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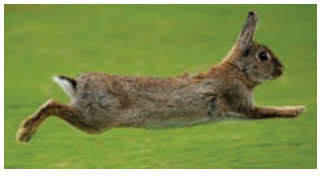
NET NEUTRALITY: WHO SHOULD BE MINDING ONLINE TRAFFIC?



By Joan Indiana Rigdon

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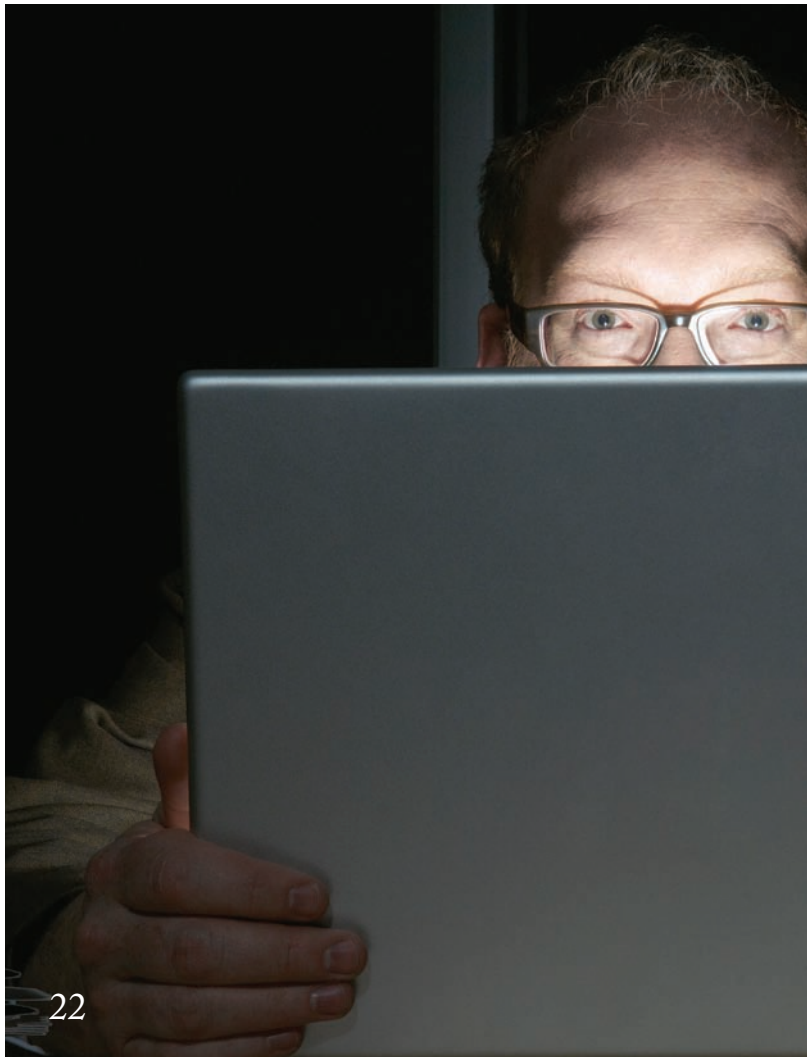

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letters

Tracking, Managing Nanotech

The March 2011 cover story, "Nanotechnology: Small Science, Huge Hurdles," suggests that existing environmental, health, and safety (EHS) regulatory programs are inadequate to govern nanotechnology. That is not the case.

In a series of briefing papers published in 2006, American Bar Association experts concluded that existing U.S. regulatory EHS frameworks are sufficient to govern these technologies. We are immersed in the process by which regulatory programs—and regulators—adapt to emerging technologies. The U.S. Environmental Protection Agency already has taken enforcement action against companies marketing certain products that allegedly contain nanomaterials, and has issued regulations targeting carbon nanotubes and siloxane modified silica and alumina nanoparticles. It has expanded its data needs and review time for registering nanoscale silver as a pesticide. There are several other agency initiatives in motion on how and when to regulate nanomaterials.

The article notes important international efforts, in which the United States participates, aimed at developing a responsible governance framework for nanotechnology. These include the International Organization for Standardization Technical Committee 229 (Nanotechnologies), which has published a robust vocabulary that includes an internationally agreed upon definition for the term *nanotechnology*. The focus of the definition is on properties associated with the 1 nm to 100 nm range. As the article points out, this is the primary range in which we are seeing innovative technologies emerge. TC 229 also has published guidance documents on risk management and safe handling of nanomaterials. The vocabulary and guidance documents are available for consideration and use by entities around the globe. For more information, readers can visit www.ansi.org.

We do not define technologies by their potential environmental effects. We define technologies by what they do, and then we manage them responsibly. This important distinction has become blurred in the rush to judgment on nanotechnology.

—Martha Marrapese
Washington, D.C.

Using Inflation to Stabilize Debt

In the April 2011 cover story, "Fiscally Unfit: Writing America's Future in Red?" Anna Stolley Persky reported that the National Commission on Fiscal Responsibility and Reform has indeed released a list of recommendations that "could stabilize debt by 2014," but the commission has omitted an important one: a measured amount of inflation that could stabilize debt as a percentage of gross national product, though not in nominal terms. Arguably that option is already under way.

When I was growing up in England during and after World War II, the dominant financial problem was the "Sterling Balances," the borrowing Britain incurred around the world to fight the war but had no hope of repaying. More than two decades later, the sterling balances were no longer an issue.

Inflation in the United States is not off the table now; indeed, we already have suffered it in the real estate market. I suggest we face a choice: either permit significant inflation in other areas—essentially allowing other sectors to catch up with what has happened in real estate—or suffer major deflation in the real estate sector. My guess is that we will choose, or perhaps already have chosen, the former, though without admitting it.

Nevertheless, we are where we are; we cannot unbinge. It is clear, however, that we can pump out dollars; indeed, the Federal Reserve is doing so already. I suggest that this may turn out to be the lesser of two evils, though China, Japan, and our other creditors may not agree. It will be interesting to see where we will be a decade from now compared to countries such as Spain and Ireland. They are facing similar problems, again largely rooted in real estate, but they do not have the same option as we do. They gave up independent national monetary policy by adopting the euro.

Before the critics pounce, I acknowledge—indeed, I would like to stress—that turning on inflation may prove a good deal easier than turning it off again. I should note, too, that I am not indifferent to the pain of inflation: in addition to serving in the army, my father contributed to the war effort by putting his savings into British war bonds during World War II, with the inevitable result.

—Brian A. Jones
Brooklyn, New York

Thank you, Ms. Persky, for the exhaustive and detailed article on the deficit.

This reader's concern is that no solution is politically feasible at this time, and it will not be until our economy crashes and our democracy is on its knees in the midst of a Great Depression.

Then perhaps the people will demand and politicians will succumb to the obvious solution—a constitutional amendment requiring a balanced budget. This is the most apparent salvation for our nation.

An important aspect of the solution is that we must recognize and accept the lessons of Korea, Vietnam, Iraq, and Afghanistan, to wit: We cannot police the world.

—Bill D. Burlison
Wardell, Missouri

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from the president

By Ronald S. Flagg

Patrice Gilbert

Simply Maureen

Maureen Thornton Syracuse, the leader of the D.C. Bar Pro Bono Program since 1992, will retire in July. Maureen's retirement would have been untimely at any moment, but it seems particularly so now, when growing numbers of our neighbors face life-altering legal issues associated with losses of jobs, homes, or public benefits while resources available to legal services providers have been sharply declining. Although Maureen's retirement is cause for sorrow, thinking about her career at this challenging moment is heartening, for it vividly demonstrates the profound difference a single attorney can make in promoting justice. In recognition of her enormous contributions, Maureen will receive the 2011 William J. Brennan Jr. Award at the Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting, on Thursday, June 30.

Under Maureen's leadership, the Pro Bono Program transitioned from a lawyer referral service to an award-winning, nationally renowned program. Our Pro Bono Program has evolved into one of the largest facilitators of pro bono legal services in the District of Columbia, providing information, brief services, and representation to nearly 20,000 members of our community and hundreds of nonprofit organizations and small businesses each year. Below are four prominent examples of programs developed with Maureen's guidance.

The *Advocacy & Justice Clinic* matches low-income clients, referred by legal and social services providers, with volunteer attorneys from 35 major D.C. law firms and several federal government agencies. Participating firms and agencies provide representation principally in family law, housing, and public benefits cases. In 2009–2010 the clinic represented 342 new clients, a 30 percent increase over the prior year.

The *Advice and Referral Clinic* provides individuals with information, advice, and brief services on most civil legal matters and refers those requiring extended representation to pro bono and legal services attorneys. The Pro Bono Program sponsors monthly general Advice & Referral Clinics at Bread for the City's Shaw and Anacostia sites, and quarterly Immigration Legal Clinics at the Carlos Rosario International Public Charter School in Columbia Heights. Volunteers from 36 law firms, federal government agencies, law schools, voluntary bar associations, and D.C. Bar sections staff the clinics. In 2009–2010 the clinics served 1,218 individuals.

Court-Based Resource Centers fill the critical role of providing unrepresented litigants with educational materials, sample pleadings, and legal assistance in landlord and tenant, family, probate, consumer, and tax sale redemption matters at D.C. Superior Court. In 2009–2010 more than 6,800 people were served by these resource centers.

The Community Economic Development Project makes pro bono counsel available to community-based nonprofit organizations, tenant associations, health care clinics, charter schools, social services providers, and small, disadvantaged businesses. In 2009–2010 the project provided representation, advice, and training to 789 nonprofit organizations and 169 small businesses.

Maureen would be quick to point out that these programs were not hers alone, but rather the product of cooperative efforts among Pro Bono Program staff, legal services providers, D.C. courts, and thousands of Bar members volunteering on a pro bono basis. But Maureen, with her wonderful judgment and gentle persistence, has been an indispensable catalyst in promoting that cooperation to a point where the relationship among our courts, our members, and legal services providers sets a standard for other communities to emulate.

The Landlord Tenant Resource Center at Superior Court is a prime example of this collaboration. A study by the D.C. Bar Landlord–Tenant Task Force showed that more than 95 percent of tenants and many landlords appearing in landlord and tenant court had no lawyers. Working with legal services providers, Superior Court judges, and D.C. law firms, the Pro Bono Program created a resource center at which unrepresented tenants and landlords can speak with a volunteer attorney and receive help understanding court proceedings, information on how to present their cases in court, assistance in preparing pro se pleadings, and referrals to appropriate legal and social services resources. Last year this resource center assisted a record 5,633 individuals, a 15 percent increase over the 2009 total.

Maureen's impact on access to justice in the District extends far beyond the confines of the Pro Bono Program and its clients. Maureen's leadership and influence in the community have been significant factors in establishing the D.C. Access to Justice Commission, broadening the use of technology as a tool for service delivery and advocate support, advancing preparedness of the Bar and related institutions to respond to disasters (such as September 11 and Hurricane Katrina), and reducing barriers to accessing legal services for those with limited English proficiency.

Finally, while Maureen's focus has always been on enhancing access to justice for those people who cannot afford to pay for their own lawyers, her work enormously has enriched the professional experience of thousands of members throughout our Bar who have been provided opportunities to serve others. Maureen has helped law firms make increasingly significant commitments to pro bono work, enabled federal government lawyers to undertake pro bono cases and matters, and provided senior lawyers with increased opportunities to contribute to the delivery of legal services as they wind down their practices.

I speak from personal experience. Eighteen years ago, Maureen and D.C. Bar past president Steve Pollak met with me to urge Sidley Austin LLP to become one of the first firms to join what became

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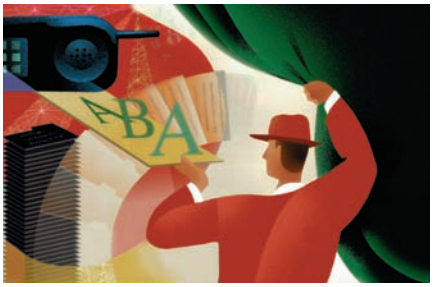
bar happenings

By Kathryn Alfisi



Mick Wiggins

Mottley Takes Oath of Office as 40th D.C. Bar President

Darrell G. Mottley, principal shareholder at Banner & Witcoff, Ltd., will be sworn in as the 40th president of the D.C. Bar during its Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting, on June 30 at the Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW.

The event will open with the Presidents' Reception at 6 p.m. to welcome Mottley, followed by the Celebration of Leadership at 7:30. The reception benefits the D.C. Bar Pro Bono Program, which provides legal assistance to the District's low-income community.

Courtesy of Banner & Witcoff, Ltd.

Darrell G. Mottley

Another highlight of the evening is the presentation of awards to outstanding Bar members and the announcement of the Bar's election results.

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

Section Programs Cover Homeland Security Issues, Family Law Updates

In June the D.C. Bar's sections will update practitioners on family law and, in a separate course, explore issues on public safety and homeland security.

The June 10 course "Family Law Legislation Update" is perfect for Bar members who are worried they may have missed important family law decisions from the D.C. Court of Appeals or legislation from the D.C. Council last year. Speakers Sharra Greer, policy director of the Children's Law Center, and Kristin Henrikson, a partner at Delaney McKinney LLP, will review new family law statutes and case law.

The program, sponsored by the D.C. Bar Family Law Section, takes place from 12:30 to 1:30 p.m. at the D.C. Superior Court, 500 Indiana Avenue NW, room 3300.

On June 21 the D.C. Bar Computer and Telecommunications Law Section will present the program "An Overview of Public Safety and Homeland Security Hot Topics," featuring James A. Barnett Jr., chief of the Public Safety and Homeland Security Bureau of the Federal Communications Commission (FCC).

Barnett will explore topics such as the Next Generation 9-1-1, ensuring nationwide interoperability for public safety communications, emergency alerting issues, and network resiliency. Joy Ragsdale, an attorney with the FCC's Enforcement Bureau, will moderate.

The program takes place from 12 to 1:15 p.m. at Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street NW. It is cosponsored by the D.C. Bar Corporation, Finance and Securities Law Section and Real Estate, Housing and Land Use Section.

For more information, contact the Sections Office at 202-626-3463 or sections@dcbar.org.

CLE Courses Provide Practical Tips on Litigation Issues

The D.C. Bar Continuing Legal Education (CLE) Program will offer two courses on litigation issues in June that are great for junior associates at larger firms.

"Strategies to Meet E-Discovery Obligations: Beyond the Basics" on June 15 will help attorneys hone their ability to respond to e-discovery requests and save time and money for their clients or their companies.

The course will focus on the legal and practical requirements for collecting and culling electronically stored information in connection with a legal hold or regulatory investigation, beginning with a strategically focused update on the requirements under the Federal Rules of Civil Procedure.

Faculty will provide tips, strategies, and techniques for evaluating e-discovery obligations, for identifying and prioritizing collection sources, and other common production issues. Participants will learn how to develop correct collection techniques early in the discovery process and how to use targeted "surgical" collections of data to save time and money, as well as provide data critical to subsequent discovery processes. The course also will consider requirements and strategies to facilitate and reasonably limit discovery requests.

Jason Baron, director of litigation at the U.S. National Archives and Records Administration; Alon Israely, a senior adviser in the Advisory Service Group of the Business Intelligence Associates, Inc.; and Ralph C. Losey, a partner in the Orlando office of Jackson Lewis LLP, will serve as faculty.

The course takes place from 5:30 to 8:15 p.m. and is cosponsored by the D.C. Bar Computer and Telecommunications Law Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Family Law Section; Government Contracts and Litigation Section; Health Law Section; Intellectual Property Law Section; Labor and Employment Law Section; Law Practice Management Section; Litigation Section; and Real Estate, Housing and Land Use Section.

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offering the course "Practical Advice on Privilege Logs" to help attorneys master the practical skills they need to make the privilege log process run smoothly and efficiently.

Faculty will discuss best practices and teach participants how to avoid common pitfalls that can turn the process into a logistical nightmare. This course also will focus on navigating issues unique to privilege logs in the digital age, including the proper treatment of e-mail chains and attachments. Participants will learn how to leverage the combined efforts of team members while minimizing problems that commonly arise when a privilege log project is divided among multiple attorneys.

Thomas H. Kim, an associate at Jenner & Block LLP, and Julie A. Smith, of counsel at Willkie Farr & Gallagher LLP, will serve as faculty.

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; Litigation Section; and Tort Law Section.

Both courses take place at the D.C. Bar Conference Center, 1101 K Street NW, first floor.

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

Keenan Leads Washington Lawyers' Committee Honorees

The Washington Lawyers' Committee for Civil Rights and Urban Affairs will hold its annual Wiley A. Branton Awards Luncheon on June 16, with NAACP General Counsel Kim M. Keenan and Crowell & Moring LLP partner George D. Ruttinger leading its 2011 honorees.

Keenan is being recognized for her work as vice president of the Equal Rights Center (ERC), her leadership as former president of both the D.C. Bar and the National Bar Association, and her work as an attorney volunteer for the Washington Lawyers' Committee. Ruttinger is being honored for his leadership as cochair, long-term board member, and attorney volunteer with the committee, as well as for his service as general counsel for the ERC.

Courtesy of Crowell & Moring LLP

George D. Ruttinger

The committee also will be honoring Rabbi Dr. Bruce E. Kahn, founder

and past executive director of the ERC, with its Alfred McKenzie Award. Attorney Stanley J. Samorajczyk and Charles W. Johnson IV, a partner at Akin Gump Strauss Hauer & Feld LLP, are this year's recipients of the Vincent Reed Award. A number of District law firms also will be recognized for their work with the committee during the past year.

Jacqueline Hicks

Kim M. Keenan

The gala will be held at the Grand Hyatt Washington, 1000 H. Street NW. To register or for more information, contact the Washington Lawyers' Committee at 202-319-1000 or wlc@washlaw.org.

