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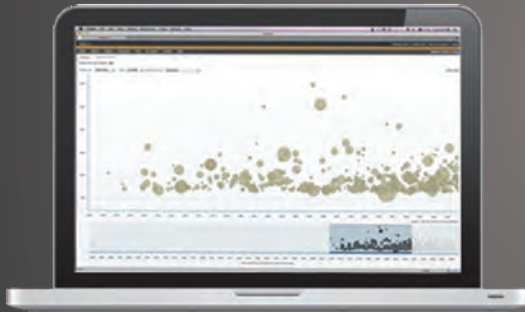
THE OFFICIAL JOURNAL OF THE DISTRICT OF COLUMBIA BAR



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By Anna Stolley Persky

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Under Contract

In today's increasingly lean legal market, many lawyers have settled, albeit reluctantly, into a new normal: contract work. *Anna Stolley Persky* writes about the good and the bad of this employment reality.

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Building Blogs: Ethically, Effectively

Law firms recognize that an online presence is vital for doing business, but opening that virtual portal for clients is not without risks. *Walter A. Effross* outlines what firms need to look out for when going digital.



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letters



No Contest in Hackers vs. Small Business
Michael Hedges' October cover story, "Internet Law: Cyberattacks, Security Breaches Spark Growth in Field," reminded me of

how precarious a company's online reputation can be.

I run a small business, and both my personal and professional reputation could be in jeopardy if a customer were to write a negative review on a social media site. I would probably be driven out of business altogether if my company's Web site were hacked. I'm sure many small businesses don't have the deep pockets to hire lawyers to defend against cyberattacks.

In his article, Mr. Hedges wrote about several big companies that were hacked.

Sony was among the victims when its digital systems were hacked, causing millions of dollars in damage. If a Fortunate 500 company can fall victim to hackers, what chance do small businesses have to defend against cyberattacks?

—Jennifer West
New York, New York

We Like Lowell

I really enjoyed your "Legends in the Law" feature on lawyer Abbe Lowell, who has built a fascinating career during his time in Washington, D.C. (December 2013 *Washington Lawyer*).

As a mid-career lawyer working in the nation's capital, Abbe Lowell's career is one that I have watched and admired over the years. While many lawyers come to Washington with an eye toward government service, Lowell has found success on his own terms, blending his desire to work in government and the law.

What stood out most for me in the write-up on Lowell was the way he reinvented himself—starting his own firm, leaving that firm, joining other firms, working for Big Law, consulting. He continuously bounced back from potential setbacks.

I also enjoyed the story he told of taking the case of someone who was not

high-profile, someone whose life might have been devastated if it weren't for Lowell's legal guidance.

There is a lesson that both young and mid-career attorneys can learn from Lowell's hard work and determination.

—J. Wheeler
Washington, D.C.

Your profile on lawyer Abbe Lowell in the December magazine was excellent.

Lowell's career should serve as an example to young attorneys that it is indeed possible to meld public service with the practice of law.

—Josh Gross
Beverly Hills, California

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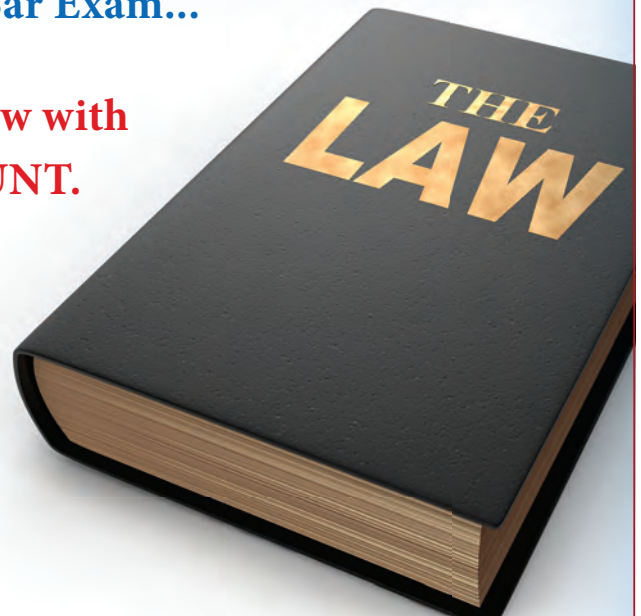
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from the president

By Andrea Ferster

“We have not ended racial caste in America; we have merely redesigned it.”

—Michelle Alexander,

The New Jim Crow: Mass Incarceration in the Age of Colorblindness

In a powerful speech before the American Bar Association’s House of Delegates last August, U.S. Attorney General Eric Holder addressed one of the most painful and troubling realities to face our country since the supposed end of the Jim Crow era 50 years ago—the effects of widespread incarceration resulting from minimum sentencing requirements and law enforcement practices at the federal, state, and local levels.

These practices and policies have produced a devastating reality for millions of Americans. Reflecting on the 50th anniversary of *Gideon v. Wainwright* last year, the nonprofit Gideon’s Promise noted that even though this country comprises just 5 percent of the world’s population, it accounts for almost a quarter of the world’s prisoners. America now has the highest incarceration rate in the world, imprisoning people at more than five times the rate of most Western countries, according to the London-based International Centre for Prison Studies.

The attorney general’s spotlight on mandatory minimum sentences for drug-related crimes follows an increasing awareness of its devastating impact on individuals and families who become entangled in the criminal justice system, and the disproportionate impact of these policies on blacks. In his speech, Holder cited a recent national study that found that black male offenders have received sentences nearly 20 percent longer than those imposed on white males convicted of similar crimes. As Holder pointed out, “[a]lmost half of them are serving time for drug-related crimes, and many have substance use disorders.”

So how does the District of Columbia stack up against these shameful national

Is D.C. the Face of the New Jim Crow?

statistics? “The War on Marijuana in Black and White,” a report released by the American Civil Liberties Union (ACLU) in June 2013, showed that the District has one of the highest rates of marijuana arrests in the country. In 2010 D.C. police made 846 such arrests per 100,000 residents, which is 3.3 times greater than the national rate, according to the report. Compared to other states, the District has the second highest level of racial dispar-

A criminal conviction can cost access to student loans, public housing, jobs, and driver’s licenses.

ities in marijuana possession arrests. In 2010 the District’s arrest rate for blacks was 1,489 per 100,000 and 185 for whites, showing that blacks were over eight times more likely to be arrested for marijuana possession than whites.

The ACLU report was followed by an even more troubling report issued by the Washington Lawyers’ Committee for Civil Rights and Urban Affairs in July 2013. The Lawyers’ Committee report, prepared with the assistance of pro bono attorneys at Covington & Burling LLP and an advisory panel of senior and retired judges, analyzed a comprehensive set of arrest data for the District covering the years 2009, 2010, and 2011 for adults 18 years of age or older. This data indicates that nearly nine out of 10 arrests for simple drug possession involved blacks. Marijuana arrests represented the lead category of drug arrests.

Wards with a higher percentage of white residents accounted for a lower percentage of drug arrests, but even in these wards blacks were arrested for drug crimes at disproportionately high rates given the wards’ demographics. According to the study, the equivalent of 17 percent of the District’s adult black population was arrested in 2010 compared with 2 percent

of the city’s adult white residents.

And yet, as the report points out, whites and blacks use illegal drugs at similar rates. According to the 2008–2010 National Survey on Drug Use and Health (NSDUH), 9.43 percent of adult residents of Ward 3, whose population is predominantly white, said they used illicit drugs in the past month before they took the survey. Wards 5, 7, and 8, which are predominately black, reported similar rates of drug use—between 12.2 percent and 14.15 percent of residents used illicit drugs in the previous month.

Likewise, the NSDUH estimated that the rate of cocaine use among Ward 3 adults was about the same as the city-wide average, and yet cocaine-related arrests were in the single digits for Ward 3 in each of the years examined. For instance, the 2011 arrest data shows that there were 597 cocaine-related arrests in Ward 5, 449 in Ward 7, and 486 in Ward 8, while there were only two cocaine-related arrests in Ward 3.

Moreover, the Lawyers’ Committee report found that of the tens of thousands of drug and traffic charges filed in D.C. Superior Court in the years 2009 through 2011, 17 percent of the narcotics cases and 23 percent of the traffic cases were dismissed. As a result, the report concluded that “a large number of people may have suffered the collateral consequences of a pending charge based on charges that were weak or otherwise not worth pursuing.”

And these collateral consequences can be severe and life changing. A criminal conviction can cost access to student loans, public housing, jobs, and driver’s licenses. It can be a factor in whether your children are removed from your care or your rights as a parent are terminated.

Even where the charges are ultimately dismissed, these arrests are humiliating and traumatic for those targeted, disrupt lives and jobs, and cause cascading adverse consequences for the families who

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the pro bono effect

By Melinda F. Levitt



Ronald Flemmings

Paying It Forward Where I Live

able assistance of a number of firm associates as well as staff and clinic mentors at the D.C. Bar Pro Bono Program. Indeed, both the Pro Bono Program staff and case-assigned mentors provide an extremely valuable resource to attorneys handling pro bono cases. I can turn to them during crunch times to discuss case strategy or various options for possible resolution.

Second, I take child custody cases in particular because they *are* harder. Without a lawyer putting in the time and effort to steer them through the difficult legal process, most parents, and ultimately their children, would not stand a good chance for a successful outcome. Some types of matters are better suited to be handled on a pro se basis (although as lawyers we like to flatter ourselves that without us the system would come crashing down). But, when it comes to children and who gets to be with them, hug them good night, cheer them on at a school event, or just spend time talking and laughing with them, emotions run so high and the issues can be so complicated that pro se representation is not realistic. There are those who prefer different types of pro bono matters; some are very high profile—for example, housing discrimination (yes, it still goes on) or class action toxic tort litigation (remember *Erin Brockovich*? That was a pro bono matter). I commend those lawyers and the work that they do. However, for myself, I prefer doing the “small” cases for people here in the District of Columbia. This is where I live. This is where I work. And each one of these people is my neighbor, even if we do not live in close proximity. At least, that’s how I feel about it.

Third, I take these cases because it changes people’s lives for the better, no matter how ugly the immediate surrounding circumstances. Several years ago, we represented a mother whose little girl kept saying that her father hit her and that she did not want to be with him. There was, however, no actual hard proof of abuse other than what the little girl said. After months of trying, there came a day when the father finally admitted in open court that, yes, he had hit his child with the metal end of his belt. Terrible. Awful. The

judge stepped in to ensure that protective measures were put in place to prevent the father from hitting that little girl again. That was a good day. It was also a good day when a father we represented in another case sent me pictures of him and his daughter celebrating Christmas together for the first time in years after we fought for the visitation that had been denied him for so long. People’s lives were truly changed.

Fourth, I take these cases because they have a constitutional dimension. As the U.S. Supreme Court has held, and the D.C. Courts have affirmed: “[N]atural parents have a ‘fundamental liberty interest . . . in the care, custody, and management of their child[ren]’ and they do not lose their constitutionally protected interest in influencing their child’s future ‘simply because they have not been model parents or have lost temporary custody of their children.’”¹ That is weighty stuff, and, in my view, worthy of recognition and enforcement so that only truly egregious cases of neglect and abuse are allowed to tear a parent and child apart.

Finally, I take these cases in silent tribute to my own parents, who certainly were not perfect people or parents. They had their issues with one another. However, throughout my entire childhood, as far as I can recall, a day did not go by that I did not either speak to or see my father no matter how angry my mother may have been with him. It was a given with both of them that that is how things would be, and they worked to make it happen. I was never a pawn in their relationship. I was their daughter, and they loved me together. Every day. All day.

As I told people later in life, their marriage may have broken down, but we never stopped being a family. That was an incredible gift that they gave me, and I hope that in taking the difficult and heart-wrenching custody cases, I can help other parents come to see that that kind of a gift to a child is invaluable and will shine and sparkle every day for the rest of that child’s life. I may not be able to convince every parent, or really get them

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I am a partner at a major law firm with a busy litigation practice dealing with clients facing difficult class action problems or addressing thorny federal government agency investigations. For the past 10 years, however, I also have handled a variety of pro bono child custody cases through the D.C. Bar Pro Bono Program’s Advocacy & Justice Clinic.

Child custody cases are some of the most challenging, and lawyers handling these cases correctly describe them as heart-wrenching. Contested custody matters do not typically come to us “clean,” with two parents prepared to consult and compromise rationally and calmly for the benefit of their children. The cases I handle frequently involve warring biological parents and young children who just need to be loved. Oftentimes, while waiting in court for a status conference or an evidentiary hearing on one of these cases, I hear similar cases being called—with all the same problems as mine, but with very wealthy, highly educated parents employing sophisticated counsel. Trust me, these are equal opportunity cases where money or education, or lack thereof, has nothing to do with the level of bad behavior, pettiness, and emotional games that get played out.

So, why do I take these pro bono cases? To me, the reasons are simple.

First, I believe deep in my heart that lawyers should and must take pro bono work as a matter of duty and conscience. But how can a fulltime practicing lawyer meet that duty? I have benefitted from the

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bar happenings

By Kathryn Alfisi



Series Highlights Legal, Practical Impact of Affordable Care Act

The D.C. Bar Continuing Legal Education (CLE) Program will open its introductory, five-part course on health law and the Affordable Care Act (ACA) in January.

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 16 provides an overview of key areas of 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 23 covers both the system-wide changes in private coverage as well as the more specific questions related to the new coverage pathway through the marketplace.

Faculty includes Toni Waldman, senior counsel at Kaiser Foundation Health Plan, Inc.



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

Law Students, Employers Converge for 12th Public Service Career Fair

On January 24 area law students and employers will get together once again for the 12th annual Washington, D.C./Baltimore Public Service Career Fair at George Mason University School of Law, 3301 Fairfax Drive, Arlington, Virginia, from 9:10 a.m. to 4:40 p.m.

Part three, "Medicaid Under the Affordable Care Act," takes place on January 30 and focuses on the impact of the ACA, particularly with respect to Medicaid expansion by the states. This session also covers Medicaid eligibility, benefits, provider and plan payment, administration, and financing.

Sarah Mutinsky, an associate at Eyman Associates; attorney Andy Schneider; and Judy Solomon, vice president for health policy at the Center on Budget and Policy Priorities, will serve as faculty.

The series will continue on February 6 with part four, "Medicare Under the Affordable Care Act," and on February 13 with part five, "Compliance Issues and Health Data Privacy Under the Affordable Care Act."

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 Hirsh Health Law and Policy Program of The George Washington University School of Public Health and Health Services and the D.C. Bar Courts,

The career fair is an opportunity for participants to discuss local public interest and government job opportunities. Participating organizations and agencies will conduct individual interviews, hold table talks, and accept résumés. Last year's fair brought together nearly 100 employers and more than 300 students.

The event is sponsored by American University Washington College of Law, Federal Bar Association, George Mason Law, Howard University School of Law, The Catholic University of America Columbus School of Law, University of Baltimore 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 career fair coordinator Joanna Bettis Craig at 703-993-8020 or lawcareerer@gmu.edu, or visit www.law.gmu.edu/career/employerservices/job_fair.

CLE Tackles Objection Process, Reviews Year in Attorney Discipline

The D.C. Bar Continuing Legal Education (CLE) Program will offer two new courses in January, one covering the latest developments in attorney discipline, the other providing a guide on how to make and respond to objections at trial.

"Disciplinary Year in Review: District of Columbia, Maryland, and Virginia" on January 13 features bar counsel from the three jurisdictions who will discuss the areas where attorneys got into disciplinary trouble in the past year, from neglect of client matters to mishandling of client funds. They also will point out areas where the three 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 & Aldrich 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.

On January 15 the CLE Program will offer the course “Objection! Objection! Making and Responding to Objections,” which will use examples and demonstrations to illustrate the objection process.

The course will guide practicing attorneys on how to make and respond to typical objections, such as objections to the form of the questions, objections to documents, hearsay objections, objections to expert witnesses, objections to attempts to impeach, and objections for inadequate foundations; how and when to make objections, including objections to opening statements and closing arguments; and how to make pretrial objections.

D.C. Superior Court Judge Judith Macaluso and University of Baltimore professor Daria J. Zane will serve as faculty.

The course takes place from 6 to 8:15 p.m. and is cosponsored by the D.C. Bar Administrative Law and Agency Practice Section; Corporation, Finance and Securities Law Section; and International Law Section.

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

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

D.C. Bar to Swear in New President at 2014 Celebration of Leadership

The 2014 Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting will be held on June 17 at the Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW.

The evening will open with the D.C. Bar Pro Bono Program’s Presidents’ Reception at 6 p.m., followed by the Celebration of Leadership dinner and the presentation of awards at 7:30.

The Presidents’ Reception will honor incoming Bar president Brigida Benitez of Steptoe & Johnson LLP and will benefit the Pro Bono Program, which is supported entirely by voluntary contributions.

Highlights of this year’s Celebration of Leadership include Benitez’ swearing-in ceremony, the announcement of the 2014 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 also features the presentation of the Bar’s 2014 Beatrice Rosenberg Award for Excellence in Government Service and the Thurgood Marshall Award.

For more information about the Presi-

SAVE THE DATE! 15TH ANNUAL YOUTH LAW FAIR

The Superior Court of the District of Columbia and the D.C. Bar Litigation Section will present the 15th Annual Youth Law Fair on March 22, from 9:30 a.m. to 2 p.m., 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 202-626-3455 or outreach@dcbbar.org.

dents’ Reception or to make a donation to the D.C. Bar Pro Bono Program, contact Kathy Downey at 202-588-1857 or kdowney@erols.com. For more information about the Awards Dinner and Annual Meeting, contact Verniesa R. Allen at 202-737-4700, ext. 3239, or vallen@dcbbar.org.

Women’s Bar Explores Ins and Outs of Federal Government Job Search

On January 8 the Government Attorneys Forum of the Women’s Bar Association (WBA) of the District of Columbia will hold a panel discussion on how job seekers could rise to the top of the applicant pool during a federal government job search.

The program, “Acing Applications: How to Drill Down for Success in Federal Government Employment Applications and Interviews,” will teach attendees the ins and outs of finding and securing choice positions through USAJOBS and agency Web sites.

Faculty includes Jeffery Anoka, outreach coordinator for the Office of Minority and Women Inclusion at the U.S. Securities and Exchange Commission; Stephanie A. Fleming, an attorney at the Antitrust Division of the U.S. Department of Justice; and Joanna Pearl, chief of staff for the Office of Enforcement at the Consumer Financial Protection Bureau. The panelists will illustrate how applicants could best tailor their application package to clear administrative filters and to stand out to professionals reviewing their materials.

The program takes place from 6 to 8 p.m. at Perkins Coie LLP, 700 13th Street NW, suite 600. The cost to attend is \$20 for WBA members and students and \$30 for nonmembers.

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

WMACCA Annual Meeting Features Executive Educator Chic Thompson

The Washington Metropolitan Area Corporate Counsel Association (WMACCA) will hold its annual meeting on January 30, featuring Chic Thompson, author and executive educator, as keynote speaker.

The WMACCA also will elect its new officers and directors at the meeting, which takes place from 12 to 2 p.m. at The Ritz-Carlton, Tysons Corner, 1700 Tysons Boulevard, McLean, Virginia.

For more information, contact Ilene Reid at 301-881-3018 or Ilene.Reid@WMACCA.com, or visit www.wmacca.com.

