, or nonprofits; open their own practices; or, as increasingly is becoming the case, work in jobs identified as "J.D. advantaged." Although legal writing faculty may be in the business of teaching writing and research skills, whether the teaching of these skills is making students ultimately practice ready for their chosen workplace is not always readily apparent inside the halls of law schools.

As former practitioners who teach legal writing to first-year law students, we realized that the one voice often missing from the public discussion on how to prepare our students for practice was that of the actual lawyers who hire and work with our students. Was there something extra that law schools, and particularly legal writing programs, should be doing to ensure that students arriving at their legal

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

employers' doorsteps were indeed ready to write as practicing lawyers? Was the traditional first-year writing curriculum, which typically focuses on drafting client memos and court documents, still sufficient? What message, if any, did employers want us to hear in connection with training law students to be practice ready, particularly in the arena of legal research and writing?

To help us answer these questions, and with the goal of making us better teachers, we decided to conduct an informal Web-based survey of lawyers in the Washington, D.C., and Baltimore region where we work. Although we recognized the limitations of a Web-based survey to permit in-depth research, we determined that the advantages of flexibility, convenience, and ease of data entry and analysis would give us a chance quickly to take the pulse of the legal marketplace and identify whether there was consensus concerning specific writing skills that practice ready students should have mastered upon graduation. We were also interested in identifying whether lawyers saw shortcomings in the students' ability to write upon arrival in the marketplace, and, if so, what were the specific deficiencies. We used Survey Monkey, a free Web-based survey tool, which allowed us to easily create a survey, reach a diverse sample, and immediately analyze the data. Designed to take fewer than 10 minutes to complete, the survey had 11 multiple choice questions, and responders were permitted to include text comments in connection with any of their answers. Many responders did provide comments.

To distribute the survey broadly, we e-mailed practitioners and judges we knew in the region, asking them to complete our anonymous survey and included a link. In addition, our e-mail asked the recipients to forward the survey to their networks. We received nearly 300 responses in fewer than two weeks. We then closed the survey and began to analyze the results (not all questions in the survey were answered by each survey-taker).

Although our initial goal in designing and executing the survey was to improve our own teaching, when analyzing the responses, we soon realized that our results could inform the larger debate on how to improve on the value of legal education in light of the seismic shifts in the legal employment market. Through this exercise, we set out to hear the voice of legal practitioners in this debate with a view to improving what we do on a daily basis. However, after reviewing the responses, including the text comments, we concluded not only that practitioners' voices should be heard, but also that they have an important role to play in advocating for or against particular reforms and curricular decisions happening in law schools.

Who Responded?

Our survey first asked the respondents to identify their professional role: An attorney in private practice (divided into subcategories for firm size or solo practice), a government attorney, a judge, or a non-practicing attorney. The majority of survey-takers indicated that they were attorneys in private practice with firms (47.6 percent), with attorneys affiliated with small firms (2–19 attorneys) constituting the bulk of respondents in this category (23.5 percent). Attorneys identifying themselves as employed with a medium-sized firm (20–75 attorneys) or a large firm (76+) had almost identical response rates of 12.7 percent and 11.2 percent, respectively. Perhaps because of our focus on the Washington metropolitan area, 28.8 percent of respondents indicated that they were government attorneys, representing the largest specifically defined category. As expected, judges accounted for the smallest number of respondents (6.5 percent). Our sample of 300 practitioners is representative of the diversity in traditional law practice. (We did not survey people working in J.D.-advantaged positions.)

We next asked survey-takers whether they had any supervisory responsibility. We designed this question to see whether those in the most likely position to actually do the hiring of our graduates and to assess their skills responded. Nearly half of those polled responded that they supervised other attorneys, with the bulk of these respondents supervising fewer than five. Considering that supervising attorneys are at the front line of managing and mentoring young attorneys, their relatively high response rate suggested to us that they had particular concerns they wanted to raise.

We also asked survey participants whether they continue to rely on the traditional writing sample to assess a prospective hire's writing skills. Eighty percent confirmed that they continue to prefer this method. Interestingly, a few responders indicated that writing samples were not considered because training would be "on the job." At the other end of the spectrum, some responders indicated that they have candidates complete a writing test.

What We Learned

As for the substantive responses we received, the results were both reassuring and surprising. The results confirmed what we in the legal writing academy have known for years: First-year writing instruction cannot be expected to sufficiently accomplish all the writing instruction in law school when gaps in basic writing skills must first be addressed. Our results, however, also had some surprises. For one, practitioners are not asking us to abandon our traditional focus in the first-year writing curriculum on having students draft comprehensive and fact-intensive memos and court documents. Regardless of where our students work after graduation, these assignments, which cultivate analytical, organizational, and research skills, have tremendous merit.

In addition, and less surprising, many respondents commented that new graduates often were deficient in the very skills the first-year legal writing curriculum is designed to teach. Through their responses to our brief survey, the message came through loud and clear: Law schools need to step up their efforts to develop students' critical thinking and writing skills. This message was not unexpected, considering the answers to the question, "how much do you write in your job?" Almost 70 percent of the

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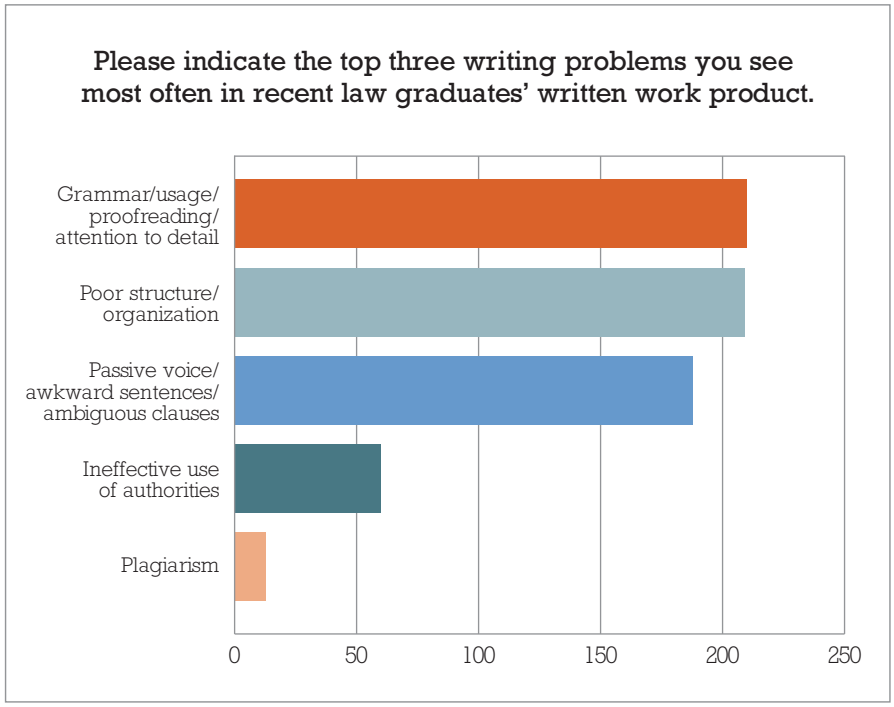
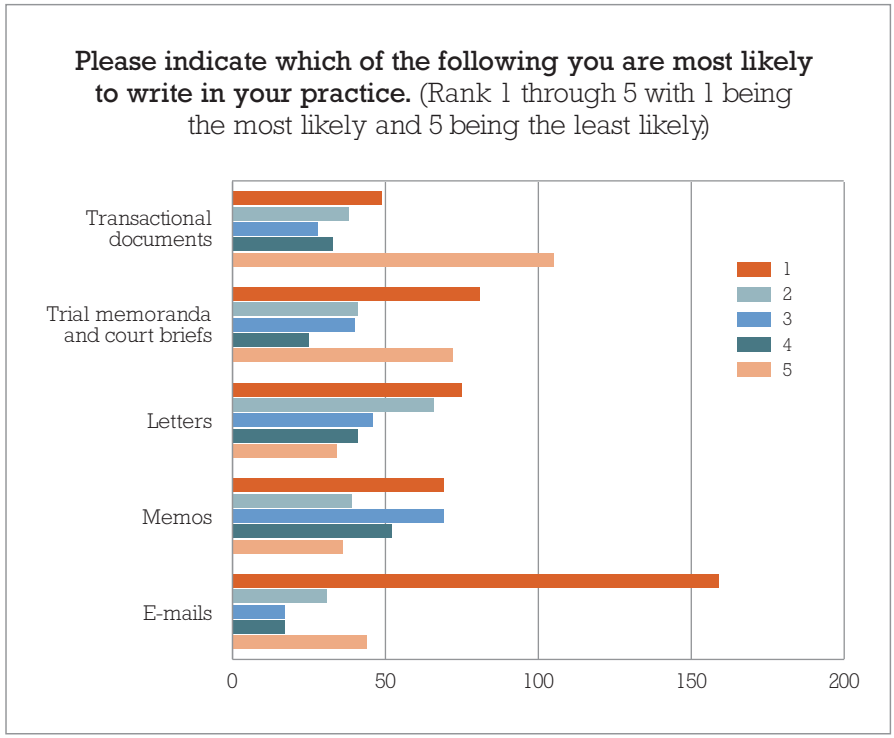
responders said that they spent more than 50 percent of their time writing, many of whom reported that writing consumed more than 75 percent of their workday. Of course, this confirms what we lawyers already know, but what law students and aspiring lawyers are sometimes surprised to learn: Lawyers write. A lot.