Lawyers Lace Up for American Heart Association's 10K Race and Fun Walk

On June 11 the American Heart Association (AHA) will hold its 21st annual Lawyers Have Heart Race and Fun Walk at the Washington Harbour in Georgetown, 3000 K Street NW.

The race has raised more than $7.5 million in the past two decades to benefit the AHA and its educational programs, as well as research of cardiovascular diseases.

The 10-kilometer race starts at 7:30 a.m., followed by the three-kilometer fun walk five minutes later. Food and entertainment will be provided, and prizes will be awarded after the race.

To register or for more information, contact Hilary Sama at 703-248-1706 or Hilary.Sama@heart.org, or visit www.runlhh.org.

Judge Goodie Speaks at BADC Forum on Advocacy, Pro Bono Work

On June 14 the Young Lawyers Section of the Bar Association of the District of Columbia will host a forum featuring Administrative Law Judge Sharon Goodie of the D.C. Office of Administrative Hearings (OAH).

Before joining the bench, Goodie was a prosecutor for the D.C. Office of the Attorney General. She also taught juvenile justice as an adjunct professor at George Mason University, and worked for a child abuse treatment center in Boston.

Judge Goodie will provide thoughts and advice for young attorneys who are developing effective advocacy and litigation skills. She also will speak on the role of the OAH in the justice system and discuss pro bono opportunities available

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Tim was among 15 law students nationwide to receive a "2011 Distinguished Legal Writing Award" from the Burton Foundation for clarity in legal writing.

Emi Ito, Derek Karchner, and John Zevitas, Class of 2011, and Parul Gupta, Class of 2013
Team members won Best Brief, Eastern Regional, at the INTA Saul Lefkowitz Moot Court Competition in trademark law, Feb. 12, 2011.

Laura Dorey, Quinn Kuranz, and Monica Sham, Class of 2011
Won CLEA Awards for Outstanding Student from the Clinical Legal Education Association.

Ellen Berndtson, Class of 2012
Ellen was awarded a competitive 10-week fellowship from the Peggy Browning Fund, designed to educate law students on the rights and needs of workers.

AnneRose Menachery, Class of 2013
Anne was selected as Catholic University's recipient of the Patton Boggs Fellowship, which recognizes exceptional law students who spend their summers working in public policy for either a non-profit institution or a government agency.

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in conjunction with the OAH.

The discussion will take place from 6:30 to 8:30 p.m. at the M Bar at the Renaissance Hotel, 1143 New Hampshire Avenue NW.

To RSVP or for more information, contact Amy Yeung at dukeamy@gmail.com.

June Courses Tackle Hot Topics in Commercial and Securities Law

In June the D.C. Bar Continuing Legal Education (CLE) Program will offer several courses dealing with hot topics in corporation, finance, and securities law.

"Top 12 Issues in Commercial and Banking Law" on June 9 will feature Barkley Clark, a partner at Stinson Morrison Hecker LLP and a nationally recognized authority on the Uniform Commercial Code and financial law.

Clark will cover topics such as new limits on overdraft banking and legal pitfalls in bank exercise of setoff.

The course takes place from 1 to 3:15 p.m. and is cosponsored by the D.C. Bar Corporation, Finance and Securities Law Section and Litigation Section.

Courtesy of Mayer Brown LLP

Elizabeth M. Knoblock

On June 14 the course "Remedies in SEC Enforcement Actions: Survey and Current Issues" will help attorneys understand the wide range of legal and equitable remedies available in Securities and Exchange Commission (SEC) enforcement actions.

The course will look at considerations taken into account for assessing disgorgement and civil penalties; when officer and director bars may be sought; and administrative remedies, including the interplay of cease-and-desist proceedings and section 15(b)(6) proceedings against licensed professionals.

Gregory S. Bruch and Elizabeth P. Gray, partners at Willkie Farr & Gallagher LLP, and Joseph K. Brenner and Antonia Chion, chief counsel and associate director, respectively, of the SEC Division of Enforcement, will serve as faculty.

The course takes place from 6 to 9:15 p.m. and is cosponsored by the D.C. Bar Corporation, Finance and Securities Law Section and Criminal Law and Individual Rights Section.

On June 23 the course "Navigating the New Regulatory Landscape for Investment Advisers" will guide attorneys on

the latest radical regulatory changes, many flowing from the Dodd–Frank Act, and provide practical advice on how to deal with these changes.

Jane A. Kanter, a partner at Dechert LLP, and Elizabeth M. Knoblock, a partner at Mayer Brown LLP, will serve as faculty.

The course takes place from 6 to 9:15 p.m. and is cosponsored by the D.C. Bar 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; and Environment, Energy and Natural Resources Section.

All courses take place at the D.C. Bar Conference Center, 1101 K Street NW, first floor.

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

'Legends' Luncheon Features Famed Litigators Lowell, Martin

On June 15 the D.C. Bar Law Practice Management Section will hold its annual "Legends in the Law" luncheon with renowned litigators Abbe Lowell and Billy Martin, who will share insights and experiences from their illustrious legal careers.

Lowell and Martin will discuss, in an informal format, law practice, business development, public service, and living fullfilled lives as lawyers. The program provides a rare opportunity to learn about lives well-spent in the law from highly respected private practitioners at the top of their game.

Lowell, who recently joined Chadbourne & Parke LLP as partner, is one of the country's leading white collar defense and trial attorneys. His well-known clients have included former Nevada governor Jim Gibbons; former Senator Robert Torricelli; former U.S. Representatives Gary Condit, Walter Fauntroy, and Charlie Wilson; and lobbyist Jack Abramoff.

Courtesy of McDermott Will & Emery LLP

Abbe D. Lowell

Courtesy of Dorsey & Whitney LLP

Billy Martin

Martin is a partner at Dorsey & Whitney LLP where he represents major corporations and high-profile individuals in civil and criminal litigation. His clients have included professional basketball players Allen Iverson and Jayson Williams, Monica Lewinsky, the parents of murdered government intern Chandra Levy, football player Michael Vick, former Atlanta Mayor Bill Campbell, actor Wesley Snipes, and former Senator Larry Craig.

Law Practice Management Section cochair Jeffrey Berger of The Berger Law Firm, P.C. will moderate the program, which takes place from 12 to 1:45 p.m. at the D.C. Bar Conference Center, 1101 K Street NW, first floor.

The luncheon is cosponsored by the other 20 sections of the D.C. Bar and the Women's Bar Association of the District of Columbia. A portion of the program's proceeds will benefit the D.C. Bar Pro Bono Program.

For more information, contact the D.C. Bar Sections Office at 202-626-3463 or sections@dcbar.org, or visit www.dcbar.org/lpm.

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

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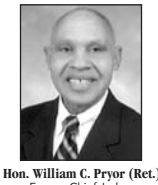

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By Joe Perry

Problems With Puffery

Mick Wiggins

As of this writing, the Web site for Cromwell and Goodwin states that the firm has "a long tradition of pro bono and community activity," and that the firm's "commitment to being a responsible, ethical law firm is embedded throughout our organisation."[1]

Such proclamations warm Bar Counsel's heart. So you can imagine our alarm upon learning of reports that the law firm of Cromwell and Goodwin may not, in fact, exist.[2] Although the author (or authors) of the Web site claim that the firm originally was established in 1980, many in the legal community contend that they had not heard of the firm until mid-March of this year, when the Web site emerged. Attempted visits to the address listed as the firm's headquarters in New York have not helped matters, because there is nothing there.[3] Calls to Cromwell's managing partner about this and other issues apparently have gone unreturned.[4]

There is, of course, a very real concern that such a site could be used to perpetuate any number of frauds.[5] Beyond this, the idea that someone might create a bogus law firm to bring an air of legitimacy to fraudulent activities demonstrates some of the power, or at least the perceived power, in holding oneself out as an attorney. The D.C. Rules of Professional Conduct directly address such issues. Rule 7.1(a), regarding Communications Concerning a Lawyer's Services, states:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
> (2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

Rule 7.5 further incorporates these ideas into its proscriptions against misleading firm names, letterhead, and professional designations. Although most readers may readily identify the ethical issues inherent in advertising on behalf of a completely phony firm, other potential pitfalls abound.

For example, a solo practitioner may be able to use the word "firm" in reference to his solo practice—"The John Doe Law Firm"—but he may not use "John Doe & Associates," as the latter necessarily implies the attorney is formally associated with other attorneys.[6] John Doe also may not state he is admitted to practice in a jurisdiction while he is on inactive status in that jurisdiction.[7]

Further, the requirement of truth in advertising applies not only to the composition and credentials of a practice, but to what the practice does. An attorney likely would run afoul of the ethical rules by stating in an advertisement, "I can help you when others can't," as such claims are incapable of substantiation.[8] Likewise, for the assertion: "I can help YOU!" The attorney who places this advertisement has no way of knowing who might be reading it, so she has no way of evaluating whether or not she actually has the capacity to help.[9]

There are limits, of course, to how strictly words will be interpreted. Attorneys who claim they are willing to "fight to the end" are generally excused from mortal combat, but those same attorneys should stand ready to carry their client's case through multiple appeals.

There is no way to know what will have happened to Cromwell and Goodwin by the time this column makes it to print. Perhaps Mssrs. Cromwell and Goodwin will wake up one day to find there is no longer a demand for their legal services, despite the fact that, according to their Web site, Cromwell specializes in nearly every conceivable practice area.

Whatever Cromwell and Goodwin's fate, however, the chatter surrounding their sudden emergence should serve as a reminder to all D.C. attorneys that the public is scrutinizing their advertising. Claims regarding qualifications and the like, whether made to solicit business, put the other side on notice, or for some other purpose, may be commonplace, but they must be made honestly. Bar Counsel encourages attorneys to review what this means for their practice.

Notes

1 The reader might find this spelling of "organisation" odd, as Cromwell and Goodwin is purportedly headquartered in New York.

2 *See, e.g.*, Baxter, B., *What's the Deal With Cromwell & Goodwin?* http://amlawdaily.typepad.com/amlawdaily/2011/04/cromwell-goodwin.html (last visited Apr. 18, 2011).

3 *See id.*

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4 *See id.*; Jones, A., *On Cromwell & Goodwin: The World's Most Mysterious Firm*, Wall St. J., http://blogs.wsj.com/law/2011/04/11/on-cromwell-goodwin-the-worlds-most-mysterious-firm/ (last visited Apr. 18, 2011).
5 In this regard, until the mystery surrounding Cromwell is resolved, lawyers are not encouraged to respond to the firm's call for résumés, which reads as follows:

> Do you want a challenging career with exceptional compensation and benefits and can give you a lifetime [of] professional development? You need not . . . go anywhere because Cromwell and Goodwin has more than something to offer you!

Aside from the inherent dangers of providing personal information to an organization that may not exist, Bar Counsel is concerned that the phrase "more than something" actually means "more than you bargained for."
6 *See, e.g.*, Rule 7.1; Rule 7.5; D.C. Bar Legal Ethics Op. 332 (Firm Names for Solo Practitioners) (2005); D.C. Bar Legal Ethics Op. 189 (Name of Law Firm) (1988).
7 *See, e.g.*, Rule 7.1(a); D.C. Bar Legal Ethics Op. 271 (Inactive Members: Business Cards and Letterhead) (1997).
8 *See, e.g.*, Rule 7.1(a)(2); D.C. Bar Legal Ethics Op. 249 (Lawyer Advertising) (1994).
9 *See id.*

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE ROBERT P. KAUFMAN. Bar No. 375715. March 10, 2011. The D.C. Court of Appeals publicly censured Kaufman in connection with his neglect of a client's personal injury lawsuit. Rules 1.1(a), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.4(a), and 1.16(d).

Reciprocal Matters

IN RE JOHN A. ELMENDORF. Bar No. 454508. March 31, 2011. In a reciprocal matter from Maryland, the D.C. Court of Appeals disbarred Elmendorf. The Maryland Court of Appeals disbarred Elmendorf's license by consent.

IN RE JASON M. HEAD. Bar No. 479171. March 31, 2011. In a reciprocal matter from Virginia, the D.C. Court of Appeals suspended Head for 50 days, subject to the conditions imposed in Virginia. The Virginia State Bar Disciplinary Board suspended Head for 20 days, and the Circuit Court of the City of Virginia Beach suspended Head for 30 days, to be followed by a one-year probationary period.

IN RE MARYROSE O. NWADIKE. Bar No. 455695. March 31, 2011. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Nwadike.

IN RE SOL Z. ROSEN. Bar No. 10967. March 24, 2011. In a reciprocal matter from Virginia, the D.C. Court of Appeals disbarred Rosen. The Virginia State Bar Disciplinary Board revoked Rosen's license to practice law by consent.

IN RE MICHAEL J. SMITH. Bar No. 432304. March 24, 2011. In a consolidated reciprocal matter involving multiple orders of discipline from Indiana, the D.C. Court of Appeals imposed functionally equivalent reciprocal discipline and suspended Smith for six months, with reinstatement contingent on a showing of fitness followed by an indefinite suspension with the right to petition for reinstatement after a period of five years or reinstatement by Indiana, whichever occurs first.

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

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legal beat

By Kathryn Alfisi and Thai Phi Le

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

D.C. Bar Presents Annual Awards at Celebration of Leadership

On June 30 the D.C. Bar will honor outstanding individuals and programs whose commitment has made a deep impact on the community and the legal profession. The presentation of awards is among the highlights of the Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting, which takes place at the Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW.

This year the Frederick B. Abramson Award, which is presented to a project that has made the year's most significant contribution to the Bar and its members, will be presented to George E. Covucci, chair, and Susan Bennett, vice chair, of the Community Economic Development Pro Bono Project Advisory Committee on behalf of their committee and partner law firms that have created the Education Initiative.

"[Vice chair] Susan Bennett and I are delighted to accept the Frederick B. Abramson Award on behalf of the D.C. Bar's Community Economic Development Project. The credit, as always, goes to the outstanding staff," Covucci said. "[The Pro Bono Program team] has worked tirelessly on a variety of education initiatives that have permitted busy nonprofit executives and other personnel to stay abreast of important legal and business developments."

The Education Initiative is designed to build core competencies for small businesses and nonprofits through increased training programs. These programs include an eight-part business law course for nonprofit executives, a four-part employment law course for small business owners, and numerous Webinars that tackle issues such as preserving and protecting intellectual property, risk management, and planned giving.

That same evening, Maureen Thornton Syracuse will be recognized with the Bar's highest honor, the William J. Brennan Jr. Award, for her nearly 20 years of tremendous service to the community as head of the D.C. Bar Pro Bono Program. In addition, Paul S. Koffsky, deputy general counsel for personnel and health policy at the U.S. Department of Defense, will receive the Bar's Beatrice Rosenberg Award for Excellence in Government Service in recognition of his more than 30 years of outstanding contributions to the legal profession and his dedication to public service.

The chairs and cochairs of the D.C. Bar Antitrust and Consumer Law Section; Environment, Energy and Natural Resources Section; Estates, Trusts and Probate Law Section; Family Law Section; International Law Section; Labor and Employment Law Section; Litigation Section; Tax Law Section; and Tort Law Section will be honored with the Best Section Community Outreach Project Award for 15 years of support to the Pro Bono Program's Advice and Referral Clinic.

Other award recipients include: D.C. Bar Intellectual Property Law Section (Best Section); Jerald Hess of DLA Piper LLP and Larry E. Tanenbaum of Akin Gump Strauss Hauer & Feld LLP (Pro Bono Lawyers of the Year); Ropes & Gray LLP (Pro Bono Law Firm Award, Large Firm); Haynes and Boone, LLP (Pro Bono Law Firm Award, Small Firm); and the Health Care Access Project of the D.C. Bar Pro Bono Committee and the New Fee Agreements Course Curricula of the D.C. Bar Continuing Legal Education Committee (Best Bar Project).—*T.L.*

Courtesy of Koonz, McKenney, Johnson, DePaolis & Lightfoot, LLP.

Paulette E. Chapman

Courtesy of Covington & Burling LLP

Thomas S. Williamson Jr.

Bar Has Mailed Dues Statements; Payment Deadline Is July 1

The D.C. Bar has sent its members their annual dues statements for fiscal year 2011–2012. The deadline for payment is July 1.

Dues are $248 for active members, $130 for inactive members, and $127 for judicial members. When paying dues, members also may join a section or renew their section memberships and make contributions to the D.C. Bar Pro Bono Program.

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

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

Members are encouraged to confirm all of their personal information on the dues statement, including e-mail addresses.

Candidates for Bar Office Present Leadership Plans

On April 27 members of various bar associations in the District of Columbia met with candidates running for leadership positions in the D.C. Bar for the 2011–2012 term.

The D.C. Bar Candidates' Forum, held at Hogan Lovells, featured candidates vying for seats in the Bar's Board of Governors and the American Bar Association's (ABA) House of Delegates.

After an hour of mingling, people crowded in a circle as Paulette E. Chapman, a candidate for president-elect of the D.C. Bar, took a few minutes to introduce herself and speak about her experiences that would help her lead the organization. "I feel like we're in a circle of kinship," she joked.

Chapman talked about her 22 years of practice in the city and her work as former president of both the Women's Bar Association of the District of Columbia and the Bar Association of the District of Columbia (BADC). She is currently a

partner at Koonz, McKenney, Johnson, DePaolis & Lightfoot, L.L.P.