Same-Sex Marriage Update Leads New Course Offerings in January

In January the D.C. Bar Continuing Legal Education (CLE) Program will tackle a variety of topics, including same-sex marriage, through new course offerings.

On January 9 the course “Update on Same-Sex Marriage and Domestic Partnerships 2014” will discuss the recent U.S. Supreme Court decisions in *United States v. Windsor*, which struck down the Defense of Marriage Act, and *Hollingsworth v. Perry*, which rejected an appeal on California’s Proposition 8. Attendees will learn how these decisions changed existing laws and how the changes are being implemented.

Led by Michele Zavos of Zavos Juncker Law Group, PLLC, the course will explore state recognition of marriages between same-sex couples; the impact on residents of recognition states (Delaware, the District of Columbia, and Maryland) and non-recognition states such as Virginia; the future of marriage equality litigation; and updates on Proposition 8 and marriage equality in California.

Zavos also will talk about same-sex marriage and its implications for estate planning, family law, immigration, federal employees, taxes, the military, and probate.

The course takes place from 6 to 8:15 p.m. and is cosponsored by the D.C. Bar Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Estates, Trusts and Probate Law Section; Family Law Section; Health Law Section; and Labor and Employment Law Section.

continued on page 41



Michele Zavos

speaking of ethics

By Saul Jay Singer

The following is the latest in a series of articles in which the Ethics Guru answers your questions about the District of Columbia Rules of Professional Conduct.

Dear Ethics Guru:

As counsel for Flexxon Corporation defending against Plaintiff's fraud claim, I received a settlement offer from counsel for Plaintiff, which, of course, I must communicate to my client pursuant to Rule 1.4(c). Flexxon has real liability in the case, the potential damages are huge, and I think the offer is one that my client would have to be nuts not to accept. (Can an entity be insane?)

However, Flexxon's chair says "No way we settle; we are going to litigate to the death—verily, even unto the gates of hell!" Three board members have each separately ordered me to go back to Plaintiff with a counteroffer, albeit with entirely different offers. Flexxon's CEO, who seems most able to listen to reason, says "Grab the deal before Plaintiff changes her mind!" The janitor, an employee of the corporation whose opinions seem to be outcome determinative in important company decisions, says "You should seek guidance from our insurer regarding whether to settle, and follow its advice."

What do I do? Whose directions do I follow? Since there is an internal dispute regarding settlement strategy, can I choose to follow the CEO's direction, since that is truly in the corporation's best interests?

—Who's the Boss

Dear Who's the Boss:

As we all know, there is no such thing as a "corporation"—it is a wholly fictional construct, except to the extent that it is created by law as some "body." But how does a body made up of various moving parts make decisions, and how does it determine which goals to pursue and which actions to take in furtherance of those goals?

Comment 1 to Rule 1.13 probably says it best:

Ask the Ethics Guru: Your Client—An Entity

An organizational client is a legal entity, but it cannot act except through its officers, directors, employers, shareholders, and other constituents.

But this raises your question: *which* of the entity's "officers, directors, employers, shareholders, and other constituents" will direct your activities? The answer is found in Rule 1.13(a):

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

The duly authorized constituent—who may actually be specified in the corporate bylaws—is usually the board chairperson, high corporate officer, or the like, but it could be anybody. Absent substantive law to the contrary, the corporation could designate an accountant or other staff member, or, for that matter, the janitor who cleans the office at night. The lawyer's duty will be to communicate with, and to take direction from, the "duly authorized constituent" on all matters related to the representation.

Dear Ethics Guru:

I have a related question. I have been representing a pro-tenant organization, Death to Landlords, for many years with no problems—except for that little incident a few years ago, which you may have heard about when one of my client's constituents took the name of the organization perhaps a bit too literally. However, I am now faced with a "battle of the boards" where two distinct groups are claiming to be the organization's properly constituted board. You will not be surprised to learn that each group is giving me entirely different directions regarding my representation, and each is threatening to file a Bar complaint against me if I follow the directions of the other. What, oh what, am I to do?

—Lost at Sea



Nick Wiggins

Dear Lost:

How the heck do I know? I'm your friendly neighborhood Ethics Guru, not a leading authority on corporate law, and I certainly don't know any facts regarding the backstabbing schemes and intrigue going on over there. Though I get paid big bucks (he said, somewhat facetiously) to write this column and to answer questions and not to duck them, I am going to have to dodge answering yours head on because it squarely presents questions of fact and substantive law.

But I can, nonetheless, give you some meaningful guidance. First, understand very well that your duty, first and always, is to the *organization* and not to any of its constituents, and any action that you take must be focused like a laser on furthering the best interests of the organization within the scope of the law and the Rules of Professional Conduct. If it is clear to you that Board A is Death to Landlord's properly constituted board and that Board B's claim is frivolous and lacks basis in fact and law, then you may continue to represent the organization, taking your direction from the duly authorized constituent designated by Board A. If, however, you cannot resolve the question of who controls the entity, you must withdraw from the representation (subject to all conditions of Rule 1.16). What will then likely happen is that Board A and Board B will each retain separate counsel and duke it out in court, and the prevailing party will decide whether to retain you as counsel for the organization—assuming that you are still interested in the gig.

Dear Ethics Guru:

For more than five years, I have served as outside counsel for MegaCorp, Inc., one of the largest wireless service providers in the United States. I understand that my duty under Rule 1.5(b) is to provide a writing to the Client's duly authorized constituent—in this case, the company chair—specifying the

basis of the rate, the scope of the lawyer's representation, and the expenses for which the client will be responsible, but new matters have suddenly begun to come in every few days and the chair is starting to turn vicious when I ask him several times a week to execute a new retainer agreement for the new cases. Given his, shall we say, keen displeasure, is there some way around the clear mandate of Rule 1.5?

—Sick and Tired of Getting Screamed at

Dear Sick and Tired:

I've got some good news for you! Contrary to popular opinion, when a lawyer is paid hourly, there is no ethical requirement to have the client sign the retainer agreement. However, as I regularly advise my readers, just because the D.C. Rules usually do not require a writing doesn't mean that it isn't a real good idea to do it that way. In this case, however, if your client doesn't want to be bothered with having to sign each new retainer, you do not have any ethical obligation to exhort him to do so. Now, leave your poor chair alone and let him return to running his company!

Dear Ethics Guru:

Direct, succinct question: As in-house counsel for Diablo Corporation, I represent the company in a wrongful termination/sexual harassment case brought by Debbie Debit, a former company accountant. May I also simultaneously represent a Diablo constituent—Plaintiff's former supervisor, Barry Beelzebub—who also has been named as a defendant?

—Wants to Do the Right Thing

Dear Right Thing:

A direct question like yours deserves a direct answer—which, of course, means that you're not going to get one. This is because the answer is: it depends.

It is not uncommon for an entity and one or more of its constituents to be named as co-defendants in an action. The seminal question for a lawyer seeking to enter into such a joint representation is whether the lawyer can meet his or her duty of competence, diligence, and loyalty to *each* client without conflict. Moreover, this is an issue that must be constantly monitored throughout the representation, because no matter how consistent the apparent interests of clients in a joint representation may appear at the onset, there exist inherent risks of a future conflict of interest raising its ugly head.

For example, in your sexual harassment case, the interests of Diablo and Beelzebub may seem to be precisely aligned, but what would you do if Beelzebub testifies at deposition that, notwithstanding Diablo's claims to the contrary, he never received sexual harassment training, nor had he ever received any information regarding the existence of any company sexual harassment policy, formal or otherwise? Under such circumstances, any position you take would be acting contrary to the interests of one of your clients in a material respect and, as such, you would be forced to withdraw from the case.

Other problems can, and often do, arise under Rule 1.6, the duty to maintain client confidences and secrets. As D.C. Bar Legal Ethics Committee Opinion 296 notes:

A lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another.

Say, for example, that well into the representation Beelzebub suddenly advises you that he wants to tell you a "secret," which he instructs you not to disclose to *anyone*, and, before you can respond, he blurts out that he was fired from his previous position for sexual harassment. Here, too, you would have an irreconcilable conflict: You have a duty to Beelzebub not to disclose his secret, but you also have a duty to Diablo to make the disclosure, as it is certainly relevant and material to the company's interests in the case. Here, too, you would have no choice but to withdraw.

And if you are thinking that should any conflict between your two clients develop, you would simply withdraw from representing Beelzebub and continue to represent Diablo, forget it, dude. First, under Rule 1.9, Beelzebub would be a "former client" to whom you would still owe the duty of confidentiality, which duty transcends the representation—indeed, it transcends the life of the client. Second, Rule 1.9 would forbid you from represent-

ing Diablo in the same (or a substantially related) matter in which the company's interests are materially adverse to Beelzebub's interests. As such, you could not represent Diablo, which, unable as a matter of law to represent itself pro se, would be forced to retain outside counsel . . . and it would likely not be pleased.

These are issues that you should be careful to discuss *in advance* with all clients in a potential joint representation. In many cases, it may be best for the entity to retain separate counsel at the inception of the case to represent the constituent, but that is a tactical issue, not necessarily an ethical one.

A related question: Lord Voldemort, counsel for Plaintiff Debbie Debit, hired an outside investigator, Dick Gumshoe, and, without first seeking my consent, Gumshoe interviewed several persons, including Diablo's chair; Norm Numbercruncher, a current Diablo accountant; and Barbara Bookkeeper, a former Diablo accountant. Is it ethically permissible for Voldemort and Gumshoe to do this?

The rules here are fairly straightforward: Under Rule 4.2, Voldemort may not communicate, or cause Gumshoe to communicate, about the subject of the representation with a person represented by counsel without first obtaining the consent of that counsel. Under Rule 4.3, Gumshoe may speak to an unrepresented person, but he must first identify himself as an investigator for Plaintiff in the case with interests adverse to Diablo.

In this case, you represent Diablo *only*, and not the chair personally, Numbercruncher, or Bookkeeper—all of whom, for purposes of this question, I will assume are unrepresented by counsel. Rule 4.2(b) permits Voldemort to communicate directly with a current Diablo employee such as Numbercruncher without your knowledge or consent, if he complies with the Rule 4.3 mandate as I discussed above. Similarly, subject to Rule 4.3, Gumshoe may speak directly to a former Diablo employee such as Bookkeeper, but he may not seek to discover privileged Diablo information from her. *See* Legal Ethics Opinion 287. However, Voldemort's/Gumshoe's communication with the chair violates Rule 4.2(c) because the chair is a Diablo employee with authority to bind the company in the Debit case and, as Diablo's "decision maker" in the litigation, he is considered to be a party with whom direct communication is prohibited.

Dear Ethics Guru:

How can I become as erudite and conversant about the D.C. Rules of Professional Conduct as you?

—A Future Lawyer and a Big Fan

Dear Fan:

Read the rules daily, hourly, if possible. Keep a copy on your desk and on your nightstand for easy reference. Make them your friend. And, if you have any ethics questions, call the Legal Ethics Helpline at the D.C. Bar.

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

Disciplinary Action Taken by the Board on Professional Responsibility

Original Matters

IN RE LILY MAZAHERY. Bar No. 480044. October 4, 2013. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Mazahery and require her to pay restitution in the amount of \$3,241.92, plus interest at the legal rate. This disciplinary case arose from Mazahery's representation of two refugees and the collection of donations for a woman on death row in Iran. In the first matter, Mazahery represented pro bono Mr. Sanjari, an Iranian dissident and former political prisoner with whom she was engaged in a personal relationship, in his efforts to travel to and then settle in the United States. In the second matter, Mazahery represented pro bono Mr. Batebi, a photojournalist and former political prisoner, in his efforts to leave Iraq and settle in the United States. Also associated with her representation of Mr. Batebi, in the third matter, Mazahery submitted a fraudulent claim to United Bank, wherein she stated that she "did not authorize or participate in" a disputed transaction. In the third matter, Mazahery collected donations in a campaign to save the life of Akram Mahdavi, a woman in prison in Iran awaiting execution. The Board found that Mazahery violated Rules 1.1(a) and (b) (competence) in the Batebi matter; Rules 1.4(a) and (b) (communication) in the Batebi and Sanjari matters; Rules 1.6(a)(1), (a)(2), and (a)(3) (client confidences) in the Batebi and Sanjari matters; Rule 1.7(b)(4) (conflicts of interest) in

the Sanjari matter; Rule 8.1(a) (false statements in a disciplinary matter) in the Mahdavi matter; Rule 8.4(b) (criminal conduct) in the United Bank matter; Rule 8.4(c) (dishonesty, fraud, deceit, or misrepresentation) in the Mahdavi, Batebi, Sanjari, and United Bank matters; and Rule 8.4(d) (conduct that seriously interferes with the administration of justice) in the Mahdavi matter. Rules 1.1(a), 1.1(b), 1.4(a), 1.4(b), 1.6(a)(1), 1.6(a)(2), 1.6(a)(3), 1.7(b)(4), 8.1(a), 8.4(b), 8.4(c), and 8.4(d).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE DONNA BARNES DUNCAN. Bar No. 329144. October 10, 2013. The D.C. Court of Appeals disbarred Duncan by consent, effective immediately.

IN RE LEROY E. GILES JR. Bar No. 379651. October 17, 2013. The D.C. Court of Appeals granted Giles's petition for reinstatement.

IN RE EDWARD N. MATISIK. Bar No. 463786. October 17, 2013. The D.C. Court of Appeals suspended Matisik for 60 days, with the additional requirements that before he is reinstated he must (1) prove his fitness to practice law and (2) make restitution in the amount of \$1,940, plus interest at the legal rate of 6 percent. While retained in three matters involving three separate clients, Matisik failed to provide competent representation and to serve his clients with skill and care, failed to represent his clients zealously and diligently and to act with reasonable promptness, failed to communicate with his clients and keep them reasonably informed, failed to communicate in writing the basis or rate of the legal fee, failed to withdraw from representation when impaired, and failed to return papers and property after termination of representation. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(c), 1.4(a), 1.5(b), 1.16(a)(2), and 1.16(d).

Reciprocal Matters

IN RE ALLEN BRUFISKY. Bar No. 64956. October 17, 2013. In a reciprocal matter from Florida, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Brufsky for 91 days with fitness, effective immediately. In Florida, Brufsky admitted that he had engaged in a conflict of interest.

IN RE CHRISTOPHER M. JOHNS. Bar No. 433783. October 24, 2013. In a

reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Johns, *nunc pro tunc* to October 9, 2013. Johns had consented to disbarment in Maryland while facing allegations that he had misappropriated entrusted funds.

IN RE GLENN C. LEWIS. Bar No. 955500. October 17, 2013. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Lewis, effective immediately. In Virginia, Lewis was found to have violated rules relating to neglect, failure to communicate with a client, charging an unreasonable fee, misappropriation of entrusted funds, failure to respond to disciplinary authorities, a criminal act reflecting adversely on attorney's fitness, and dishonesty.

IN RE LEODIS C. MATTHEWS. Bar No. 284182. October 17, 2013. In a reciprocal matter from California, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Matthews for one year, stayed in favor of two years' probation with 30 days of actual suspension served with the same conditions imposed in California, effective immediately. In California, Matthews admitted that he had engaged in a conflict of interest.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE FRANK B. CEGELSKI. Bar No. 414766. October 10, 2013. Cegelski was suspended on an interim basis based upon discipline imposed in New York.

IN RE ALAN S. GREGORY. Bar No. 411664. August 2, 2013. Gregory was suspended on an interim basis pursuant to D.C. Bar R. XI, § 3(c), on the ground that he failed to respond to an order issued by the Board on Professional Responsibility in a matter involving an allegation of serious misconduct.

IN RE GARLAND H. STILLWELL. Bar No. 473063. October 21, 2013. Stillwell was suspended on an interim basis based upon discipline imposed in Maryland.

Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory

and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dcb.org/discipline and search by individual names.

IN RE JOHN B. BLANK. Bar No. 208660. On May 3, 2013, Connecticut's State-wide Grievance Committee reprimanded Blank by consent for neglecting a legal matter entrusted to him.

IN RE CHRISTOPHER B. SHEDLICK. Bar No. 1010480. On August 27, 2013, the Attorney Grievance Commission of Maryland reprimanded Shedlick for violations of rules relating to supervision of nonlawyer assistants, professional independence of a lawyer, and communications regarding a lawyer's services.

IN RE TODD L. TREADWAY. Bar No. 479233. On August 8, 2013, the Virginia State Bar Disciplinary Board publicly reprimanded Treadway by consent for failing to respond to a lawful demand for information.

IN RE MALIK J. TUMA. Bar No. 420616. On July 22, 2013, the Attorney Grievance Commission of Maryland reprimanded Tuma for failure to respond to Bar Counsel.

IN RE RACHEL L. YOSHA. Bar No. 423700. On January 16, 2013, the Supreme Court of Arizona reprimanded Yosha for violations of ethical rules relating to conduct prejudicial to the administration of justice, meritorious claims and contentions, and expediting litigation.

Informal Admonition Issued by the Office of Bar Counsel

IN RE HARRY TUN. Bar No. 416262. October 10, 2013. Bar Counsel issued Tun and informal admonition. While dealing, on behalf of a client, with a third party who was unrepresented by counsel, Tun gave advice to the unrepresented person even though there was a potential conflict of interest. Rule 4.3(a)(1).

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.dccourtydiscipline.org. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in

the Atlantic Reporter and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.

From the President continued from page 6

are supported by those charged. Indeed, unjustified and unnecessary arrests are often the first steps that lead young men of color down the path of the "redesigned" system of racial caste that Michelle Alexander has so aptly identified as "the New Jim Crow."

In response to these troubling reports, the Metropolitan Police Department (MPD) has said that the "arrest numbers reflect the increased presence of law enforcement often demanded by residents who want order restored in communities long considered neglected," *The Washington Post* reported in July. Police Chief Cathy L. Lanier pointed out that there are other variables that contribute to these racial disparities, including the "complex relationship" between race, poverty, education, and employment.

The Washington Lawyers' Commit-

tee has requested additional data from the MPD and is presently conducting a detailed study of the collateral consequences of arrests and convictions on jobs, housing, and eligibility for public benefits.

So what is the solution? There are no silver bullets and the answers are not simple. According to Rod Boggs, executive director of the Lawyers' Committee, "this issue continues to be a matter of urgent priority for the Lawyers' Committee and it will need the ongoing support and assistance of the pro bono bar in our city."

Part of the answer may be legislation that decriminalizes possession of marijuana, as has been proposed by D.C. Councilmember Tommy Wells, as well as a broad reexamination of our city's drug laws and arrest policies. The reality is that arrests of minority members of our community occur before lawyers normally become involved. Accordingly, as lawyers, we must broaden our remedial scope to support enhanced diversity training for police and, most important, expanded opportunities for quality education and gainful employment for the residents of all the wards of the District.

Reach Andrea Ferster at afenster@railstrails.org.



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 are eligible to participate if:

- You appeared before one or more judges scheduled for evaluation (see http://www.dcb.org/judicial_evaluations.cfm); **and**
- Your appearance(s) took place between July 1, 2011 and June 30, 2013.

If you do not receive an invitation from Research USA, an independent vendor administering the survey, and you are eligible to participate, please request a link to the survey directly from Research USA at dcbjudicialevaluation@researchusainc.com.

Evaluations are due by 10 p.m. Eastern time on January 12, 2014.