Asked to rank five legal writing concerns that they see most often in recent law graduates' written work, practitioners spoke with a unified voice. The top three problems—grammar/usage, poor structure/organization, and passive voice/awkward sentence structure—were almost identically ranked as the top problems. To our surprise, however, the remaining two areas listed on the survey—use of legal authorities and plagiarism—were ranked *far behind* basic writing skills. This large difference between the top three problems and the remaining two underscores that practitioners more than ever are requesting that we focus on the basics before focusing on writing issues that are unique to legal practitioners—legal research and attribution. Indeed, a frequent refrain in the comment section to this question was that students are not graduating law school with satisfactory grammar and syntax skills, and that these deficits undermined the credibility of their legal analysis. As one responder succinctly commented, these are "often very big problems."

We also surveyed practitioners regarding what they write in their own practices. As expected, e-mails were written more than any other documents. (E-mails also ranked fairly high as the product written the least in the survey-takers' law practices, highlighting the diverse nature of the writing that lawyers actually do on a daily basis.) Letters, memos, and court documents all tracked closely as the second most frequently written work product. Transactional documents ranked last in terms of what our survey-takers write (which may be a result of the survey-takers being litigators and not transactional lawyers). With the deficits identified and the diversity of the writing actually taking place in law practice, the results, we think, support advocating for having students writing more—a lot more—and writing a wider variety of products in the first year (or even advocating for a writing-across-the-curriculum approach, incorporating, for example, the drafting of e-mails, letters, and transactional and court documents as assignments in doctrinal classes).





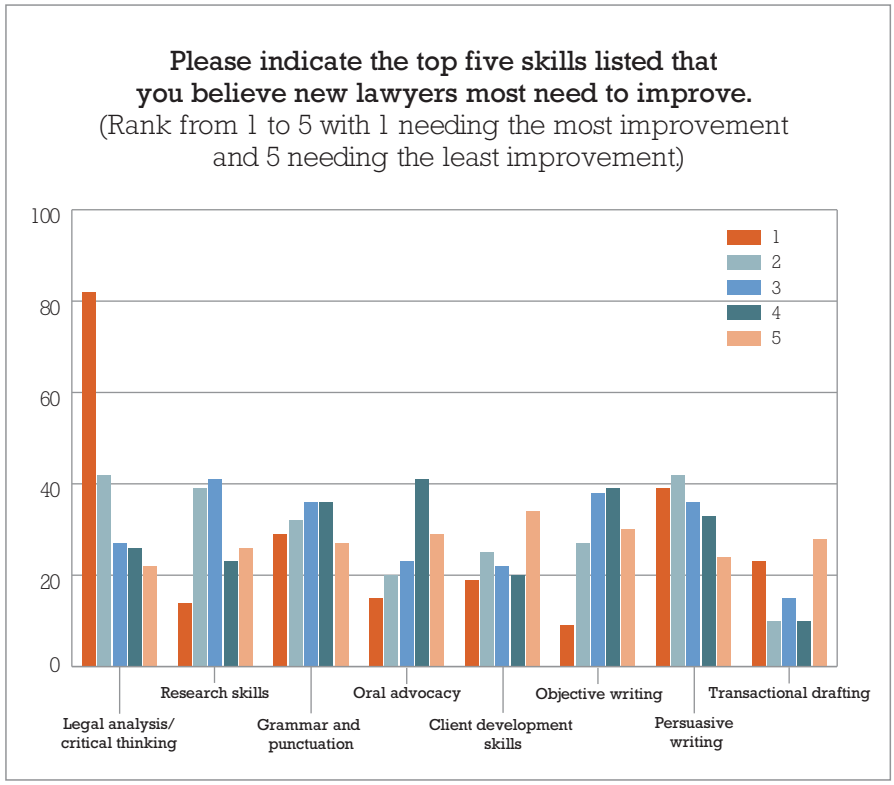
The survey results, however, also reminded us not to abandon our traditional curriculum, which requires students to draft comprehensive client and trial memoranda and court briefs as a way to teach the skills that are unique to law school pedagogy (learning how to "think like a lawyer"). This is true even in positions that may not require the lawyer ever to write a memo,

let alone a court document. Many practitioners commented that drafting the traditional memo and court documents, such as a trial memo or appellate brief, provides a great opportunity for students to develop their analytical and organizational writing skills, regardless of whether they will be drafting such documents in their future careers. (Although graduates increasingly work in J.D.-advantaged positions, which do not require bar passage or an active law license, the advantages conferred by the J.D. are the analytical and critical thinking skills that are the essential foundation of a law school education.)

In addition, and somewhat surprising to us, our survey confirmed that the traditional memo format (issue presented, short answer, facts, and analysis) remains widely used to communicate answers to the questions raised by clients' legal issues. Sixty-two percent of respondents answered unequivocally "yes" to the question whether they and their colleagues still used the traditional memo format. Eighteen percent of respondents said that the memo format has changed to one that is less formal and offered explanations from "we've shortened what is required" to "it's less formal because we e-mail clients and they want the answers in the first paragraph." A few responders indicated that new hires (or law clerks or interns) are required to use a traditional memo format initially in practice as a means to further hone their analytical skills.

Finally, the question that yielded the most eye-opening response asked survey-takers to list the areas in which they believe recent graduates are deficient. Of the skills ranked by our responders, six are traditionally taught in first-year legal writing classes: Critical thinking/analysis, legal research, oral advocacy, grammar/punctuation, objective writing, and persuasive writing. Two additional skills that were ranked—client development and transactional drafting—are not traditionally taught in the first year. Overwhelmingly, the number one skill that our respondents believe recent graduates lacked was critical thinking and analysis.

This is both good news and bad news. The good news is that it confirms our view that the responsibility of first-year legal writing instruction is much more than just teaching basic writing skills. The bad news is that employers believe that our students are still graduating without these essential skills.



We concluded the survey with a final question asking responders to provide specific advice to law professors to improve the teaching of legal writing to law students. A frequent refrain was that young lawyers did not know how to review what they wrote, did not target their writing for the particular audience reading it, and did not write concisely and clearly. Practitioners told us that law professors must hold students accountable for a litany of concerns including "poor grammar and typos, use of the passive voice when inappropriate, legalese, poor organization, and lack of critical analysis." Teach students how to "avoid fluff [and to] get to the point," wrote one responder. To do this, practitioners acknowledged that law students cannot be taught appropriate writing and critical skills without an opportunity to write, receive extensive feedback, and revise. "Practice, practice, practice," insisted one responder. Another encouraged writing faculty to "[f]ear not the red pen. Give specific edits/critiques and review several drafts. At the end of the assignment compare their first and final drafts to demonstrate improvement.

"Emphasize that many drafts, reviews, and edits are necessary to properly prepare a document and that a fear of this work will lessen the quality of their product."

The advice our respondents gave us echoed the responses to the multiple choice questions: Continue to stress foundational writing and analytical skills.

Ammunition for Advocacy

From the responses we received, we conclude that not only are the core skills traditionally taught in the first-year writing program relevant to the goal of creating practice ready students, but that an even greater focus on these core skills is necessary. The critical thinking and analytical skills required for writing a brief are the same as those required for drafting a will or a contract or advising the chief executive officer of a corporation. Before law schools expand programming or adopt new curricula to make students practice ready, however, they must also ensure that students can master the fundamentals of good writing that are applicable to whatever law practice that they wish to pursue. For legal writing faculty, the challenge is to accomplish this without adding more into what is already a crammed first-year writing cur-

riculum while also recognizing that recent graduates, as confirmed by our survey results, are showing up in greater numbers for their first legal jobs with deficits in basic writing skills. Accordingly, for the legal practitioners reading this article and nodding their heads in agreement about the deficits identified by the responders, there is a role to play. We urge you to inform yourselves about reforms in legal education and advocate for (or against) changes in curricula or programming that you view as beneficial (or detrimental) in ensuring that your potential hires are better prepared for entering the marketplace.

Fortunately, recognizing that law schools must do more to make their students ready to practice law in the 21st century, many law schools are already experimenting, sometimes very rapidly, with changes in curricula and programming. Obviously, the diversity and extent of these reforms are affected by budgetary constraints, degree of consensus among faculty, and direction from the law school administration. The changes should not be done in a vacuum, however, without employer input and endorsement.

To address students' deficits in writing and critical thinking, schools are adding programming or curricula outside the traditional classroom teaching model. For example, law schools have created writing centers, staffed by students or faculty. As the law student population has grown to include non-native speakers, schools are developing additional instructional resources for these students. Academic support programs, although traditionally focusing on study and exam skills, are realizing that such skills can no longer be addressed without working on overall writing ability. Accordingly, many of these programs are now providing additional opportunities for critical feedback and revision. Schools are experimenting with the "flipped classroom" (e.g., the student hears a lecture online about legal citation and does problems in class with the instructor to review the lesson learned) and increasing the availability of online teaching resources such as grammar diagnostic and writing tutorials. Even before students matriculate to law school, a few schools are providing summer "boot camp" experiences, which are designed not only to introduce students to the basics of study and exam skills, but also to address new students' grammar and syntax deficits.

Overwhelmingly, the number one skill that our respondents believe recent graduates lacked was critical thinking and analysis.

The same changing economic conditions that have affected the legal hiring market are affecting the law schools themselves, in the form of decreased enrollment and tighter restrictions on budgets and other resources. At the same time that the marketplace is urging innovative reforms, some law schools are being forced to cut back. Above all, our survey confirmed that the academy and the profession both share the goal of improving students' mastery of the foundations of legal analysis. Achieving this shared goal requires shared action. The law schools need to hear from the practitioners. Are these reforms working, and if not, why not?

Just as the law schools inherit the strengths and weaknesses of their students' earlier educational experiences, so, too, do the practitioners inherit the strengths and weaknesses of their new lawyers' law school education. Practitioners should not only voice their concerns but should be active in the process in shaping what the new law school landscape will be in coming years. This can be as simple as touching base with one's alma mater and keeping abreast of media reports of changes in law schools. Those inclined to be more involved can actively seek out opportunities through participation in focus groups, interacting directly with faculty, teaching at law schools, and giving feedback to the law schools' deans. These efforts greatly benefit law students, the law schools, and legal employers, and ensure that not only are lawyers being listened to but that their voice matters in creating the 21st century law school experience.