"I have served on nominations committees, screening committees, executive committees, budget committees. And on the voluntary side, I have handled everything from putting on programs, honoring lawyers, honoring judges, mentoring students, [and] worrying about the budgets [to] trying to increase membership, making sure programming was relevant, and trying to ensure that your identity in the voluntary bar that you represented had its singular place and reputation," Chapman said. Her extensive experience, she said, would be a great asset in exploring and meeting the needs of the Bar's diverse constituencies.

Added Chapman, "I will absolutely put the same enthusiasm and dedication and hard work into the president-elect and president position, and like other bars, I will remain completely involved as a . . . past president."

Thomas S. Williamson Jr., a partner at Covington & Burling LLP, addressed the two questions he gets asked the most about running for president-elect of the D.C. Bar: why do you want to be president and what will be your priorities?

He recalled his "formative years" when lawyers were at the forefront of social change. Williamson said he, too, wanted to be part of the change. "Over the years, I've had to figure out how to adapt to the challenges of being a commercially successful lawyer, but I've never really abandoned this notion as a lawyer—you have a special responsibility to give back to the community," he said. "If you are the Bar president, then you have enhanced stature or legitimacy to reach out to institutional stakeholders like the courts, the D.C. government, and, of course, the voluntary bar associations."

Williamson also discussed his priorities if elected, which include access to justice, collaboration with the local courts, and helping lawyers in transition.

Among those who attended the forum were leaders from the Asian Pacific American Bar Association of the Greater Washington, D.C. Area; BADC; GAYLAW, the Gay, Lesbian, Bisexual, and Transgender Attorneys of Washington; the Greater Washington Area Chapter of the Women Lawyers Division of the National Bar Association; South Asian Bar Association of Washington, D.C.; the Vietnamese American Bar Association of the Greater Washington, DC Area, Inc.; and the Washington Bar Association.

Nominees in the Bar's 2011 elections are running for the positions of president–elect, secretary, and treasurer; five vacancies for three-year terms on the Bar's Board of Governors; and three seats in the ABA House of Delegates, one of which is reserved for a candidate under the age of 35.

Results of the election will be announced on the Bar's Web site and on June 30 at the Celebration of Leadership: The D.C. Bar Awards Dinner and Annual Meeting, which takes place at the Mayflower Renaissance Hotel, 1127 Connecticut Avenue NW.—*T.L.*

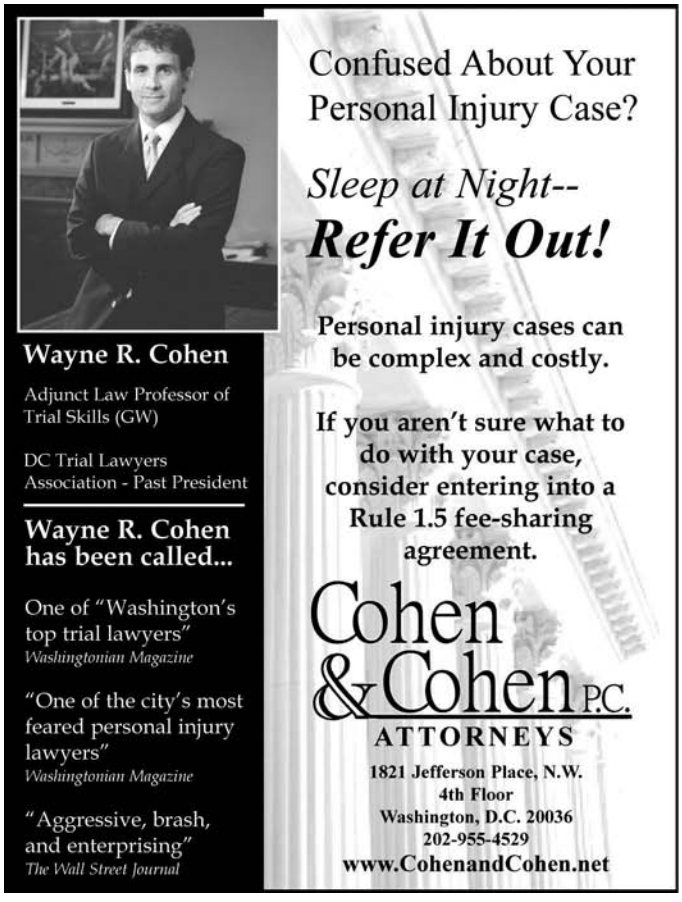
Loubier Receives Scoutt Prize at Judicial Reception

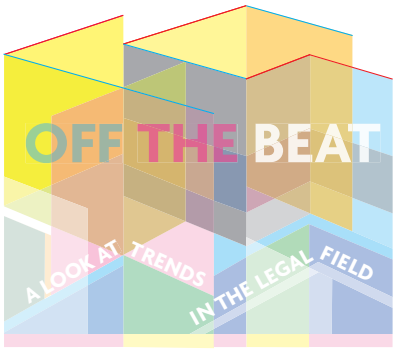
On May 3 the District of Columbia Bar Foundation presented its 2011 Jerrold Scoutt Prize to Erin Loubier, senior managing attorney and director of public benefits of the Whitman-Walker Clinic's Legal Services Program, for her outstanding legal services to the community.

Loubier was recognized at the annual D.C. Bar Judicial Reception, during which judges who have retired or taken senior status in the past year were also honored.

"Erin truly exemplifies the ideals and

continued on page 19





Marathon Lawyers Put Fitness in Legal Career Equation

Early one December morning, Mike Heyl, a partner at Hogan Lovells, began layering up. He threw on a wicker shirt and a wind shell, and stepped into GORE-TEX and waterproof pants. A balaclava was wrapped around his head while his feet were covered in SmartWool socks. Heyl was ready to trek 26.2 miles for the 2010 Antarctic Ice Marathon in a balmy zero-degree temperature.

For Heyl, the Ice Marathon marked the end of a seven-year adventure that began on the roads of Washington, D.C., during the Marine Corps Marathon in 2003. While always a runner, the Marine Corps was his first full marathon.

Inspired by Heyl's accomplishment, Edward "Ted" Wilson Jr., also a partner at the firm, decided he, too, wanted to run a marathon. "I kind of got hooked on the idea that maybe a common person like me can get into shape," said Wilson. The two decided to do the Paris Marathon together.

Heyl was already in good running shape, but Wilson was another story. "I was literally out of breath running from here [at 13th and E Streets NW] to the Washington Monument." They trained for months, though, and in 2004, Heyl and Wilson were running down Avenue des Champs-Elysées in Paris.

"You know, 26 miles, you have a lot to talk about," laughed Heyl. A main topic of discussion? The possibility of running a marathon on all seven continents. "We both like to travel. We both travel a lot for work, and we both like to run. It would be a really neat way to see the world," said Heyl. Their quest would soon take them from the café-lined streets of Paris to the expansive Great Wall of China.

Grueling Training

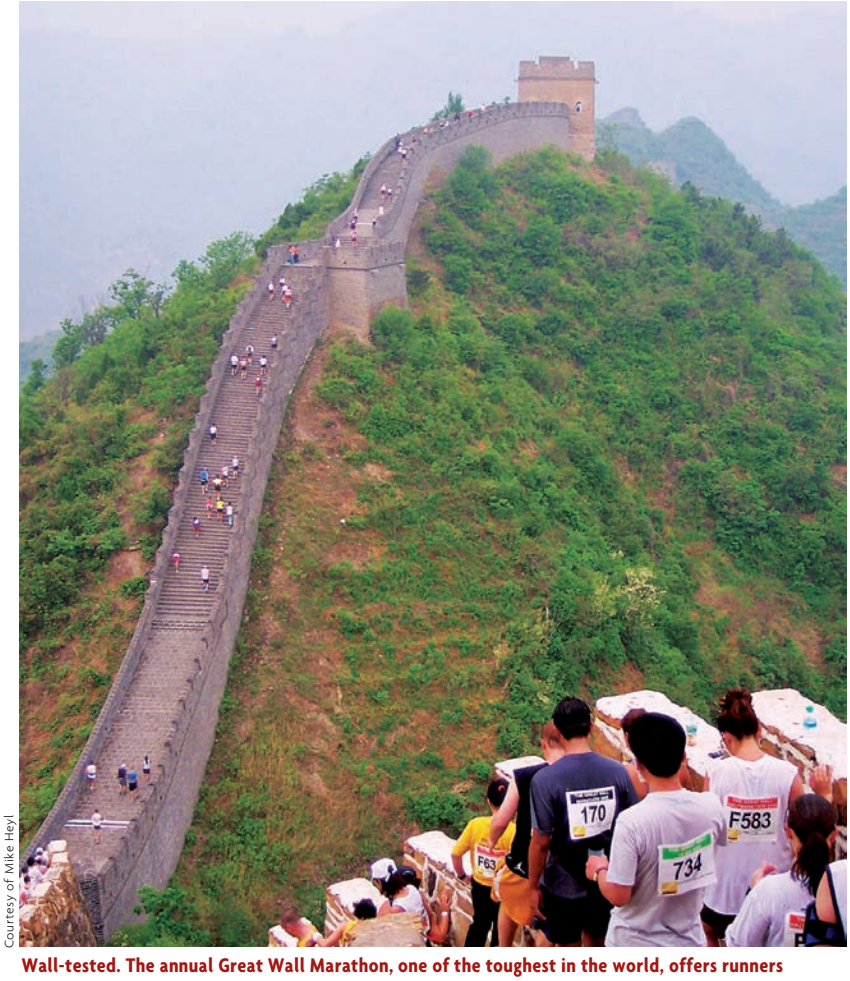
Research the Great Wall and you will see that it has a daunting 5,164 steps. To prepare, Heyl and Wilson took advantage of the 13 floors at Hogan, hauling themselves up and down the stairs. At their peak, they had traversed the stories of the building 10 times. "We'd go out and run and go back and do it again. It was torture," said Heyl. "There's nothing to look at, just paint and stairs."

They would alternate between the stairs run and long runs. "For me personally, it was great having the partner I work with [to train with]. He's invested too," said Heyl. "His schedule was very similar to my schedule. If we wanted to run and we think we've got a break between meetings, we could fit seven miles in."

Not having time was never an excuse for Heyl or Wilson to quit training despite the busy life of a typical D.C. lawyer. "I had the challenges of work hours," remarked Heyl. "I think for any one of the years that I ran these races, I did not bill anything less than 2,100 hours."

In fact, Heyl often had his BlackBerry in hand while running through the city or on his various trails. He never took conference calls with clients, but would

continued on page 46



Courtesy of Mike Heyl

Wall-tested. The annual Great Wall Marathon, one of the toughest in the world, offers runners breathtaking sights, but also puts their endurance to the test with its daunting 5,164 steps.

Mike King

Cold Play. After crunching through layers of ice and snow, attorney Mike Heyl crossed the finish line at the Antarctic Ice Marathon in December 2010, completing his goal of running a marathon on every continent.

the best qualities of the legal profession, and all of us at Whitman-Walker are delighted she's receiving the 2011 Jerrold Scoutt Prize," said Whitman-Walker Legal Services Program director Daniel Bruner in presenting the award.

Loubier has been at Whitman-Walker for almost 13 years, working on behalf of people living with HIV/AIDS and other serious medical conditions, as well as for gay, lesbian, bisexual, and transgender individuals.

"At Whitman-Walker we rely on our friends at the Bar and they always come through, and this is what makes this award such a unique honor to me and our entire team at Whitman-Walker," Loubier said. "Thank you for recognizing me, but most of all, thank you for recognizing the incredible need for access to justice."

The prize is awarded annually to an attorney who has worked for a significant portion of his or her career at a nonprofit organization, providing hands-on legal services to the District's disadvantaged residents; demonstrated compassionate concern for his or her clients; and exhibited a high degree of skill on their behalf.

Judges who were honored during the reception were John H. Bayly Jr., Kaye K. Christian, Stephanie Duncan-Peters, Brook Hedge, Judith E. Retchin, and Odessa F. Vincent of the Superior Court of the District of Columbia; Inez Smith Reid of the District of Columbia Court of Appeals; and Ricardo M. Urbina of the U.S. District Court for the District of Columbia.—*K.A.*

Federal Courts Honor Firms' Pro Bono Work

For prioritizing pro bono work to help the city's underserved residents, judges from the District of Columbia Federal Courts honored 30 law firms on April 7 during the annual 40 at 50 Judicial Pro Bono Recognition Breakfast.

As Judge Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit took to the stage, he recognized each firm for having 40 percent of its attorneys devote 50 or more hours to pro bono work in 2010. He singled out three firms—DLA Piper LLP, Hogan Lovells, and Sonnenschein Nath & Rosenthal LLP—that not only reached that benchmark but also had 40 percent of their partners achieving the same standard.

While the firms' dedicated work helped alleviate the challenges facing District residents, Garland said the need for free legal services remains critical, noting that more than one-third of the city's population lives 200 percent below the federal poverty levels. He urged firms to be creative and find new ways to provide civil legal services.

"We are not powerless against these statistics. When a pro bono lawyer meets the legal needs of even a single family, that lawyer can help stave off a personal disaster that could send ripples throughout the community at large," Garland said. "Engaging in pro bono services allows lawyers to pursue, on behalf of our community's least fortunate, the aspiration that is carved in marble above the Supreme Court: 'Equal Justice Under Law.'"

Chief Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia, which hosted the event, later recognized all the judges from the Circuit and District courts for their support to foster a culture of pro bono work throughout the legal community.

"Those of you in this room understand that money should never be a barrier to

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Other banks authorized to hold D.C. IOLTA accounts are listed on the Foundation web site.

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Memo

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justice. You understand that meeting the legal needs of the poorest in our community is a shared responsibility of the private bar and legal services providers. You understand that your time and talent can make the difference between homelessness and shelter, domestic violence and safety, and a job and unemployment," Lamberth said. "I congratulate all of you on your achievement."

The breakfast, which began in 2004, started with seven law firms. It has since grown to 30 firms, which collectively contributed more than 200,000 pro bono hours in 2010, which is the equivalent of more than 100 full-time attorneys.

The event was sponsored by the D.C. Circuit Judicial Conference Standing Committee on Pro Bono Legal Services.—*T.L.*

Course Examines Social Media Opportunities, Pitfalls for Lawyers

Lawyers know what social media is, but

Bar Members Must Complete Practice Course

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

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

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

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

The preregistration fee is $219; the on-site fee is $279. Upcoming dates are June 7, July 9, August 9, September 10, and October 4. Advanced registration is encouraged.

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

how can and should they use it? To shed light on the issue, the D.C. Bar hosted the seminar "Demystifying Social Media: What Every Lawyer Should Know."

Held April 4, the course looked at the risks of and opportunities in using social media in the legal industry. Tasha Cooper Coleman, a social media attorney and chief executive officer of Upward Action, kicked off the session by discussing the importance of creating branding and marketing strategies.

"You need to actively shape what people are finding out about you," she said. First, Cooper advised, listen to what is going on in the marketplace. Setting up a Google Alert is a good first step for lawyers and law firms to learn what people are saying about them. She also stressed that lawyers need to position themselves in a way to best attract the business they want.

The key is to provide client-centric information that is valuable to potential clients in numerous forms, from Webinars to blogs. Once potential clients surface, remember to engage them in dialogue and become a trusted advisor, Cooper said.

Tom Foster, founder of Foster Web Marketing, agreed. "Do *not* talk about yourself," he told attendees. "Social media is a platform for real people and businesses to create relationships. It's no different than what we're doing here except it's online."

Social media is a great way for lawyers to break perceptions of the stereotypical attorney and present themselves as real people to the public. Even more importantly, new media is fast becoming another way to get the ever-important client, he said.

For those with limited time, both Foster and Coleman recommended either hiring someone or using programs like HootSuite and Postling to manage all their outlets at once and track the number of users who visit their sites.

Michelle Thomas, a principal at M.C. Thomas & Associates, PC, offered participants a practical perspective on using social media as a lawyer. While a September 2010 poll commissioned by the American Bar Association Standing Committee on the Delivery of Legal Services showed that only 7 percent of people surveyed search for lawyers online, 13 percent of that number were 18 to 24 years old. "Be ahead of the curve," Thomas said, emphasizing that those in the younger age range will likely be the clients firms reach out to someday.

Ending the program was Laura Possessky, a social media, entertainment, and Internet law attorney at Gura & Possessky, P.L.L.C. She focused primarily on the legal ethics implications of joining social media networks for work.

"With social media, there's a lot of ambiguity because there's a lot we don't know," she said. Possessky said common sense should override much of the communication. She urged attorneys to find a way to engage the potential client out of the social media network after the initial contact and to not give specific information about a case through any social media sites.

The program was sponsored by the D.C. Bar Practice Management Service Committee and cosponsored by the D.C. Bar Law Practice Management Section.—*T.L.*

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

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NET NEU

Who Should Be Minding Online Traffic?

By Joan Indiana Rigdon

Nearly 20 years ago, when the general public was just starting to experiment with the possibilities of the Internet, it occurred to a lot of entrepreneurs and economists that the online world represented an unusual opportunity to level the playing field for businesses.

Throughout the 1990s corporate giants first ignored, and then belittled, the mom-and-pop storefronts that began popping up all over what was then known as "cyberland." By the end of that decade, a few of those startups mushroomed into major threats to their slow-footed competitors—Netscape Communications Corp. being among the most famous, mostly for its initial public offering, which raised $2.2 billion on the first day of trading alone toward its war chest for its ultimately lost battle against Microsoft Corp.

There was a boom and then a bust, and that story has been told. But when that was over, major business assumptions had changed. It was now widely accepted that anyone with an idea and a modem connection could set up shop online and launch (whether successfully or not) niche products, songs, books, or ideas that could not have found shelf space in the offline world.