Thank you for your participation.

Mary Ann Snow, Chair, D.C. Bar Judicial Evaluation Committee

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

D.C. Bar Launches New Web Site

Hit the refresh button. The new D.C. Bar Web site is here. With its streamlined navigation, new online storefront, and improved search features, the site provides Bar members and the public greater access to important legal information.

The dynamic visual design will point users toward the latest, most relevant news and offer a more interactive experience while conducting legal research, registering for their next course, or searching for pro bono opportunities around the District of Columbia.

In addition, the new Marketplace serves as a one-stop shop for members to buy or download materials made available from some Continuing Legal Education and Sections programming, and numerous publications such as the Practice Manual. Users also can register for events in one easy transaction.

Need information while waiting on the platform for the Metro? No problem. The new site renders in a mobile-friendly interface to make browsing seamless on any device, from your tablet to your smartphone.

Keep in mind that during the transition, bookmarked links may no longer work on our new Web site. The Bar's Web site is available at www.dcbar.org.

For questions, feedback, or to report issues with the new Web site, please contact the D.C. Bar at 202-626-1302.—*T.L.*

6 Mayoral Candidates Face Off in First Debate of 2014 Race

Arent Fox LLP's auditorium was filled beyond capacity on November 13 for the first District of Columbia mayoral forum of the 2014 election cycle, sponsored by the D.C. Bar District of Columbia Affairs Section.

The event brought together six Democratic candidates—four of whom are current D.C. Council members—vying to replace Mayor Vincent C. Gray, who is seeking reelection.

D.C. Council members Tommy Wells (Ward 6), Muriel Bowser (Ward 4), Jack



Six Democratic candidates for D.C. mayor prepare to answer questions from the media and the public during a mayoral forum, the first of the 2014 election cycle, hosted by the D.C. Bar District of Columbia Affairs Section on November 13 at Arent Fox LLP.

Evans (Ward 2), and Vincent B. Orange (At Large), and two political newcomers, Busboys and Poets owner Andy Shallal and former U.S. Chamber of Commerce vice president Reta Jo Lewis, faced off on critical issues confronting the District, including education, economics, and crime.

In their opening statements, the candidates were eager to distance themselves from Gray and the ethics scandals that have plagued his administration. Wells vowed to bring integrity to the office and to “fight for what is right every time,” while Shallal and Lewis both proclaimed their outsider status.

Bowser said she thought District residents “deserve a fresh start in the mayor’s office,” and Orange told the audience he was running “to provide a reasonable, fair, balanced approach” to the D.C. government. Evans, meanwhile, said that as mayor he would “stand for issues that are important to all of us.”

The evening was not without some confrontation as Evans and Orange were asked by members of the media about voting against the censure of Council-

member Marion Barry (D-Ward 8) in September, after Barry was accused of taking money from a city contractor. Evans and Orange, along with Bowser, also received some harsh words from other candidates about voting to delay a voter-approved election of the District’s attorney general.

The forum was cosponsored by DC Applesseed; DC Vote; the Consortium of Universities of the Washington Metropolitan Area; the University of the District of Columbia David A. Clarke School of Law; and the D.C. Bar Administrative Law and Agency Practice Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Labor and Employment Law Section; Litigation Section; and Real Estate, Housing and Land Use Section.—*K.A.*

Bar Seeks Nominees for 2014 Rosenberg, Marshall Awards

The D.C. Bar is calling for nominations for its 2014 Beatrice Rosenberg Award for Excellence in Government Service and its

2014 Thurgood Marshall Award. Both awards will be presented at the Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting in the spring.

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 Bar established the Thurgood Marshall Award in 1993, which is presented biennially and alternates with the presentation of the William J. Brennan Jr. Award. Candidates for the Marshall Award must be members of the D.C. Bar who have demonstrated exceptional achievement in the pursuit of equal justice and equal opportunity for all Americans.

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

Nominations for both the 2014 Rosenberg and Marshall awards may be submitted electronically by e-mail attachment to rosenbergaward@dcbar.org or marshallaward@dcbar.org, respectively, or in a hard-copy format to Katherine A. Mazzaferrri, Chief Executive Officer, District of Columbia Bar, 1101 K Street NW, Suite 200, Washington, DC 20005. Electronic submissions are encouraged.

The deadline for submissions is Friday, January 24.

To inquire about the awards, please e-mail rosenbergaward@dcbar.org or marshallaward@dcbar.org.

Justice Thomas Recounts Journey to SC at Federalist Society Dinner

A relaxed and jovial Supreme Court Justice Clarence Thomas joined the more than 1,300 attendees of The Federalist Society for Law and Public Policy Stud-

FINDING LOVE



Anita Jarman

The D.C. Superior Court and the D.C. Child and Family Services Agency held their 27th annual adoption ceremony on November 23 to celebrate National Adoption Day. Pictured is NBC News4 anchor Barbara Harrison, who emceed the program, holding one of the more than 20 children whose adoptions were finalized during the ceremony held at the H. Carl Moultrie Courthouse.—K.A.

ies’ annual dinner on November 14, one of the highlights of the organization’s National Lawyers Convention in Washington, D.C.

Justice Thomas, known for rarely speaking from the bench, sat down with Judge Diane S. Sykes of the U.S. Court of Appeals for the Seventh Circuit in a candid conversation that covered his life story and his path to the Court.

The justice began by reminiscing about his education at the College of the Holy Cross and Yale Law School during the turbulent 1960s. While in the past Thomas has spoken negatively about Yale, he told Sykes that his experience at the school “was very beneficial.”

Asked how he made his way to Washington, D.C., and eventually to the Supreme Court, Thomas recounted how in 1979 he quit his job, took a U-Haul, and traveled to the nation’s capital, where he eventually got a job with then U.S. senator John Danforth of Missouri. Thomas said he intended to eventually return to his home city of Savannah, Georgia, but that “one thing led to another and I wound up on the Court.” His journey to the nation’s highest court, Thomas said, was “totally Forrest Gump.”

Now in his 22nd year as a Supreme Court justice, Thomas said he “feels blessed

every day” for his job. “I never thought I would treasure doing my job, and I have reached that point. Even the most boring cases are fascinating . . . I’ve gotten to the point where it’s like the priesthood, it’s what I was called to do,” he said.

When Sykes asked whether the doctrine of stare decisis, or deference to legal precedents, holds much weight with him, Thomas said that it does, but “not enough to keep me from going to the Constitution.”

“I think someone should have kept writing that segregation was wrong regardless of what the precedent was,” he said, adding that in some cases the justices are obligated to say what they think regardless of precedent.—K.A.

Bar Seeks Candidates for Committee, Board Vacancies

The D.C. Bar Board of Governors is seeking candidates for appointment this spring to the Attorney/Client Arbitration Board, Judicial Evaluation Committee, Legal Ethics Committee, Clients’ Security Fund, and the Bar Foundation as well as to the Board on Professional Responsibility (BPR) of the D.C. Court of Appeals.

All candidates must be members of the D.C. Bar. For Board on Professional Responsibility openings, 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.

Résumés must be received by March 14. Individuals interested in applying should submit a résumé with a cover letter stating the committee on which they would like to serve to executive.office@dcbar.org or by mail to the D.C. Bar Screening Committee, 1101 K Street NW, Suite 200, Washington, DC 20005-4210.

Additionally, 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.

Bar Sections Announce Steering Committee Openings

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 6. All section members were notified by e-mail or postal mail about the availability of Candidate Interest Forms, which can be found online by choosing the "Elections" option under the "Sections" tab at www.dcbbar.org.

Nearly all steering committee vacancies are for three-year terms. Each section has two, three, or four available positions. A list of vacancies also 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 2014, and the results will be announced in June. The winning candidates will assume their new steering committee roles on July 1.

2014 D.C. Bar Elections Open for Nominations

The D.C. Bar is accepting applications from members wishing to be candidates in the 2014 Bar elections. The deadline for receipt of nominations is January 6.

The D.C. Bar Nominations Committee is charged with nominating

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

Individuals interested in being considered for any of these positions should submit their résumés and a cover letter stating the position for which they would like to be considered, as well as a description of work or volunteer experiences that provide relevant skills for the position(s) sought. 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. Nomination materials may be e-mailed to executive.office@dcbbar.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.

Bar Evaluation Committee Invites Performance Feedback on Judges

The D.C. Bar Judicial Evaluation Committee (JEC) is conducting its 2013-2014

performance evaluation of judges who preside over the D.C. Court of Appeals and the D.C. Superior Court.

Attorneys who have appeared before one or more of the judges listed below during the period between July 1, 2011, and June 30, 2013, will be asked to provide feedback. The survey is conducted online only, and all responses and comments will remain anonymous. Evaluations are due by 10 p.m. EST on January 12.

The following Court of Appeals judges will be evaluated this year: Corinne A. Beckwith, Catharine F. Easterly, Michael W. Farrell, John M. Ferren, Theodore R. Newman Jr., William C. Pryor, Frank E. Schwelb, and John A. Terry.

The following Superior Court judges will be evaluated this year: Mary Ellen Abrecht, John H. Bayly Jr., Leonard Braman, Harold L. Cushenberry Jr.,

NEW BAR MEMBERS MUST COMPLETE PRACTICE COURSE

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

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

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

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

The preregistration fee is \$219; the onsite fee is \$279. Courses will be held on January 11, February 4, March 8, April 8, May 17, and June 10. Advanced registration is encouraged.

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

SPECIAL NOTICE TO D.C. BAR SECTION MEMBERS: 2014 Steering Committee Voting to be Online

The 2014 section steering committee elections will be conducted primarily online with paper ballots only available on request.

Section members in good standing will access their ballots by logging into the Bar's Web site during the spring voting period to cast their ballots. Paper ballot requests will be available on the Bar's Web site in early 2014. To make a request in the meantime, please send an email to section-ballot@dcbbar.org.

Online voting will be available to all eligible voters throughout the election period but paper ballots will not be generated unless a specific request is submitted.



BE OUR GUEST



On November 13 the D.C. Bar hosted the Shenzhen Lawyers Association. Bar executives presented a broad overview of the D.C. Bar and discussed the Pro Bono Program. After greeting the visitors in Chinese, Senior Legal Ethics Counsel Saul Jay Singer (pictured above, center) presented a roundtable discussion on legal ethics, the D.C. Rules of Professional Conduct, and the lawyer disciplinary system.

Danya A. Dayson, Jennifer A. DiToro, Herbert B. Dixon Jr., Frederick D. Dorsey, Stephanie Duncan-Peters, Natalia Combs Greene, Brian Holeman, Craig Iscoe, William Jackson, John Ramsey Johnson, Ann O'Regan Keary, Peter A. Krauthamer, Judith Macalusco, John F. McCabe Jr., Robert E. Morin, John M. Mott, Michael L.

Rankin, J. Michael Ryan, Fern Flanagan Saddler, Lee F. Satterfield, Frederick H. Weisberg, Ronald P. Wertheim, Yvonne Michelle Williams, Peter H. Wolf, and Joan Zeldon.

Judges are evaluated in their 2nd, 6th, 10th, and 13th year of service. Additionally, 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.

The JEC has retained Research USA, an independent vendor, to administer the survey and tabulate the final results. Attorneys who do not receive an invitation from Research USA, and believe they are eligible to participate, may request a link to the survey directly from Research USA at dcbarjudicialevaulation@researchusainc.com.—K.A.

SEC Chair Mary Jo White Delivers Fifth Annual Flannery Lecture

On November 14 U.S. Securities and Exchange Commission (SEC) Chair Mary Jo White delivered the fifth annual Judge Thomas A. Flannery Lecture, focusing her speech on the importance of trials in helping to develop new laws and in creating an atmosphere of public accountability by allowing the public to

continued on page 21

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Bar Dialog Tackles Legal Help Access for Modest-Means Clients

More than two dozen members of the legal services provider community in the District of Columbia, and some from across the country, gathered at the D.C. Bar on November 7 for a dialog on how to make affordable legal services available to individuals of modest means.

D.C. Bar President Andrea Ferster, who has made the issue the focus of her presidency, welcomed the attendees, telling them that she sensed this was a historic moment.

The dialog was an opportunity for representatives from various legal services providers to hear about some programs that are available, to ask questions and debate issues, and to discuss possible solutions. The conversation centered on providing legal assistance to people who do not meet certain guidelines—typically income at or below 200 percent of the federal poverty line—to avail of pro bono help.

“I do want to emphasize that today we are here simply to examine the problem, or as one bar leader has said, to admire it. We are obviously not going to solve this problem today. But even so, just the fact that we are here . . . is a giant step forward by virtue of the fact that we are looking at this issue,” Ferster said. “It’s my hope that . . . many of you will want to continue this discussion and look at ways that we can work together as a legal community to solve this access to justice problem in our community.”

Serving Modest-Means Clients

The first part of the program was dedicated to listening to various individuals who are involved in some aspect in the provision of legal services to people of modest means.

William Hornsby, staff counsel for the ABA’s Standing Committee on

the Delivery of Legal Services, opened the discussion by talking about the types of affordable legal services available nationwide. He said the scope of the problem for individuals who could neither afford to hire an attorney nor qualify for free legal help could not be overstated, and that attempts to resolve it have been “an ongoing experiment.”

Hornsby briefly discussed legal assistance options for low- to middle-income clients such as modest means panels, prepaid legal services, low bono or low-cost services, unbundled legal services or limited scope representation, and court self-help centers.

Several other participants talked about the initiatives at their respective organizations to help make legal services accessible to the moderate-income population. Among them was Alan Herman, supervisory attorney at the Legal Counsel for the Elderly’s (LCE) legal hotline, who explained how LCE’s Reduced Fee Panel is helping to address the problem. The panel has 14 attorney volunteers (interviewed and screened before entering into contracts with LCE) who provide legal services at reduced rates for clients referred to them by LCE’s legal hotline staff.

Julie Petersen, executive director of the Bar Association of Montgomery County, Maryland, said her bar’s Lawyer Referral Service, one of a number of similar programs developed by state and local bar associations to serve modest-means clients and to connect them with affordable lawyers, has seen an increase in reduced-fee requests.

Ana Selvidge, public service programs manager at the Washington State Bar Association, joined the dialog by video conference and discussed the bar’s Moderate Means Program. The program, a partnership with Gonzaga University School of Law, Seattle University School of Law, and University of Washington School of Law, connects moderate-income people with lawyers offering reduced-fee work in family, housing, and consumer law. Using a PowerPoint presentation, Selvidge shared statistics showing the growth of the Moderate Means Program in the past couple of years.

Meanwhile, Fred Rooney, director of the Touro College Jacob D. Fuchsberg Law Center’s International Justice Center for Post-Graduate Develop-

ment, talked about law school incubator programs, which serve the dual purpose of addressing the legal needs of low- and middle-income individuals and provide training and jobs for recent law school graduates.

Rooney oversaw the launch of Touro Law Center’s own incubator program in November. At City University of New York Law School, Rooney also was the founding director of the school’s incubator program, the Community Legal Resource Network.

An Important First Step

The first segment of the dialog was followed by two breakout sessions where small groups discussed ways to make legal services more available to people of modest means.

When the groups reported back to the full conference, some common ideas came up. The groups shared that advances in technology will make it easier for people to do legal work on their own, the need for legal services for moderate-income people will continue to increase, there are possible advantages to getting law school graduates into practice before they pass the bar exam, there is a move toward more solo practitioners doing low bono work, and courts will have to continue to adjust the way they do business.

The attendees discussed these concepts, raised questions, and offered comments. They also weighed the advantages and disadvantages of each before coming up with four possible approaches that will be explored further: reduced-fee referral service, a consortium of law school incubator programs, the expansion of self-help centers, and allowing new law school graduates to practice pending their admittance to the bar.

Ferster brought the dialog to a close by thanking those who participated. “I just want to emphasize in closing that we are tackling an incredibly difficult issue that has profound implications for our neighbors here in D.C., for our legal community, and the District of Columbia as a whole. But I feel like today we’ve just taken a really important step in addressing this issue, and we’ve created, I think, a lot of momentum with which we can now move forward,” she said.

The D.C. Bar will issue a summary report on the meeting in the spring.—*K.A.*

hear the charges and evidence.

"Trials allow for more thoughtful and nuanced interpretations of the law in a way that settlements and summary judgments cannot," said White as she addressed the crowd in the ceremonial courtroom at the E. Barrett Prettyman U.S. Courthouse.

In discussing the role of trials at the SEC, White said the agency "settled virtually all of its cases on a no-admit/no-deny basis," which allows a party to neither admit guilt nor deny the misconduct asserted by the SEC. In return, the defendant usually pays a large fine and agrees to an injunction against future misconduct.

In June, however, White announced that the SEC was revising its settlement practices to require admission of guilt from defendants in some cases, acknowledging it would likely lead to more trials.

"I don't think that is a bad thing, and we welcome the possibility. More trials should mean greater public accountability and more instances of a full factual record of wrongdoing that should foster better development of the law," said White. Even with the altered policy, White said the SEC will continue to use the no-admit/no-deny tool in most cases.

The lecture commemorates the con-

PATHS TO PUBLIC SERVICE



Courtesy of SABA-DC

The South Asian Bar Association of Washington, D.C. (SABA-DC) celebrated the achievements of Judge Sri Srinivasan of the U.S. Court of Appeals for the District of Columbia Circuit (right) and Neera Tanden, president of the Center for American Progress (center) as "South Asian American pioneers in the public sector." Srinivasan and Tanden spoke about the paths they took that led them to work in the public sector. The reception and panel discussion, held at Arent Fox LLP, was moderated by former SABA-DC president Dharmesh Vashee (left). The event was cosponsored by Arent Fox and the North American South Asian Bar Association.—T.L.

tributions of Judge Flannery, who served as assistant U.S. attorney for the District of Columbia from 1950 to 1962 and as U.S. attorney from 1969 to 1971. He was appointed to the U.S. District Court for

the District of Columbia in 1971 and assumed senior status in 1985.—T.L.

Reach Kathryn Alfisi and Thai Phi Le at kalfisi@dcbar.org or tle@dcbar.org, respectively.

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The District of Columbia Bar's Attorney/Client Arbitration Board (ACAB)

is seeking lawyer and non-lawyer volunteer arbitrators for its fee arbitration service. The ACAB's fee arbitration service provides a relatively informal, efficient and confidential forum for D.C. Bar members and their clients to resolve disputes about legal fees. Candidates are screened and appointed by the ACAB Committee. Appointed arbitrators must be able to attend a training session on June 5 from 12 pm to 4 pm at the D.C. Bar before serving on cases.

Interested candidates should contact Kathleen E. Lewis at (202) 737-4700, ext. 3238 or kewis@dcbar.org. Applications, additional information about the ACAB, and qualifications for ACAB arbitrators are at www.dcbar.org/acab. Candidates who wish to be considered should submit an application and résumé to the ACAB by mail, D.C. Bar ACAB, 1101 K Street, N.W., Suite 200, Washington, DC 20005-4210, fax 1-866-550-9330 or email to kewis@dcbar.org by February 21, 2014.



Under Contract

By Anna Stolley Persky

Temporary Attorneys Encounter No-Frills Assignments, Workspaces

Temporary contract attorneys are, by most accounts, crucial to the legal workforce in Washington, D.C. But some contract lawyers are not, to put it bluntly, happy about their fate. They bemoan what they describe as poor working conditions.