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Q&A

Interview by
David O'Boyle

Q&A With Eric Yaffe: Chair of the Board on Professional Responsibility

The Board on Professional Responsibility (the board) administers the disciplinary system of the District of Columbia Court of Appeals. Established by the Court of Appeals pursuant to Rule XI of the D.C. Court of Appeals Rules Governing the D.C. Bar, the Board on Professional Responsibility adjudicates cases of attorney misconduct and disability. The nine-member board is comprised of seven attorneys and two members of the public; all are unpaid volunteers nominated by the D.C. Bar Board of Governors and appointed by the D.C. Court of Appeals. Board members are eligible to serve two three-year terms. The board appoints members of the hearing committees, which serve as the trial level of the disciplinary system. The board, together with the Office of Bar Counsel and the Office of the Executive Attorney, make up the lawyer disciplinary system in the District of Columbia, which is funded through D.C. Bar member dues.

Washington Lawyer recently sat down with Eric L. Yaffe, chair of the board and managing officer of the Washington, D.C., office of Gray Plant Mooty, to talk about the Board on Professional Responsibility and its work within the disciplinary system.

What is the Board on Professional Responsibility's central mission?

The board's central mission is to protect the public, the courts, and the legal profession by ensuring that the rules that govern all lawyers are abided by in the District of Columbia. We are trying to make sure that there is a fair process, that attorneys and complainants have an opportunity to be heard, and that a fair decision is ultimately rendered.

How would you describe the Board on Professional Responsibility's role within the larger disciplinary system?

The Board on Professional Responsibility's role is really twofold: There is both an administrative role and there is what I would call more of a legal role.

As to the administrative role, the board is responsible for running the disciplinary system as an arm of the Court of Appeals. So we will review and prepare a budget, which is ultimately approved by the Bar. We are involved in setting rules that govern the disciplinary system and the disciplinary process.

We are involved in the recruitment of hearing committee and board members and the training of hearing committee members as well. We manage the board and the Executive Attorney's Office as well as the Office of Bar Counsel and oversee those two offices, including ensuring that they have the resources that they need.

Of course, our role also includes adjudicating cases, including the review of recommendations from the hearing committees, hearing oral arguments, and drafting reports and recommendations for review by the Court of Appeals. That is our legal role.

How would you describe the Board on Professional Responsibility's relationship with the Court of Appeals?

The Board on Professional Responsibility has an excellent relationship with the Court of Appeals. The board looks to the court, which provides the board guidance and support through its case law, and interacts with the court on a regular basis on matters of importance to the disciplinary system.

The court also supports and takes part in the board's training program for hearing committee members. The court provides the board with crucial guidance and support in both our administrative and adjudicative functions.

When did you begin to get involved with the Board on Professional Responsibility?

I started with the Board on Professional Responsibility in 2004. I had always been interested in public service. Early in my career, when I was an associate at Goulston & Storrs in Boston, I was chair of the Young Lawyers Division of the Boston Bar Association, and we were involved in a number of public interest projects.

When I moved to the District of Columbia in the early '90s, I was a federal prosecutor with the U.S. Department of Justice. When I left the government in 2000, in addition to doing pro bono work at my firm, I was looking for something else to get involved with. I happened to notice an advertisement for hearing committee members for the disciplinary system, and I applied to become a hearing committee member. That's where I started.

So you worked your way up from the hearing committees?

Yes. I started as a lawyer alternate hearing committee member. Then I became a member of a hearing committee and then chair

Photographs by Patrice Gilbert

Q&A

If attorneys have been subject to discipline in another jurisdiction, they actually have an obligation to let the Office of Bar Counsel in the District of Columbia know about that.

of a hearing committee. I was a member of hearing committees for five or six years, and then I was appointed to the Board on Professional Responsibility. I have two years left as a board member—this year and next.

What interested you in the disciplinary system?

I was interested in public service, generally. I thought the disciplinary system would be a good way of giving back to the D.C. community.

It seemed like a natural transition for me to go from being involved with the Department of Justice to getting involved with the disciplinary system. As a prosecutor, you are prosecuting cases that involve wrongdoing and are enforcing criminal laws, and the disciplinary system, in some respects, is a prosecutorial-type system where there is the enforcement of rules and regulations governing attorneys.

How does the disciplinary system work?

There are really four levels in the disciplinary system. It starts with the Office of Bar Counsel, which is the investigative and prosecutorial arm of the disciplinary system.

So when a matter first comes in, the Office of Bar Counsel conducts an investigation and makes a determination as to whether the matter should be dismissed or should proceed. In some instances, there might be an early resolution to matters that aren't dismissed by way of an informal admonition or diversion.

The Office of Bar Counsel makes that initial determination, which is reviewed by a hearing committee member who will take a look at the file to make sure that Bar Counsel's determination is reasonable and consistent with Rule XI. If Bar Counsel seeks diversion, a member of the Board on Professional Responsibility is required to review and approve the diversion agreement.

If Bar Counsel decides to go forward with what we call a specification of charges, then the matter goes to a hearing committee for review. The hearing committee will have a limited hearing if it is a negotiated discipline matter. But if the respondent contests the charges, then the hearing committee will hear the case and a trial will take place.

The hearing committee is comprised of two lawyer members and one public member, all of whom are volunteers. There is an examination of witnesses by Bar Counsel and the respondent or the respondent's lawyer, exhibits that are submitted into evidence, and then the hearing committee will make an initial determination and consider the appropriate sanction. The hearing committee's findings of fact, conclusions of law, and any sanction that it recommends, are reduced to writing and reported up to the Board on Professional Responsibility.

If the hearing committee's decision is contested by either party, that is, if either party appeals the hearing committee's findings, then the Board on Professional Responsibility will hear oral arguments on the matter. The Board on Professional Responsibility will review the hearing committee's findings, hear oral arguments, and make its report and recommendations to the D.C. Court of Appeals, which is the ultimate decision-maker in the process.

The D.C. Court of Appeals will either agree or disagree with the board, or remand the case for further consideration. The court may disagree as to the findings of fact, the board's findings of violations, and/or the sanction that we have recommended.

Is there often agreement between the Board on Professional Responsibility and the court?

The standards that govern the court's review of the Board on Professional Responsibility's recommendations are found in Rule XI. Generally, the court defers to the hearing committee's findings of fact, considers the board's conclusions of law *de novo*, and defers to the board's recommended sanction if it is consistent with other sanctions imposed for comparable misconduct and not otherwise unwarranted. Thus, the court will often agree with the board, but certainly will exercise its independent judgment if it disagrees with our findings and recommendations.

What forms of discipline can be taken against attorneys who have broken the rules?

Initially, in many cases, there will be a determination made at an early stage that the matter should simply be dismissed, for a variety of reasons. There are also instances where the Office of Bar Counsel will determine that there should be diversion—that certain conditions should be imposed on the attorney if the violation is minor and the misconduct otherwise qualifies for diversion under Rule XI. If the diversion conditions are met, then the attorney will have no record of misconduct. In that case, the Board on Professional Responsibility will look at the diversion agreement and make sure that we agree that that is an appropriate determination.

Bar Counsel may also write a letter of informal admonition, which is the lowest level of sanction and is public. The informal admonition is published in *Washington Lawyer* and on the D.C. Bar's Web site, and only used for generally minor violations. There can also be a board reprimand, which is a slightly higher level of discipline than an informal admonition.

There can also be a public censure, which is imposed by the D.C. Court of Appeals. These first few sanctions are all for relatively minor violations of the rules. Again, these are all forms of public discipline—the informal admonition, board reprimand, and the public censure—but the individual can still practice law and has not been suspended.

In some cases, an individual receives a suspension from the practice of law. That can be for a short period of time, like 30 days, or it can be for up to three years. Suspensions can be imposed with conditions, including placement on probation with practice or other forms of monitoring. Suspensions also can be imposed with or without what we call a fitness requirement. That is, where there is no fitness requirement, the attorney can go back to practicing law upon the expiration of the period of suspension. Where the attorney is required to prove fitness to practice as a condition of reinstatement,

the attorney must prove by clear and convincing evidence that the attorney is fully rehabilitated and that the attorney's reinstatement is not inconsistent with the protection of the courts, the profession, and the public. Disbarment, which is the equivalent of a five-year suspension with a fitness requirement, is imposed for the most serious instances of misconduct.

What kind of evidence do individuals need to provide to prove fitness?

They need to establish by clear and convincing evidence that they have the moral qualifications to be members of the Bar, that they have the character to be members of the Bar, that they are currently competent to be members of the Bar and have the requisite skills, and that they appreciate the seriousness of their misconduct. There are specific factors that the court will look at, including the ones that I just mentioned, in determining whether someone is in fact fit to be reinstated and to practice law again in the District of Columbia.

Where do proceedings originate?

When we talk about an original case, we are really talking about something that originates with the Office of Bar Counsel. But the Office of Bar Counsel can receive a complaint from any source. It could be from a third party. It could be from a judge. It could be from the attorney's client who is complaining about the work that the lawyer did. It could also be through a newspaper article or something that the Office of Bar Counsel otherwise becomes aware of.

