national association of women lawyers®

Women Lawyers Journal®

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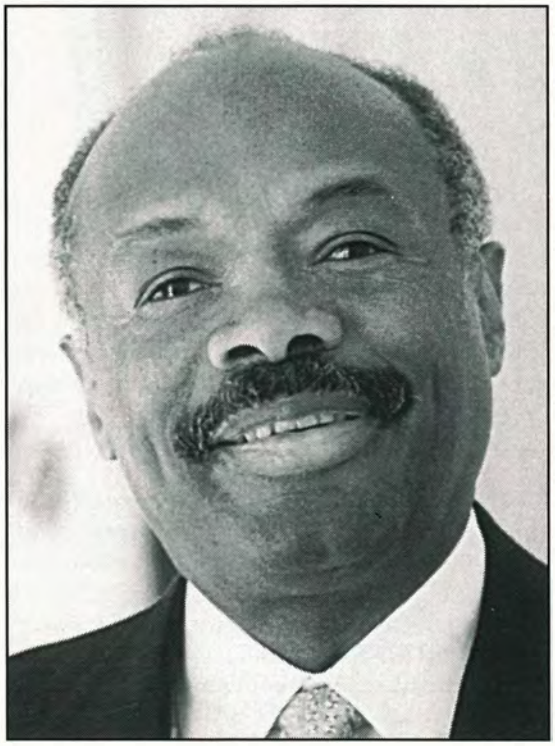
Summer 1997

TWO CITIES, TWO MAJOR MEETINGS

› In San Francisco



SHARING A VISION

Mayor Willie Brown joins with NAWL® at its annual meeting in August for a salute to the diversity of the profession *(Page 5)*

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Mapping a new plan

Speakers say NAFTA brings opportunities to lawyers *(Page 7)*

women lawyers journal®

Begun in 1911

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About the Cover: NAFTA panelists and guests gather around the stone tablet commemorating the signing of the NAFTA agreements on the grounds of the Plaza San Antonio, site of NAWL's midyear meeting. *Photo provided by Sally Lee Foley.*

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National Association of Women Lawyers®

Founded in 1899, NAWL® is a professional association of attorneys, judges, law students and nonlawyers serving the educational, legal and practical interests of the organized bar and women worldwide. Contact Executive Director for information about membership and programs.

President's Message

By Sally Lee Foley

The American racial divide needs more healing activists. Are each of us as fully committed to diversity in our legal offices and local bar associations as we are capable of being? The germ of the idea for this diversity column arose after attending a State Bar of Michigan evening program honoring African-American women jurists in Michigan in early 1996. I was shocked and dismayed that the audience at the judicial awards ceremony was overwhelmingly African-American on the occasion of celebrating the public service contributions of these dynamic women pioneers of the Michigan legal system. There is still an unacceptable level of discrimination among legal professionals based on racial, ethnic and gender bias that needs to be confronted as we prepare for the 21st century and the demands of our national and international business and legal communities.

Detroit area NAWL® members were privileged to attend the lecture of A. Leon Higginbotham Jr., Judge (Retired), 3rd Circuit U.S. Court of Appeals, at Wayne State University on Dec. 2, 1996. The Higginbotham lecture raised funds for the Damon J. Keith Law Collection of African-American Legal History. The collection brings together the substantial historical accomplishments of African-American lawyers and judges in the United States. This central depository of more than a century of records, documents, photographs, personal papers and memorabilia is located at the Wayne State University Archives of Labor in Detroit.

Roads Worth Traveling

Judge Higginbotham spoke out passionately of the acts of betrayal by the white judicial establishment—from colonial times up to the present—in institutionalizing racism in U.S. society through deliberate court rulings. His book, "Shades of Freedom" (Oxford University Press, 1996), superbly accounts the American legal system's treatment of races in the myriad of civil and criminal cases decided by the state and federal courts.

The book harshly criticizes and documents how the U.S. judicial system, entrusted to guarantee equal justice under the law, instead played a major role in enforcing racial discrimination. The author's thorough treatment will bring new insights to any student of American constitutional law. Some of the cases mentioned are famous: *Plessy v. Ferguson*, where the U.S. Supreme Court legitimized racial segregation under the court's rationale of "separate but equal," which in practice was separate and never equal. Many of the court cases were less heralded in their day, but the long-term social impact of these court decisions has been tragic. As educated attorneys, we should *not* be ignorant of our country's legal history on these constitutional issues. Perhaps quiet reflection on past wrongs done to our neighbors, friends and fellow lawyers by the judicial system will renew our personal efforts to stamp out the vestiges of racism and sexism in the legal system and in our own communities.

What can one person do with respect to such immense, complicated societal issues such as racism and ethnic intolerance in these United States? Educate yourselves about racism. Reach out to other professional colleagues whose ethnic backgrounds may be different from your own to establish new professional friends. Each of us should recruit minority applicants for our corporations and our law firms, and should fund scholarships for minority students by designating our annual charitable educational funds for specific minority scholarship funds at our respective law schools and colleges. This directed-giving campaign would open more opportunities to talented minority candidates.

Ask yourself: Do you ever remember being discriminated against because you are a women, because of your ethnic background or your membership in a particular religious sect, or because of your age? Think about the toughest life experiences of gender, religion, age or race bias that you have suffered over your entire life and try to recall the most difficult events in careful detail.