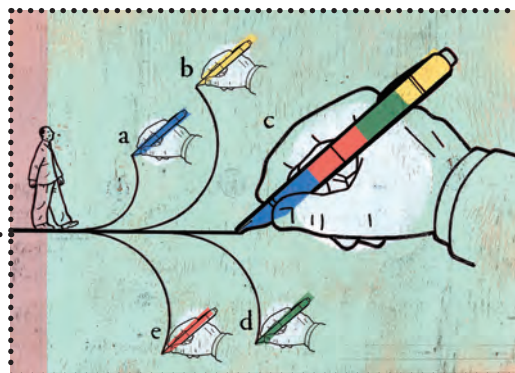
Sometimes there's no toilet paper in the bathroom. Sometimes they are not allowed access to their cell phones or the Internet. The work, they say, is tedious. The hours can be long, and the rooms can be windowless.

When they talk among each other, they share their stories of mounting debt, low wages, and what they see as humiliating treatment by law firms they had once dreamed of joining. They describe themselves as disillusioned and, most of all, trapped by their inability to find other more permanent employment. "We are treated like day laborers. We are the [migrant farm workers] of the industry," says Fiona Edwards, a Washington, D.C., lawyer who "stumbled into the contract market" and has never gotten out of it. "We are treated like an inconvenience when, in reality, law firms are making lots of money off of us. The morale among contract lawyers? Disenchanted."

The Posse List, an online clearinghouse for contract attorney employment opportunities, says it has more than 14,000 U.S. lawyers registered nationwide as actively seeking temporary employment. But there is no official method for determining the total number of lawyers in the Washington metropolitan area working on a temporary contract basis.

There are many different ways to view the plight of the temporary contract lawyer. Certainly, for some of them the reality of their day-to-day employment is far different than their expectations upon law school graduation. On the other hand, the legal economy is in a rut, with some major law firms either collapsing or shrinking. And so, from another perspective, perhaps temporary workers should count themselves lucky to have employment at all.

"Many lawyers have had huge expectations, and now are so full of bitterness," says Daniel M. Mills, assistant director of the D.C. Bar Practice Management Advisory





Service. “They blame law schools for graduating too many lawyers. But the blame thing, who cares? It’s happened.”

These days, temporary contract lawyers represent a surprisingly diverse group of attorneys. According to temporary workers and employment agency representatives, the pool of workers ranges in experience from recent law school graduates to older lawyers with decades of work experience. While some temporary contract lawyers have made lifestyle choices, many more attorneys say they have been forced by the lackluster economy to find work when and where they can.

“When you are on a project, and people open up about the careers they once had or the careers they thought they would have, you feel a profound sadness for them,” says a Washington, D.C., temporary contract attorney who asked not to be identified over concerns her comments would affect her employment opportunities. “Basically, there is this entire sector of highly educated workers who are doing this very mundane, tedious and sometimes mindless work, and who aren’t able to get out of it.”

‘That’s Just Reality’

The National Association for Law Placement (NALP) reported that the overall employment rate for 2012 law school graduates continued to drop from prior years. That being said, the NALP noted some positive signs, in that graduates were finding more jobs in large law firms and median earnings rose for the first time in five years.

According to market observers, there is an overabundance of lawyers for a shrinking number of jobs due to an overall weak economy.

“When law firms bring in staffs of contract lawyers instead of bringing in permanent attorneys, they are choosing a lower cost alternative and will continue to make every effort to keep

costs low,” says James W. Jones, a senior fellow at the Center for the Study of the Legal Profession at Georgetown University Law Center. “That’s just reality, I’m afraid. There are eight million stories in the *The Naked City*.”

But, as with any unemployment or underemployment trend, there are larger questions. Is the trend toward hiring temporary contract attorneys a short-term development out of economic necessity? Or is the legal economy shifting toward a business model increasingly reliant upon temporary workers?

Mills believes that the “old model of doing business” will become obsolete. The days of law firms doling out cushy associate positions with outlandish salaries are gone for good, he says.

“There’s this big self-correction going on in the profession. Clients don’t want to pay as much for services, and so the power balance has shifted, and firms are adjusting to that,” Mills says.

Mills is not alone in predicting that cost-conscious law firms will continue to trim their partner and associate positions instead utilizing temporary attorneys as needed.

The recent law school graduate and the experienced, but now unemployed, attorney now both face a different kind of market than 20 years ago, Mills says. And, indeed, law firms are increasingly exploring other lower-cost options, including outsourcing services abroad and utilizing technological advances such as sophisticated software programs.

The time has come for attorneys, Mills says, to think creatively about how to become integral to the new legal market.

“The fact is that firms just aren’t going to be hiring a whole bunch of associates anymore, so lawyers are going to have to get out of this mentality of ‘I’ve been trained. I’m brilliant. So I should be hired,’” Mills says. “While the economy is coming back, the legal market is going to look very different. The situation may be ripe for opportunities, but we don’t yet know what those will be.”

‘Ridiculously Low’ Wages

Certainly, dozens of large and mid-size law firms, either locally based or with local offices, hire contract lawyers. Temporary attorneys often are hired through placement agencies.

“To properly serve a client who comes in with an immediate need in a large matter that will necessitate additional bodies for a fixed period of time, that’s when you hire the contract lawyers,” says Diane P. Kilcoyne, director of litigation support at Lerch, Early & Brewer, Chartered, in Bethesda, Maryland.

In addition, many corporations and local firms, including some smaller firms, hire contract lawyers for more specialized assistance such as reviewing telecommunications contracts.

Temporary contract lawyers with specific skills such as technological expertise tend to get higher wages. The mass of lawyers engaged in large-scale document review, usually as part of discov-

ery, are more likely to be paid much less.

Contract attorneys in the Washington metropolitan area and beyond are specifically outraged by their pay, which often ranges from \$25 to \$40 per hour. By contrast, law firms can bill their hours to clients for much more, perhaps for hundreds of dollars per hour.

Meanwhile, the median salary for 2012 law school graduates with full-time jobs lasting at least a year was \$61,245, according to the NALP. Salaries of more than \$75,000 accounted for almost 36 percent of salaries reported. And, in the top 100 grossing law firms in the country, the average partner earned \$1.47 million in 2012.

For some temporary contract attorneys, the disparity between their lives and those of their counterparts in the more prestigious, larger law firms is a source of anger and frustration. There has been some discussion among contract lawyers of unionizing to negotiate higher wages and better treatment.

Even some staff attorneys and administrators at large and mid-size firms in charge of hiring or supervising temporary lawyers agree that contract attorneys are poorly compensated.

"The amount that contract lawyers make is ridiculously low," says one law firm administrator who asked not to be identified. "You can make more waiting tables."

Not Always Path to Richness

Looking at the history of the legal industry provides some interesting insight. Attorneys in the United States haven't always assumed they would get rich practicing law. In fact, in colonial times, lawyers were considered part of the professional class, but not, generally, the upper class.

Of course, there's no question that certain standout lawyers had been at the center of American historical developments, such as certain drafters of the Declaration of Independence, the U.S. Constitution, and state constitutions. Notable advocates argued key cases in state and federal courts, entered politics, or used their legal knowledge in the business world.

But their importance didn't necessarily translate into high wages. As the country grew, attorneys such as President Abraham Lincoln practiced law without the benefit of a formal legal education. Lawyers of the time faced the prospect of barely making enough to support their families. Alternatively, they could make a relatively high salary, especially if they came from upper-class backgrounds or had luck and the ability to market their skills.

In addition, lawyers then were less likely to have specializations and more likely to be general practitioners working alone or in what we would now describe as small firms.

As the United States industrialized, the role of lawyers changed. Eventually, some law firms began to consolidate and grow. With increased regulation and a changing society, lawyers also began to seek out areas of specialization.

State laws once limited legal fees. But as the maximum-fee laws were repealed, the concept of billable hours emerged as a way to ensure higher pay for services rendered. By the 1970s, billable hours became the standard charging procedure for most services.

"There was a time when lawyers made less money than other professionals," Mills says. "Then [lawyers, and therefore firms,] decided they should be charging

by the hour rather than charging by the value generated. That changed everything."

Clients Push Back

By the 1990s, law firms with hundreds of attorneys—dubbed BigLaw—pushed their associates to bill as many hours as possible to their paying clients. At the same time, attorney salaries skyrocketed.

Since 1994, which saw a dip in law firm employment, the job scene grew brighter and better than ever before. But, as proven many times, when things go up, they can come crashing down.

The recession that began in 2007 led companies to cut expenses, including lawyer fees. In the years that followed, large and seemingly unshakable law firms have collapsed; others, such as Patton Boggs LLP, have laid off associates. And numerous law firms cut perks and forced salary cuts.

The country's slow wriggle out of the recession hasn't translated into more and better jobs for lawyers. Companies, still reeling from the crisis, are fighting back against hefty legal fees.

"Demand for legal services has been pretty flat for the past couple of years," says Georgetown's Jones. "Law firms are trying to raise their rates, but client pushback is pretty vigorous. Growth is sluggish, and firms continue to struggle. It's a delicate balance for law firms."

In the first half of 2013, Washington law firms struggled more than their counterparts in other states to grow their businesses, according to data compiled by Citi Private Bank Law Firm Group. The findings counter conventional wisdom that Washington firms have been insulated from the recession because of their close proximity to the government. The data also supports the conclusion that the Washington metropolitan area is no better, and arguably worse, than any other area for lawyers to find permanent work.

"It remains a competitive market, to say the least," says Matthew Pascoello, director of career development and alumni counseling at American University Washington College of Law. "In the Washington area, there is a strong labor pool of smart, well-credentialed attorneys."

Perks Were Nice

The concept of a contract worker is certainly nothing new in the legal industry. In the Washington metropolitan area, temporary contract workers have long been a staple for an economy already reliant on a transient population.

"For a number of years, contract lawyers were the best-kept secret in the legal profession," Jones says.

For several decades, Washington law firms have relied on a steady stream of temporary attorneys to help with regulatory work, mergers and acquisitions, and document review and processing in preparation for litigation.

Lawyers who chose contract work found that there were some perks to temporary employment, especially in the tonier firms. Some firms had a reputation for feeding their contract workers gourmet meals and housing them in glamorous accommodations, sometimes in the trendiest parts of town.

Contract lawyers describe meals and snacks delivered to their desks, decent wages, and clean, spacious work stations. They also recall

"We are treated like day laborers. We are the [migrant farm workers] of the industry."

—Fiona Edwards,
Washington, D.C., contract lawyer

a seeming abundance of work, allowing them to pick among a number of potential projects.

"In the beginning, the contract market was great," says Edwards, the Washington, D.C.-based contract lawyer. "The money was good. A lot of times they treated you well. You could get rides home and meal vouchers or they fed you right there. It was gainful employment. I was rolling."

But then, as Edwards describes it, "that whole recession thing came along."

According to contract lawyers, the environment changed as the economy spiraled down. Contract pay dropped and the accommodations worsened. For several years it became difficult to snag even a temporary position in the most basic of document reviews.

When the money dried up, "projects were scarce," Edwards says. "You had to hustle to get work."

While the market has picked up slightly for contract attorneys, it's still not where it used to be, Edwards says. The median salary, which dropped during the recession, has failed to rise back up to its pre-recession rates, she says.

Mary Legg Winter, president and general counsel of Firm Advice, Inc. in Washington, D.C., has been placing attorneys for temporary and permanent positions since 1996. Winter says that as the permanent jobs have become scarce and the number of temporary placement agencies has increased, the collegiality among placement agencies has declined.

"As law firms have tightened their admissions to partnership, there are a lot of high-level lawyers willing to work on a contract basis," Winter says. "It's much more competitive between the agencies. It used to be a very nice civil environment."

Cost Trumps Pedigree

In the past, law firms marketed their reputations and, in many cases, accepted clients with an explicit or perhaps implicit promise that the work would be done by their own lawyers.

Jill Foer Hirsch, a former legal administrator at several large firms in the Washington metropolitan area, says there was, at one time, a stigma to admitting that your firm staffed projects with temporary contract attorneys.

"Presumably, clients were coming to you because you said you trained your attorneys. That's what you were selling them," Hirsch says.

But as observers of the legal profession have espoused, the legal industry is likely on the verge of a paradigm shift. Some academics describe the change as redefining the types of services lawyers provide and the value attached to those services.

"In the 'buyer's market for legal services' that has prevailed since 2008, clients are much more discriminating about the services they want, the sophistication or uniqueness of those services, and the prices they are prepared to pay for them," Georgetown's Jones says.

Many clients, it appears, are focusing less on the pedigree of the people who conduct research and reviews, for example, and more on whether costs are kept down.

Jones, Mills, and other legal market observers predict that

"When law firms bring in staffs of contract lawyers instead of bringing in permanent attorneys, they are choosing a lower cost alternative and will continue to make every effort to keep costs low."

— James W. Jones,
Georgetown University Law Center

law firms likely will increase their reliance on temporary contract workers.

"The use of contract attorneys is an incredibly important part of the overall legal process," says Marc Zamsky, chief operating officer of Compliance Discovery Solutions, an e-discovery legal staffing company. "Most corporations and law firms have fully embraced the use of contract attorneys through third-party vendors because it is efficient and cost effective."

But pressure from clients to minimize costs also appears to lend itself to other solutions, such as law firms increasingly outsourcing services to countries like India, or relying more heavily on

technological advances that, in some cases, can replace lawyers, paralegals, and other office workers.

For example, many larger law firms are using predictive coding for large document review. Predictive coding uses algorithms to determine whether documents are relevant for a review.

"There is no doubt that technology is revolutionizing the work in large document reviews," Jones says. "And there is no question computer search algorithms will continue to improve and reduce the amount of human time required to complete initial sortings. Indeed, this is one factor in the meteoric rise of the legal process outsourcing industry, an industry that will probably command over \$1 billion in total annual revenues in the next two or three years."

Too Many Lawyers

Despite the faltering legal market and rapidly changing industry, law schools continue to send new graduates out into the working world.

The class entering law school in 2010 was the largest on record. Since then, there has been a sharp decrease in the number of law school applicants, perhaps as potential students learned of the difficulties facing new law school graduates.

"The law firms aren't hiring anywhere near the way they used to hire, and yet law schools are continuing to churn out graduates. That's a big reason why there is a huge glut of lawyers," Winter says.

To make matters worse, law school graduates are saddled with unprecedented debt. In 2012 the average debt load for law school graduates was \$108,293, according to the *U.S. News & World Report*. At some schools the average debt load was even higher.

The average debt load for a graduate of American University Washington College of Law, for example, was listed at \$151,318 for 2011. The school, meanwhile, provides counseling on student loan management and repayment options.

According to data from Law School Transparency, a nonprofit legal education policy organization, 27.7 percent of 2012 law school graduates were either in short-term, part-time, or non-professional jobs, or were unemployed.

"We are graduating people who are already behind the eight ball because of the debt they have," says Kyle McEntee, cofounder of Law School Transparency. "The situation is dire for new lawyers. Every year that law schools graduate more people than get

jobs, the problem is compounded.”

For McEntee, the plight of the legal industry isn't just measured in statistics. McEntee says he “can't help but think about the individuals and how much debt they have and how that affects the decisions they have to make in the near and long term. There is a psychological and emotional cost to carrying that debt.”

“This is an important segment of our population. Lawyers matter,” McEntee says.

‘Zombie Land’

Some lawyers having difficulty finding permanent employment, and yet trying to make a living from their trade, express bitterness that law schools continue to churn out more graduates. More lawyers, they say, quite simply means more competition over both the coveted permanent jobs and even the much maligned temporary positions.

Some temporary contract attorneys also describe lives filled with drudgery. They have lists of gripes, especially when it comes to the dreary task of document review.

Temporary contract lawyers in 2013 have a medium—the Internet—for voicing their complaints, and they do so, occasionally using provocative language on blogs, in chat rooms and, through e-mails that eventually land on Web sites devoted to the legal scene. On one Web site, an apparently unhappy temporary contract worker described in an e-mail “extremely crowded working conditions.”

Temporary contract workers are quick to point out that even if they have employment every day for months, the jobs are not the type that look impressive on a résumé. Further, they say that for the most part their work does not help them gain references or allow them to network.

“You don't have stable coworkers or an office or a stable boss,” says the Washington, D.C., temporary contract attorney who asked not to be identified. “You are basically an anonymous worker for a brief period of time, so you are not building up a résumé.”

“Conditions go from OK to horrific. Sometimes you can be in an environment where you can chat a bit with coworkers and build friendships. But often it's more like zombie land. You're in a windowless room with cheap tables crowded together. Sometimes they put pressure on you not to talk and to review documents quickly. It's unbelievably dehumanizing,” the attorney adds.

Further, temporary contract workers complain that the lifestyle is uncertain and stressful. In addition to low pay, temporary contract attorneys point out that they don't get health care benefits.

“You literally have no idea whether you will have three months of unemployment or two weeks of unemployment between projects,” says the anonymous attorney. “You have zero control, and it makes it

hard to budget. And doing mindless reviews for 60 hours a week, it's exhausting and taxing on your body.”

Suitable Suites

Edwards also says she has experienced less-than-satisfactory working conditions on occasion.

“With one agency, lawyers are not allowed to have their phones with them on-site. They go into phone lockers,” Edwards says. “I don't want to sound like a spoiled, entitled brat, but that's not professional treatment.”

Law firms and legal staffing agencies counter that the complaints they have heard and seen on blogs are often embellished and not connected to the reality of what they have seen on a daily basis.

“Of the recent complaints that have made their way onto the blogosphere, many, if not all the things cited, were either out of context or patently wrong,” says Zamsky of Compliance Discovery Solutions.

Compliance has its own centers to house contract lawyers while they are conducting document reviews. Zamsky says Compliance makes a point of ensuring that the facilities have comfortable work stations, fully stocked kitchens, and properly working air conditioning or heat, as needed. He says the contractors get a “fair market wage.”

In addition, Zamsky says, law firm clients often work at the facilities alongside the contract staff.

“Our facilities are all in Class A buildings and provide the highest grade amenities. The facilities are kept clean and the bathrooms are maintained,” he says. “We have the understanding that all our attorneys want to work in a nice environment with windowed



facilities. In my experience, complaints can often be exaggerated and unsubstantiated.”

Zamsky says there are certain restrictions on Internet access and rampant phone use as a “security protocol” that law firms and their corporate clients demand.

Georgetown’s Jones points out that putting contract workers in “fancy, wood-paneled offices downtown” wouldn’t make sense, because doing so wouldn’t be “cost effective.”

Says Jones: “Think about it—how do we hold down costs for attorneys who don’t need to be in fancy offices that corporate clients are going to be visiting? Rent space in a less high-priced part of town. This is all part of the effort to hold down costs”.

Making It Work

Certainly, there are benefits to working on a contract basis. While Winter’s staffing agency doesn’t handle document review positions, it does focus on placing what she describes as “substantive attorneys” in corporations and law firms. For example, the attorneys she places are experienced with negotiating commercial contracts, assisting with financial transactions, or writing legal briefs.

Winter says some of her attorneys are attempting to start their own firms. “I’ve had some people who’ve used contract work from my clients to keep them afloat while they set up their own private practice,” Winter says. “Eventually some of them get to the point where they don’t need the work from my clients because they’ve developed their own. So it helped them get started, and that is fine for all involved.”