Of course, in other cases, the matter doesn't originate with Bar Counsel. It could be what we call a reciprocal discipline matter, which comes from another jurisdiction. If D.C. Bar members have been subject to discipline in another jurisdiction, they actually have an obligation to let the Office of Bar Counsel in the District of Columbia know about that. Reciprocal discipline is imposed only where an attorney has been disbarred, suspended, or placed on probation. If the discipline from the other jurisdiction does not include suspension or probation, the court orders publication of the fact of that discipline in this jurisdiction. Sometimes attorneys will not let D.C. Bar Counsel know that they have been disciplined in other jurisdictions and we find out through other means, either by a court in another jurisdiction, perhaps a bar in another jurisdiction, or through an article or some other

means. Those cases are typically opened as reciprocal discipline matters, as opposed to the ordinary process that begins with an investigation by Bar Counsel.

In addition, formal disciplinary proceedings are opened when an attorney is found guilty of a crime or pleads guilty or *nolo contendere* to a criminal charge. Attorneys must report guilty findings or pleas to the Board on Professional Responsibility and the Court of Appeals. If the crime is found to involve moral turpitude, disbarment is mandatory.

What is the ratio of reciprocal proceedings to proceedings originating in the District of Columbia?

I think that perhaps 5 percent to 10 percent of the matters that we see in the system are reciprocal discipline proceedings, and the other 90 percent to 95 percent are original matters. But that is still very high relative to what you see in other jurisdictions. We tend to get a lot more reciprocal cases than other jurisdictions do.

Why does the District of Columbia see a relatively higher number of reciprocal proceedings?

There are a lot of practitioners in the District of Columbia who have D.C. Bar licenses but primarily practice in other jurisdictions. I think that is largely because there are so many people who temporarily, or for particular matters, join the D.C. Bar, especially if they do a lot of work with the government.

I do not think that is the case as much in other jurisdictions. We tend to have a lot more practitioners who are also barred in other jurisdictions.

The Disciplinary System Study Committee studied the issue of reciprocal discipline, among other issues. What were the recommendations from that committee?

The committee's recommendations ultimately resulted in the 2008 amendments to Rule XI, which included changes to the reciprocal discipline process. Before then, the Board on Professional Responsibility would weigh in on each reciprocal discipline case. As a result of that, it clearly slowed down reciprocal discipline matters and it took longer to resolve those cases.

Because of the nature of reciprocal discipline cases—since someone has already gone through the process in another jurisdiction, presumably the case has been brought by Bar Counsel or investigators in a different jurisdiction, and there has been appropriate due process throughout—the notion was that perhaps we could have a more expedited process at that point since the case has already been heard elsewhere.

Today, the Board on Professional Responsibility only gets involved in reciprocal matters if the court wants our input. It's not automatic. As a result, reciprocal discipline cases are able to move through the system more quickly.

How long, beginning to end, do the proceedings usually last?

I would say there is really no typical length to the proceedings. There are so many factors that determine whether a proceeding takes a long or a short period of time. The length of proceedings typically depends on the complexity of a case and of the legal issues presented, including the number of violations and the number of complainants—perhaps it is only a single person who is complaining, in other instances, we could have five or 10 complainants in a case.

There are many checks and balances in the system, and there is a lot of due process, and with that the possibility of delay. We want to make sure that every party involved is treated fairly, and the important thing is that we get it right. Certainly, we always try to move the cases along as quickly as possible, but sometimes they can take more time than we would like because of the nature of the process.

Can attorneys still practice during an ongoing investigation?

In most cases, an attorney can continue to practice while the investigation is ongoing, but there are exceptions where removing the attorney from practice is necessary to protect the public. If an attorney has committed what is considered a serious crime, then the Court of Appeals will issue an order of temporary suspension pending the conclusion of the proceeding, because the court wants to ensure that the

Q&A

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public is adequately protected. If there is a reciprocal matter and the person has been suspended or disbarred, then the court will automatically suspend or disbar that person pending the determination as to whether there should be identical reciprocal discipline; that is, the same discipline that the other jurisdiction imposed.

The court will also impose a temporary suspension where the attorney appears to pose a substantial threat of serious harm to the public or has failed to respond to an order of the Board on Professional Responsibility in a matter where Bar Counsel's investigation involves allegations of serious misconduct.

So there are some instances where an attorney will be temporarily suspended pending the outcome of the case, but that attorney can petition for reinstatement if there are reasons for the suspension to be lifted.

What must an attorney do to apply for reinstatement?

An attorney must file a petition for reinstatement, and if Bar Counsel does not contest the reinstatement, but actually believes that the person is fit to go back to practice, then Bar Counsel will draft its report to the court and make that recommendation, providing support for why Bar Counsel believes reinstatement is appropriate. The court will then make a decision as to whether the person should be reinstated.

If it is a contested matter, then it will go to a hearing committee to determine whether there is clear and convincing evidence proving that the person is fit and qualified to practice law in the District of Columbia. The hearing committee's report will go directly to the D.C. Court of Appeals. The court, in some instances, will send the matter to the Board on Professional Responsibility for our recommendation, but if it does not, it will simply decide whether the individual should be reinstated.

Tell me a little about the Mandatory Course on the D.C. Rules of Professional Conduct and District of Columbia Practice. What is its role in the disciplinary system?

The Mandatory Course itself is not a part of the disciplinary system. It's a part of the education of all new attorneys in the District of Columbia, but we see it as important because the ethical component of the course is obviously a major component of the course as a whole.

Gene Shipp, who is Bar Counsel, provides a real world perspective through actual discipline cases on violations of the ethics rules and ethical pitfalls that land lawyers in the disciplinary process. His presentation actually happens to be a very popular part of the course, and I think that it is important to ensure that newer attorneys are fully familiar with the rules—not only the rules themselves and the specifics of the rules, but the nuances and things that might not be readily apparent. That's where Gene Shipp comes in; he does a great job in teaching that segment of the course.

How do people get involved with the Board on Professional Responsibility?

The best way to get involved is to apply for appointment to serve as a member of a hearing committee. The board looks for potential candidates from wherever we can find good people. We are looking for people who are thoughtful, who are good writers, who are analytical, and who have the right judicial temperament for these positions. We also seek candidates from a variety of legal practices and who reflect the broad diversity of our bar and the public.

We welcome recommendations from any source. We advertise in *Washington Lawyer*, on the Bar's Web site, and also find attorneys through word of mouth. Of course, we want people who are really passionate and interested in the disciplinary system and who are interested in serving the community in the way that we do.

At the board level, recommendations are generally made from among the pool of members of the hearing committees. We believe that experience as a hearing committee member, which allows a candidate to master our disciplinary law and procedure, is a key qualification for membership on the board. It is the people who have shown a passion for the work and an interest in it, and who have served well at the hearing committee level, who are elevated to the board. The D.C. Bar Board of Governors makes recommendations to the Court of Appeals, and the court appoints members to be on the Board on Professional Responsibility.

What is the time and work commitment for a Board on Professional Responsibility member?

Substantial. We meet every other week and those meetings tend to be two to three hours or so in length. We hear a number of oral arguments throughout the year. The members of the board each take on a number of reports to draft. We deliberate over each matter and have discussions as to what the appropriate result should be.

In some instances, if someone disagrees with the board's determination or its reasoning, they will draft a dissenting or a concurring statement. The reports can take quite a bit of time to draft and research, so it is a fairly substantial commitment, and that is why we want people who are really interested and passionate about doing this work.

Is training provided?

Training is provided to all hearing committee members. There is a substantial training session, and materials are provided so that each hearing committee member has a sense of what their role is in the process, what the rules are, and how other cases have been decided that might be similar to the ones they will be hearing. There is also training of all hearing committee members that the court is involved with.

Also, the board's Executive Attorney's Office is a tremendous resource for everybody involved in the system. There is Executive Attorney Betty Branda, Deputy Executive Attorney Jim Phalen, as well as other attorneys who really do a very good job in providing support to board members. They are there as a resource and are always quite helpful.

What is the significance of the public members in the disciplinary system?

The system's mission, in part, is to pro-

tect the public and to protect the citizens of the District of Columbia. It seems fitting that as part of that process, at least some members of the public are involved. In addition, though, these people bring a fresh perspective as nonlawyers to the process, and they tend to bring with them a lot of common sense.

Sometimes lawyers get mired in the particulars of a case and the nuances of the law, and perhaps we tend to, on occasion, miss the forest for the trees. That is where public members can be extraordinarily helpful in seeing through that and giving their gut and their common-sense reactions to the cases. We all find, as lawyers, that public members are quite helpful to the process.

Are public member volunteers difficult to find? Is it hard to advertise a need for them?

Overall we are able to find good people who are really interested in the work we do. We have a lot of interesting people in this area with a variety of backgrounds. A lot of them are excited about getting involved in the legal process because it is something different that they have not experienced before. Most, when they get involved, find it to be a very rewarding and enriching experience.

So overall, we tend to be able to find some very good people with interesting backgrounds. They come from medicine and business and government. They are writers; they are economists. They really have had rich lives and that is another reason why they bring to the process a lot of good insights that we would not otherwise have.

What is the most rewarding part of being involved with the Board on Professional Responsibility?

The feeling that I am helping to benefit the community and individuals whose voices might not otherwise be heard if we did not have this process. There are people who get involved in this process who find themselves in problematic situations with their lawyers who really cannot afford to take the matter to court or to arbitration. This is a system that permits them to have an opportunity to be heard, and I believe we fairly and evenhandedly try to resolve all matters in a thoughtful and deliberate manner, and that is a good feeling.

Reach staff writer David O'Boyle at doboyle@dcbar.org.

Confusion Over D.C. Bike Laws Leads Many to Ask:

Who's at Fault?

By David O'Boyle

Between 2000 and 2012, the number of commuters choosing to ride a bicycle to and from work increased by more than 250 percent, and among cities in the United States, the District of Columbia ranks third in the percentage of the population who bike to work. The number of cyclists continues to grow, and as more people pedal onto the roadways in the District each year, the number of accidents and collisions involving bicyclists has grown steadily.