Today the Internet still offers a mostly open playing field, with a vast array of products and content. But there's a twist: since at least 2005, it's been possible for companies to get their Internet traffic into so-called "fast lanes" by paying a premium to the pipe owners. The pipe owners—cable companies like AT&T Inc., Comcast Corp., and Verizon Communications Inc.—point out that they have invested billions of dollars in building out their networks and, therefore, should be able to leverage their investments to offer any services they choose.

That practice has heated up the debate over net neutrality, the idea that all Internet traffic should be treated equally, whether the bytes exchanged represent major transactions between businesses, penny-ante trades between independents, or just bored desk jockeys pushing viral videos of laughing babies.

Senator Al Franken (D–Minn.) is calling net neutrality the biggest issue since freedom of religion. Without it, he says, today's mostly open Internet will fall under the control of the biggest media companies, whose legal obligation is to protect their bottom line. The result: an Internet where the richest companies get the fastest loading times and best access to customers around the world, while smaller players with independent products or ideas are squeezed aside, just like they always have been in the offline world.

The Media Access Project, a Washington D.C.-based nonprofit public interest law firm that specializes in communica-

Photographs courtesy of Photodisc

TRALITY:

Photograph courtesy of Getty Images

Senator Al Franken (D-Minn.) is calling net neutrality the biggest issue since freedom of religion. Without it, he says, today's mostly open Internet will fall under the control of the biggest media companies, whose legal obligation is to protect their bottom line. The result: an Internet where the richest companies get the fastest loading times and best access to customers around the world, while smaller players with independent products or ideas are squeezed aside.

tions policy, says faster loading times for preferred customers can actually stymie innovation.

What "if someone comes up with a better way to do social media than Facebook and they can't get off the ground because Facebook has an exclusive relationship with Comcast, and Comcast says [Facebook traffic] goes faster than other people's social media?" posits Andrew J. Schwartzman, the group's senior vice president and policy director. "Openness allows for innovation."

Free market advocates, of course, want fewer rules for businesses. But in the debate over net neutrality, they also are arguing that if the federal government gets into the business of deciding how traffic should or should not move over the Internet, that's a direct threat to free speech.

"I think we ultimately have more to fear from government censorship in the name of promoting fairness and discrimination" than the alternative, which is simply letting businesses decide for themselves how to use the Internet, says Randolph J. May, a former general counsel for the Federal Communications Commission (FCC) and now president of the Free State Foundation, a think tank based in Rockville, Maryland.

Republicans apparently agree. On March 9, 2011, the House Energy and Commerce Communications and Technology Subcommittee voted to overturn the FCC's new Internet rules. The following month, the full House of Representatives voted to repeal the FCC's net neutrality regulations, just a few days after President Barack Obama threated to veto any such repeal. Getting rid of the rules would "undermine a fundamental part of the nation's Internet and innovation strategy," the administration said in a statement.

Throttling Competition

Most Americans had no idea what net neutrality was until 2008, when the FCC sanctioned Comcast for violating the commission's open Internet guidelines by throttling—or slowing—traffic for users of a bandwidth-hogging, peer-to-peer file-sharing network called BitTorrent. Today, BitTorrent describes itself as a free file-sharing service for those who want to distribute "very large" software and media files.

Comcast initially denied throttling BitTorrent traffic, but eventually admitted to the practice after the Associated Press, followed by the Electronic Frontier Foundation, produced test results showing throttling of not only BitTorrent, but also of another file sharing site called Gnutella, as well as Lotus Notes. BitTorrent, however, was by far the most popular.

"Whenever somebody tried to use BitTorrent, what [Comcast] would do was tell the site they were trying to reach to tell them to disconnect and try again later. So if you were a subscriber, it would look like the site is not working, and if you were [BitTorrent], it would look like Comcast is down," says Harold Feld, the legal director of Public Knowledge, a District-based public interest group that supports net neutrality.

Amid the ensuing public drubbing, Comcast tried to explain the difference between delaying and blocking traffic, but net neutrality proponents worried: if Comcast could slow down traffic for BitTorrent customers, and in a way that was undetectable by most customers, then any cable provider could do, or might already be doing, the same thing for any other reason.

Photograph courtesy of Getty Images

As part of the sanction, the FCC ordered Comcast to stop throttling, to file a statement explaining how the cable company had done it, and to basically "find a way to manage your congestion issues that doesn't target a particular application," as Feld summarizes. Comcast responded with bandwidth caps that were not related to specific applications.

That might have been the end of it, Feld says, but "Comcast was annoyed. By this time, [Comcast chair and chief executive officer] Brian Roberts and [then FCC chair] Kevin Martin, let us say, they had fully personalized the conflict between them." At the 2007 FCC Chairman's Dinner, Martin asked members of the cable industry to identify themselves, and then quipped, "I want to start out by apologizing that we had to remove the knives from your table."

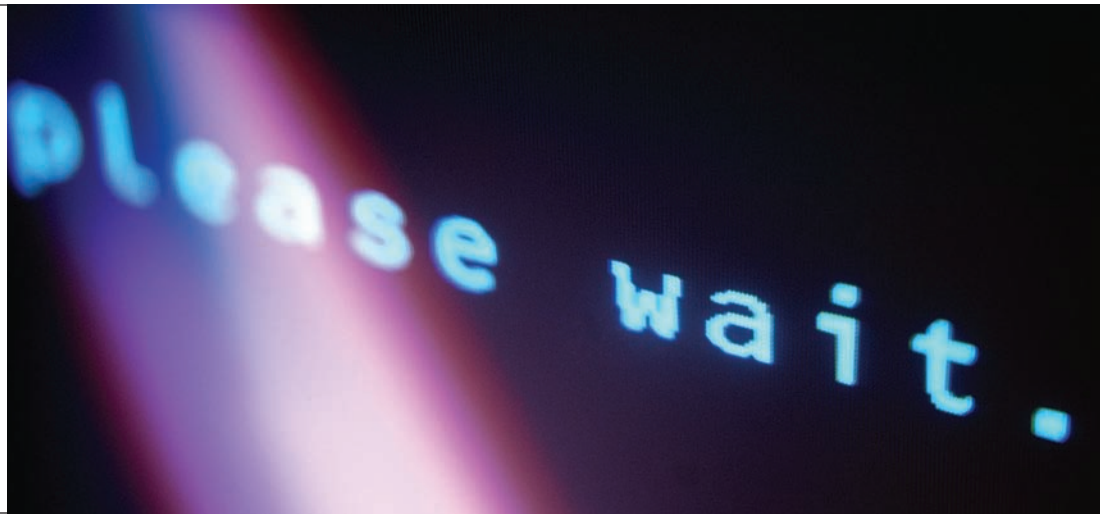
In March 2008, Comcast and BitTorrent announced that they working together on ways to manage file-sharing over Comcast's network. Then, in September 2008, "for no reason that one could understand," Feld recalls, Comcast challenged the FCC's order in the U.S. Court of Appeals for the District of Columbia Circuit. Comcast said that while it would comply with the FCC's order, it argued that the commission did not have any rules that served as the basis of its sanction.

"Now the FCC has a problem," Feld says by way of explaining the situation at the time. "It could either figure out some way to justify exercise of ancillary authority that would respond to the D.C. Circuit decision, or it could reclassify broadband as a Title II service. Or give up."

Ultimately, rather than reclassify broadband, Feld says the FCC "decided to go back to the drawing board on Title I and it came up with a different legal theory, on ancillary authority."

FCC: Web Traffic Watchdog

The 1934 Communications Act came into being to ensure fair and open access to the nation's then nascent telephone infrastructure. But the FCC regulations that cover telecoms do not cover cable companies. Instead, cable companies are considered "information services," which fall under the FCC's Title



Photograph courtesy of Photodisc

I rules. Telecoms are regulated under the much more stringent Title II rules, which were set up to prevent monopolies from taking over the nation's telephone lines.[1]

While Title I does not give the FCC explicit authority to regulate the way cable companies manage their traffic, section 4(i), referred to as ancillary authority, does allow the commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." When it sanctioned Comcast for throttling in 2008, the FCC cited these ancillary powers as the source of its authority.

The D.C. Circuit ultimately disagreed, and vacated the FCC order in its April 2010 decision.[2]

Drawing heavily from California Democratic Rep. Henry Waxman's engineered compromise, FCC Chair Julius Genachowski responded in December 2010 to the appellate court's decision by announcing new "rules of the road" for the Internet. The new rules give the FCC more power to regulate Internet providers, but not nearly as much power as net neutrality proponents had hoped.

"Now, for the first time, we'll have enforceable, high-level rules of the road to preserve Internet freedom and openness," Genachowski declared. Under the new rules, the FCC gave itself the authority to monitor the network management practices of companies who provide Internet access to homes via wires such as cable companies. Specifically, cable companies are not allowed to block any sites and practice "unreasonable discrimination" when deciding which traffic gets priority over their networks.

But that ban does not apply to companies that provide wireless access to the Internet, a distinction that many watchers find strange.

"In our opinion, you really shouldn't" treat wired and wireless Internet providers differently, says Feld. "The reason the FCC did that is because they brokered a political compromise. It was purely a matter of politics.

"The official reason given in the order is that wireless is different. It operates pursuant to different logic. It's a relatively newer service," Feld adds. "But we believe strongly that there is only one Internet and that everybody should be able to access it" equally, no matter what kind of technology they use to do it.

First Amendment and New Media

Robert Corn-Revere, a Davis Wright Tremaine LLP partner who specializes in First Amendment, communications, and information technology law, questions whether the FCC should have any rule-making ability over the Internet at all.

"Keep in mind that the FCC is sort of an anomaly in our constitutional system. We have the First Amendment, based on the notion that freedom of expression abhors things like press licensing. Yet we have a major regulatory agency whose very existence sprang forth from a perceived need and desire to license broadcasters and the electronic press. There is, at the very least, an anomaly you have to address when you approach the concept of having government control of a major medium of communication," Corn-Revere says.

"The way the courts have approached it historically is, 'We're going to treat different media differently under the First Amendment.' We're still working on parts of that, and the way the [U.S.] Supreme Court has dealt with that is simply to come up with a different view of the First Amendment based on" which technology is used to deliver content, he continues.

He cites film as an example. "When film was first introduced, the Supreme Court refused to protect it under the First Amendment. They said it wasn't part of the press, it was just a business. That decision was in *Mutual Film Corp. v. Industrial*

Photograph courtesy of Getty Images

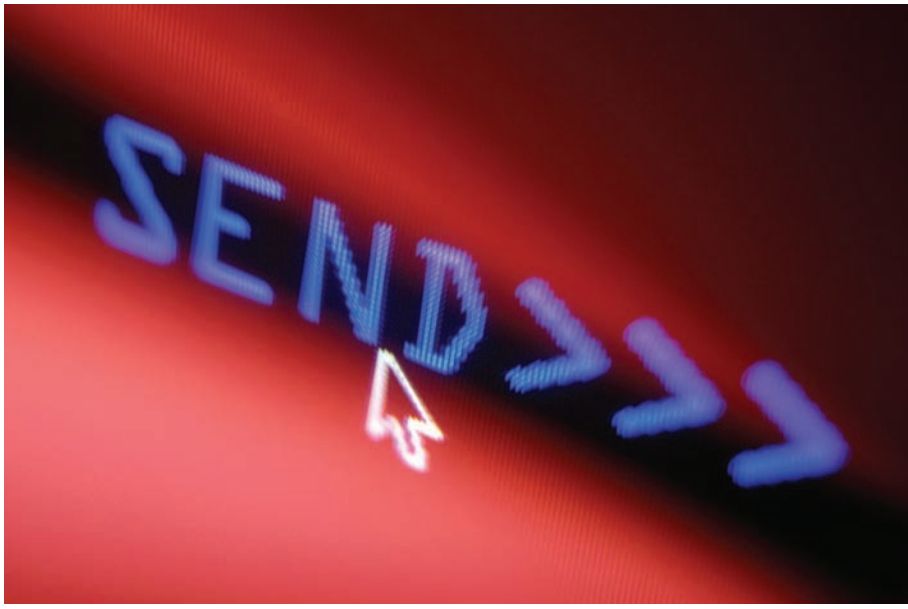
Drawing heavily from California Democratic Rep. Henry Waxman's engineered compromise, **FCC Chair Julius Genachowski** responded in December 2010 to the appellate court's decision by announcing new "rules of the road" for the Internet. The new rules give the FCC more power to regulate Internet providers, but not nearly as much power as net neutrality proponents had hoped.

Commission of Ohio,[3] Corn-Revere says.

"And so, as of 1915, cinema was not considered to be something that fell under the First Amendment. Of course, in 1915 there were no decisions defining what the First Amendment [protected]. That really didn't start until the 1930s, around the same time the FCC was created.

"When broadcasting was created during this time of First Amendment development, [the Supreme Court] said it has some First Amendment protection. But it's just treated differently. The initial rationale was that the electromagnetic spectrum is limited and government has to ration it, and as a result of that peculiar physical characteristic, if government doesn't set down the rules of the road, then overall [free speech] will come to be diminished," he adds.

"The way it played out was that the Court then extended full protections to these media. In 1952 the Supreme Court reversed itself [in the *Burstyn*[4]] case and said film is fully protected by the First Amendment," Corn-Revere says.



Photograph courtesy of Photodisc

Decades later, the Supreme Court granted the same protection to cable operators after cable operators challenged section 505 of the Communications Decency Act, which Congress had passed in 1996. That rule required cable operators who offered primarily sexual programming to follow certain rules, including scrambling and blocking their signals and broadcasting only during "safe harbor" hours, from 10 p.m. to 6 a.m. The idea was to prevent "signal bleed" of the programming from appearing on the screens of nonsubscribers, especially children.

In *United States v. Playboy Entertainment Group, Inc.*,[5] the Supreme Court found that the rule violated the First Amendment because it is applied only to a certain type of content when another, less-restrictive method—in this case, allowing nonsubscribers to block certain channels—would serve the purpose of preventing accidental screening of sexual content to young children. (The Court's ruling was delivered in 2000, three years after the Communications Decency Act itself was struck down. However, section 505 had lived on as part of the Telecommunications Act.)

The Supreme Court's 1997 decision to strike down the Communications Decency Act, in *Reno v. ACLU*,[6] marked a shift in the Court's treatment of First Amendment rights as they applied to speech made through different technologies. Two provisions of the Communications Decency Act sought to regulate the transmission of sexual content on the Internet. The Court ruled that those regulations were violations of the First Amendment.

"It was the first time that the Supreme Court had looked at new technology and said in its first decision that it is fully protected under the First Amendment. So the Court is moving away from treating different technologies differently under the First Amendment," Corn-Revere says.

It will become harder to treat different technologies differently as they converge, he adds. Now, "you have a medium that can be a publisher and radio station and provide video. The ability to treat those technologies differently becomes a much bigger problem," according to Corn-Revere.

The question facing lawmakers and policymakers today is, "Can we impose these older visions" of how to regulate bandwidth "onto this new technology that is innovating quickly and changing?" he says. In Corn-Revere's view, "It becomes increasingly difficult to find a rationale to do that."

Feld agrees to that extent: "Not every part of the Communications Act that we have thought of in the last 74 years is appropriate for broadband." But that does not mean the act cannot be updated, he adds.

Tool for Offense or Defense?

What's interesting about the debate over net neutrality is each side's view of the First Amendment, starting with whether the Founders intended it for use as a defense or an offense.

"There's a real divide here in terms of how you construe the First Amendment," says the Media Access Project's Schwartzman. "The way it was determined in the context of [the 1984 deregulation of AT&T] was that the government has an affirmative obligation to create a platform for speech to promote democratic discourse, that the goal of the First Amendment is to ensure democratic decision making" by an informed public.

Then there's the question of who has the right to freedom of speech. "Some argue that anything that supports openness

Photograph courtesy of Getty Images

supports the First Amendment," Schwartzman says. "But it's one thing to treat big corporations [as entities] that have First Amendment rights. It's another thing to say that a corporation's First Amendment rights are superior to the rights of the public, to the rights of living, breathing citizens who vote."

In Schwartzman's view, it doesn't make sense for Internet providers to say their free speech rights are being infringed upon when the government requires them to treat all Internet traffic equally.

Corporations "aren't content creators," according to Schwartzman. "To use the telephone analogy, [say] you and I are having a phone conversation, Verizon or whoever you're connecting through has no right to censor this conversation. You and I can have a very intimate conversation and engage in heavy breathing and it's none of the phone company's business. They get paid for delivering bits from A to B. The Internet carriers are in much the same situation. The point of their existence is to carry bits. They're not creating content. They're carrying other people's content."

May of the Free State Foundation disagrees. "The FCC views the providers as having two functions. If you subscribe to Comcast, it's clear that when I log on to Comcast, right there on the front page, that's their own content. I think the FCC with regard to that would say, 'We can't censor that. But a large part of what Comcast does is really just transporting information, so for all practical purposes, we can just treat them as a common carrier.' That's what they would say," May asserts.

"I just don't think you can separate out, that the government can compel that separation and basically tell the Internet service provider with regard to content it has to allow competing content, even though it's not its own content, that it has to allow" that content equal access, he says.

But Who Owns the Pipes?

May argues that companies that have invested billions of dollars in building and developing their own networks should be free to decide how to use those networks. "There are some who think the Internet is free. It's required billions and billions [of dollars] of investment," May says.

Schwartzman, however, questions some people's assumptions that companies truly created their networks. First, "they didn't invent the Internet. The government invented it," he says, referring to ARPANET, an electronic military information network that was designed with many redundant connections so that it could continue to operate even if part of it was damaged.

"Second and more fundamentally, whether [companies] are using wireless connections over publicly owned airways, which are licensed to them, or whether they use wires through streets where they have franchises or municipal permissions, where they are the recipients of government privilege in order to build and construct their businesses . . . for them to say that [they] built it" is misleading, according to Schwartzman.