Cindy Tewksbury, an attorney who is licensed to practice in New York and Washington, D.C., works part-time from her home in Chevy Chase. Tewksbury has a background in communication networks, software licensing, and technology contracts. And she also has a young child with whom she wants to spend time.

“Working on a contract basis allows me to continue to work, but also manage my other commitments and be with my child,” Tewksbury says. “It works for me. Before I started contract work, I had significant legal experience. My training and experience allow me to hit the ground running for the contract work I get.”

Iana Mark, licensed to practice in Maryland and Washington, D.C., has been doing contract work since 2006.

“It started as something for me to do while I was looking for a ‘real job,’” says Mark, who contracts out mostly for document review positions. “Then it turned out that the money was good and the work was flexible. You meet a lot of people and learn about different areas of the law.”

However, the drawback, Mark says, is she never knows when there will be a project and she has no “reliable paycheck.” Sometimes she gets to a project, the case settles, and she gets sent home.

But, Mark adds, she also doesn’t have to take work home with her.

“I don’t have to have crazy hours and be a slave to a law firm,” Mark says.

Less Chat, More Act

For now, legal industry observers say, the profession is in limbo, as



are the careers of unemployed or underemployed lawyers. There are, however, steps lawyers can take to try to maximize opportunities, Mills says.

For example, the D.C. Bar offers training and pro bono work to help lawyers “gain a level of expertise and experience,” Mills says. Law schools such as American University Washington College of Law have educational programs and other alumni resources to help lawyers with networking and expanding their skill set.

Mills has some practical advice for frustrated temporary contract attorneys and especially for the younger generation: “Get off social media and stop

complaining about it. Stop ranting and come down here to do training and learn practice areas. Start taking cases under our supervision. Stop the moaning and groaning and interject yourself. Make yourself marketable.”

In his recent book *Tomorrow’s Lawyers: An Introduction to Your Future*, Richard Susskind discusses the future of the legal industry and suggests that lawyers need to master the changing technology and the emphasis on cost-effectiveness.

Observers such as Susskind and Jones suggest there will be a growing need for certain legal-related positions such as online dispute practitioner and legal management consultant.

But some attorneys, like Edwards, say they struggle with garnering the energy required for enthusiasm and initiative.

Edwards moved in 2006 to Washington, D.C., with dreams of a thriving legal career. She says she thought, initially, that when she started contract work, she would get “noticed” by a law firm for her skill and initiative and eventually be offered a full-time job.

“When you pack up your truck and your law degree and you dream of a career where all your investment and time will come to fruition, and then you get stuck in the contract mode, it’s depressing,” Edwards says. “When you show up to work with a room filled with attorneys working for \$30 an hour, just like you, it’s depressing.”

Freelancer writer Anna Stolley Persky wrote about the state of same-sex marriage in the November 2013 magazine.

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Most lawyers think they don’t have enough time to develop new business. When they do make time, they often don’t know best practices for engaging with prospective clients. Learn the strategies and tactics for building your business, the right questions to ask, and how to determine whether a sales activity is worth the time. Leave with a plan that will guide you through the specific actions necessary to create a valuable name for yourself and build your business.

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JANUARY

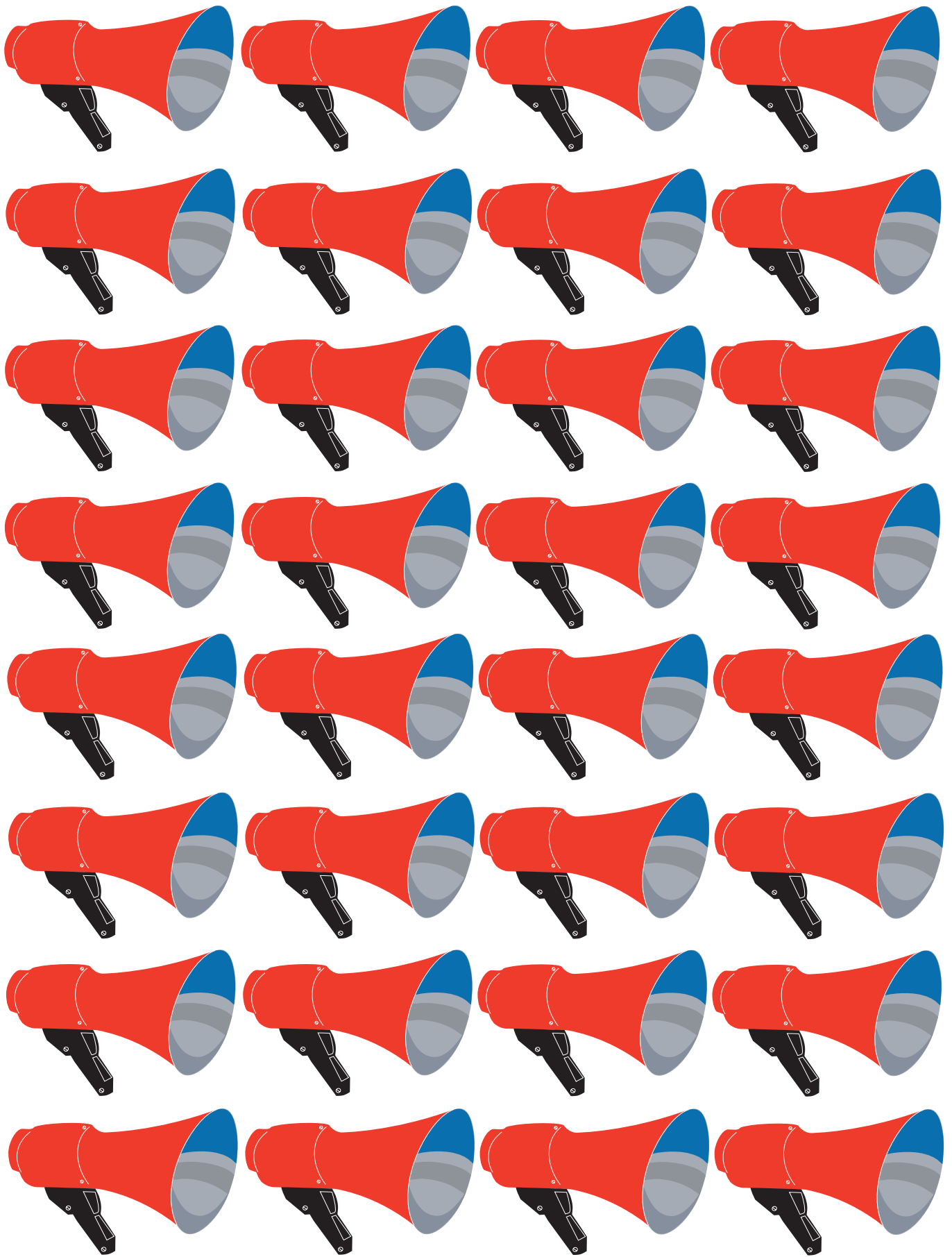
- 7 So Little Time, So Much Paper®: Effective Time Management Techniques for Lawyers
- 9 Update on Same-Sex Marriage and Domestic Partnerships 2014
- 13 Disciplinary Year in Review: DC, MD and VA
- 14 Developments in Class Action Litigation 2014
- 15 Objection! Objection! Making and Responding to Objections
- 16 Introduction to Health Law and the Affordable Care Act Series, Part 1: Introduction to the U.S. Health Care System
- 23 Lawyers Supervising Associates, Summer Hires, and Others: Ethics Issues and Best Practices
- 23 Introduction to Health Law and the Affordable Care Act Series, Part 2: The New Insurance Marketplace
- 24 Effective Writing for Lawyers Workshop
- 28 Introduction to Export Controls
- 29 Introduction to Department of Defense Security Clearance Cases
- 30 Introduction to Health Law and the Affordable Care Act Series (ACA), Part 3: Medicaid Under the Affordable Care Act

FEBRUARY

- 3 ABCs of the National Labor Relations Board Series, Part 1: Practice and Procedure Before the National Labor Relations Board
- 3 Ethics Issues Facing Corporate Counsel
- 4 LLCs in the District of Columbia and Other Business Entities 2014
- 5 Essential Trial Skills Series, Part 1: Jury Selection
- 6 Introduction to Health Law and the Affordable Care Act (ACA) Series Part 4: Medicare Under the Affordable Care Act
- 10 ABCs of the National Labor Relations Board Series, Part 2: Unfair Labor Practices
- 11 Export Controls and Economic Sanctions 2014: Recent Developments and Current Issues
- 12 Essential Trial Skills Series, Part 2: Opening Statements and Closing Arguments
- 13 Introduction to Health Law and the Affordable Care Act (ACA) Series Part 5: Compliance Issues and Health Data Privacy Under the Affordable Care Act
- 18 Drafting Operating Agreements for LLCs and Other Business Entities 2014
- 19 Essential Trial Skills Series, Part 3: Witness Preparation and Direct Examination
- 20 Statute Drafting Workshop: D.C. Council Case Study
- 21 Top Ten Tips for Trying an Automobile Accident Case: What You Need to Know in the District of Columbia, Maryland, and Virginia
- 24 ABCs of the National Labor Relations Board Series, Part 3: Union Organizing
- 25 U.S. Economic Sanctions and the Office of Foreign Assets Control: An Introduction
- 26 Essential Trial Skills Series, Part 4: Cross-Examination
- 27 For Lawyers Who Lobby (and their Firms): Legal Ethics and Unauthorized Practice Update
- 28 Effective Writing for Lawyers Workshop



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BUILDING BLOGS

{ AND LAW FIRM WEB SITES }

ETHICALLY EFFECTIVELY

BY WALTER A. EFFROSS

One popular guidebook promises that to start blogging, “you don’t need to know much more than how to use a web browser, open and create files on your computer, and get connected to the Internet.”¹

Blogs can be an excellent platform for immediate and unmoderated publication, especially in an environment of never-ending news cycles, minute (or minute) attention spans, intense competition for potential clients, and perpetual pressure for professional self-promotion.

Although a blog has been described as a Web page that features frequent updates, reverse chronological arrangement, categorization of entries (or posts), and (often, but not always) the ability of readers to leave comments,² courts are still grappling with the definition.³ To make matters more confusing, some law firms’ Web sites present as “blogs,” collections of client alerts arranged in reverse chronological order; other firms’ sites offer focused, in-depth, and frequent entries by members of particular practice groups; and some firms even invite visitors to post comments on such pages.

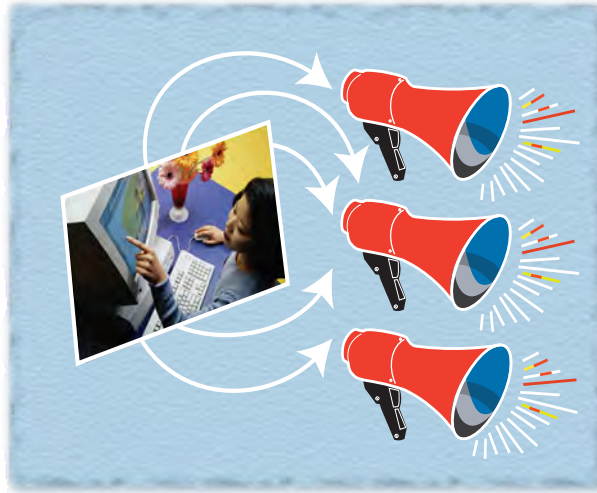


Illustration by Ron Flemmings / Photo by Photodisc

state[,] to comply with its own regulations on professional responsibility.¹²

Disclaimer of Legal Advice and of Content Applicability

Sites could also specify that their contents do not constitute legal advice, but are provided “for informational purposes only,” that they merely “provide a general description of the law” rather than “specific legal advice,” and that for legal advice visitors should consult their own counsel.

In addition, warnings that a site’s information (including publications or posts that may have been written months or years previously) is not guaranteed to be complete, accurate, and updated could appear prominently near all such content, and might not be relegated to the site’s “Terms and Conditions” page, especially if the link to that page is itself inconspicuous.¹³

Disclaimer of Permanence

Operators should specify that they may revise or remove without notice whether by direct e-mail to visitors or a post on some part of the site itself, any of the site’s content, and that the site itself is not guaranteed to be continuously accessible.

Disclaimer of Attorney–Client Relationship and of Confidentiality

Model Rule of Professional Conduct 1.18 requires that lawyers keep confidential the information they receive from prospective clients, and that the receipt of such information may disqualify them from representing a client (current or prospective) with adverse interests to those of the prospective client.

Thus, sites should display conspicuous warnings to visitors that a confidential attorney–client relationship will not be formed merely by a visitor’s accessing the site’s contents or sending an e-mail to the operators. (Some firms even provide the telephone number of a staff member to contact about representation.)

Such disclaimers, though, might not fully protect operators from being disqualified from their representation of existing clients. In its Formal Opinion 2005-168, the California Ethics Committee addressed a situation in which a visitor, in completing a form on a law firm’s site to request representation in divorcing her husband (whom the firm was, without her knowledge, already representing), confided that she had had an extramarital

affair. The committee concluded that the firm might be disqualified from representing the husband: Despite the site’s “click-through” disclaimers of a “confidential relationship,” the potential client could still reasonably have believed that the firm would keep her information confidential. The committee suggested that the law firm would have been better protected if it had required potential clients to indicate that “I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm,” or if it had requested that visitors furnish the firm with only the information that would have been necessary for it to conduct a conflicts check.

Five years later, the ABA’s Formal Opinion 10-457 emphasized the value of “reasonably understandable, properly placed, and not misleading” disclaimers of the creation of an attorney–client relationship, of the confidentiality of information submitted by the visitor, of the provision of legal advice, and of an obligation not to represent an adverse party.¹⁴

Such warnings are often addressed to anyone who is not “an existing client” or “a current client” of the firm. However, they

“We realize that such comment policy can never be evenly enforced, because we can’t possibly monitor every comment equally well”

should also be made explicitly applicable to existing or former clients who seek to be represented by the firm in new matters. (Conversely, the “Disclaimer” page of one law firm’s site includes the provision that “If you are a client of [the firm], nothing in [the disclaimers] will supersede any provision of your engagement letter, or other agreement with respect to the attorney–client relationship.”)

A Refinement of Click-Through Disclaimers

Some law firms display these disclaimers on windows that appear when a visitor clicks on the e-mail link on an individual attorney’s page, requiring the visitor to disable the window by clicking on its “I agree” option before being allowed to compose or send an e-mail.

Yet the effectiveness and enforceability of these terms may be destroyed if that attorney’s full e-mail address appears (perhaps as the link itself) on that page, or if, when the visitor positions her cursor over the link, the e-mail address becomes visible in the lower left portion of her browser’s window. In either of these cases, the visitor might well simply type the exposed e-mail address into her own e-mail program, thereby avoiding exposure to, and not being bound by, the disclaimer.

To prevent this, some firms install on attorney pages “Contact this attorney” links that bring up disclaimer windows. Visitors who click on that window’s “I agree” option are presented with a template into which they can type their communication’s text, but which does not reveal the attorney’s e-mail address. (Of course, someone confronted with this arrangement, or even someone who had not visited the site, could simply guess that, say, Jane Smith’s address at Jones & Brown is jsmith@jonesbrown.com, smith@jonesbrown.com, or [\[jonesbrown.com\]\(mailto:jonesbrown.com\), and thereby possibly bypass the disclaimers.\)](mailto:jane.smith@</p>
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Other Disclaimers

- Some firms warn visitors that information sent by e-mail is not necessarily secure in transit, and might be subject to interception by third parties. At least one firm invites visitors with such concerns to contact a specified member of the staff who can arrange for encryption of the visitor’s messages.
- In this connection, visitors might be advised that they should not send time-sensitive requests for representation to the firm through e-mail.
- Operators might wish to clarify in their terms and conditions, or in a disclaimer posted more prominently on their site, that opinions expressed in posts or other publications by one or more individual members of the firm are not to be taken as those of the entire practice group or firm, or of any clients of the firm.
- In discussing previous representations, operators might want to clarify that because the facts of each situation vary, their previous successes do not guarantee future results. In addition, care should be taken not to name clients unless they have consented to the reference.
- To avoid professional responsibility concerns about misrepresentations in advertising, a site might indicate which of its photographs (particularly generic “stock images”) do not depict the firm’s lawyers and/or clients.

Privacy and Security Policies

- Sites should identify the types of information they collect from visitors (especially through “cookies” and other automatic processes); how they use that information (including

whether, when, and how it is shared with third parties); and whether visitors can view the data collected from them and/or opt out of its collection, and if so, how.

- If the organization operating a site is acquired by or merges with another entity, will the information collected from visitors be considered a business asset that can be transferred to the other entity? Can the information be licensed or sold to one or more parties if the organization that collected it is in bankruptcy or reorganization proceedings?
- If they address the issue at all, operators typically indicate quite vaguely the nature and intensity of their efforts to protect visitor information. Examples include physical, electronic, and procedural safeguards “that comply with our professional standards,” “that comply with the highest professional standards,” and that reflect “our best efforts to ensure [your information’s] security on our system.”
- Operators might indicate the circumstances under which they would voluntarily (and/or would be required to, under state or federal law) contact visitors to report a possible compromise of the security of the visitors’ information.
- To prevent “phishing” or “social engineering” by criminals misrepresenting their e-mails as originating from the operators of a site, operators might wish to include conspicuous notices that they will never authorize anyone to contact a prospective, current, or former client by e-mail or telephone to ask for certain sensitive information such as e-mail passwords or bank account numbers. Alternatively, the operator might wish to specify its security procedures (such as the use of special passwords or a telephone number for the client to call) to confirm the legitimacy of such a request.
- The operator could specify whether (and if so, how) the site will indicate any changes to its privacy policy and/or its terms and conditions generally. By a notice on the home page and/or the page in question? Will that notice specify the nature and location of the change? Will the operator e-mail notice of the changes to the visitors whose e-mail addresses it had collected? Will the operator pledge that any changes to the privacy policy will only protect visitors’ information more strongly? If not, and if a revised policy weakens the protection of this infor-

A Proposal

One simple, efficient, and inexpensive method of displaying effective disclaimers and privacy policies on law firm Web sites and blogs would be for the ABA and state bar associations to adopt standardized sets of terms, each identified by a particular icon and designation. For example:

A finger held over pursed lips in a “Shh” symbol with the designation “Read Before E-Mailing Us,” or a closed vault door with the designation “Privacy.” Each icon itself would serve as a link to a page maintained by the ABA that displayed the corresponding set of terms.

For a given icon, different colors could indicate different standard “flavors” of the underlying policy or disclaimers. A green vault door might, for example, signify a very visitor-friendly privacy policy, while a red one might indicate one less so.

mation, will the terms of the previous policy still apply to the information collected while it was in force, or are the changes retroactive?