Under District regulations bicycles are treated as vehicles, and cyclists must follow the same laws as cars, trucks, and motorcycles. The rapid growth in the number of bicyclists on the road, as well as the expansion of bicycle infrastructure, has created a complex, confusing, and sometimes contradictory regulatory environment to navigate for cyclists, drivers, law enforcement officials, insurance claims adjusters, and lawyers.

Recently, the D.C. Bar Sections Office hosted the panel discussion "Examining D.C. Bike Laws: Who's at Fault?" during which participants spoke about bike laws in the District and legal considerations for bicyclists and the lawyers representing them after an accident. Peter T. Anderson, an associate at Ashcraft & Gerel, LLP, served as moderator.

Unfamiliar Territory

According to Cory Bilton, a personal injury attorney who has represented bicyclists after accidents, cases involving bikes and collisions contain unique factors that are often unfamiliar to many people when determining liability. Part of this is due to the numerous surfaces on which cyclists can ride, the exposed nature of riding a bicycle, the relative size of a bicyclist compared to other vehicles on a roadway, and the uncertainty about the duties of bicyclists and motorists on the roadway.

"There's less clarity on what the duties of bicyclists are," Bilton says. "Some of this is shared by bicyclists, it's shared by a lot of motorists, but it's also shared by people within the legal system, whether it's lawyers, judges, witnesses, or insurers."

Bicycle accidents can occur in a bike lane, in the roadway, on the sidewalk, or on a trail, and the way in which bicyclists interact with other vehicles is much different than the way cars interact with other cars. For example, it is rare for two cars to be in the same lane, side-by-side, but bicyclists frequently ride abreast with cars in the same lane. This leads to the types of accidents that are unfamiliar to many people such as a "right hook" collision in which a car to the left of a cyclist turns right either into the cyclist or directly in front of him or her, causing the cyclist to run into the car.

The unfamiliar nature of bicycle collisions and accidents can hinder a cyclist's chances of recovering damages. Motorists, witnesses, law enforcement officials, and jurors may not understand the various regulations governing bicycles or the circumstances that can lead to a cyclist's breaking of a regulation.

These factors must be considered when a lawyer determines whether to represent a bicyclist following an accident, and lawyers must be thorough when collecting information about an accident. If a bicyclist was not riding in accordance with the law, or was riding in a dangerous manner leading up to an accident, his or her chance of winning a case can be minimal.

"One of the big lessons that I've learned in representing bicyclists is that . . . the facts and details matter a lot more, particularly the facts as they relate to how the incident occurred," Bilton says. "Everything from what the person was wearing to what the bike looks like to a step-by-step analysis" is more important than in a typical motor vehicle collision case.

Confusion Over the Law

Navigating the roadways can be a challenging endeavor for bicyclists. There is often confusion over where a cyclist may legally enter and exit bike lanes, and cars and other objects frequently block portions of the bike lanes, forcing bicyclists into the road. Many bicyclists in the District are unaware that they are prohibited from riding on the sidewalks in the central business district, an area which is bounded by 2nd Street NE and SE, D Street SE and SW, 14th Street NW and SW, Constitution Avenue NW, 23rd Street NW, and Massachusetts Avenue NW, where many bicyclists ride on the sidewalks to reach bike racks or offices.

Additionally, law enforcement officials may not understand the laws and regulations applying to bicyclists and sometimes write erroneous citations. For instance, when a bicyclist is "doored," which occurs when a motorist opens his or her door into a bicyclist, it is the motorist who is at fault, according to District law, but some law enforcement officials have ticketed cyclists improperly for riding too close to traffic.

"You have regulatory signs that say to do things that conflict with the vehicle code, and then you have police officials who will tell you to do something totally

continued on page 46

The State of Biking in D.C.

D.C. ranks **8th** in the number of bicyclists commuting to and from work.

13,493 people cycle to and from work out of a total population of 632,323.

D.C. ranks **3rd** in the nation in the percentage of the population who bike to work.

4.1% of commuters cycle to and from work.

D.C. ranks **3rd** in the growth of cycling since 1990

This is a rate of **445. 4%**

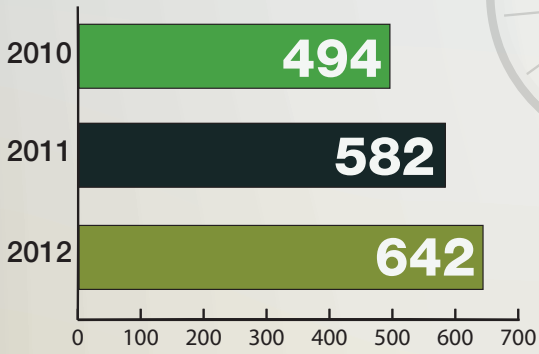
Between 2000 and 2012, the number of bicycle commuters has grown by **255.6%.**

68 Total miles of bike lanes in the District

This includes nearly 6 miles of protected bike lanes (or cycle tracks) and an additional 13 miles of shared lanes

In 2014, DDOT installed 9 miles of bike lanes, including 2 miles of shared lanes

Reported crashes involving bicyclists



Four states and the District of Columbia still have systems of Contributory Negligence:

- Washington, DC
- Maryland
- Virginia
- North Carolina
- Alabama

DDOT's definitions of the various bikeways

Bike Lane - A bike lane on both sides of a two-way road; one side on a one-way road

Bus/Bike Lane - A dedicated lane shared by both cyclists and buses

Climbing Lane - A bike lane on the uphill side of the road, and a shared lane on the downhill side

Contraflow Bike Lane - A bike lane going in the opposite direction of travel for the rest of the roadway

Cycle Track - A buffer and/or post separated bike lane

Shared Lane - A road that is not wide enough for a bike lane containing a bike symbol and chevron in the travel lane indicating that cars and bikes must share the space

Neighborhood Bikeway - A low-volume and low-speed street optimized for bicycle travel through treatments such as traffic calming, way-finding signage and pavement markings

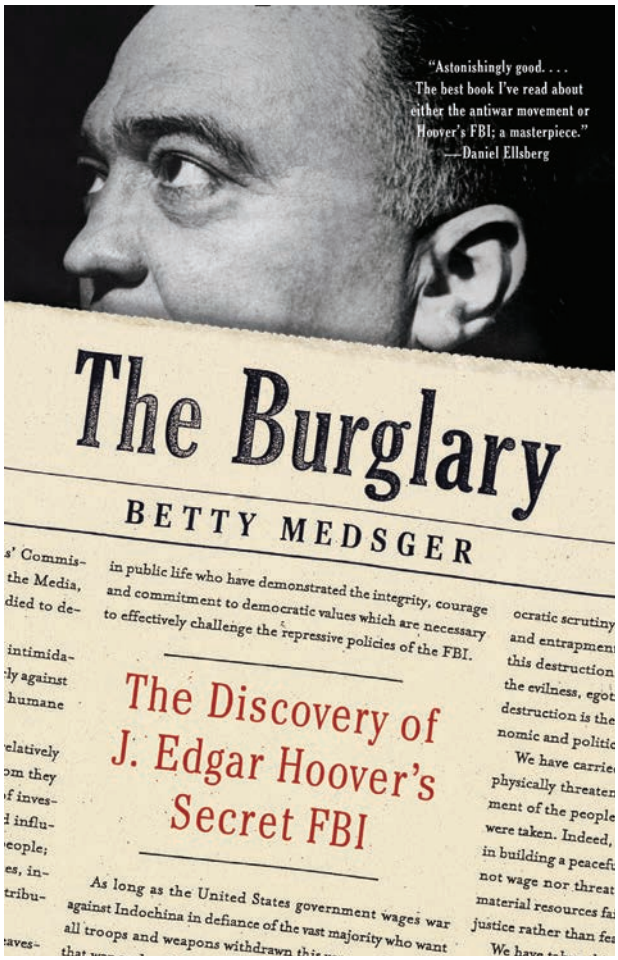
Sources:

Where We Ride: Analysis of Bicycling in American Cities. Annual American Community Survey Data Report for 2012 by the League of American Cyclists

Traffic Safety Statistics Report for the District of Columbia (2010-2012) by the Howard University Transportation Safety Data Center

Some of this information was presented at the October 22, 2014 D.C. Bar Tort Law Section program, "Examining D.C.'s Bike Laws: Who's at Fault?"

books in the law



The Burglary: The Discovery of J. Edgar Hoover's Secret FBI
By Betty Medsger
Vintage Books, 2014

REVIEW BY DAVID HEYMSFELD

For almost all of his 48-year tenure as FBI director (1924–1972), J. Edgar Hoover successfully created a public image of the Bureau as one of the best crime-fighting agencies in the world. The Bureau became known as the agency that "always gets its man."

The image went largely unchallenged in the Congress and in the press. There was little appetite for confronting the Bureau when any who did so would have to overcome the Bureau's strong reputation and its willingness to develop and use derogatory information against challengers.

The Bureau's image began to unravel in the last year of Hoover's tenure as the public learned that the FBI had engaged in extensive surveillance, aided by illegal wiretaps and burglaries, of hundreds of thousands of persons not suspected of crimes. It was revealed that the Bureau had gone beyond surveillance to spreading misinformation and using other dirty tricks to silence individuals and disrupt organizations that supported causes disapproved of by Hoover. The targets included civil rights groups and groups opposing the war in Vietnam.

A highly publicized example was the Bureau's campaign against Martin Luther King Jr., in which the Bureau spread negative information about King to the press, his funders, and groups wanting to honor him. The FBI also sent anonymous letters to King threatening to expose his extramarital sexual activities unless King committed suicide. In another shocking case, the Bureau spread false information that a Black Panther leader was the father of a child to be born to pregnant actress Jean Seberg. The misinformation was believed to be a factor in the suicide of Seberg, who had been a financial supporter of the Panthers.