"They built it from benefits from government. It's perfectly reasonable for government to say that a condition of you're being able to use our streets is that you maintain an open network."

Schwartzman adds, "We regulate utilities. With wireless, there's increasingly greater competition and less need for traditional monopoly-type regulation, but wireless is using public spectrum, which they get out of a license. They don't own the spectrum. The public owns the spectrum. They're just given the right to use it for a number of years and they bid for it. They buy [the license] and they pay for it . . . as encumbered property. It's like buying land with an easement."

Regulating the Medium, Managing Public Opinion

Feld, the legal director of Public Knowledge, believes it is business control of Internet traffic that poses huge threats to the notion of free and open discourse. During protests, like recent ones in Tahrir Square in Cairo, Egypt, or in Madison, Wisconsin, "who should have the ability to control" Internet accounts of those events?

"Let's pretend the Comcast workers are on strike. Do we really want to leave it to Comcast's discretion [to control Inter-

net traffic] when people are trying to use this common platform to find out about the issue and be engaged?" Feld asks.

"You don't have to be explicit. You don't actually have to block access to a site" to sway public debate, he continues. "It's enough if you just make it harder for people. If Comcast workers are trying to form a union, for instance, Comcast can make it that much harder for subscribers to access pro-union sites, and that much easier to tell Comcast's side of the story."

"It's easy to do. You don't have to cut off all access. It depends on what level of blocking you want. First of all, if I am a network provider, I can read your traffic. I can see what traffic you're downloading, what traffic you're uploading. I can do keyword searches. I don't have to be a total censor to make a difference. All I have to do is make that connection [to any particular Web site] suck. All I have to do is notice that a particular YouTube page is being circulated and pointed to and make it a little jittery. It takes very little in the network environment to persuade the casual user that it's just not worth it" to load certain sites, Feld says.

There are also things that are time-sensitive. One example is After Downing Street (now known as War Is a Crime), an organization against the Iraq war. "They were trying to organize a particular event" using e-mail, but "Comcast stopped the e-mail because they thought the e-mail was spam. They simply prevented the e-mail from reaching their subscribers. It took After Downing Street a week to find out what was going on," recalls Feld.

Photograph courtesy of Getty Images

Davis Wright Tremaine's Corn-Revere believes that giving the government the ability to regulate Internet traffic is a much bigger threat to a free national discourse. "You have to overcome fairly significant First Amendment questions whenever you are exerting government control over a medium of communication. You may argue that that is being done for all kinds of good reasons and reasons that are supposed to promote free speech values. You can argue the same thing about newspapers. You can say government ought to be able to regulate newspapers in the name of providing more free speech," he contends.

Overall, he says "greater regulation of new media is on the wrong side of history." Corn-Revere does not agree with the idea that FCC regulation of Internet providers is regulation of an information transportation system, as opposed to content. "If you pass a law that says no one can use these pipes to transmit speech about Republicans, you're only regulating the pipes. But you would still have a First Amendment problem," he argues.

Other attempts to regulate infrastructure have had the result of infringing on free speech, Corn-Revere says, citing Turkey's ban on typewriters in 1901. "They said they led to too much uncontrollable speech. That was not a regulation of speech. You're only regulating a device. But it clearly presents what in this country would be a First Amendment problem," he adds.

Free Market Versus Government Control

Instead of reading the First Amendment as a mandate to enable discourse, Corn-Revere says "you have to flip that question and say government can't impose regulations on media unless it comes up with a constitutionally sufficient" reason.

Although there has been dire talk about what can go wrong if companies are allowed the unfettered ability to decide how to use their networks, "The funny things is, if you really look at the FCC's network neutrality order, there's really very little in it that talks about why these rules became necessary," he says.

"The vast majority of the argument for justification talks about how companies may have both the ability and the incentive to do bad things, so for that reason it's imperative for government to regulate the Internet in the name of freedom? If we're really going to justify these rules based on potential abuse, shouldn't we also look for the potential for the government to abuse its authority over this medium?" Corn-Revere asks. "It bears recalling that the government's entry into the realm of Internet regulation was to try and impose the same kind of broadcast indecency rules" it had already imposed on cable and on the Internet.

"If there's abuse, then we might have a problem. The reason we have a free and open Internet really is because it was unanticipated by government. Sure, you can talk about its origins as military research project, but the open Internet that people celebrate for very good reasons evolved really when government wasn't looking, and it's free and open for that very reason. Can you even imagine what the Internet would look like if the FCC did the rule book on what it would be?" Corn-Revere quips.

"If you have to compare the track record of the companies that are behind the expansion of broadband access and the track record of the U.S. government in terms of promoting a free and open media, I think I'll go with the people who are actually making" the network, he says.

May is also unsettled by the idea of government being in control of any aspect of the Internet. "I'm not equating the government of the United States with the Chinese government, or with [Muammar Gaddafi's Libyan] government, or any other government. But you must note, in a lot of instances around the world today, including those countries and others, the real concern is with the government shutting down the Internet and what the government is going to ultimately do with the Internet," he says.

That was, in fact, a major concern earlier this year, when the Egyptian government shut down Internet access amid escalating protests, which had been partly organized on Facebook.

May insists he's not "attributing bad faith to our government, or ill motives." Instead, his view "really is a recognition that men who as [James] Madison said are not saints" should not be able to make decisions about how traffic moves across the Internet. "I think we ultimately have more to fear from government censorship in the name of promoting fairness and discrimination" than from free market control of the Internet, he says.

"Let's take a look at it from another level," he continues. "A lot of these providers, like Comcast, provide spam filters. Most

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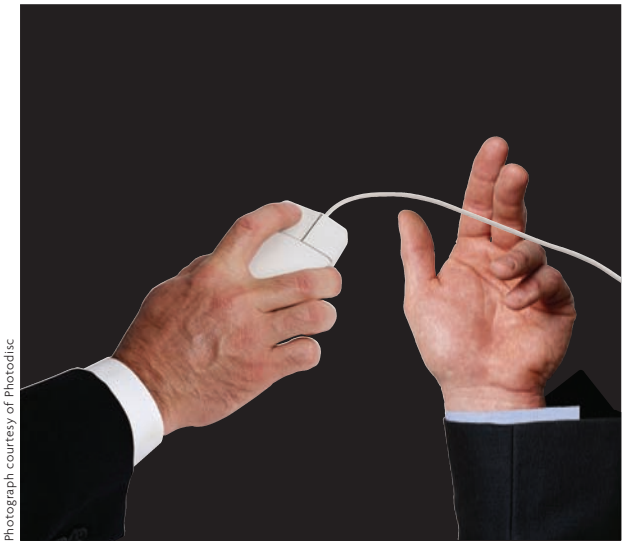
After deregulation, "the cable industry required that if you were a programmer [content provider] and you wanted to get carriage in a cable system, you had to give them an equity interest."

—Harold Feld, legal director of Public Knowledge

consumers want them. But when they do that, they're making choices about content based on certain words—Viagra or whatever. They're making judgments. . . . When they're making a decision about what's spam, they're making a content decision. The question is, do you want them to make it? Or do you want the government to make it?

"I don't want the government to make it because the government ultimately is the reason we have a First Amendment, because we ultimately don't trust the government. The government has motives itself, sometimes including retaining power. That's what Madison and the Framers were concerned about—the government playing favorites if it can censor speech," May says.



Photograph courtesy of Photodisc

New Life on the Fast Lane

While the debates over government versus business control of anything may continue indefinitely, one thing seems settled for now: pay-for-priority treatment on the Internet—also known as "fast lanes"—is not being challenged by the FCC. The commission's new rules of the road do not specifically forbid them.

It's been happening for a while. "This goes back to 2005, when the FCC deregulated DSL," then the speediest wired way to access the Internet, says Feld. "The FCC started with the proposal that DSL was a telecom service. When cable began to offer cable modem, that went unclassified for a while, and then the FCC classified cable as Title I information service. That went all the way up to the Supreme Court in *Brand X*,[7] where it was affirmed that the FCC could classify cable modem as information service. Then the FCC turned around and reclassified DSL to be an information service."

"After that, Ed Whitacre, then chairman of AT&T, talking about Google and Yahoo!, famously said something to the effect of, 'They think they're going to use my pipes for free. If they want to reach my customers, they're going to have to pay,' and that is where the paid prioritization kicked off," Feld says.

Whitacre's comments about then-upstart Google and others in a 2005 interview with *Bloomberg Businessweek* were actually far more flamboyant: "Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes?"

Whitacre further said, "The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!"

"As one might imagine, this caused some considerable consternation," Feld says. "People who were in telecom followed it. It was always a concern for those who were involved in this" that history would repeat the events of 1996, when the cable industry was deregulated.

After deregulation, "the cable industry required that if you were a programmer [content provider] and you wanted to get carriage in a cable system, you had to give them an equity interest," Feld says. "So HBO in late '70s and early '80s offered to give to Time Inc. a share of ownership, and then AT&T [a Time Warner, Inc. partner after Time merged with Warner Communications] graciously agreed" to give HBO carriage.

The FCC forbade that practice, but if it does not have the power to regulate, say, wireless Internet providers who are largely exempt from Genachowski's "new rules of the road," then an AT&T could hypothetically require an Amazon to fork over an equity share in return for carriage.

Feld believes there's a simple way to avoid this scenario: "We continue to be strong advocates for simply classifying all of these things as a Title II telecom service."

However, since that is not politically viable, Feld supports Genachowski's "third way": "The FCC should say 'Broadband is a Title II service, and we will take a few basic rules that make sense, like the nondiscrimination rule, the just and reasonable rules, and the interconnectivity rule' . . . and apply those."

There's a lot at stake, Feld adds. "The Internet is the equivalent of the phone service of the 21st century. It's the thing that everyone's got to have in order to communicate and participate in society."

Freelance writer Joan Indiana Rigdon wrote about the debate over the constitutionality of the national health care reform law's individual mandate in the January 2011 issue of Washington Lawyer.

Notes

[1] Title I of the Communications Act of 1934 spells out the FCC's administration and powers, including "ancillary authority." Title I also governs "information services" (i.e., DSL, cable). Title II of the act governs "telecom services" (i.e., telephone companies), with more stringent rules to prevent monopolies. Debates center on whether broadband/wireless Internet providers should be regulated under the more strict Title II rules.
[2] *Comcast Corp. v. Federal Communications Commission*, 600 F.3d 642 (D.C. Cir. 2010).
[3] 236 U.S. 230 (1915).
[4] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).
[5] 529 U.S. 803 (2000).
[6] 521 U.S. 844 (1997).
[7] *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. ___ (2005).

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—Ed Berkowitz, Attorney Volunteer

THE PRO BONO EFFECT

Small Businesses Empower D.C.'s Poorer Neighborhoods

By Thai Phi Le

Walk into the D.C. Bar Pro Bono Program's Small Business Brief Advice Legal Clinic, and it may seem like a typical pro bono resource center run by the Bar. Long-time attorney volunteer Ed Berkowitz describes it as a "legal mosh pit." Lawyers are positioned throughout the room, talking to clients in need of legal advice. Some are clicking away at a computer. Papers are scattered across desks.

But the clinic is unlike other pro bono projects. The problems it addresses and the clients it serves are unique. "You are dealing with entrepreneurs, people who are really trying to do business, people who are trying to get their commercial lives in place," said Berkowitz, a retired attorney who was formerly in-house counsel for Kastle Systems. "They are not people in trouble. They are people who are trying to really make it."

While legal assistance for those on the brink of losing their homes or their benefits to continue medical treatments is critical to the District's underserved community, the small business clinic aims to help the economically disadvantaged in a different way—by spurring the local economy and offering entrepreneurs a chance to make it on their own and generate more jobs.

Creating More Opportunities

The D.C. Bar Pro Bono Program's Community Economic Development (CED) Project was created in 1999 to make pro bono business law services available to the District's community-based nonprofit organizations. In the fall of 2006, the CED Project launched its Small Business Initiative in response to a lack of access to legal services to help low-income entrepreneurs interested in bringing small businesses into the District's poorer neighborhoods.

"In the late 1990s, when the District government was bankrupt, the burden of providing services and job creation in the District's low-income neighborhoods often fell on the local nonprofits," said Maureen Thornton Syracuse, executive director of the Pro Bono Program. "We started this project to provide legal help to the nonprofits and startup small businesses that were really trying to make a difference to help accomplish their goals."

The Pro Bono Program began partnering with community development organizations, including Howard University's Center for Urban Progress, the Washington Area Community Investment Fund, and the D.C. Department of Small and Local Business Development, that were also invested in supporting and creating small businesses in the District. All were united under the same mission: to create vibrant commercial corridors to build healthy communities throughout the city.

Another top priority of the CED Project was to produce more jobs in areas of the city where unemployment remains well above the national average. According to the D.C. Department of Employment Services, Ward 8 in the District had the highest jobless rate in the United States at 25.2 percent in January 2011, followed closely behind by Ward 7 with 17.1 percent. By bringing in new businesses, residents will have greater opportunities to find work nearby—a critical component for many who depend on public transportation to get to and from work.

"When there's as much unemployment as there is now, a lot of people say now is the time to just go for it and start up," said Cyril Crocker, vice president of development for the Menkiti Group. During the past year, Crocker has used resources from the CED Project for his company, a small residential and commercial real estate office in the Brookland neighborhood. "They're ready to be entrepreneurial, sometimes out of necessity," he said.

To help potential entrepreneurs navigate the process of starting a new business or patenting an invention, the CED Project offers walk-in legal clinics and business law training programs, in addition to matching small businesses, community-based nonprofits, and low-income tenant associations with pro bono legal counsel.

Photograph by Patrice Gilbert / www.patricephoto.com

"One issue that came up repeatedly was . . . defining when someone is an employee and when someone is an independent contractor. The designation is significant when determining whether an organization needs to provide certain benefits. That was fascinating to me to really delve into that issue. Since we do development, pretty much every contractor we hire is considered an independent contractor. I felt it was that much more important to make sure that the format and the way we use people was consistent with that."

—**Cyril Crocker,** Vice President of Development for the Menkiti Group

Photograph by Patrice Gilbert / www.patricephoto.com

Business Training

Back in the fall of 2010, Renee Ingram, president and chief executive officer of Diversified Enterprises Group, a startup information technology consulting company, took advantage of the CED Project's eight-week business law training program.

Despite having both an undergraduate degree in business management and a master's in finance, Ingram still found the classes extremely useful. "It was great to have a refresher course in terms of understanding some of the nuances in the District of Columbia, in terms of some of the laws here," she said. "I enjoyed it and recommended it to other individuals who are thinking about starting a new business, or a business that just has been formulated, to get a good grounding on some of the basic concepts of going into business for [themselves]."

The small business classes provide newer, emerging businesses an overview of the basics, including entity choice, employment, real estate, and contracts. Interested particularly in teaming agreements, Ingram was able to have a draft of one reviewed by an attorney at a small business clinic held after the training series she attended to ensure that she had written the contract correctly.

"As a new business, you want to be able to partner with other firms or companies that may have more experience than you do," said Ingram. "[The attorney] reviewed my teaming agreement and did a thorough job of it. That was a tremendous benefit to me."

For Crocker, the training sessions helped clarify important business law issues that were critical to his company. "One issue that came up repeatedly was . . . defining when someone is an employee and when someone is an independent contractor," said Crocker. The designation is significant when determining whether an organization needs to provide certain benefits.

"That was fascinating to me to really delve into that issue," said Crocker. "Since we do development, pretty much every contractor we hire is considered an independent contractor. [Afterwards] I felt it was that much more important to make sure that the format and the way we use people was consistent with that [definition]."

By attending the workshops, both Crocker and Ingram discovered another benefit: ample networking opportunities. "You're there with other people who you know are just as motivated as you are to take that additional training and to learn something. There's an initial kinship around that," said Crocker.

Ingram agrees and has developed relationships with other IT firms for potential future partnerships.

Walk-in Clinics

Unlike the structured training program, clients come into the clinic with an array of issues. Should I form a limited liability company or partnership? Which licenses do I need to start a barbershop or nail salon? Can I patent or copyright my idea?

"Very often, they don't know what their problem is. It's like going to a doctor and saying, 'I don't feel good.' Somebody has to probe out and come out with a general idea. This is a real estate problem. This is an intellectual property problem. This is a corporate problem," said Berkowitz.

While the typical questions revolve around basic business needs, occasionally lawyers are confronted with people who have real legal problems. Berkowitz remembers one man who came in with questions about buying a fast food franchise. The person "selling" the franchise told the client to try running the business for a while to make sure he liked doing it.

"It seemed like a perfectly reasonable thing, except this trial period kept going on for literally a matter of months," said Berkowitz. "This fellow was getting absolutely nothing out of it except running this man's business for him for free. The whole thing was a nightmare. He had signed all kinds of pieces of paper that he didn't really know what he signed, and the seller kept waving all these documents at him." In the end, Berkowitz was able to point him in the right direction and find someone to come in and provide legal assistance to get the client out of the situation.

With an expertise in intellectual property, Brian Bannon, a partner at Blank Rome LLP and regular volunteer at the clinic, often hears cases about possible inventions. "Some have very good ideas, but you have to explain to them that it's a long and complicated process," he said. "You have to try to work through the issues with the people to get an understanding if their inventions do rise to a level of novelty and [non-obviousness] that can result in a patent."

Bannon also walk clients through the process of creating their own business or marketing their products, from obtaining startup capital, to forming the business, to hiring employees. He tries to be realistic with many possible inventors, warning them of the daunting patent application and registration process. "It's unlikely that an individual without a legal education—for that matter, most lawyers—can undertake it on their own," he noted.