Ownership, Editing, Removal, and Moderation of Comments

Section 230(c)(1) of the Communications Decency Act provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” thereby insulating the operator of a Web site or blog from certain types of liability (e.g., for defamation) under state law based on content added by visitors to the site.¹⁵

Nonetheless, operators may wish to indicate explicitly not only that comments by visitors do not necessarily reflect the operators’ views, but also that the operators, as one site puts it, “reserve the right to remove any comments that contain spam or include negative or defamatory comments about another person or subject.” Other candidates for removal could include comments that are “clearly ‘off topic’ or that promote services or products or contain any links . . . [or] that make unsupported accusations.” (Lengthier lists of categories of objectionable comments can be found in the terms and conditions of Internet service providers like AOL.¹⁶)

If visitors cannot post their comments directly but must submit them for approval and posting by the operators, the operators might indicate that submissions will be posted (and possibly edited) subject to the sole discretion of the operators. As the comment policy of one leading academic law blog acknowledges, “We realize that such a comment policy can never be evenly enforced, because we can’t possibly monitor every comment equally well. . . . Those we read, we read with different degrees of attention, and in differ-

ent moods. We try to be fair, but we make no promises.”¹⁷

In either case, the site could display an e-mail address or link through which complaints about comments could be brought to the attention of the operators. That address or link could also be used by visitors to alert the operators to allegedly copyright-infringing posts or comments in the “notice-and-takedown” procedure provided by the Digital Millennium Copyright Act.¹⁸

Other Issues

- Some operators arrange for a third party to display a selection of alternating advertisements on their sites, although the operators might not endorse, or even have any knowledge of, some or all of the items or services advertised. Such operators might consider disclaiming any personal endorsement of, or liability for, the subjects of the advertisements.
- The Federal Trade Commission requires full disclosure of “a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience).”¹⁹ Thus, operators who have been given free products or services should conspicuously reveal that fact in any of their sites’ reviews or discussions of the products or services.
- Given the legal uncertainties about whether (and if so, when) a blogger can qualify as a journalist or media representative for purposes of invoking the “shield law” of particular states, a blogger anticipating receiving sensitive information might want to disclaim any absolute guarantee or expectation that he would be able to shield the name of his source, assuming that the informa-

tion was provided in such a way that the identity of the sender could subsequently be established (for instance, by non-anonymous e-mail).

- A significant number of state ethics advisory opinions has addressed the question of whether counsel have an ethical duty to ensure that metadata—embedded but often easily retrievable information about the author, date, last changes to, and other production history of a digital document—is scrubbed from a client-related document before providing it to third parties, and whether counsel have a duty to refrain from attempting to view the metadata of digital documents provided to them.
- Less often discussed in advisory opinions, but regularly appearing in news reports, are failures of digital redaction. When a document is converted into a digital format (by scanning, for instance), which is then redacted (by, for example, digitally “blacking out” passages of text in the image of a page). Such redaction can sometimes be digitally reversed, and the original sensitive information recovered. Operators posting files or images should thus take care to ensure that the redaction is made to the hard copy *before* it is digitized and posted.
- It remains unclear to what extent sites constitute “place[s] of public accommodation” subject to the Americans with Disabilities Act,²⁰ and how sites can and should be modified to enable their use by individuals with disabilities.
- The few ethics opinions addressing the issue have concluded that the domain names used by sites “cannot be false, deceptive or misleading.” A domain name does not have to contain the name of the firm or of one or more of its lawyers, but in that instance the

Assessing—and Approaching—a Law Firm Through Its Blog

Law students, possible clients, and others might find important clues to a law firm’s dynamics embedded in its blog(s):

- In which area(s) does the firm operate a blog?
- By whom are the blog posts written? By only some of the partners in a practice group? By senior and/or junior associates? Are any individual posts credited to two or more partners as co-authors, or to two or more associates, or to a partner and an associate?

- How often, and in what detail, are new items posted?
- Does the blog feature occasional comments by, or “guest” participation of, any members of other practice groups at the firm?
- Are different bloggers at the firm elaborating on, disagreeing with, or otherwise reacting to each other’s posts?
- What types of questions or comments, if any, are being added by

visitors? Are lawyers at the firm responding to such comments in detail? Are visitors responding to each other’s comments?

- How do the operators deal with inappropriate, off-topic, and/or offensive comments made by visitors?
- How carefully worded—and conspicuously displayed—are the site’s disclaimers?

Using Blogs to Clarify Paper Topics/Analyses

Visitors might post comments or questions as a way of introducing themselves and their interests to members of the practice group, especially if the visitors are identifying or developing topics for papers, or are in the process of writing papers, that they would like to bring to the attention of the firm.

firm's advertisements cannot use only the domain name to identify the firm.²¹

Operators' Expressions Contrary or Embarrassing to Client Positions

The New York City Bar Association's Formal Opinion 1997-3, written in the infancy of legal Web sites and before the creation of law blogs, "reaffirm[ed] that a lawyer may resist a client's efforts to curb expression of his or her personal views on public issues, assuming the lawyer does not reveal a confidence or take a position that would adversely affect the lawyer's specific representation of a client in a direct way. . . . [So long as] the lawyer's conduct will not adversely affect the rights of a client in a matter the lawyer is then handling, the lawyer may take positions on public issues and espouse legal reforms favored by the lawyer without regard to the individual views of any client."

Although it would seem to be a violation of a lawyer's professional responsibility for her to post arguments against a position that she is currently arguing on behalf of a client, could she ethically publish such views online if another member of her firm were representing the client? According to the formal opinion, in the latter situation the lawyer could "take a personal position on the issue in public."

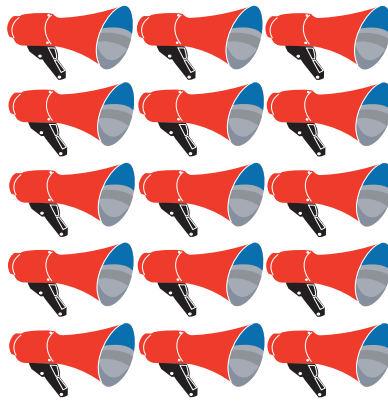
Would a lawyer's blogging about a topic entirely unrelated to his or his firm's representation of a client cross any lines of professional ethics if the lawyer's views were so extreme, and/or the topic so controversial, that the lawyer's self-expression embarrassed the client?

Would it make any difference, from a professional ethics if not an employment law perspective, if the lawyer's firm had adopted a social media policy that, as does at least one actual policy, prohibits its employees from doing anything "detrimental to the reputation, goodwill or best interests of [the firm] and/or any of its personnel," and requires them, "[w]hen posting to a blog, [to r]efrain from posting about controversial or potentially inflammatory subjects"?²²

Conclusion

Click-through windows, conspicuous and detailed disclaimers, and other legal and ethical safeguards might make law firms' Web sites, or lawyers' blogs, less user-friendly than their operators might prefer. Yet the risk of professional embarrassment, if not also of financial liability, could well outweigh these considerations.

In fact, a visitor might be most likely to appreciate these features when they



appear on the site of a lawyer or law firm whom she is considering retaining for counsel concerning online issues.

Walter Effross is a professor at American University Washington College of Law. This article is adapted from material he presented at a recent conference at the law school and at continuing legal education programs of the D.C. Bar.

For additional resources for law bloggers, see Susannah Gardner & Shane Birley, *Blogging for Dummies* (4th ed. 2012); Ernie Svenson, *Blogging in One Hour for Lawyers* (2013); and Walter A. Effross, *Topics for Law-Blogging: 125+ Suggestions* (2013), available at www.effross.com.

Notes

¹ Susannah Gardner & Shane Birley, *Blogging for Dummies* (4th ed. 2012), at 2.

² *Id.* at 16.

³ See, e.g., *State v. Lead Indus. Ass'n., Inc.*, 64 A.3d 1183, 1199 n.5 (R.I. 2013) (quoting a dictionary definition of a blog as a "website that displays in chronological order the postings by one or more individuals and usually has links to comments on specific postings"); *Hunter v. Virginia State Bar*, 744 S.E.2d 611, 613 n.1 (Va. 2013) (quoting another dictionary definition: "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer"); *Maxon v. Ottawa Publ'g Co.*, 929 N.E.2d 666, 671 n.1 (Ill. App. Ct. 2010) (defining a blog as "a frequently updated Web site consisting of personal observations, excerpts from other sources or, more generally, an online journal or diary"); *Apple Computer, Inc. v. Doe I*, 2005 WL 578641, *2 n.4 (quoting an online dictionary's definition as an "online diary; a personal chronological log of thoughts published on a Web page").

⁴ Adrian Dayton, *You Read It Here: Blogs Never Sleep*, Nat'l L.J., Sept. 16, 2013, p.4.

⁵ Mark Herrmann, *Memoirs of a Blogger*, 36 *Litigation* (2) (Winter 2010), p.46, at 63.

⁶ For simplicity, the opinions are identified here by the state name and opinion number, and the committees are identified as the [state name] Ethics Committee.

⁷ See, e.g., Michigan Opinion RI-276 (1996); Vermont Opinion 2000-04. Additionally, Section 7.3 doesn't exist under the D.C. Rules of Professional Conduct.

⁸ See, e.g., Alabama Opinion 1996-07; California Formal Opinion 2001-155; Hawaii Formal Opinion 41 (2001); Mississippi Opinion 252 (2005); North Carolina Opinion 239 (1996); North Dakota Opinion 99-02; Pennsylvania Opinion 96-17; West Virginia Opinion 98-03. Additionally, Section 7.2 doesn't exist under the D.C.

Rules of Professional Conduct.

In February 2013, the Supreme Court of Virginia upheld, against a lawyer's First Amendment challenge, the Virginia State Bar's power to regulate the content of his firm's Web site under Virginia Rules of Professional Conduct 7.1 and 7.2 in order to protect the public from being misled by its advertising content. *Hunter v. Va. State Bar*, 285 Va. 485, 744 S.E.2d 611 (Va. 2013).

⁹ Pennsylvania Opinion 96-17.

¹⁰ Pennsylvania Opinion 98-85.

¹¹ See Utah Opinion 97-10 (not deciding the issue, but observing that it would be a fact-sensitive matter).

¹² California Formal Opinion 2001-155.

¹³ For an extensive disclaimer of liability for content, see www.bingham.com/TermsOfUse.

¹⁴ State bar ethics opinions recommending the use of disclaimers include: Florida Opinion 07-03, Massachusetts Opinion 07-01, Nevada Formal Opinion No. 32 (2005), New Hampshire Opinion 2009-2010/1, Vermont Opinion 2000-04, Virginia Opinion 1842 (2008), Washington Opinion 2080 (2006), and Wisconsin Opinion EF-11-03 (2011).

¹⁵ 47 U.S.C. § 230(c)(1). For an example of the application of this provision to bloggers, see *Shiamili v. Real Estate Group of New York, Inc.*, 952 N.E.2d 1011 (N.Y. 2011).

¹⁶ Cf. Daniel Solove, *Our Comment Policy*, Concurring Opinions, Apr. 19, 2009, www.concurringopinions.com/archives/2009/04/our_comment_pol.html (legal academics' blog policy providing in part that "Since our aim is for a discussion that is civil and intelligent, we may delete comments that strike us as stupid, that don't contribute to the debate, or that are shrill and not in the spirit of reasoned discourse. . . . Our judgment on whether to delete a comment or ban a commenter is final. Please feel free to disagree with us, and to disagree strongly, but be respectful of us and others.")

¹⁷ *Comment Policy*, The Volokh Conspiracy (July 11, 2013), available at www.volokh.com/2013/07/11/comment-policy/#disqus_thread.

¹⁸ 71 U.S.C. § 512(c).

¹⁹ Federal Trade Commission, *Revised Endorsement and Testimonial Guides*, 16 CFR § 255.5, www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf. See also *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (March 2013), <http://ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

²⁰ 42 U.S.C. § 12182.

²¹ Kentucky Opinion E-427 (2007); New Jersey Committee on Attorney Advertising Opinion 32 (2005).

²² For a discussion of whether corporate executives' fiduciary duties include the responsibility of not embarrassing their firms, see Walter A. Effross, *Corporate Governance: Principles and Practices* 183-196 (2d ed. 2013).

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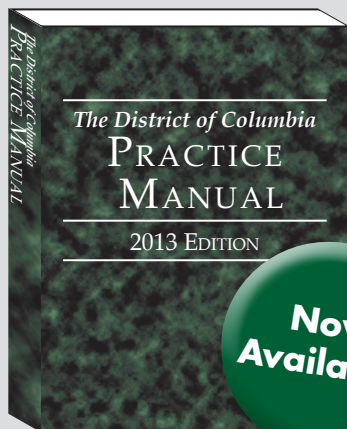
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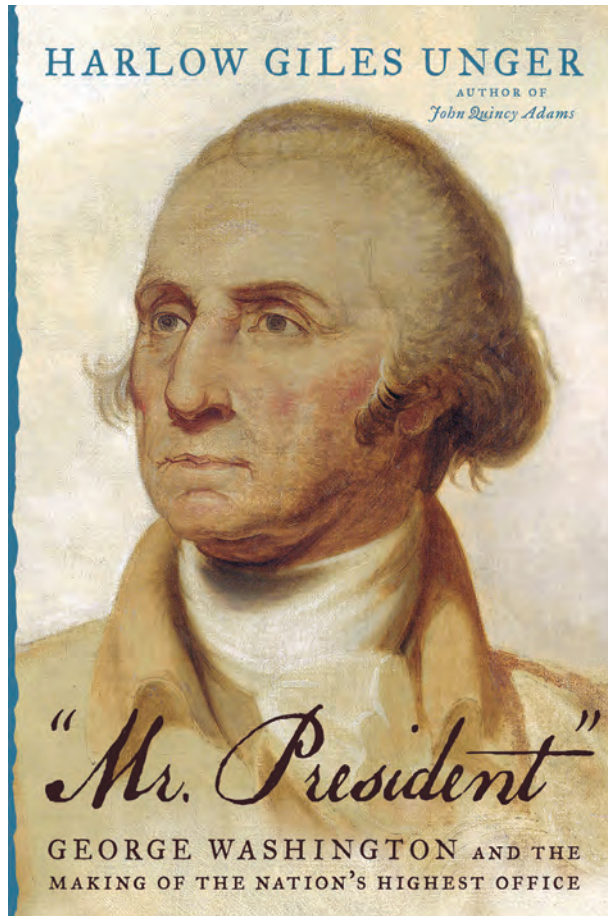
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**“Mr. President:”
George Washington
and the Making of the
Nation’s Highest Office**
By Harlow Giles Unger
Da Capo Press, 2013

REVIEW BY JOSEPH C. GOULDEN

Six years and six months of bloody war were but the first phase of the American Revolution. Left unresolved was how the fledgling nation would be governed. Omens for success of the new nation were limited. Even as the fighting raged, Alexander Hamilton, a top aide to General George Washington for much of the war, said that any defeat should be blamed on the “absurd political and constitutional system that left Congress with insufficient powers . . . for calling forth the resources of the country.”

But once military victory was achieved, the Founding Fathers fashioned a constitution that was a mare’s nest of confusion and omissions. An overriding fear of many persons was that if Washington should become president—his popularity preordained that fact, although he did not want the office—he would assume powers similar to those through which King George III of Britain had exerted tyranny over the colonies.

As written, the Constitution gave the president almost no power. Although it vested “executive power” in the president, the document failed to define the term or specify what he could or should do with it. As Harlow Giles Unger, a leading historian of the revolutionary era, writes, the Constitution “failed to give the president any measurable executive functions or aides to help him. He stood—or sat—alone as the entire executive branch of the new government.”

Unger summarizes the limitations placed on Washington: “He could not deal with foreign powers to seek military or financial aid—or war against Indian tribes if they attacked his troops. He would not even appoint an aide, issue an order, or take a breath that was not subject to congressional oversight. . . .” Even if Congress permitted him to raise an army, the troops were his to command only “when called into action” by Congress.

But a loophole gave the president the obligation to “preserve, protect and defend” the Constitution and the Union. Washing-

ton moved swiftly to use these implied powers. During his first term, Indians in the west attacked farmers who settled in their territory. Washington ordered General “Mad” Anthony Wayne to muster an army to fight the Indians, thus usurping powers of Congress to raise an army and declare war.

In another early crisis, Congress adjourned without providing funds to run the government. Washington ordered Treasury Secretary Hamilton to borrow money from the Bank of New York, thus usurping powers reserved to the House of Representatives to appropriate funds and authorize spending.

Thereafter, Washington moved to bypass constitutional strictures that made his job nigh impossible. With the support of Vice President John Adams, Washington won the right to dismiss any officer of the executive branch without “the advice and consent” of the Senate—in effect, stripping Congress of much authority over the executive branch.

Washington’s most controversial early action came when farmers in Western Pennsylvania rebelled against a federal whiskey tax. Washington sent 13,000 soldiers to crush the Whiskey Rebellion. Critics charged that Washington was emulating the use of British troops to put down the “tea party revolt” of years earlier. But Unger points to a critical difference: Americans had representatives in their government, whereas protesters against British taxes were not heard in Parliament. Further, Washington could not have carried out his oath to “form a more perfect Union” had he allowed the rebels to refuse to pay federal taxes or permitted them to leave the Union.

But the greatest test of Washington’s use of implied presidential powers was an audacious attempt by the revolutionary government of France to draw the United States into a war with Great Britain—or, that failing, to direct a covert action that would drive Washington from office and convert the United States into a French colony.

The imbroglio began when the French called on Washington to honor a treaty of alliance, dating to the Revolutionary War, which obligated the United States to side with France in any war with Britain. Washington had no stomach for a military rematch with the British, nor did he wish to dash the hopes of a restoration of trade.

There also were emotional reasons. The Parisian violence repelled such Washington intimates as Hamilton, who termed the revolutionists “assassins reek-

ing with the blood of murdered fellow citizens.” Vice President Adams said the revolutionaries “make murder itself as indifferent as shooting a plover.”

Thomas Jefferson, as minister to Paris, had helped draft a preamble to the new French constitution, writing, “If the happiness of the mass of the people can be secured at the expense of a little tempest now and then, or even a little blood, it will be a precious purchase.”

Washington decided that since the contemplated French action was offensive, not defensive, he was not bound by the treaty. Therefore, he issued a proclamation declaring U.S. neutrality. Jefferson, now secretary of state, protested that the Constitution clearly gave Congress the right to declare war, and a declaration not to go to war, therefore, fell within the purview of congressional, not presidential, powers. But since Congress was not in session, Washington cited his broad authority over “defending national interests,” Unger writes.

While this debate raged, France dispatched Edmond Charles Genet, a minister plenipotentiary (ambassador) to the United States, with two sets of instructions: One sought permission for the French to bring captured British vessels into America for auction, the other secret instruction was to raise armies within the United States that would seize Canada from Britain and “liberate” Louisiana and the Floridas from Spain.

Genet’s mandate was audacious. As Unger writes, “If Washington’s government refused to cooperate, [Genet] was to exploit the Jeffersonian pro-French ferment in America to foment revolution, topple the American government, and convert the United States into a French puppet state.” The United States would become part of a French-dominated American federation of Canada, Florida, Louisiana, and the French West Indies.

In a deliberate breach of diplomatic protocol, Genet landed not in Philadelphia, the national capital, but in Charleston, South Carolina, a hotbed of anti-British sentiment. Genet recruited a network of agents to raise armies to capture France’s targeted territories. Politically, his agents organized 40 so-called Democratic Societies across the United States, “merging some into Democratic Clubs that Jefferson’s supporters had formed to support his presidential ambitions.” Genet began bringing seized British vessels into U.S. ports.

The groundwork for his coup being in place, Genet set out for Philadelphia in a

coach-and-four, “with Jefferson’s Democratic Clubs heralding [his] approach as a Second Coming.” Church bells tolled his arrival in each town, cannons boomed salutes, “French flags flapped in the wind.”