When the revelations of misconduct were completed in the mid-1970s, Hoover's reputation was in shambles. A Senate Committee concluded that "many of the techniques used would be intolerable in a democratic soci-

ety even if all of the targets had been involved in violent activity." Hoover's successors distanced themselves from his programs. After the death of Seberg, FBI Director William Webster said, "The days when the FBI used derogatory information to combat advocates of unpopular causes have long since passed. We are out of that business forever."

The revelations of secret FBI misconduct came in several stages. The first stage is the subject of Betty Medsger's recent book, *The Burglary*. Medsger describes the March 1971 burglary of an FBI field office in Media, Pennsylvania, a Philadelphia suburb, by opponents of the Vietnam War. Medsger's article in *The Washington Post* was the first to report on the documents obtained in the Media burglary.

Medsger gives us a complete picture of the revelations from the Media burglary documents. She also describes in detail how the theft was accomplished, and why the burglars were never identified until most of them recently chose to go public. Interestingly, in carrying out the burglary and avoiding detection, the amateur Media burglars were much more successful than the contemporaneous Watergate burglars who had CIA expertise.

The Media burglary was carried out by anti-war activists concerned about FBI informants infiltrating their organizations. The documents they obtained revealed widespread FBI surveillance and use of paid informants to monitor radical groups on college campuses, particularly groups opposed to the war in Vietnam.

There was also pervasive monitoring of blacks. Hoover demanded monitoring of black students and their organizations at all institutions of higher education. The FBI scrutinized black organizations supporting nonviolent activities to promote racial equality, including the Southern Christian Leadership Conference, and the NAACP. Hoover directed the establishment of networks of "ghetto informers" to report on possible demonstrations. As Medsger states, Hoover appears to have "thought of black Americans as falling into two categories—black people who should be spied on by the FBI and black people who should spy on other black people for the FBI."

The Media documents also suggested that the purpose of FBI surveillance and use of informers was not only to gather information, but also to harass and intimidate. An FBI internal memo said the objective was to "enhance the paranoia" and "get the point across there is an FBI agent behind every mailbox."

The Media documents were damaging to the FBI in and of themselves. They also provided leads for further investigations that gave a complete picture. One of the Media documents contained a reference to "COINTELPRO." This term had never been heard of outside of the FBI. It attracted the attention of Carl Stern of NBC News who began efforts to obtain information about COINTELPRO under the Freedom of Information Act. After a lengthy battle in the courts, Stern succeeded, and in 1973 the public began receiving shocking information about the FBI's program to intimidate dissenters of whom Hoover disapproved.

COINTELPRO was instituted in 1956 after the U.S. Supreme Court ruled against Hoover's efforts to destroy the Communist Party by criminal prosecutions against party leaders for teaching and advocating the eventual need to overthrow the government. In *Yates v. United States, 354 U.S. 298 (1957),* the Court ruled that this advocacy was protected under the First Amendment so long as there was no planning for specific acts of violence. In response, Hoover developed the COINTELPRO program to disable Communists and other groups he disapproved of by harassment and other tactics. The most prominent target was King, and the efforts to get him to commit suicide.

Many other groups were targeted, including New Left Activists, for whom Hoover directed that "every avenue of possible embarrassment must be vigorously and enthusiastically supported." The FBI also attacked the Black Panthers. FBI operatives promoted gang warfare, involving the Panthers both within and outside of the organization. Another target was the Socialist Workers Party (SWP), which advocated overthrow of the government, but had no plans for specific illegal acts. There was FBI or FBI-promoted burglaries of SWP offices, bomb threats, shooting at offices, and spreading of false information. The SWP obtained a ruling from a federal District Court prohibiting the FBI from using information about the SWP obtained through COINTELPRO and other surveillance programs. The judge found that the party had engaged only in peaceful, lawful political activities, and that the FBI's harassment was "illegal and patently unconstitutional." U.S. Attorney General Edward Levi ordered the FBI to end its operations against SWP.

Medsger's description of the Media burglary and its aftermath is fascinating. The burglary was organized by William Davidon, "a mild mannered physics professor from Haverford College," associated with the Catholic Peace Movement. He recruited eight others, largely from the movement, including a professor of religious studies, a day care worker, a graduate student, and two students who had dropped out of college. As Medsger points out, it was hard to believe that an FBI office wouldn't have enough security to prevent a break-in and protect any secret files against amateurs. Careful surveillance by the burglars showed that a break-in was possible and that files were not well secured. They had no way of knowing what would be in the files.

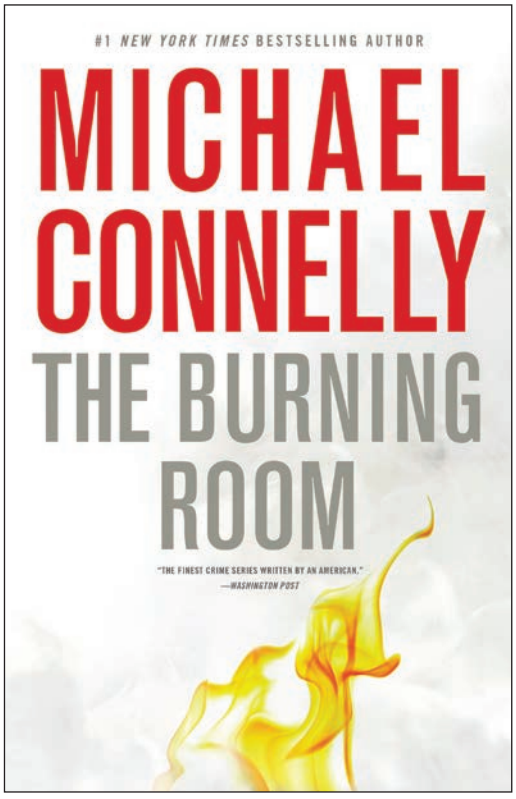
Before the burglary many steps were taken to ensure that it worked and that they wouldn't be detected. The burglary was planned for the night of the Muhammad Ali–Joe Frazier fight that would distract security guards and others in the neighborhood. The burglars made their own burglary tools so they would be untraceable. They conducted extensive surveillance of the FBI office itself (including a lengthy visit to the office by one of them pretending to be a college student doing a paper on FBI hiring practices). They watched police patrols in the neighborhood and the behavior patterns of residents of the building in which the FBI office was housed. To avoid detection after the burglary, the burglars agreed to go their separate ways and never talk with each other, and never talk to anyone else about the burglary.

Despite this preparation, the odds were against them. There was a good chance that they would not find any useful information, and an even better chance that they would be caught in the act or found in the extensive FBI investigation that was sure to follow. If caught, they would face long terms in prison. But with a bit of luck, it all worked out, and the FBI terminated its investigation of the burglary after the five-year statute of limitations.

Overall, Medsger's recounting of the Media burglary and its aftermath, and of the personal stories of the burglars, enhances our appreciation of their bravery, and of the importance of what they accomplished. The lessons learned from the secret programs of Hoover's FBI should be an important part of the discussion of programs developed to combat 21st century terrorism.

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

The Burning Room
Michael Connelly
Little Brown & Company, 2014



Review by Ronald Goldfarb

Michael Connelly is a brand. A former journalist, Connelly knows the world of Los Angeles police and trial lawyers, which he has explored in 28 novels that have sold 58 million copies worldwide. His cop hero in 19 of those books, Hieronymus Bosch, is about to be the star of an Amazon Original series, and *The Burning Room* may be Bosch's farewell to books.

Even Connelly devotees will find *The Burning Room* a tired, plodding read. The hard-nosed, savvy veteran cop is in his final year before retirement and is partnered with Lucy Soto, a young, earnest student with a history that includes one related aspect of a cold arson and murder case they are assigned. There is much tutoring of Soto by Bosch about lessons in policing—too much after a while. Lost are any of the human parts of Bosch's life explored interestingly in prior books in the series—his loves, his single-parent dealings with his teenage daughter, his love of and reflections on jazz. There are mentions, but so little real exploration of those parts of Bosch's life that make him a whole and interesting human being. In *The Burning Room* we get only a burned out, coffee-drinking, obsessed workaholic pursuing leads in an old cold case come-to-life, and little else. There is an exciting scene near the end of Connelly's novel, but by that time, readers are waiting for the book to end.

The Burning Room starts with an assignment to an old case that changes from a shooting and turns into a murder when the victim dies, years later. The story then twists and turns as the investigators tie into the shooting a historic fire and robbery that turns out to be related, not only to the now murder, but also the personal history of Bosch's new assistant. "[I]n any operation, there was always a possibility of things going sideways," Bosch tells his protégée, and that happens several times in their pursuit of the truth of their investigation. "[T]he answers to most cases are hidden in the details," they discover as they pursue new leads to historic events.

For readers who love the inside workings of police practice, there is plenty to read here:

- How cold case investigations are able to deal with colleagues on cases they "take away."
- The disdain veteran police have for the "media beast."
- How smart investigators "listen" to a crime scene, waiting for "a sense of ghosts."
- How police work priorities are set, and the ever-present balance among administrators, politics, and the working detectives.
- The role of new forensic sciences and digital techniques in investigative work.
- PTSD in cases where police are involved in shootouts during their work.
- Or Bosch's formidable way of thinking: "Bosch always thought that if you started with the assumption that murder is an unreasonable act, then how could there ever be a fully reasonable explanation for it?" For that reason, Bosch didn't watch detective stories on television or in movies where the audience got "all of the answers."