That is not to say their chances are impossible. The possibility of having that one great idea or building a hugely successful company from the ground up is what the American Dream is made of.

Berkowitz remembers meeting entrepreneur Gene Samburg back in the 1970s at an alumni association meeting for Cornell University. "We just met casually and he said, 'I want to start a business, but can't afford a lawyer. Do you know any lawyers who might be able to assist me?'" Berkowitz had just formed his own firm and had zero clients at the time. "We got him started. It was a very unique business," he recalled. "At the time, electronic office security stuff was unknown in Washington."

For a year, Samburg worked day in and day out. "I was getting beat up by my partners wondering where the money was. Obviously, [Samburg] didn't have any," said Berkowitz. "At the end of the year, he called me up and said, 'We had a very good year. I know you worked very hard. Send me a bill.'"

Samburg continued paying Berkowitz for the next 30 years. His company was Kastle Systems, a security system that now protects more than 2,000 buildings across the world, or nearly 400 million square feet of office space. Added Berkowitz, "We're talking about one man."

As Ingram noted, "Small businesses are the backbone of the economy here in this country." From a home-based bakery that later opened a small storefront in Mount Pleasant to a flower shop in Anacostia, the CED Project has helped more than 430 businesses attain some of the skills and information they need to venture out on their own.

"Some of them [who walk in the clinic], you know. You can look at them and say, 'This guy is going to make it. He's really going to make it,'" said Berkowitz. "He many not become General Motors, but you know he'll do just fine."

Reach D.C. Bar staff writer Thai Phi Le at tle@dcbar.org.

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MEET THE PRESIDENT

A CONVERSATION WITH DARRELL G. MOTTLEY

INTERVIEW BY THAI PHI LE

On June 30, 2011, Darrell G. Mottley will begin his term as the 40th president of the D.C. Bar. Unlike many of his predecessors, Mottley spent the first part of his professional career in a completely different occupation: he worked as an engineer. For 12 years his work included duties such as project engineering for ship structures and conducting engineering analysis of aerospace and weapon systems. However, his interest in the law developed as he dealt with legal issues that would arise in his engineering projects.

By 1999 Mottley had a new career as a law clerk for Banner & Witcoff, Ltd. Eleven years later, he is a principal shareholder at the firm, focusing on intellectual property law, particularly patent-related matters in the areas of computers, e-commerce, electrical and mechanical technologies, and medical devices.

Mottley is a member of the board of directors of the Bar Association of the District of Columbia, a fellow at the American Bar Foundation, a member of the Commercial Law Section of the National Bar Association, and a member of the Hispanic Bar Association of the District of Columbia. He also serves on the Industrial Advisory Council of the College of Engineering at Virginia Tech, his alma mater, and on the editorial board for the American Bar Association's *Landslide* magazine. He formerly served as chair of the D.C. Bar Council on Sections and also cochaired the D.C. Bar Intellectual Property Law Section. He also served on the Bar's Strategic Planning Committee. He has lectured on patent law issues at Howard University Law School.

Mottley has a bachelor of science in engineering science and mechanics and a master of business administration, both from Virginia Tech. He received his juris doctor, with honors, from The George Washington University Law School.

Tell me about your upbringing.
Like many Americans, my parents are not from this country; they immigrated to the United States. My father is from Panama, and my mother is from Barbados. They met in New York, which is where I was born.

My father later joined the Air Force and was stationed at McGuire Air Force Base in New Jersey. After that, we moved all over the world. I lived in eight or nine different places before I was 12 years old.

What were some of those places?
Holland, the Netherlands. From the Netherlands, we moved to San Bernardino, California. We stayed a couple years in San Bernardino, then moved to the Philippines in the early 1970s. This was around the time of the Vietnam War.

I remember the Philippines well, because we did a lot of traveling within the country. When I was in school, I remember making a "welcome" card for a returning prisoner of war in the base hospital. Looking back, these experiences helped shape my views of the importance of public service. From the Philippines, we moved to Spokane, Washington—snowy country—for another year and a half. From there, we moved to Guam, and then my family finally settled in Hampton, Virginia.

It was the typical military experience. By moving around to so many places, I adapted to different environments. You have to make friends quickly and easily. You learn how to appreciate and understand different cultures, how to relate to people who are not like you, and hopefully, the experiences help you to understand how to work with all types of people.

How long were you in Hampton?
I went to middle school and high school in Hampton. The Tidewater area of Virginia is what I consider my hometown.

How did you end up in Washington, D.C.?
After I graduated from undergrad, I moved to Hunt Valley, Maryland, and worked for a defense contractor called AAI Corporation. I was there for a few years as an engineer, handling tasks involving structural analysis and electronics manufacturing.

I then transitioned to the federal government after leaving AAI and worked for the U.S. Army Belvoir Research and Development Center in Virginia in ship construction and support for the Army's water fleet. In this capacity, I dealt with, for example, watercraft designed to land on beaches to release troops, armor tanks, and other vehicles to deliver logistical supplies. In the early 1990s I accepted a position at the National Oceanic and Atmospheric Administration (NOAA) in Silver Spring, Maryland.

Why did you decide to first become an engineer?
In high school, I liked math and science. I had a very good physics teacher and a guidance counselor who gave me some good advice about which careers I might want to consider. My parents did not know much about the college search and application process; I had to rely on people in the school system for help. My school

Photograph by Patrice Gilbert

advisors suggested that I consider engineering, and I wanted to go to an engineering school. I would not suggest this to prospective students today, but the only school to which I applied was Virginia Tech [laughs]. I was fortunate enough to get in.

At the time, I applied for an Air Force scholarship. The Air Force wanted to see how I would do in my first semester. I made the Dean's List that semester, so I was accepted into the Air Force Reserves. Originally, I was on a material science engineering track at Virginia Tech. However, like a lot of young people, I changed majors and broadened my discipline. I finally settled on a degree in engineering science and mechanics.

How did you make the transition into the legal field?
I was exposed to legal issues when I was an engineer in the federal government. As a mechanical engineer, I had to learn about parts of the Federal Acquisition Regulations. At NOAA, I dealt with an intergovernmental real estate project with weather forecast facilities near Dulles Airport as well as building construction and design management. I also worked as a real property contracting officer through the U.S. General Services Administration and learned about government real estate issues.

During my years in the Air Force Reserves as an engineer and commissioned officer, I also dealt with U.S. Department of Defense contracting and procurement issues. The Air Force provides training on those types of legal issues. All those experiences with legal issues drew me to the field of law as a career.

Getting into patent law was completely different. What does an engineer do with a law degree? There are a lot of things I could do with a law degree. I considered project finance law. I had an MBA. I thought I could do construction, construction projects, and negotiations in developing countries, but with a family and two kids, it would have been difficult.

I wanted to find a career where I could use my skills in business, law, and engineering. Patent law and intellectual property law are a perfect fit for that. When I went to law school, I focused on that track, and I found it utilized those skill sets well. Then I came here to Banner & Witcoff as a law clerk before my last semester of law school in 1999, and I have been here ever since.

Did it feel like you were starting over or was it a natural transition?
I started over. When I was in the government, I was at a certain professional level. I knew the environment I was in, I knew the political issues, and I knew the governmental management of how to deal with those issues. It is a risk you take. In 1996 I started law school at George Washington. We had a two-year-old daughter and a newborn son. So, it was very challenging to balance a full-time job, family responsibilities, and law school studies. At the time, there was a lot of expansion of the economy. The Internet was still considered new. There was a lot of new technology. You felt like you could take the risk to start a new career. Of course, I had to discuss it with my family.

Then you go from being a manager of a group to basically an associate at a firm, starting over. You have to ask, "Is this the right place for me? Can I grow?" I felt like I could do that at Banner & Witcoff. Over the years, it has been very interesting and exciting working on patent prosecution and patent litigation. For example, I have helped startup companies develop an intellectual property portfolio from an idea, and then assisted them in selling the companies. I also have worked on fashion design intellectual property issues. Through these experiences, I have learned the value of lawyers and the positive results we can bring to clients over a wide range of legal and business issues.

How do you think your experience with starting over can help lawyers who are going through similar career transitions?
I hope to inspire people and let them know that they can start over, too. They have to find the right mix of skills and education to do it. For lawyers, I think starting over will mean learning and practicing different areas of law.

The Bar offers different substantive programs through continuing legal education courses and the Bar's 21 sections to help with that component. We also have a strong network of members who give their time to talk to people and help them through that process. Plus, the Bar offers a Practice Management Advisory Service course, "Basic Training: Learn About Running a Law Office," which helps lawyers learn how to manage a law practice, if they want to transition to a solo practice.

We hope to expand the Bar's law practice management services to include long-term training and different relevant programs for members.

When did you first get involved with the D.C. Bar?
About seven years ago, I became involved with the Bar's Intellectual Property Law Section. As that section's Patent Committee chair, I helped create programs and learned how sections worked. As time went on, I became further involved in Bar leadership.

Why do you think it is important for members to get involved with the Bar?
It is important to be active in *any* bar. It would be great to be active in the D.C. Bar, but the District of Columbia has many voluntary bars, too. It gives you a different viewpoint on leadership and legal issues. Whether you are an attorney in private practice or in government, you are able to interact with other lawyers in different ways.

Technology is a key priority for you as Bar president. Why do you think expanding technology is so important to the Bar's mission and its future?
During my years within the Bar leadership, I have been thinking about how information technology could help the Bar become more efficient in the way it operates. Technology could help the Bar save money, lower costs, and help volunteers save time performing Bar activities. It also could help the Bar to better communicate with its members.

Over the past five or six years, we have had this awesome phenomenon with social media that is changing how people engage one another online. Twitter is only five years old now; I frequently tweet, and I have been doing that for the past year now. I have about 160 followers. They slowly come. I did not advertise it, I just started to tweet about news and information that I wanted to share.

I believe social media will help the Bar to better engage its 95,000-plus members. We have to find different ways for the members to communicate with one another and with the leadership. This is one way to do it. *Washington Lawyer* is also a great resource to do that, but we need other ways to complement the magazine.

The Bar is still developing a long-term social media strategy. We are going to layer in parts of the strategy in the coming months, and some down the road. The Bar's Web site redesign has been important. Launching the Web site was a big project about 10 years ago. Now with all the new technologies, we must make the Bar's Web site a more useful portal for members.

Our newly established relationship with Fastcase, a legal research company, is a good example of where we could be going, using the Bar's Web site as a portal for online services. Ideally, members should

be able to log in and access all the e-services. Hopefully, we will have more of those types of services in the future.

During my term as president-elect, I was pleased that the Bar's Board of Governors approved the formation of a Technology Committee to assist the Bar in carrying out its long-term strategic goals and to spearhead its technology initiatives.

What would you say to lawyers who are hesitant about social media or who do not really understand it?

The technology is changing every day, literally. There are about 200 or 300 different types of social media systems. Right now, I have LinkedIn, and I have used that for years. Twitter. Facebook. Plaxo. Martindale-Hubbell. Connect. YouTube. Quora. The D.C. courts have Twitter and Facebook feeds, and I follow those feeds. The courts post very useful information on its social media feeds.

The main thing about social media is that it provides interactive communication. It is getting information out and receiving information from others. You just have to figure out which platform is right for you.

As one of my friends said, "It's this ocean, and you have this fear about where you're going to go and whether you can swim." Yes, you can swim; it is safe. Listen first. Sign up and see how it works. Then send out your first message.

What would you say to people who are concerned about the legal ethics component of social media?

I think you have to use your normal everyday thinking as a lawyer. You do not want to use confidential information or provide legal advice on a social media site.

What kind of presence do you have on YouTube?

I am exploring the benefits of YouTube. YouTube is great for social media information. The D.C. Bar might want to think about exploring the idea of having a separate channel of information on YouTube. People can subscribe to their own channel of videos. In the long term, I am interested in beta testing a separate D.C. Bar channel. Is that something we could think about doing? Maybe. The D.C. Bar Community Economic Development (CED) Project, a component of the D.C. Bar Pro Bono Program, has probably one of the Bar's first YouTube videos.[1] I would like the Bar to experiment to see what is possible and look at how YouTube could be used down the road.

What other priorities do you have as president?

I am interested in looking at the global practice of law issues. Lawyers mobilize a lot. How do we engage with national bars, international bars, and the global marketplace? How do we fit in? There are a lot of changes going on in the legal industry, and we want to make sure we are ahead of the curve.

The D.C. Bar Leadership Initiative Task Force helps lawyers to lead projects or teams, or to become successful in any leadership capacity. In addition to leading litigation teams, clients have come to expect lawyers to offer project management skills. I think this project will be very beneficial for members. The initial project was started by former Bar president Kim M. Keenan, and we have been developing it through Ronald S. Flagg's presidential year. Among the Bar's efforts will be a general bar leadership program, and another track dealing with D.C. Bar-specific leadership priorities.

Of course, there is also pro bono work; that should always be a priority of the Bar. I also want to look at using technology to assist pro bono attorneys and pro bono clients. For example, I am excited about the new resource developed by the Pro Bono Program that provides unrepresented litigants the opportunity to complete landlord and tenant court pleadings through a simple, online, interactive interview, using a computer program similar to the ease of use of conventional tax preparation software. Interactive interviews also are being developed for family court.

What pro bono work have you done recently?

I have done pro bono work through the D.C. Bar Pro Bono Program Advice & Referral Clinic. It is a wonderful experience for attorneys. For example, as an intellectual property attorney, I do not usually encounter local real estate issues. However, at the clinic, I get to use my lawyering skills and my interview skills in these and other areas. It is a really great experience to be able to diagnose legal issues people are having, and do quick research to give them the tools they need. I also volunteer at the CED Project's Small Business Brief Advice Legal Clinic, which is more in my area of practice.

What are the biggest challenges the legal community is facing, and how can the Bar help?

I think that the biggest challenge still tends to be the economic issues, but it is more in how the legal industry responds to the demand for legal services, and how the Bar can assist in those kinds of career-changing issues.

As president, it would be good to take the resources and say, "Overall, what can we do to help new attorneys—those without jobs—come in and network?" I do not think they know we have resources. We want to make sure people know that we are here to help. We have to look at the resources we have at the Bar to focus on that issue. What in our organizational structure could help those attorneys?

When I was chair of the Bar's Council on Sections, we promoted speed mentoring—an event that borrows from the speed dating formula—and other similar programs. Our new member programs are good, too. I am hoping with social media, we also can show that there are more projects of which people can take advantage. There is also our Practice Management Advisory Service. The Bar is using more of a three- or four-tiered approach to help members deal with economic issues.

For most of the fiscal year, we have monthly voluntary bar leadership coordinating meetings. I would like to find some way to have a discussion about how the bars can work together. Perhaps there is a job bank or another outlet to pass along job opportunities to all of our members.

Let's talk about your personal life. How did you meet your wife?

We met in undergrad at Virginia Tech, and we married in 1988.

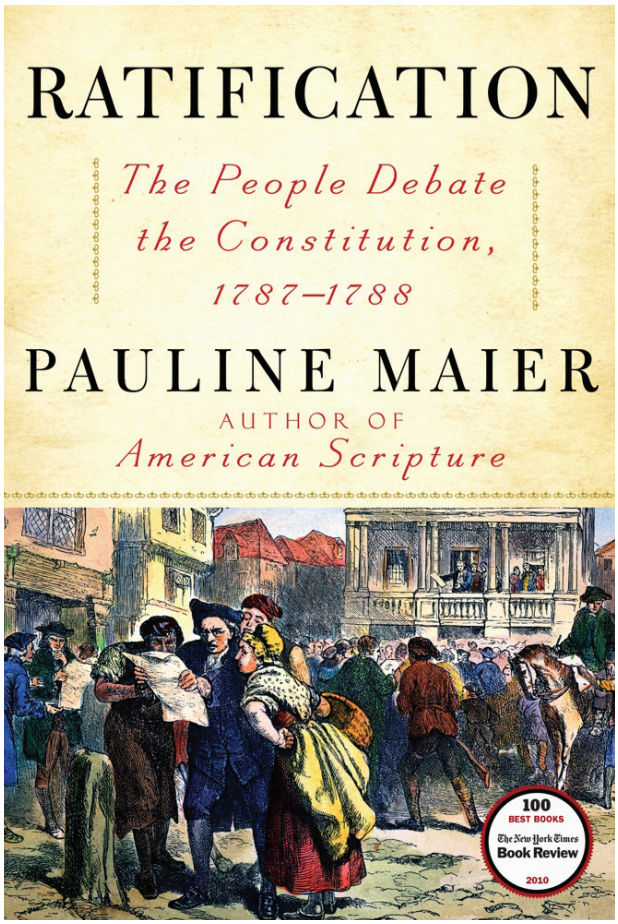
What do you like to do outside of work?

I like the outdoors. I have been involved as a Scout leader since my son was seven years old. I like to run. I like to camp out when I can around the Shenandoah Mountains. We also have camped in Maryland and around Gettysburg, Pennsylvania.

I also have hiked in local areas, biked on the Eastern Shore of Maryland, and rock-climbed in Great Falls, Virginia. The Washington metropolitan area has a lot to offer folks, aside from the great legal careers and legal minds. There is a remarkable history and rich outdoor environment that is great to take in.

Note

[1] D.C. Bar Pro Bono Program Community Economic Development Project social media tool, available at www.youtube.com/watch?v=5BZBcfN2eDI.



Ratification: The People Debate the Constitution, 1787–1788
By Pauline Maier
Simon & Schuster, 2010

Review by Leonard H. Becker

It is tempting to think of the Constitution as a latter-day Ten Commandments, as though inscribed on tablets by the Framers at their Philadelphia convention in the summer of 1787 and handed down to an awestruck populace a la Charlton Heston descending from Mount Sinai. The truth differs from the myth: the process of drafting and adopting a new Constitution for the 13 states was hotly contested from start to finish.