An irate Washington feared that Genet’s activities could provoke Britain into declaring war on the United States. Rejecting Jefferson’s pleas, he issued a “proclamation” declaring the United States at peace with Britain, France, and all other nations, and that the United States would “engage in conduct friendly and impartial towards the belligerent powers.”

Unger calls the proclamation “one of the most important acts of Washington’s presidency” since it was, “in effect, nothing less than a new law, and, like the power over the purse and the military, the Constitution had reserved the right to legislate to Congress, not the President.”

Genet was undeterred. “Five hundred coaches with ardent Francophiles” escorted him into Philadelphia, where some 5,000 supporters rallied outside his hotel. As an added insult, his own flagship sailed up the Delaware to Philadelphia, a seized British ship in tow. Genet’s Jacobin clubs gave free rum to draw mobs to the wharfs to greet the arrival of seized British ships. “Not only was Washington’s presidency collapsing, so was the Union,” Unger comments.

In a heated cabinet meeting, Jefferson made the mistake of displaying a pro-French newspaper (which he subsidized) depicting “a cartoon showing Washington’s crowned head beneath a guillotine blade.” (“The president was much inflamed,” a witness reported.)

More was to come. Genet sent the president an ultimatum “in the name of France,” warning that if he failed to declare war against Britain, Genet would “appeal to the people . . . the decisions of the president.” He claimed that Americans would “rally from all sides” to support him. He moved on to New York, where a French fleet greeted him. Mobs (stimulated by free rum) multiplied, many persons shouting “Genet to power!” and “Down with Washington!”

In full military regalia, Genet prepared to lead assaults on Canada and New Orleans. But as he stood on the deck of his flagship, the cheering mobs suddenly dispersed. He demanded an explanation. “Yellow fever, *Monsieur!*” a servant replied.

As John Adams commented, “The coolest and the firmest minds have given
continued on page 41

Reflections on Judging

By Richard A. Posner

Harvard University Press,
2013

REVIEW BY RONALD GOLDFARB

“Judges tend not to be candid about how they decide cases.”

—Judge Richard Posner

Reflections on Judging, the latest book of the prodigiously prolific federal appellate Judge Richard Posner, is part autobiography, part examination of the state of judging. It is, in his words, “a study of the judicial process,” mixing “the academic with the personal.” Both perspectives are interesting and provocative, as are most of Posner’s writings.

Posner’s autobiographical background is impressive and self-assured. Posner found the U.S. Supreme Court “an unimpressive institution” as a young man. Starting out as an English major at Yale at 16 (having skipped his last year of high school), then on to Harvard Law School, Posner was “surprised at how little haste the modern young feel in establishing themselves in their chosen career.” He loved Harvard (he thought his other choice, Yale, babied students), and he especially enjoyed his first year there for all “its brutishness.”

Posner clerked for Justice William Brennan and later became intrigued by economic theory that he augmented in several years of government service at the Solicitor General’s Office. Then he decided casually “to take a whack at law teaching,” first at Stanford, later at the University of Chicago, due to its unique focus on the application of economics on law.

Economics, Posner concluded early in his career, explains “how people respond to incentives and constraints, and how those responses shape (or undermine) rules, practices, and institutions.” Posner seemed to have coasted into one interesting job after another before finally being recruited, at first hesitatingly, to a federal judgeship.

The American Bar Association, which Posner calls “a trade association of practicing lawyers,” only gave him a “qualified” endorsement. Posner’s description of his confirmation is noteworthy, given current charades and warfare over the process. He was told in advance the questions he’d be asked; Senator Strom Thurmond court-

Reflections on Judging

RICHARD A.
POSNER

ously asked if his mother’s communism reflected his point of view, Posner said no, and Thurmond accepted his response, so Posner was never asked the question publicly. “The political polarization of the Senate lay in the future,” Posner writes. The result of the current confirmation practice is that “there are fewer duds, but also fewer stars.” The training of new judges then “had little content,” and off he went.

Posner has been on the U.S. Court of Appeals for 32 years, heard over 6,000 cases, written more than 2,800 published opinions, and authored over 40 books (I’m sure there are a roomful of brilliant gnomes in his basement grinding out books, as no human could be so prolific).

Posner gets less autobiographical as the book proceeds, with analytical and instructive chapters on interpretation, complexity, and the evolution of the federal judiciary. I particularly applaud his comments on judicial writing. Posner is critical of jargon, verbosity, stilted prose created by gender neutrality (I was referred to as a “chair” of a judicial review committee—a *chair*?), the overuse of clerks (would Thomas Wolfe have asked Maxwell Perkins to do a first draft of his novels?), not writing clearly for your perceived audience, pomposity, lack of clarity, and overwriting (and overfootnoting.) As Justice Oliver Wendell Holmes once suggested, a judge’s opinions needn’t be heavy to be weighty. Posner also adds guidance for appellate advocacy—use props, save

rebuttal time, rehearse your argument. He proposes better training and managerial improvement for judges.

Posner’s particular focus is on the important differences between formalism and realism in the decision-making process. Here, with many case examples and references to jurisprudential giants, Posner challenges current theorists such as Yale law professor Akhil Amar and Justice Antonin Scalia. Posner analyzes many controversial Scalia opinions—*District of Columbia v. Heller* (Second Amendment) and *Citizens United v. Federal Election Commission* (First Amendment), for example—pointing out Scalia’s inconsistencies and conservative activism dressed up as textual, originalist jurisprudence. Posner skewers Scalia in a scholarly and analytically specific fashion.

Posner’s analysis of judicial activism and judicial restraint is classic legal realism, looking as it does at the realities of decision making. He opens *Reflections on Judging* by rejecting formalist approaches to the law as “premised on a belief that all legal issues can be resolved by logic, text, or precedent, without a judge’s personality, values, ideological leanings, background and culture, or real-world experience playing any role.” His models are Holmes, John Marshall, Louis Brandeis, Benjamin Cardozo, Robert Jackson, Learned Hand, Roger Traynor, and Henry Friendly—a pantheon of great jurists.

He criticizes the modern judiciary for “failing to keep up with the dizzying advances in technology . . . and in other fields of knowledge.” Since legal decisions are fact-driven more so than theory-driven, Posner posits, new findings of science are critical to proper decision making. We shouldn’t deem cases and rules of law as abstract propositions, as many outsiders (and some jurists) do. Posner also wishes “[a] bit more of the mystique of judging would be chipped away.” Relying solely on Supreme Court opinions “is a recipe for intellectual malnutrition,” he writes.

Posner is tough on judging that fails to consider realities and relies predominantly on prior case law. He tears apart campaign finance law decisions as naïve and simplistic, contributing to a corruption of the political process, and voter ID laws as based on fallacious premises (fraud prevention as opposed to voter suppression), further poisoning national politics.

“[J]udges need a return to realism,” Posner argues. Orthodox authorities don’t answer complex questions, and judges need to admit they rely on life experiences, ideas about sacred policies, moral beliefs,

personal pressures, or backgrounds in deciding cases—however they dress them up in jurisprudential coloration. Judges must consider the real-life consequences of any case. For example, in gun control cases, Posner suggests it is proper for judges to consider whether deaths will be a consequence of their ruling. Common sense, doing what is right, and being concerned with the consequences of a decision need to be part of the equation.

Posner's analysis of the chameleonic idea of judicial restraint exposes how misleading the shibboleth can get. It has varied interpretations: One is that "judges apply the law, they don't make it" (formalism, Posner calls it); another is that judges defer to others—states, executive, Congress, administrative officials, trial courts (judicial modesty or "constitutional restraint," according to Posner). But judicial self-restraint, or constitutional restraint, "the invention of American judges, is prudential though nowhere to be found in the Constitution." Posner synthesizes examples of these judicial approaches by Holmes, Brandeis, Alexander Bickel, and Felix Frankfurter. There has been "no consistent exponent of judicial self-restraint on the Court since Harlan," Posner concludes. The term is "judicial camouflage," Posner states, while judicial "activism" survives as a vague, all-purpose pejorative, a term of opprobrium used by partisans against the decisions critics dislike. Today, Posner thinks, there is no coherent liberal constitutional jurisprudence, and "the right has gotten away with garbing its activism in legalistic rhetoric."

Following Posner's analytical, and very accomplished, mind is an intellectual treat. He destroys the use of the Bluebook as "an absurdity . . . impervious to criticism and ridicule." If all copies of the Bluebook were burned, "their absence would not be noticed." His examples of judicial resort to dictionaries to decide the meanings of words that are critical to a given decision are eye-opening. What does "to harbor" (an illegal alien or a flood victim) mean, what are "clothes" (employee work clothes or equipment), what is "malicious" or "willful"? How can we define words without considering the real context in which the words are used? Does an ambulance rescuing someone in a park violate a "Keep off the grass" sign? Is a goldfish an animal where gifts of animals as prizes are forbidden? Did the Second Amendment include the right to bear arms for slaves, criminals, lunatics, or children—or only people serving in a

militia? The words alone don't answer these questions.

Too bad all lawyers aren't required to take a brush-up course at some point in their careers to draw on their experiences and reconsider what we do in light of analyses like Posner's. Like Harvard professor Michael J. Sandel (author of *Justice: What's the Right Thing to Do?* and *What Money Can't Buy: The Moral Limits of Marketplace*), Posner would keep us in thrall, challenge us, and amuse us.

Ronald Goldfarb is a Washington, D.C.- and Miami-based attorney, author, and literary agent. E-mail him at rlglawlit@gmail.com.

"Mr. President"

continued from page 39

their opinions that nothing but the yellow fever . . . could have saved the United States from a fatal revolution of government." Genet's followers quickly vacated Philadelphia and New York to escape the disease. A change of government in Paris brought a death sentence for Genet, who took refuge as a farmer in upstate New York. Thus, his coup came a cropper.

So, have subsequent presidents observed the limits of their constitutional power? Unger allows that only one of them did so—William Henry Harrison, who died after only a month in office. He ticks off the foreign wars waged by presidents without congressional authorization—Polk in Mexico, Johnson in Vietnam, Nixon in Cambodia, and, most recently, Bush in the Middle East. "Of more than a dozen wars the United States has fought, Congress issued a formal declaration in only five. Unconstitutional presidential orders were responsible for the others—and the deaths of untold numbers of American troops," Unger writes.

But Unger also notes that Washington's Neutrality Proclamation kept us from war with Britain in 1793, and Lincoln's Emancipation Proclamation freed thousands of slaves.

Washington spent his presidency yearning for the chance to retire to Mount Vernon and farm. His actions made the U.S. government a workable institution, and we are fortunate that a Washington made the decisions.

Longtime Washington writer Joe Goulden is the author of 18 nonfiction books.

Bar Happenings

continued from page 11

On January 23 the CLE Program will offer for the first time the course "Lawyers Supervising Associates, Summer Hires, and Others: Ethics Issues and Best Practices." This class underscores the important ethical responsibilities of lawyers in regard to the supervision of staff members, from attorneys who work for them to non-lawyer assistants, paralegals, and summer law students and interns.

D.C. Bar legal ethics counsel Saul Jay Singer and Hope C. Todd will discuss the responsibilities of partners, managers, and supervisory lawyers, as well their responsibilities for nonlawyer assistants.

Other issues that will be explored include confidentiality, reporting professional misconduct, successive government and private employment, unauthorized practice of law and its exceptions, fostering a culture of professionalism and civility where ethical questions from staff members are encouraged and welcomed, and identifying an "ethics lawyer" at a firm/agency for interns and summer associates.

The course takes place from 9:30 to 11:45 a.m. and is cosponsored by all sections of the D.C. Bar.

Another new course, "Top 10 Tips for Trying an Automobile Accident Case: What You Need to Know in the District of Columbia, Maryland, and Virginia," takes place on January 24 and focuses on successful trial tactics for navigating an automobile accident case from initial intake to discovery and trial.

This class provides practical guidance on critical issues, including responding to discovery requests, taking and defending a *de bene esse* deposition of a medical expert, cross-examining key witnesses, opening statements, and closing arguments.

Faculty includes Paul Cornoni, a partner at Regan Zambri Long & Bertram, PLLC; Carmen Martorana, staff counsel at GEICO; Andre Forte of Wilson Forte LLP; and Walter Gillcrist Jr., a partner at Budow & Noble, P.C.

The course takes place from 1 to 4:15 p.m. and is cosponsored by the D.C. Bar Litigation Section and Tort Law Section.

All 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.dcbbar.org/cle.

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

The People's Advocate: The Life and Legal History of America's Most Fearless Public Interest Lawyer

By Daniel Sheehan
Counterpoint, 2013

REVIEW BY RICHARD B. HOFFMAN

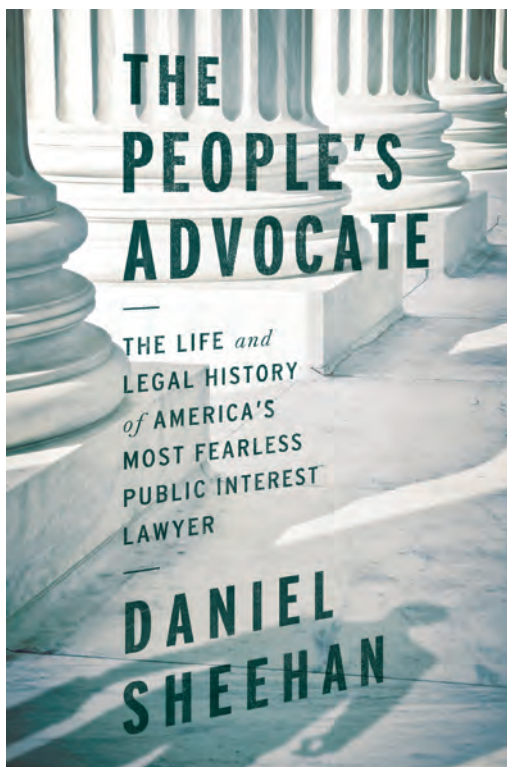
"There are those in legal and public interest circles here who say that Daniel Sheehan has a messianic desire to uncover criminal conspiracies by conservatives and has long been a legal accident waiting to happen. There are others who say Mr. Sheehan is a maligned prophet deserving honor, not scorn from his peers."

So began an account by Felicity Barringer in *The New York Times* in 1989 regarding a \$1 million judgment penalizing Sheehan and his clients for, in the opinion of the trial judge, not satisfying the requirements of Rule 11 of the Federal Rules of Civil Procedure in bringing a case based on "allegations that a 'secret team' of veterans of the Central Intelligence Agency, Cuban exiles and soldiers of fortune spent 30 continent-hopping years dealing in drugs, arms, death and anti-Communism."¹

Sheehan's new book, *The People's Advocate: The Life and Legal History of America's Most Fearless Public Interest Lawyer*, traces his involvement in an amazing number of celebrated cases over the past 40 years: the Pentagon Papers, Silkwood, the Wounded Knee trials, Attica, Watergate, and the Iran-Contra Affair. He also defended Dr. John Mack, a Harvard Medical School professor, when the academic was brought before a committee of inquiry after putting out a book on UFOs.

If that's not enough, he continues to lecture on what he describes as the true stories behind the Kennedy assassinations and the government suppression of alleged UFO sightings. He also found himself defending another put-upon professor in the same Idaho courtroom where Clarence Darrow defended William "Big Bill" Haywood of the Industrial Workers of the World early in the 20th century.²

While the \$1 million judgment in *Avirgan v. Hull*³ (upheld by the U.S. Court of Appeals for the Eleventh Circuit and denied certiorari by the U.S. Supreme Court) put Sheehan's Christic Institute



out of business, he remains active in Santa Cruz, California, leading a successor group, the Romero Institute. In San Francisco he was conducting programs after former Soviet Union president Mikhail Gorbachev appointed him director of the "Strategic Initiative to Identify the New Global Paradigm" in 1995.

Although even by his accounts his involvement in some of these proceedings was tangential, one can definitely confirm that Sheehan has a remarkable propensity for being in the center of the action when it comes to litigation of progressive causes. Almost before he was out of law school, he was litigating with the likes of F. Lee Bailey, Michael Armstrong, and Floyd Abrams in cases ranging from the Bill Baird contraceptive prosecution in Boston to the Pentagon Papers case in New York. He also spent some time as chief counsel for the National Office of Social Ministries of the Society of Jesus.

The book is filled with delicious recollections of legal luminaries, all of whose abilities pale in Sheehan's view when matched against his invariably accurate perceptions. One especially delightful tale finds Sheehan saving the day for press freedom by convincing the late renowned constitutional law professor Alexander Bickel to refer to *Youngstown Sheet & Tube Co. v. Sawyer* in challenging the government's assertion of "inherent authority" in the Pentagon Papers argument before the Supreme Court. (The resulting decision was a "75

percent" win, Sheehan opines, suggesting that had he been in charge of the case, total victory would have been achieved.)

There's no agreement about Sheehan among those who have litigated with or against him, or, for that matter, among his clients. One of them, Tony Avirgan, one of the reporters who instituted the Iran-Contra litigation that resulted in the \$1 million judgment against them and Sheehan, concluded that "the [Christic] Institute must share at least 'partial responsibility for the dismissal of the La Penca lawsuit.'" As plaintiffs in the case, Avirgan said he and Martha Honey "struggled for years to try to bring the case down to earth, to [bring] it away from Sheehan's wild allegations. Over the years, numerous staff lawyers quit over their inability to control Sheehan. We stuck with it—and continued to struggle—because we felt that the issues being raised were important."

To be sure, Philip Hirschkop of the American Lawyers for Trial Justice told the *Times* in its 1989 story of the case that the evidentiary attrition was only normal. "I've worked with Dan for a year now on this case and he's always turned out to be correct," he said.

In chronicling the further events in that case, Sheehan recounts how the assassination of Judge Robert Vance, who had been one of the three Eleventh Circuit jurists hearing the appeal of the dismissal of the case and the \$1 million award to the appellees, resulted in the panel being made up of two Reagan appointees who were assertedly determined to affirm the trial judge, who, according to Sheehan, failed to disclose some previous CIA connections. Sheehan refers to hostile questioning during argument by the replacement judge, a recent Republican appointee.

Other accounts of the case suggest that Sheehan and his co-counsels proceeded haphazardly in the face of a trial judge who they knew was likely to be skeptical of their claim. His discussion of the appellate panel's political makeup fails to mention that the third judge, a Carter appointee, concurred in the unanimous affirmance of the trial court ruling.

In the end, does Sheehan make a good case for law students to follow his career path? The whole tale does support his approach of charging into a controversy fearlessly, especially in terms of contacting often renowned practitioners and coming off as knowledgeable enough to be treated as an equal, or at least as someone worth working with.

His story of how he managed to turn a short-term apprenticeship at a famous

Boston law firm into his being propelled by the firm's appreciative leadership into Harvard College and then Harvard Law School, coupled with his early baptism by fire in some major cases before he even spent a day at law school, is breathtaking. Law students might well study how Sheehan, using a combination of shrewd timing, concentrated effort (especially in his earlier days), and unmitigated gall, managed to hurl himself into the midst of all these major cases.

However, the contrary impression left by his experience in Florida and the \$1 million judgment, for which he apparently left himself open by not proceeding in a more organized way despite the obvious difficulties he faced, makes the reader feel that hiring this lawyer could expose one, as it did his clients, to unhappy consequences that seemingly could have been avoided.