It's also interesting to note that Bosch's reflections on life and police work do have a literary flare:

- Every squad and interrogation room looked the same, "stark . . . designed to instill hopelessness in those who waited to be questioned. From hopelessness comes compromise and cooperation."
- "It seemed to him that every gleaning success with the city had a dark seam to it somewhere, usually just out of view," Bosch ruminates as he thinks about the Dodgers' stadium, and the city's sociology it represents.
- Bosch's sense of what is, at heart, a good cop: "The good ones all had that hollow space inside. The empty place where the fire always burns. For something. Call it justice. Call it the need to know. Call it the need to believe that those who are evil will not remain hidden in darkness forever."
- Or about human nature and sexual attraction. "It was about love, he told himself, not about carnal need, not about every man's desire to take something off the top shelf. His desire ultimately destroyed a man's life. There had to be a valid reason."
- Bosch thinks about noir Los Angeles as a metaphor: "It was one of the strange contradictions of the city. No matter how close something looked, it was still far away."
- Or the sociology of big cities versus small towns: "It was a microcosm—a ladle dipped into the melting pot and coming out with the same mixture of ingredients."

Connelly devotees will want to read *The Burning Room* even if we don't rank it high on his list. Newcomers to the series who want to dip in for a first read should pick another Bosch story by way of introduction. Even Willie Mays didn't get a hit every time up, and *The Burning Room* isn't Connelly's best. At one point in *The Burning Room,* Bosch tells Soto, "Nobody bats a thousand," perhaps the telltale of this literary episode. As if Connelly acknowledges this, his story ends with the purist Bosch trumped by his political bosses, walking out of the station to the clapping of his colleagues, and remarking to his protégée: "It's not about what is right . . . I'll be fine . . . don't let the fools around here drag you down . . . There's only ten-thousand more cases waiting for you."

Adios, Hieronymus!

Ronald Goldfarb is a Washington, D.C., and Miami, Florida, attorney, author, and literary agent whose reviews appear regularly in Washington Lawyer. Reach him at *www.ronaldgoldfarb.com; e-mail: rlglawlit@gmail.com.*

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attorney briefs

By David O'Boyle

Honors and Appointments

Bradley Arant Boult Cummings LLP partner **John Parker Sweeney** has been named president of DRI—The Voice of the Defense Bar… Hudson Cook, LLP partner **Michael A. Benoit** has received the 2014 Auto Finance Excellence Award recognizing his achievement and contribution to the automotive finance industry… **John B. Sandage** has been selected as the deputy director-general of the World Intellectual Property Organization in Geneva, Switzerland… Class-action law firm **Hagens Berman Sobol Shapiro LLP** has been named to the National Law Journal's inaugural list of America's Elite Trial Lawyers… The Bar Association of the District of Columbia has named Solicitor General **Donald B. Verrilli Jr.** as its Lawyer of the Year.

On the Move

Kevin M. Barner and **William E. Bradley** have joined Michael Best & Friedrich LLP as partner on the firm's intellectual property practice team… **Jason D. Cruise, Andrea M. Hogan,** and **Adam L. Kestenbaum** have been promoted to partner at Latham & Watkins LLP. **Gabriel K. Bell, Brandon John Glenn Bortner, Drew C. Ensign, Marc A. Granger, Brian D. Miller,** and **Anne W. Robinson** have been promoted to counsel at the firm… **Kristy M. Wagner** has joined the energy practice group at Duane Morris LLP as partner… Family law attorney **Camellia J. Jacobs** has joined Zavos Juncker Law Group, PLLC as partner… **Jonathan E. Missner** has joined Stein Mitchell Muse Cipollone & Beato LLP as managing partner… **Mark D. Agrast** has joined the American Society of International Law as executive director… **Michael A. Woods** has joined Sol Systems as general counsel… **Valerie Butera** has joined Epstein Becker & Green, P.C. as member on the firm's employment, labor, and workforce management team… **Andre M. Gregorian** has joined Grenier Law Group PLLC as of counsel. **Stanley M. Doerrer** has joined as associate… Public policy lawyer **Mercedes Kelley Tunstall** has joined Pillsbury Winthrop Shaw Pittman LLP as partner… **Joshua M. Miller** has been promoted to partner at Proskauer Rose LLP… **Richard Almon** has joined Kilpatrick Townsend & Stockton LLP as associate in the firm's software and electrical engineering team… **Genevieve G. Marshall** has been promoted to coordinator of the asbestos litigation department at Gavett, Datt & Barish, P.C. **Douglass V. Calidas** has joined the firm as associate… **Andrew M. Smith** has joined Covington & Burling LLP as partner on the firm's financial institutions team… **Patricia H. Doersch** has joined Squire Patton Boggs LLP as of counsel… **Theodore "Ted" R. Lotchin, Nicole D. Carelli,** and **Tiffani V. Williams** have joined Baker, Donelson, Bearman, Caldwell & Berkowitz, PC as of counsel. Carelli and Williams have also joined The Daschle Group as vice president and senior vice president, respectively… **Kendra P. Norwood** has joined the maritime, international trade, and public contracts team at Blank Rome LLP as associate.

Company Changes

Melissa A. Kucinski has relocated her family law practice, **MK Family Law**, to 2001 S Street NW, suite 550, in Washington, D.C.… Peter C. Grenier has launched **Grenier Law Group PLLC**, a firm focusing on serious personal injury, wrongful death, and civil rights issues. The firm is located at 1400 L Street NW, suite 420, in Washington, D.C.… Jennifer Birchfield Goode, Sarah Moore Johnson, and Laura Stone Quam have launched **Birchstone Moore LLC**, which specializes in estate planning and administration. The firm is located at 5335 Wisconsin Avenue NW, suite 640, in Washington, D.C.

DC Water General Counsel Randy E. Hayman has been awarded the *Washington Business Journal* Legal Champions Award.

Lindsay A. Kelly has joined the Los Angeles office of Irell & Manella LLP as special counsel.

Bernard Max Resnick has been appointed as a lecturer in law at the Villanova University School of Law.

Author! Author!

John J. Hoeffner, an attorney, and **Michele R. Pistone**, director of Clinic for Asylum, Refugee and Emigrant Services and law professor at Villanova University School of Law, have coauthored "No Path But One: Law School Survival in an Age of Disruptive Technology," published in the *Wayne Law Review*, volume 59, 2013… **Cynthia Thomas Calvert, Joan C. Williams**, and **Gary Phelan** have coauthored *Family Responsibilities Discrimination*, published by Bloomberg BNA… **Thomas G. Snow** has written "Supreme Court Messenger, 1977 Term," published in the July 2014 edition of *The Journal of Supreme Court History*, volume 39, issue 2.

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

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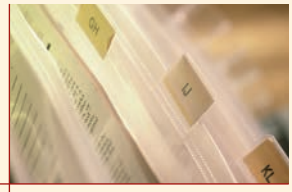

Note: Unless otherwise indicated, all D.C. Bar events are held in the D.C. Bar Conference Center at 1101 K Street NW, first floor. For more information, visit www.dcbar.org or call the Sections Office at 202-626-3463 or the CLE Office at 202-626-3488. CLE courses are sponsored by the D.C. Bar Continuing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

JANUARY 6

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

JANUARY 8

Criminal Environmental Enforcement Update
12–1:30 p.m. Sponsored by the Environment, Energy and Natural Resources Section. Cosponsored by the Criminal Law and Individual Rights Section, and the ABA Section of Environment, Energy and Natural Resources. Alston and Bird LLP, 950 F Street NW.

Introduction to Health Law and the Affordable Care Act, Part 1: Introduction to the United States Health Care System
6–9:15 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section; the Health Law Section; and the Labor and Employment Law Section.

JANUARY 13

Statutory Interpretation: Exploring the Dialogue Between the Supreme Court and Congress
12–2 p.m. Sponsored by the Administrative Law and Agency Practice Section.

Ethics for Tax Lawyers: Circular 230 and the Rules of Professional Conduct
1–3:15 p.m. CLE course cosponsored by the Taxation Section.

Advertising Law and Unfair Competition: Substantiating and Litigating Claims
6–9:15 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section; Antitrust and Consumer Law Section; Corporation, Finance and Securities Law Section; Criminal Law and Individual Rights Section; and Litigation Section.

JANUARY 14

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

Estates, Trusts and Probate Law, Part 5: Top 10 Revenue Rulings Every Estate Practitioner Should Know
12–2 p.m. Sponsored by the Estates, Trusts and Probate Law Section.

Working With the Rules of Evidence in Civil Proceedings in the District of Columbia, Part 1
6–9:15 p.m. CLE course cosponsored by the Antitrust and Consumer Law Section; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Family Law Section; Government Contracts and Litigation Section; Health Law Section; Labor and Employment Law Section; Litigation Section; Real Estate, Housing and Land Use Section; and Tort Law Section.

JANUARY 15

The United Nations Environment Programme and Climate Change
12–2 p.m. Sponsored by the International Environmental and Resource Law Committee of the Environment, Energy and Natural Resources Section. Cosponsored by the Administrative Law and Agency Practice Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; International Law Section; American Bar Association's Section on Environment, Energy and Natural Resources, International Environmental and Resources Law Committee, Environmental Law Institute, and FBA's Energy, Environment and Natural Resources Section. Beveridge & Diamond, P.C., 1350 I Street NW, suite 700.

The Family Lawyer Tool Kit: Sharpening Essential Skills Every Family Lawyer Should Possess
6–8 p.m. Sponsored by the Family Law Section.

Introduction to Health Law and the Affordable Care Act, Part 2: The New Insurance Marketplace
6–9:15 p.m. See entry for January 8

JANUARY 16

Trying an Automobile Case: What You Need to Know in the District of Columbia, Maryland, and Virginia
1–4:15 p.m. CLE course cosponsored by the Litigation Section and Tort Law Section.

JANUARY 20

Statute and Regulation Drafting, Part 1: Statute Drafting
5:30–8:45 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section; Antitrust and Consumer Law Section; and District of Columbia Affairs Section.