To begin, the Framers at Philadelphia disregarded the mandate given them by the Confederation Congress, which was to propose amendments to the Articles of Confederation, not to junk the Articles and replace them with an entirely new form of government. The proposed new Constitution, in turn, did not spring up overnight; it was the product of key compromises, at times painfully arrived at over a four-month convocation from which some delegates walked out early when they caught the drift of the proceedings. Notably, the Framers negotiated a bicameral Congress, with a lower house to be elected by the people (or, more accurately, by white male property holders 21 years of age and older) and an upper house to be chosen by the state legislatures, with two senators for each state, without regard to population.

Further, the drafters capitulated to the southern states in rigging the population count so that every five black slaves would count as three persons, thereby expanding the clout of the slaveholders in both the lower house of Congress and the Electoral College's votes for president. Other proposed provisions reflected the mercantile interests of the Framers—especially that the new Congress would have the power to levy taxes directly on individuals and that the states would be deprived of authority to authorize the payment of debt in scrip in lieu of specie backed by gold or silver. In reflection of their profound distrust of state legislators, who had the most to lose from the adoption of the Constitution, the Framers specified that ratification must occur, if at all, in specially elected state conventions

[Pauline] Maier shows that the ratification of the Constitution was a close call, nearly derailed at several junctures by intense and at times widespread opposition to the proposed new form of national government.

and that the Constitution would become operative if nine or more such conventions, of the 13 states then in existence, voted to adopt.

In her new book, *Ratification,* Pauline Maier, a professor of American history at the Massachusetts Institute of Technology, punctures the companion myth that the Constitution enjoyed an easy ride to adoption. To the contrary, Maier shows that the ratification of the Constitution was a close call, nearly derailed at several junctures by intense and at times widespread opposition to the proposed new form of national government. (In marshaling the evidence, Maier has benefited from the *Documentary History of the Ratification of the Constitution*, in the process of compilation by the Wisconsin Historical Society over the past 35 years, running to date to 21 published volumes and with the end only barely in sight.)

Once the Confederation Congress submitted the Framers' draft proposal to the states, the process struggled from Pennsylvania, where the Constitution's proponents resorted to strong-arm tactics to secure the commonwealth's vote to ratify in December 1787, to Massachusetts, Virginia, and New York, ratifying respectively in February, June, and July 1788. The draft Constitution encountered *de facto* rejection in New Hampshire in February 1788, outright refusal to convene a ratifying convention in Rhode Island in March 1788, and formal rejection (absent prior amendments) in North Carolina in August 1788.

What were the grounds for objection, and why did the battle go down to the wire? First and foremost was opponents' fear that the proposed new central government would resurrect the tyranny that the American colonists had thrown off when they rebelled against British colonial rule. High among opponents' objections was the proposed authority for Congress to levy "direct taxes," to be apportioned among the states according to their population. (Nobody was entirely sure what direct taxes were, but the uncertainty only added to the suspense.) Far better, said opponents, to allow the new federal government to collect imposts (tariff duties) at the ports of entry, a function performed under the Confederation by the states, and then to requisition additional funds from the states, if needed.

Other instances of the potentially tyrannous nature of the federal government to be fashioned under the proposed Constitution, in the view of its opponents, were the infrequent elections (every two years for representatives, four years for president, and six years for senators); insufficient popular representation (one House member for every 30,000 people); and no clear mandate for jury trials in civil cases.

Surprisingly absent from the debates, at least as described by Maier, was any particular deference to the Framers. Apart from George Washington, who had presided at the Framers' Philadelphia convention and who most people expected would be the first president if the new Constitution came into effect, none of the drafters received special consideration by virtue of their having been present at the Constitution's creation.

Another surprise was the relative lack of significance of the Federalist Papers, written by John Jay, Alexander Hamilton, and James Madison, which we commonly take today as an authoritative gloss on the Constitution. The three Federalists, writing collectively under the pen name "Publius," generated advocacy pieces designed for the audience in New York at a time when that state's ratification was in doubt. During the period covered by the various ratifying conventions, Publius' papers received virtually no publication outside New York.

Yet another surprise is the relative lack of uniformity in support of what eventually became the Bill of Rights. The convention in Massachusetts, ratifying by a narrow margin of 187 to 168 in February 1788, became the first of several state conventions to call for amendments, recommending that the amending process should follow the adoption of the Constitution, in accordance with the manner of amendment there prescribed rather than go forward as a precondition to ratification. The ensuing rosters of proposed amendments that ratifying states submitted for consideration, likewise to be taken up after the Constitution came into effect, varied widely in length and content. With the exception of North Carolina, no state ultimately insisted upon the adoption of amendments as a condition of ratification.

The Constitution's opponents were no ragtag bunch of naysayers. They included such well-known luminaries as Samuel Adams in Massachusetts and Patrick Henry and James Monroe in Virginia. But not until the Virginia convention was underway, in mid-1788, did the anti-Federalists seek to generate a united front among the several states where ratification remained in contention and to come up with a common set of objections.

The principal consideration bolstering the case for ratification was the parade of horribles that might ensue if the states failed to adopt the new Constitution. Thirteen disunited states stood little chance of surviving hostilities with Great Britain, which maintained its network of fortified installations in the northwest territory; with Spain, which controlled commerce and navigation at the mouth of the Mississippi River and which would have a natural incentive to extend its influence northward; or with the various Indian tribes that bedeviled the trans-Appalachian settlements throughout the mid-Atlantic and southern states. In 1786, the year before the Framers' convention in Philadelphia, Massachusetts had put down Shays' Rebellion only by resort to military force, thereby suggesting that the prospect of internal rebellion, or even civil war launched by factions seeking reunification with Great Britain, was not unthinkable.

Additional worries attended the possibility that some states would ratify while others might not. How would a truncated Union, missing, say, New York or Virginia, manage to function? Similar thinking beclouded the prospects for individual states. Thus, in New York, for a time, the prospect of rejection at the ratifying convention was sufficiently plausible that residents of New York City and nearby downstate counties, who favored ratification, gave thought to seceding from the state and linking up in some fashion with the new government. One of the accomplishments of Maier's work is her demonstration that the terms of debate shifted subtly over time, as one after another state convention added its vote to the "yea" column and thereby generated a continually mounting hydraulic pressure for ratification.

Maier might have done more to tease out the economic motivations that underlay the positions taken by the antagonists in the ratification contest. (She does describe in some detail the economic arguments for and against the Constitution marshaled in

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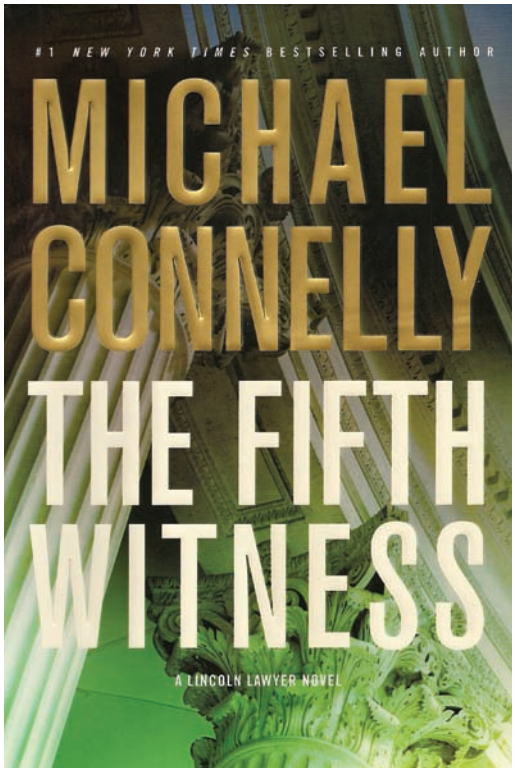
The Fifth Witness
By Michael Connelly
Little, Brown, 2011



Review by Ronald Goldfarb

Michael Connelly is a literary gold mine. His 23 novels, now in 39 languages, have sold 42 million copies. He cranks them out with prodigious regularity—two this year—*and* steady quality. His noir cop series centering on the criminal investigations of Harry Bosch are now played against an evolving series based on the adventures of trial lawyer Mickey Haller that began with the very successful *Lincoln Lawyer* and continues with *The Fifth Witness.*

A former newspaper reporter in Florida and California, Connelly learned and mastered the inside workings of the police and court systems that he explores with impressive reality for a non-lawyer. "I spend a lot of time with lawyers and cops," Connelly reports, and it shows in his writings.

In *The Fifth Witness,* Connelly exposes the current mortgage foreclosure mess, cleverly and informatively, before he moves into the criminal trial system he writes about so insightfully when one of Mickey's civil clients is charged with murdering her mortgage banker. Connelly said in an interview that he is "always looking for a story that reflects a little bit of what is happening in society at the moment." In this book, his dark hero, Mickey, facing a slow period in his criminal law practice as a result of the economic downturn, supplements his work defending hapless debtors in mortgage foreclosure proceedings. Mickey learns how to "game the system"—to delay, frustrate, and occasionally beat the system. "I went civil," Mickey reports, "at four or five grand a pop . . . The only growth industry in the law business was foreclosure defense."

Mickey's cases come from his bilingual advertisements and Web site, and "buying lists of foreclosure filings from the county clerk's office," Connelly writes. Mickey sees his role as "helping the deadbeats game the system while delaying the economic recovery." Connelly provides a deft description of how the fallout of the recent mortgage debacle played out among low-income homeowners who were scammed by unscrupulous banks, brokers, and packagers when the bubble burst. Borrowers' losses were folded into blocks of mortgages and reassigned, so they did not know who held their debt. California was the third leading state in the United States for such foreclosures, and "Los Angeles was the hotbed," Connelly writes.

Connelly's description of that morass ought to go into *The Congressional Record*, as it aptly dissects the recent national problem:

> Initially scammed with the American dream of homeownership when lured into mortgages they had no business even qualifying for. And then victimized again when the bubble burst and unscrupulous lenders ran roughshod over them in the subsequent foreclosure frenzy. Most of those once-proud homeowners didn't stand a chance under California's streamlined foreclosure regulations. A bank didn't even need a judge's approval to take someone's house. The great financial minds thought this was the way to go. Just keep it moving. The sooner the crisis hit bottom, the sooner the recovery would begin.

Mickey continues his take on the problem:

> There was a theory out there that this was all part of a conspiracy among the top banks in the country to undermine property laws, sabotage the judicial system and create a perpetually cycling foreclosure industry that had them profiting from both ends of the process.

Mickey did not "buy into that," Connelly writes. He had "seen enough predatory and unethical acts by so-called legitimate businessmen to make me miss good old-fashioned criminal law."

He got his wish. Mickey was propelled back into the criminal justice system when one of his mortgage clients was charged—wrongfully, she proclaimed—with murdering the senior vice president of the mortgage loan division of her bank. The client had been "fired in the kiln of false accusation." She had been leading a public citizens' outcry against the bank's practices. "In less than 24 hours, I had gone from scrounging $250-a-month foreclosure cases in South Los Angeles to being lead defense attorney on a case that threatened to be the signature story of this financial epoch," Mickey narrates. And, he predicts, "there could be a book in this, maybe even a film, and I could end up getting paid."

Mickey operates out of a Lincoln Town car he bought from a convicted murderer's widow. It is equipped with plated doors, laminated bullet-proof windows, a copy machine, and supplies and files in the trunk, and driven by his ex-con, tattooed, bilingual assistant. His mobile law office's license plate: IWALKEM. Eventually, he rents a real office to house his eccentric team: his ex-wife assistant; her motorcycle-riding boyfriend, a muscle-bound but crafty investigator; and a young, idealistic, and book smart intern who learns the ropes with Mickey as she piques his conscience.

A hard-boiled, savvy negotiator, Mickey operates adroitly in the police precincts and with the tough assistant district attorney in a deadly chess game of criminal justice. I will not relate the story; that is not fair in a review. I will say *Washington Lawyer* readers will admire *The Fifth Witness* for the writing and the fast-paced ride of reading a swell writer's work.

Michael Connelly is a good storyteller, but I rate his books high less on his stories—some (like this one) are engrossing, some a bit strained—than on his extraordinary ability to get inside the tactician's head of his cops and lawyers. This requires more than knowing the system through interviews with experts and players and watching the process. Connelly's genius is in explaining how a veteran trial lawyer thinks, strategizes, and plays the system and its players.

He does use some fine literary language, as his dialogue between Mickey and his half-brother, Bosch, about the view of Los Angeles from the deck of his home:

> From up here, the city had a certain sound that was as identifiable as a train's whistle. The low hiss of a million dreams in competition.

To which Bosch replies:

> From this angle, it's hard not to love it, isn't it?

But it is Connelly's insights into the criminal justice system that are most impressive, so rare in television, movie, and book attempts to describe what lawyers do.

About the preliminary hearing, Connelly writes, "a fixed game of hide and seek," and "one hundred percent the prosecutor's show."

> It was all strategy and games at this point, and I had to admit, it was the best part of a trial. The moves made outside the courtroom were always more significant than those made inside. The inside moves were all prepped and choreographed. I preferred the improvisation done away from the courtroom.

The tough defense lawyer mantra:

> It is the defense's job to take the miscues and mistakes of the investigation and ram them down the state's throat . . . . When you come from the criminal defense bar, you are used to being despised.

On burden of proof:

> The reality was we didn't need to prove a damn thing. We only had to suggest it and let a jury do the rest. I just had to plant the seeds of reasonable doubt. To build the hypothesis of innocence.

On the elected judiciary:

> No judge elected to the bench wants to throw out the evidence in a murder case. Not if he wants the voting public to keep him on the bench. So the jurist will look for ways to maintain the status quo and get the decisions on evidence before the jury.

On trial preparation:

> In the courtroom there are three things for the lawyer to always consider: the knowns, the known unknowns, and the unknown unknowns . . . it is the lawyer's job to master the first two and always be prepared for the third.

On prosecutors:

> The prosecution is always the home team in the criminal trial competition. So less is always more when it comes to the defense.

The Fifth Witness is fast and timely, with a surprise ending. Lawyers, especially trial lawyers, will read it with a knowing nod and smile.

Ronald Goldfarb is a Washington, D.C. attorney and author who writes regularly for Washington Lawyer.

Ratification

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May 1788 at the South Carolina convention.) For the most part, adoption was favored by mercantile interests—importers, tradesmen, and professionals whose commercial activities impelled them to favor a strong central government. For these advocates, failure was not an option: the Confederation Congress had proved itself incapable of governing. Conversely, opposition to the proposed Constitution was strongest among rural interests, who feared a remote central government that would operate essentially beyond their control and that would have a largely unchecked power to levy taxes directly upon them and their property.

Maier provides no account of the debates at the Framers' Philadelphia convention. Her choice is deliberate, and perhaps justified by the previously published histories of events at Philadelphia, but she thereby misses an opportunity to show how the issues pondered in the Framers' debates prefigured those vetted in the succeeding state ratifying conventions.

Maier's book closes, appropriately, with a review of the amendments submitted to the states by the First Congress after the Constitution became operational. The first 10 amendments, which we know collectively as the Bill of Rights, were the last of 12 amendments proposed by Congress. Their basic text, if not their final organization, was largely the handiwork of James Madison, who had been elected to the first House of Representatives from Virginia. A leading proponent of the Constitution at the Virginia ratifying convention, Madison now insisted that the post-ratification amendments originate in Congress rather than in a potentially runaway national amending convention, and that the amendments not include a provision that Congress be forced to requisition direct taxes from the states in lieu of the national government's hard-won authority to levy direct taxes on its own behalf.

Readers may wonder where Maier's able history leaves the debate over "originalism," the notion that constitutional construction should be determined by the meaning of the words as understood by those who drafted the instrument. It is hard to know how to ascertain that meaning as of 1787–88 without exploring what the various drafters and ratifiers said the words meant. For years, historians have focused on the meaning expressed by the Framers, likely because only 40 or so of them signed the draft of the Constitution negotiated at Philadelphia and because we have Madison's detailed notes taken at the convention. Now, however, thanks to painstaking studies such as Maier's and the underlying documentary record compiled in the *Documentary History*, the comments of the more than 1,800 delegates who voted at the state ratifying conventions, to the extent that their words have been preserved in minutes, notes, or contemporaneous letters or newspaper accounts, are accessible as never before. That availability obviates any excuse not to come to grips with the intentions of the state convention delegates whose ballots decided the fate of the Constitution. At the same time, the enriched history leaves the reader to wonder why, if present-day interpretation is not to be bound by the meaning ascribed by the Framers, how the understanding of some 1800 contemporaries, most of them entirely unknown today, should have preclusive effect.[1]

Len Becker served as District of Columbia Bar Counsel from 1992 to 1999 and as general counsel in the Office of Mayor Anthony A. Williams from 2003 through 2006. He resides in Washington, D.C. and may be reached at lenbecker@verizon.net.