Although I was a classmate of Sheehans at Harvard Law and I recall his presence in some classes, I did not know him personally then nor have I had any contact with him since our graduation more than 40 years ago. But even then, Sheehan quickly acquired a reputation around the law school as a singular character.

He does claim, and I do recall that he did display, a willingness to challenge the first-year course professors who were at that time still notorious in their abilities to eviscerate most students. In his book, he explains that he had done some research on their professorial behavior when still an undergraduate; consequently, he avers that he was better prepared than most first-year students to take on professors who used the same tricks to browbeat their classes year after year.

Yet it is in his recounting of his experiences at Harvard Law where my doubts arise as to the reliability of his recollections. Passing over his seemingly endless misspellings of names—from Harvard Law dean (and later Harvard president) Derek Bok to playwright Jean Anouilh—one does wonder about the accuracy of many of the stories of legal happenings in the late 20th century according to Sheehan.

Another episode he recounts was the cancellation of some of our first-year final exams at law school after the shooting and death of Robert Kennedy. Sheehan may well be correct in recalling a mass student meeting and a petition signed by most of the class, but he goes on to state that most or all of the exams were cancelled by the faculty. Well, I have always wished that that had been what happened, but, alas, only my last two exams out of six were called off, and I have that

C in Civil Procedure to prove it.

Sheehan, now operating out of Santa Cruz, said recently that Edward Snowden wouldn't receive a fair trial if he returned to the United States. "No American citizen in their right mind would trust the honesty and the objectivity of the American judicial system at this time in history. They are not trustworthy. The majority of the United States Supreme Court is not trustworthy. They have given themselves over to this same national security state mentality," he said in an interview in August. All of which suggests that should Snowden ever tire of his Russian exile and return to the United States, where he surely would face the legal consequences of his leaks, you just might find Sheehan appearing for his defense.

Richard B. Hoffman was formerly clerk of the D.C. Court of Appeals and executive director of the National Prison Rape Elimination Commission.

Notes

- 1 Felicity Barringer, *THE LAW; Giving Law Teeth (and Using Them on Lawyers)*, N.Y. Times (March 17, 1989).
- 2 Sheehan identifies Darrow as "the greatest trial lawyer of the nineteenth century," which would exclude his 20th century defenses of Eugene Debs, Leopold and Loeb, and John Scopes, as well as Haywood.
- 3 691 F. Supp. 1357 (S.D. Fla. 1988), *affirmed*, 932 F.2d 1572 (11 Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992).

Pro Bono

continued from page 8

to change, but at least I will have tried to pay forward the good blessings that I received from my parents as I fulfill my duty as a lawyer.

Melinda F. Levitt is a partner at Foley & Lardner LLP, where she is a member of the firm's antitrust, privacy, security and information management, and international practices. In addition to organizing her firm's participation in the D.C. Bar Pro Bono Program's Advocacy & Justice Clinic, Levitt personally litigates and supervises many pro bono cases.

Note

- 1 *In re K.D.*, 26 A.3d 772, 778, n.7 (D.C. 2011).

Get Involved

The D.C. Bar Pro Bono Program's Advocacy & Justice Clinic partners with law firms and government agencies to provide full representation to income-qualified individuals in family law, housing, public benefits, consumer, and personal injury cases. For information on how your firm can get involved, contact Pro Bono Program Managing Attorney Lise Adams at ladams@dcbbar.org.

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attorney briefs

By Thai Phi Le

Honors and Appointments

Plunkett Cooney attorney **Bradford S. Moyer** has been named chair of the Insurance Coverage Litigation Committee of the American Bar Association's Tort Trial & Insurance Practice Section. Kilpatrick Townsend & Stockton LLP partner **Helen Michael** has been named 2013–2014 chair-elect... District of Columbia Attorney General Irvin B. Nathan has appointed **Phillip Husband** as general counsel for the D.C. Department of Health... **Richard A. Boswell** has been appointed associate dean for global programs at the University of California, Hastings... **Michael Carrier** has been named Distinguished Professor at Rutgers School of Law... **Michael J. Lichtenstein**, a shareholder at Shulman, Rogers, Gandal, Pordy & Ecker, P.A., has been appointed to the board of directors of the Montgomery County Coalition for the Homeless in Maryland... **Catherine M. Reese**, a family law attorney and owner of Reese Law Office, has been appointed as a member of the Judicial Nominations Committee of the Fairfax Bar Association in Virginia and elected chair of the Rules Subcommittee of the Standing Committee on Lawyers Discipline by the Virginia State Bar... The American Bar Association has honored **Michael J. Myers**, an assistant attorney general in the New York State Office of the Attorney General's Environmental Protection Bureau, with its 2013 Environment, Energy, and Resources Government Attorney of the Year Award... **Kevin J. McIntyre**, **Patrick J. Moran**, **Judge Patricia A. Seitz**, and **Jane C. Sherburne** have received the Georgetown University Law Center Paul R. Dean Alumni Award for exhibiting leadership to Georgetown Law and to the legal profession... The Anti-Defamation League (ADL) has paid tribute to **Steven Schram**, copresident of Shapiro, Lifschitz & Schram, P.C., with the 2013 ADL Achievement Award in recognition of his leadership as the organization's Washington, D.C., regional

board chair... **Mark J. Riedy**, counsel at Kilpatrick Townsend & Stockton LLP, has been named 2013–2014 vice chair of programs of the American Bar Association Section of Environment, Energy, and Resources Energy and Environmental Markets and Finance Committee and 2013–2014 vice chair, Additional (Finance) of the ABA Section of Environment, Energy, and Resources Energy and Environmental Markets and Finance Committee... AJC Washington has honored **Susan G. Esserman**, a partner at Steptoe & Johnson LLP, with the Judge Learned Hand Award, the organization's highest honor in the legal profession... The U.S. Senate has confirmed **Gregory D. Winfree** as administrator of the Research and Innovative Technology Administration at the U.S. Department of Transportation... **John Parker Sweeney**, a partner at Bradley Arant Boult Cummings LLP, has been named president-elect of DRI-The Voice of the Defense Bar.

On the Move

Charles D. "Chip" Nottingham has joined Husch Blackwell LLP as partner in the firm's transportation and public policy, regulatory, and government affairs teams... **Erica T. Klenicki**, **Sarah Mortazavi**, and **Catherine E. Stolar** have joined Hollingsworth LLP as associate... Patent litigator **David Long** has joined Kelley Drye & Warren LLP as partner... **Bryan Walker** has joined MacDonald, Illig, Jones & Britton LLP in Erie, Pennsylvania, as associate patent attorney... **Paul J. Delligatti** and **Matthew S. Sheldon** have been elected to partnership at Goodwin Procter LLP... **Alexander Chinoy**, **Phyllis Jones**, **Michael Kennedy**, **Robert Lenhard**, **Jennifer Plitsch**, and **Jennifer Zachary** have been promoted to partnership at Covington & Burling LLP... **Jonathan Vogel** has joined the legal department of Bank of America Corporation as associate general counsel



Kilpatrick Townsend & Stockton LLP has added **Sonia Baldia** to the firm's global sourcing and technology team as partner.



Benjamin P. Saul has joined **Goodwin Procter LLP's** consumer financial services litigation group practice as partner.



Denise Hammond of Hammond Immigration Law, PC, has been appointed as a fellow of the American Bar Foundation.

and senior vice president for consumer regulatory enforcement... Former U.S. Department of Justice litigator **Justin Savage** has joined Hogan Lovells LLP as partner... **Thomas A. Utzinger** has been named assistant general environmental counsel for Public Service Enterprise Group... **Andrew C. Schuh** has been appointed managing partner at the newly opened Orange County office of Quintairo, Prieto, Wood & Boyer in Costa Mesa, California... **Brian R. Charville** has joined the insurance-defense firm of Murphy & Riley, P.C. in Boston as associate... Intellectual property attorney **Fred W. Hathaway** has joined Dickinson Wright PLLC as member... United States Air Force Judge Advocate General's Corps Reservist JAG attorney **Kent Eiler** has joined Tully Rinckey PLLC as senior associate... **Javade Chaudhri** has rejoined Jones Day as partner in the firm's global disputes practice... **Michael Wigmore** has joined Vinson & Elkins LLP as partner in the firm's environmental practice

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docket



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

JANUARY 7

The Future of Auer: Will Deference to Agency Interpretations of Their Own Regulations Survive?
12–1:30 p.m. Sponsored by the Administrative Law and Agency Practice Section and cosponsored by the Antitrust and Consumer Law Section; Arts, Entertainment, Media and Sports Law Section; Courts, Lawyers and the Administration of Justice Section; District of Columbia Affairs Section; Law Practice Management Section; and Litigation Section. Pension Benefit Guaranty Corporation, 1200 K Street NW, Training Center, first floor.

Financial Reporting: The SEC's Renewed Interest
12–2 p.m. Sponsored by the Corporation, Finance and Securities Law Section.

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; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; District of Columbia Affairs 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

Media Law Committee Brown Bag Lunch
12:15–1:30 p.m. Sponsored by the Media Law Committee of the Arts, Entertainment,

ment, Media and Sports Law Section. The Washington Post, 1150 15th Street NW.

JANUARY 9

Estate Planning, Part 3: Common Mistakes in Charitable Gift Planning: A Dirty Dozen
11:30 a.m.–2:30 p.m. Sponsored by the Estate Planning Committee of the Taxation Section.

Update on Same-Sex Marriage and Domestic Partnerships 2014
6–8:45 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Estates, Trusts and Probate Law Section; Family Law Section; Health Law Section; and Labor and Employment Law Section.

JANUARY 13

Disciplinary Year in Review: DC, MD, and VA
11 a.m.–2:15 p.m. CLE course cosponsored by all sections of the D.C. Bar.

JANUARY 14

New Tax Practitioners, Part 3
12–2 p.m. Sponsored by the New Tax Practitioners Committee of the Taxation Section.

SEC and FINRA Enforcement of Insider Trading: Current Issues and a Look at What's Next
12:30–2 p.m. Sponsored by the Corporation, Finance and Securities Law Section.

Developments in Class Action Litigation 2014
4–7:15 p.m. CLE course cosponsored by the Antitrust and Consumer Law Section; Corporation, Finance and Securities Law Section; Labor and Employment Law Section; Litigation Section; and Tort Law Section.

JANUARY 15

The End of Zombie Corporate Directors? A Consideration of Majority Voting Reforms
12–2 p.m. Sponsored by the Investor Rights Committee of the Corporation,

Finance and Securities Law Section.

Objection! Objection! Making and Responding to Objections
6–8:15 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 16

Estates, Trusts and Probate Law, Part 5: Can They Have That? Secured and Unsecured Creditors' Rights in Decedents' Estates
12–2 p.m. Sponsored by the Estates, Trusts and Probate Law Section.

Tax Audits and Litigation, Part 3
12–2 p.m. Sponsored by the Tax Audits and Litigation Committee of the Taxation Section.

Introduction to Health Law and the Affordable Care Act, Part 1: Introduction to the U.S. Health Care System
6–9:15 p.m. CLE course cosponsored by the Hirsh Health Law and Policy Program of The George Washington University School of Public Health and Health Services and the D.C. Bar Courts, Lawyers and the Administration of Justice Section; Government Contracts and Litigation Section; Health Law Section; and Labor and Employment Law Section.

JANUARY 17

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

Lunch and Learn: Grow Your Practice With LinkedIn
12–2 p.m. Sponsored by the D.C. Bar Practice Management Service Committee. Contact Daniel M. Mills or Rochelle D. Washington, assistant director and senior staff attorney, respectively, of the Practice Management Advisory Service, at dmills@

dcbbar.org and rwashington@dcbbar.org, or call 202-626-1312.

JANUARY 21

International Tax, Part 4

12–2 p.m. Sponsored by the International Tax Committee of the Taxation Section.

JANUARY 23

Lawyers Supervising Associates, Summer Hires, and Others: Ethics Issues and Best Practices

9:30–11:45 a.m. CLE course cosponsored by all sections of the D.C. Bar.

Employee Benefits, Part 4

12–2 p.m. Sponsored by the Employee Benefits Committee of the Taxation Section.

Lunch and Learn: Social Media Ethics for Lawyers

12–2 p.m. See listing for January 17.

Introduction to Health Law and the Affordable Care Act, Part 2: The New Insurance Marketplace

6–9:15 p.m. See listing for January 16.

JANUARY 24

Top 10 Tips for Trying an Automobile Accident 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 28

Estate Planning, Part 5

12–2 p.m. Sponsored by the Estate Planning Committee of the Taxation Section.

Introduction to Export Controls

6–9:15 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section; Corporation, Finance and Securities Law Section; and International Law Section.

JANUARY 29

Art From Abroad: Legal Protection of Objects From Foreign Countries

12–2 p.m. Sponsored by the International Law Section. Arnold & Porter LLP, 555 12th Street NW.

Pass-Throughs and Real Estate, Part 4

12–2 p.m. Sponsored by the Pass-Throughs and Real Estate Committee of the Taxation Section.

State and Local Taxes, Part 3

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

Introduction to Department of Defense Security Clearance Cases

6–9:15 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Government Contracts and Litigation Section; International Law Section; Labor and Employment Law Section; and Litigation Section.

JANUARY 30

Introduction to Health Law and the Affordable Care Act, Part 3: Medicaid Under the Affordable Care Act

6–9:15 p.m. See listing for January 16.

JANUARY 31

Lunch and Learn: Hands-On With Fastcase

12–2 p.m. Sponsored by the D.C. Bar Practice Management Service Committee. Contact Daniel M. Mills or Rochelle D. Washington, assistant director and senior staff attorney, respectively, of the Practice Management Advisory Service, at dmills@dcbbar.org and rwashington@dcbbar.org, or call 202-626-1312.

FEBRUARY 3

ABCs of the National Labor Relations Board, Part I: Practice and Procedure Before the National Labor Relations Board

6–9:15 p.m. CLE course cosponsored by the Administrative Law and Agency Practice Section, Health Law Section, and Labor and Employment Law Section.

Ethics Issues Facing Corporate Counsel

6–8:15 p.m. CLE course cosponsored by all sections of the D.C. Bar.

FEBRUARY 4

LLCs in the District of Columbia and Other Business Entities

6–9:15 p.m. CLE course cosponsored by the Arts, Entertainment, Media and Sports Law Section; Corporation, Finance and Securities Law Section; District of Columbia Affairs Section; Family Law Section; Law Practice Management Section; and Real Estate, Housing and Land Use Section.

Attorney Briefs

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group... **Victoria Holstein-Childress** has joined Troutman Sanders LLP's financial services litigation practice as partner... Environmental enforcement veteran **Matthew Morrison** has joined Pillsbury Winthrop Shaw Pittman LLP as partner in the firm's environment, land use, and natural resources practice... **Kelly Donohue** has joined Wilkinson Barker Knauer, LLP as counsel, focusing primarily on advising clients in the media and digital content arenas on regulatory, transactional, intellectual property, and enforcement matters... **Andrew D. Herman** has joined Miller & Chevalier, Chartered as counsel in the firm's litigation practice... **Julie Ortmeier** has been promoted to vice president and general counsel of CARFAX, Inc.... St. Jude Children's Research Hospital has named **Robyn Diaz** as its chief legal officer and senior vice president.

Company Changes

Herrick, Feinstein LLP has opened an office in Washington, D.C., and Istanbul, Turkey. The firm's D.C. office is located at 700 12th Street NW, suite 700.

Author! Author!


Leonard W. Wang has written a novel about Washington, D.C., and other locales titled *Tale of the Magic Dragon*... **Adam L. Abrahams**, a principal in the Abrahams Law Firm, has written "Irrevocable Life Insurance Trusts: An Effective Estate Tax Reduction Technique," which was published in the summer 2013 issue of *The Practical Tax Lawyer*... **Carol Miller** has written the mystery novel *Murder and Moonshine*, which was published by Minotaur Books/St. Martin's Press... **Jerry W. Cox** has released a 2014 expanded and updated version of his book *Transportation of Hazardous Materials*, which was published by Touching Covers, Inc.... Attorney **H. R. "Hal" Moroz**, a former county judge and city chief judge in Georgia, has written *Federal Benefits for Veterans, Dependents, and Survivors*.

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

classifieds

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legal spectator

By Jacob A. Stein



Partners as Friends

“Indeed the words ‘friend’ and ‘friendship’ have become so stretched and extended as to have lost a good deal of their meaning, and this even before we begin to ask for lines of demarcation between friendship and other relationships. . . .¹”

—A. C. Grayling

Mr. Grayling’s recent book, *Friendship*, is a history of those who defined the meaning of the word. He brings in the Greek and Roman authors and the philosophers who have taken the subject seriously, people such as Plato and Aristotle and many others, with words such as these:

Real friendship is a slow grower, and never thrives unless engrafted upon a stock of known and reciprocal merit.

—Lord Chesterfield

Cicero (106–43 B.C.) wrote about friendship. He was in need of protection from so-called friends in the circumstances of Julius Caesar’s death. Here are Cicero’s comments:

Friendship is nothing else than an accord in all things, human and divine, conjoined with mutual good-will and affection.

—Cicero, *De Amicitia*,
Ch. vi, sec. 20

Cicero was a lawyer. However, I don’t think he had time to give attention to his civil law practice. If he had, he would have advised the rich Roman businessmen about the elements of a partnership. Roman law, as it was then, is much like our general partnership law. Two or more people shake hands and agree they are now on a profit and loss status, and each is the agent of the other in this fiduciary relationship. The English took up the Roman law and converted it to their laws. These laws were brought to the American colonies.

Now back to our friends. I have met

over the years many lawyers who have had a small partnership practice, and all were close friends. When one of the partners had a serious problem, he knew he could see a co-partner only two doors away. His friend listens and sees things that the actor before him does not. The actor does not see the whole play. He solves the problem. Furthermore, in those days, when a partner lost a big case, his friends, right then and there, put together the memorandum requesting a new trial.

Judge Benjamin Cardozo defined the obligation in a fiduciary relationship for the New York Court of Appeals in *Meinhard v. Salmon*, 249 N.Y. 458, 463–64, 164 N.E. 545 (1928):

Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

—Benjamin N. Cardozo.

That strict obligation has drifted away. The general partnership and its fiduciary obligations has been replaced by the limited liability partnership and the corporate

veil. The individuals are protected.

There are law firms with outposts all over the world. Many partners spend years without meeting any of their fellow partners.

In reading about friendship, I came across many people who exalted in the subject of friendship and its worthiness. However, I did come across some comments that question this exaltation. Here are a few:

The holy passion of Friendship is of so sweet and steady and loyal and enduring a nature that it will last through a whole lifetime, if not asked to lend money.

—Mark Twain,
Pudd’nhead Wilson’s Calendar

Love thy neighbor as thyself, but choose your neighborhood.

—Louise Beal

There is no stronger bond of friendship than a mutual enemy.

—Frankfort Moore

Nothing so fortifies a friendship as a belief on the part of one friend that he is superior to the other.

—Honoré de Balzac (1799–1850)

If we were all given by magic the power to read each other’s thoughts, I suppose the first effect would be to dissolve all friendships.

—Bertrand Russell

My friends, I wish you all good times, good clients, good reputations, and those of you who wish to become judges, because you are specially qualified, will be appointed.

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

Note

¹ Grayling, A. C., *Friendship*, New Haven and London: Yale University Press, 2013.

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