JANUARY 21

Basic Training & Beyond, Day 2: How to Grow a Law Firm
9:15 a.m.–4:30 p.m. See January 14.

Working With the Rules of Evidence in Civil Proceedings in the District of Columbia, Part 2
6–9:15 p.m. See entry for January 14.

Young Lawyers Survival: IP Drafting
6:30–7:30 p.m. Sponsored by the Young Lawyers Committee of the Intellectual Property Section.

continued from page 38

different, and they have the regulation that says you must do what an officer says," says Shane Farthing, executive director of the Washington Area Bicyclist Association. "Add in the occasional construction project with its approved [District of Columbia Department of Transportation] alternate routing plan that you're also supposed to follow, and eventually you just end up in this morass of conflicting legality."

Contributory Negligence

District of Columbia tort law is governed by the legal doctrine of contributory negligence. Under the contributory negligence doctrine, a plaintiff seeking to recover damages could be barred from doing so if he or she acted in a negligent manner that was a proximate cause of his or her own injuries.

Advocates for reform of the contributory negligence doctrine in D.C. tort law argue that it is unfair because a bicyclist whose negligence contributed to a relatively small percentage of the accident can be barred from recovering any damages. The advocates also emphasize that bicyclists are vulnerable roadway users who, when in an accident, are often injured and require trips to the emergency room, replacement of expensive equipment, and time off from work. Motorists, on the other hand, are rarely injured in accidents involving bicycles, and their vehicles often sustain minimal damage.

According to advocates, contributory negligence functions as an automatic dismissal of many bicyclists' insurance claims, and ultimately, their ability to take a case to court. A cyclist whose taillight or headlight went out before an accident, a cyclist who turned out of a bike lane and into the road to avoid a parked car, or a cyclist who was given an improper citation will often have their insurance claim denied.

Regardless of how minimal a bicyclist's negligence was in contributing to an accident, his or her claims can be denied under the contributory negligence standard. After the initial denial of an insurance claim, and because the damages sought often do not have a high enough dollar value, it is very difficult for bicyclists to find a lawyer willing to represent them in court.

"If the case sounds like a contributory negligence defense, nine times out of 10, we're going to say no," Bilton says. "The only time we would take the case is if the damages were so enormous that we thought that it would be worth taking the risk."

To address this, D.C. Councilmember David Grosso in July introduced the Bicycle and Motor Vehicle Collision Recovery Amendment Act of 2014 to shift D.C. tort law under the doctrine of comparative negligence for accidents between bicyclists and motorists.

Under the proposed legislation, a bicyclist injured in an accident can receive damages proportionate to the level the motorist was at fault. If the legislation passes, a bicyclist seeking $1,000 in damages who is found to be 25 percent at fault in the accident would ultimately receive $750.

Grosso's bill before the Council was tabled in November. Councilmembers cited the need for more time to work on the legislation after consulting with bicyclist associations, representatives from the insurance industry, and trial lawyers. It is likely that the discussions on the legislation will continue in January, after the new Council convenes.

The Cost of Change

Currently, the District of Columbia and four states use the contributory negligence standard: Alabama, Maryland, North Carolina, and Virginia. Other states either shifted from contributory negligence or never used the standard.

According to Eric M. Goldberg, vice president of state government affairs at the American Insurance Association, the proposed legislation before the D.C. Council could prove costly for the District.

"D.C. currently has a contributory negligence tort law, which bars a person from recovering damages if they were at fault," Goldberg says. "In contrast, the bill before the Council would adopt a pure comparative negligence standard for cyclists involved in accidents with other vehicles, [which would] allow a judge to apportion damages in accordance with the plaintiff and defendant's relative fault."

Under the law, a bicyclist could attempt to recover damages following an accident in which they were at greater fault than the motorist. "Not surprisingly, therefore, pure comparative negligence has been criticized because it allows a plaintiff who is primarily at fault to recover from a lesser at-fault defendant and recover some damages," Goldberg says.

If the comparative negligence standard is adopted, there will likely be an increase in the amount of insurance claims paid to bicyclists following accidents with motor vehicles. The increase in insurance claims could lead to higher premiums for motorists, and could have a negative impact on the District government and other businesses that own fleet vehicles requiring insurance, opponents say.

According to a study by the Insurance Research Council, 11.9 percent of motorists in the District are uninsured. Opponents of the legislation worry that the increased cost of vehicle insurance would be passed on to consumers and drive many low-income motorists to drop their coverage, increasing the number of uninsured motorists on the roadways.

Better Education and Law Enforcement

The issue of contributory negligence is only one problem facing bicyclists and drivers. There is vast uncertainty surrounding their responsibilities and interactions on the road. Law enforcement officials are sometimes confused over regulations and how they apply to cyclists in the various environments in which they ride.

The behavior of some bicyclists is an issue as well. Many people can recall at least one instance when a bicyclist rode through a red light or failed to fully stop at a stop sign. Many cyclists are even unaware that they are required to come to a stop at stop signs.

Despite the disagreements over contributory negligence, motorists and bicyclists alike agree that better understanding and enforcement of the laws and regulations governing drivers and cyclists is required to make roadways safe for all users.

"By talking about the duty of bicyclists and talking about how laws apply to bicyclists more broadly, whether it's through education or debate, it is very important to educate our community," Bilton says. "It is only because the whole community knows what the rules are that we can see any sort of justice for one group or the other."

Reach David O'Boyle at doboyle@dcbar.org.

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legal spectator

By Jacob A. Stein

The Commonplace Book of Wisdom

The *Oxford English Dictionary* reports that a *commonplace book* is one "in which common places or passages or references were collected, usually under general heads; hence a book in which one records passages or matters to be especially remembered or referred to, with or without arrangement."

John Gross, in his *Oxford Book of Aphorisms,* writes that in a Commonplace Book, there will be aphorisms. He gave many definitions of that word aphorism, such as its brevity, verbal artistry, and things to use at the right time.

Metaphors also are writings that are in a Commonplace Book. A metaphor is a little different. It compares two unlike statements or ideas that are similar. Here is a metaphor. A lawyer says to another, "That last witness was a sly cat." That metaphor is worth a hundred words.

I have collected aphorisms, metaphors, quotations, and essays. I will put them in my Commonplace Book.

My Commonplace Book will differ from others. It has been said that the Commonplace Book, if read carefully, tells the character of the person who made the selections. Probably true.

In this passage below from Samuel Shellabarger, the words "the unburned bridge" caught my eye. Shellabarger was a biographer of Chesterfield (1694–1773), a man of the world. He is now remembered by the letters to his illegitimate son. Here are selections from Shellabarger as well as other notables that you will find in my Commonplace Book:

> Distinguishing the man of the world of all ages is a philosophy at times implicit, but in general avowed, which perhaps is most conveniently expressed by the indefinite term worldliness. It is an alliance of rationalism with materialism in the practical exercise of social life. Less formally stated, it is a belief in the supreme desirability of what most men strive for—power, position, wealth, the esteem of one's associates, the pleasures of the senses—the pursuit and enjoyment of all this to be regulated partly by some code of good form and partly by common sense, which is rationalism *en négligé.* The objectives of worldliness will always commend themselves to that legal fiction, the ordinary prudent man; its values will always seem valuable to 99 percent of the population; it is the most plausible form of selfishness.
>
> The true man of the world is no doctrinaire and would warmly disclaim the title of worldly. It may often serve his purpose to be considered or consider himself as an idealist. But his distinguishing features are the same: he is the adept of compromise, expediency, the unburned bridge, the secret reservation, the ultimate confidence in Mammon.
>
> —Samuel Shellabarger (1888–1954)

Guilt and crime are so frequent in this world that all of them cannot be punished and many times they happen in such a manner that it is not of much consequence to the public whether they are punished or not.

—John Adams (1735–1826)

Where the least thing is seen as the center of a network of relationships and the investigator does not restrain himself from following and multiplying the details, the inquiry becomes infinite. Whatever the starting point, the matter in hand spreads out and out, encompassing ever vaster horizons—and if permitted to go further and further in every direction, it would end by encompassing the entire universe.

—Italo Calvino (1923–1985)

When young, when our own understanding is not yet fully developed by years or experience, we believe humanity to be ruled by reason. When, however, our understanding has reached maturity, and our inferences are drawn more logically and supported by long experience, we find that humanity is much less swayed by reason than by emotions, impulses, fancies, whims; by chance happenings, chance actions, even chance words.

—Unknown

The enemy increaseth every day. We, at the height, are ready to decline. There is a tide in the affairs of men which, taken at the flood, leads on to fortune, omitted all the voyage of their life is bound in shallows and miseries. On such a full sea are we now afloat, and we must take the current when it serves or lose our venture.

—Shakespeare

On the whole, human beings want to be good, but not too good and not quite all the time.

—Orwell

This day I shall have to do with an idle curious vain man, with an unthankful man, with a talkative railer, a crafty, false or an envious man. An unsociable sarcastic man. A greedy man. A deceiver. Such is the way of the world, and I shall be no more affected by it than I am about changes in the weather.

—Marcus Aurelius
(Stein Translation from the Latin)

Now back to the scraps picked up in the past.

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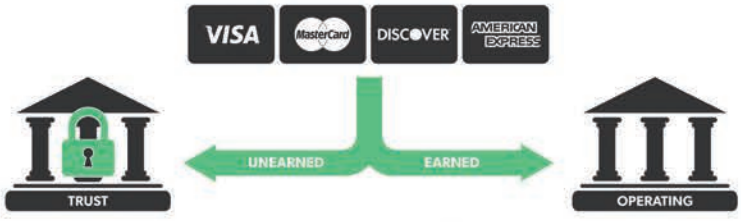

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