Note

1 According to Maier's tally, 1,124 delegates at 12 state conventions voted to ratify; 761 opposed. (Maier does not provide numbers for the proponents in Delaware, which, along with New Jersey and Georgia, ratified by unanimous vote.)

attorney briefs

By Thai Phi Le

Honors and Appointments

Chris Petersen, a partner at Morris, Manning & Martin, LLP, has received the President's Distinguished Service Award from the Professional Insurance Marketing Association… **Lawrence E. Berman** has been named staff counsel at URAC/American Accreditation Healthcare Commission… **Paul Pilecki,** a partner at Kilpatrick Townsend & Stockton LLP, was selected to BTI Consulting Group's Client Service 2011 All-Stars… **Brian H. Bieber**, a partner at Hirschhorn & Bieber, P.A. in Miami, has been elected a fellow of the American Board of Criminal Lawyers… **Tammy McCutchen**, a shareholder at Littler Mendelson P.C., has been named to the Small Business Legal Advisory Board for the National Federation of Independent Business… **Scott C. Clarkson** received a judicial appointment to the U.S. Bankruptcy Court for the Central District of California, Santa Ana Division… **Smith W. "Smitty" Davis,** a partner at Akin Gump Strauss Hauer & Feld LLP, has received a Foundation Fighting Blindness Visionary Award.

On the Move

Rawle Andrews Jr. is the new regional vice president for Zone 2 at AARP, which includes oversight of the organization's operations and activities in Delaware, Indiana, Kentucky, Maryland, Michigan, New Jersey, Ohio, and Pennsylvania… **Emma F. Hand** and **Presley R. Reed Jr.** have been elected partner at SNR Denton LLP… **John W. Blouch** and **Bruce W. Dunne** have joined Drinker Biddle & Reath LLP as of counsel in the firm's investment management practice group… **Les P. Carnegie** has joined Latham & Watkins LLP as counsel in the firm's litigation department. **Amanda P. Reeves** has returned to Latham as counsel in the firm's antitrust and competition practice group… **N. Beth Emery** has joined Husch Blackwell LLP as partner in the area of energy law. **Ronald E. Gilbertson** also has joined the firm as partner, focusing his practice on government contracts… **Seth Green** and **Howard Wiener** have joined KPMG LLP as principal in its Washington National Tax practice… **Keith R. Fisher** has joined Ballard Spahr LLP as of counsel in the firm's business and finance department… **Kristan M. Cassidy**, **Christopher P. Ferragamo**, and **Alfred L. Scanlan Jr.** have been promoted to equity director at Jackson & Campbell, P.C. **Paul D. Smolinsky** has been promoted to director at the firm and **Michele L. Dearing** to senior counsel… **Larry E. Bergmann**, former senior associate director with the U.S. Securities and Exchange Commission's Trading Practices and Processing Division, has joined Murphy & McGonigle, P.C., as partner… **Cheryl Hepfer** has joined Offit Kurman as principal… **David Andrew "Andy" Olson** has joined Sandler, Travis & Rosenberg P.A. as senior trade and government relations advisor… **Miranda Berge**, **Logan Breed**, **Jessica Ellsworth**, **Michael Heyl**, **Todd Overman**, **Nadine Peters**, and **Michele Sartori** have been promoted to partner at Hogan Lovells. **Stephen Giordano**, **Jennifer Henderson**, and **Miyun Sung** have been promoted to counsel at the firm. **Daniel Meade** has rejoined the firm as partner in its corporate practice… **C. Scott Hataway** has joined Paul, Hastings, Janofsky & Walker LLP as partner in the firm's antitrust and competition practice. **Eric Dodson Greenberg** has joined the firm as partner in its corporate practice… Holland & Knight LLP partner **Lynn Calkins** has been appointed practice group leader for the firm's mid-Atlantic litigation group; **Steve Shapiro,** also a partner, has been appointed practice group leader for the firm's construction litigation group.

Company Changes

Selzer Gurvitch Rabin & Obecny, Chartered, and Wertheimer & Ciazza, LLC have merged to form **Selzer Gurvitch Rabin Wertheimer Polott Obecny & Strickland, P.C.** The new firm is located at 4416 East–West Highway, fourth floor, in Bethesda, Maryland.

Christopher J. Hart has been reappointed to the board of directors at Locke Lord Bissell & Liddell LLP.

Tracy P. Marshall has been named partner at Keller and Heckman LLP.

Orlan M. Johnson, partner at Saul Ewing LLP, has been named a "trailblazer" by the U.S. Securities and Exchange Commission's African American Council.

Author! Author!

Paul Rodgers has written *United States Constitutional Law: An Introduction*, which was published by McFarland & Company, Inc.… **Ira P. Robbins** has written *Habeaus Corpus* and *Prisoners and the Law*, published by Thomson/West… **Paul A. Lombardo** has written *A Century of Eugenics in America: From the Indiana Experiment to the Human Genome Era*, which was published by Indiana University Press.

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

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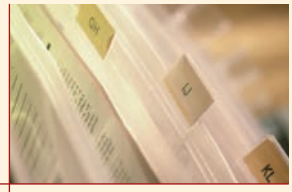

Note: Unless otherwise indicated, all D.C. Bar events are held in the D.C. Bar Conference Center at 1101 K Street NW, first floor. For more information, visit www.dcbar.org or call the Sections Office at 202-626-3463 or the CLE Office at 202-626-3488. CLE courses are sponsored by the D.C. Bar Continuing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

JUNE 2

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

JUNE 7

Basic Training, Part 1: The Solo's Characteristics and Workplace
9:15 a.m.–4:30 p.m. Sponsored by the D.C. Bar Practice Management Service Committee. Contact Daniel M. Mills, manager of the Practice Management Advisory Service, at 202-626-1312 or dmills@dcbar.org.

Taxation Section Summer Lunch With Nina Olson, National Taxpayer Advocate, IRS
12:30–2 p.m. Sponsored by the Taxation Section. Arnold & Porter LLP, 555 12th Street NW.

Foreclosures in the District of Columbia: From Modification to Mediation to Litigation
6–9 p.m. Sponsored by the Antitrust and Consumer Law Section and cosponsored by the Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; District of Columbia Affairs Section; Litigation Section; Real Estate, Housing and Land Use Section; the National Consumers League; the National Association of Consumer Advocates; and the AARP Legal Counsel for the Elderly.

JUNE 8

Substance Abuse and Depression in the Legal Profession: Ethics Issues
5–7:15 p.m. CLE course cosponsored by the Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Family Law Section; Health Law Section; Labor and Employment Law Section; Law Practice Management Section; and Litigation Section.

JUNE 9

Top 12 Issues in Commercial and Banking Law
1–3:15 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section and Litigation Section.

JUNE 10

Family Law Legislation Update
12:30–1:30 p.m. Sponsored by the Family Law Section. D.C. Superior Court, 500 Indiana Avenue NW, room 3300.

JUNE 14

Current/Former SEC Staff Discuss Hedge Fund Compliance With Disclosure Rules in Modern Capital Markets
12:15–1:30 p.m. Sponsored by the Mergers and Acquisitions Committee of the Corporation, Finance and Securities Law Section and cosponsored by the Administrative Law and Agency Practice Section; Arts, Entertainment, Media and Sports Law Section; Computer and Telecommunications Law Section; International Law Section; and Law Practice Management Section. Weil, Gotshal & Manges LLP, 1300 I Street NW, suite 900.

Remedies in SEC Enforcement Actions: Survey and Current Issues
6–9:15 p.m. CLE course cosponsored by the Corporation, Finance and Securities Law Section and Criminal Law and Individual Rights Section.

JUNE 15

Strategies to Meet E-Discovery Obligations: Beyond the Basics
5:30–8:15 p.m. CLE course cosponsored by the Computer and Telecommunications Law Section; Corporation, Finance and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Criminal Law and Individual Rights Section; Family Law Section; Government Contracts and Litigation Section; Health Law Section; Intellectual Property Law Section; Labor and Employment Law Section; Law Practice Management Section; Litigation Section; and Real Estate, Housing and Land Use Section.

JUNE 16

Annual Update of D.C., MD, and VA Law
12–1:30 p.m. Sponsored by the Estates, Trusts and Probate Law Section.

JUNE 20

Drafting and Negotiating Executive Employment Agreements
6–8:15 p.m. CLE course cosponsored by the Corporation, Finance, and Securities Law Section; Courts, Lawyers and the Administration of Justice Section; Labor and Employment Law Section; and Litigation Section.

Patent Damages Update: Recent Changes and Related Strategies
6–9:15 p.m. CLE course cosponsored by the Intellectual Property Law Section and Litigation Section.

JUNE 21

An Overview of Public Safety and Homeland Security Hot Topics
12–1:15 p.m. Sponsored by the Computer and Telecommunications Law Section and cosponsored by the Corporation, Finance and Securities Law Section and Real Estate, Housing and Land Use Section. Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street NW.

From the President

continued from page 6

the Advocacy & Justice Clinic. As a result of that request, and the Pro Bono Program's subsequent support, scores of Sidley lawyers have helped hundreds of clients address their housing, family law, and disability benefits matters.

So, Maureen, while you will be sorely missed, your many legacies will enrich our community long after your retirement—thoughtful and innovative programs that benefit thousands of our neighbors annually, a collaborative approach that will serve as our model for responding to unmet legal needs in the future, and generations of District lawyers whose commitment to pro bono work you helped spark and maintain.

Reach Ronald S. Flagg at rflagg@dcbar.org.

Off the Beat

continued from page 18

check in with partners and answer any immediate questions if needed.

Their persistence paid off when they completed the Great Wall Marathon in May 2005. "That, for me, was the hardest [marathon]," Heyl said. The first nine kilometers is marked with steep ascents and descents, and, of course, the famous stairs. "Some are tall. Some are short. Some are long, intentionally so that invaders cannot be quickly running up and down," said Heyl. "Then you run through fields and pastures and a lot more hills. Then you double back and hit the Wall again at probably 22 miles."

Wilson toughed out the marathon despite having a shin splint. "The running part on the so-called flat part was really painful, but for me, the Wall was actually a relief because it was using different muscles," he said. "Mike had pulled us through 25 miles or something, and the last part, you had to get back on the Wall. I was so happy that I had gotten back on the Wall. I knew we were going to finish."

"He pulled me through on that one," noted Heyl. Added Wilson, "It's very much so pushing and pulling the other one."

Two months later, they did it all over again in Australia for the Gold Coast Marathon. The hardest part was the heat. "By that time, we had four continents down," said Heyl. With the birth of his third child, Heyl decided to take a break.

Into the Wild

The break lasted four years. Heyl kept his distance up by running 10-milers, but never committed to another marathon until June 2009. As he was looking at different flight itineraries for a work trip to Sydney, Australia, he realized that the Big Five Marathon in South Africa was to take place the same weekend he was heading home, and it was cheaper to go through Johannesburg than Los Angeles.

"I've always wanted to go to Africa. I've always wanted to do a safari," he said. "I figured, hey, the stars are aligning on this one." By then, Wilson had unfortunately been sidelined with an injury, so Heyl would go it alone.

Held on the Entabeni Game Reserve, the Big Five Marathon course consists of a plateau and a valley, separated by a massive hill. In the valley live the big cats, from lions to cheetahs. The plateau is home to giraffes, rhinoceroses, hippos, and wildebeests.

Heyl saw most of these animals during a 26.2-mile safari of the course the day before the race. "While we were driving the course—we were on the lower part—we actually had to stop because there were two cheetahs that were out hunting and actually had a kill right on the path where we were going to be running the next day," he recalled. "They did promise that during the race, you'll be protected. There's going to be people out with shotguns."

As the sun rose the next day, the greatest challenge was not the wild animals but the hill. "You're going down two miles where parts are at 40-degree [angle]. It completely tears your quads apart," said Heyl. "You get to the bottom part and then you're running through deep sand. We're talking about sinking and no stability . . . then you have to go back up that two-mile torture."

For Heyl, finishing the Big Five was one of his greatest feelings of accomplishment. With five marathons down, he decided to double up again and signed up to do the Buenos Aires Marathon five months later in October. The two races could not be more different. Heyl went from the hilly wilderness of South Africa to the flat city streets of Argentina. The run took him by the well-known Casa Rosada (Pink House), through the tango district of San Telmo, and into the La Boca neighborhood.

"Six are done now. What am I going to do now?" Heyl remembered thinking. The only continent left was Antarctica.

Running on Blue Ice

Heyl had already registered for the Antarctica Marathon, but was on a three-year waiting list. So he looked up the Antarctic Ice Marathon. "When I first read the description of the Ice Marathon, I thought, there's no way I'm going to do that," Heyl said. It's the southernmost marathon in the world—a couple hundred miles from the South Pole. Pilots need an eight-hour window of perfect weather to get runners from Chile and onto the blue ice runway of Antarctica. Often, the race is delayed as pilots wait out weather systems.

Everyone sleeps in small solar tents. There's no running water. "Basically, they give you a bowl of water if you want to wash your hair and hands or whatever," he said. "That's just nuts. That's crazy." But Heyl decided to be crazy and on December 15, 2010, he was bundled up and ready to go.

As he trampled through ice and snow, Heyl looked around. "I was taken aback. The scenery was just spectacular. There are mountains everywhere. Every time you turn your head, it was a picture that you could take." If he was thirsty in between rest stations, he could simply take ice and snow from the course. "We're talking thousands of years old frozen water. It doesn't get any fresher than that."

He chronicled his journey with photos at numerous mile markers, but by mile 19, the camera froze. The day began at zero degrees and never got above 15 degrees. He hammered out the last few miles and, at the finish line, Heyl celebrated with all the runners, who fittingly came from every continent. All seven marathons were completed.

Bucking the Trend

Back in Washington, D.C., Heyl continues running. Wilson is also getting back into the game, currently training for the 2011 ING New York City Marathon as part of Fred's Team to raise money for cancer research at Memorial Sloan-Kettering Cancer Center.

"We as lawyers sit behind a computer. We have a very sedentary existence," said Wilson. "But we're bucking the trend," added Heyl.

"People need to see the benefits of exercise in terms of rounding them off as a person and making them better able to cope with other parts of their life," said Wilson. "Investment in our health is just as important as an investment in our career. Long term, that's really what it's all about, isn't it?"—*T.L.*

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legal spectator

By Jacob A. Stein

The Cliché Expert Testifies About the Law

Frank Sullivan's essays appeared in the *New Yorker* in the 1930s and 40s. He interviewed a Mr. Arbuthnot who was the expert on the subject of political cliché. Here is a sample of his expert testimony, circa 1946.

Q. Mr. Arbuthnot, I hear that you have become a campaign orator in addition to being the expert on the political cliché.

A. Well, sir, it is not my wont to brag, but I believe I may say with all due modesty that I can point with pride and view with alarm as sententiously and bombastically as any senator who ever thrust one arm in his frock coat, and with the other called upon high heaven to witness the perfidy of the Other Party.

Q. Mr. Arbuthnot, perhaps you'll tell us just what kind of leader the hour calls for?

A. A leader who will lead this country out of the wilderness, eliminate waste and extravagance in government, do away with red tape and bureaucratic inefficiency, solve the problem of unemployment, improve living conditions, develop purchasing power, raise the standard of living, provide better housing, and insure national defense by building a navy and air force second to none.

Q. What has the Other Party proved?

A. It is spending vast sums of the taxpayers' money.

Q. For what?

A. To build up a huge political machine. It has aroused class hatred. Fellow Americans, in this solemn hour, when the sacred institutions of democracy are challenged on every side and the world is rent by strife, I charge the Other Party with having betrayed the pee-pul of these Yew-nited States.

Q. What about the farmer?

A. The farmer must have relief.

Q. What kind of relief?

A. Farm relief. Labor must have the right to organize. Economy must be the watchword. Mounting deficits must cease; so must these raids on the public treasury. I view with alarm the huge and unwarranted increase in our national debt. Generations yet unborn! Those who would undermine our sacred institutions! Bore from within! Freedom of speech! Monroe Doctrine! I call upon every patriotic American—

The other day I happened to meet Mr. Arbuthnot walking along Connecticut Avenue. He told me he was not only an expert on political clichés, he was also the expert on lawyer clichés.

We took a bench in Dupont Circle Park, and I conducted a direct examination of him. Here are my notes:

Q. What can you tell me about our profession?

A. With all their faults, we stack up well against those in every other occupation or profession. We are better to work with or play with or fight with or drink with than most other varieties of mankind.

Q. Please continue.

A. We lawyers are always curious, always inquisitive, always picking up odds and ends for our patchwork minds, since there is no knowing when and where they may fit into some corner and we know life practically. A bookish man should always have them to converse with. A talented lawyer, if he has any talents at all, is the best companion in the world.

Q. What about clients?

A. We spend a considerable part of our lives doing distasteful things for disagreeable people who must be satisfied against an impossible time limit and with hourly interruptions from other disagreeable people who want to derail the train; and for his blood, sweat, and tears, he receives in the end a few unkind words to the effect that it might have been done better, and a protest at the size of the fee.

Q. Can you describe your own career in a few clichés?

A. I will confess that from the beginning to what appears to be the end of my years at the bar, I loved the profession with all the ardor and intensity that the jealous mistress, the law, could ever exact. But it was demanding. The lawyer's vacation is the space between the question put to a witness and his answer.

Q. Who was the best lawyer you ever knew?

A. John W. Davis. I knew him years ago when he was known as the lawyer's lawyer. Mr. Davis wrote a poem filled with clichés, a poem I envy. I shall recite it for you and that will conclude this very pleasant direct examination.

The lawyer's a man of sorrow, and
acquainted with grief;
Among all the sinners, he's considered
the chief.
His friends all admire him when he
conquers for them;
When he chances to lose, they're quick
to condemn.
They say, "Ah! He is bought!" if he
loses a case;
They say, "Ah! He is crooked!" if he
wins in the race.
If he charges big fees, they say he's a
grafter;
If he charges small fees, "He's not
worth going after."
If he joins the church, "it's for an
effect;"
If he doesn't join, "He's as wicked as
heck."
But here is one fact we all must
admit:
When we get into trouble, our lawyer
is IT.

He stood up, bowed, tipped his hat, and continued up Connecticut Avenue.

Reach Jacob A. Stein at jstein@steinmitchell.com

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