I can remember a time as a young lawyer when I was requested to walk in the *side* door of a private club in downtown Detroit during the early 1970s, solely because

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President's Message continued

that was the "women's entrance." The men were permitted to use the front door entrance of the club. I also recall a waitress refusing to seat me at a private luncheon club in Detroit, as a guest of a newly nominated member, solely because I was a woman. Those two events are as vivid in my memory as if they took place yesterday. I was shocked that such conduct was "unofficially" sanctioned by polite, educated people in the early 1970s.

Those isolated incidents were painful, but for me these displays of "suggested inferiority" were isolated; these events did not repeatedly flow through my life experience on a daily basis. A well-educated family and university environments protected me from individuals with their own private racist, ethnic or gender bias agendas. These discriminatory incidents do *not* stop for the African-American male or female or other ethnic minorities who deal with the emotional burden of racism on a regular basis. These societal verbal indignities continued unabated in many instances, because we do *not* demand a higher code of social and professional conduct from our friends and colleagues. The next time you hear a racial or ethnic slur, speak up and let the speaker and the others present know in no uncertain terms that racism verbally expressed is not to be tolerated in your presence. Timely, dignified action to stop racist comments and discriminatory conduct demands respect and sets a higher standard of non-racist and non-sexist human conduct for all of us. Try, in your own life, to be more inclusive by promoting diversity in your religious organizations, community groups, social functions and where you work.

Have you ever attended a local minority bar function in your legal community? Your understanding of and sensitivity to minority bar issues would increase if you attended a few minority bar meetings. Experiences with temporary shyness and social discomfort should develop for you a more compassionate understanding of the heavy emotional weight of racism, ethnic and gender bias exact on others every day of their lives. One has to understand and recognize the racism problem before one attempts to correct the particular daily situation at hand. A good first step across the social-racial divide is to develop diverse friendships across racial lines. This choice for diversity among your friends will enrich your life experience and create within you a deeper understanding of other ethnic cultures.

NAWL® encourages diversity in our membership. We welcome your ideas for promoting diversity further. And if you have the opportunity to attend Judge Higginbotham's national book lecture tour, don't miss it. The experience might change your life. ✱

NAWL® Welcomes New Members

CALIFORNIA
Audra R. Behné
Sandra H. Cox
Rebecca A. Speer
Mary Beth Trice

CONNECTICUT
Elizabeth Phillips Marsh

FLORIDA
Terri R. Day
Lyrissa Lidsky
R. Dane Robinson*
Alessandra P. Serano*
Sharon Sperling

IOWA
Linda A. Whittaker

MICHIGAN
Amy B. Fagan
Carol A. Friend
Jacqueline R. Wright

OHIO
Hon. Janet R. Burnside
Wanda L. Carter
Kristi Hautman*
Susan M. Zidek

PENNSYLVANIA
Jerome Shestack

TENNESSEE
Foster D. Arnett
Hon. Sue McKnight Evans
Leesa Hinson
Marlene Eskind Moses

TEXAS
Emily S. Barbour
Jane Haun Macon

**Law Student*

National Meeting Offers Salute to Diversity

Panels on issues of concern to women lawyers also on agenda in San Francisco

One of the nation's best-known mayors and a justice from one of the most visible state supreme courts will join with the National Association of Women Lawyers this August in a salute to diversity on Main Street and in the profession.

San Francisco Mayor Willie Brown and California Supreme Court Justice Joyce Kennard will participate in the Aug. 2 program during the NAWL® annual meeting in San Francisco.

Brown will speak and present the association's 1997 President's Award for Community Service to the Rev. Cecil Williams of Glide Memorial United Methodist Church in San Francisco. Justice Kennard will install the NAWL® Executive Board.

Also at the program, U.S. District Judge Bernice Bouie Donald of the Western District of Tennessee will receive the association's 1997 Arabella Babb Mansfield Award, Gloria Allred, a partner in the Los Angeles firm of Allred, Maroko & Goldberg, will receive the Outstanding NAWL Member of 1997 Award, and the San Francisco-based firm of Morrison & Foerster will receive the President's Award for Advancement of Women in the Profession.

The Rev. Williams, who marched with the Rev. Martin Luther King Jr. in 1963 in Washington, D.C., has transformed Glide Church into a light in the city. The 6,000-member church reflects the diversity of America with a congregation that is 40 percent black, 40 percent white, with Latinos and Asians also among its members.

Over the years, the church has become a major social service provider in San Francisco. It has the city's only food program that serves three meals a day, every day of the year. It also offers a substance abuse and treatment program, HIV/AIDS prevention and testing program, academic tutoring and life skills training for children, a domestic violence program, and job training for homeless persons.

In 1985, Gloria Allred received the NAWL President's Award. This year, she was named NAWL's Outstanding Member. Her high profile cases and frank commentaries have made her one of the best known women attorneys in the U.S.

The Rev. Williams has been active for more than 32 years as a minister and community leader. Among those who have attended Glide Church and voiced support for its efforts are President and Mrs. Clinton, poet Maya Angelou, South African archbishop Desmond Tutu, and civil rights leader Coretta Scott King.

While Glide Church has brought together people from diverse backgrounds to work toward solving common problems, Judge Donald has compiled a string of firsts that ultimately have made her a federal judge who happens to be a minority and a woman. She is the first black woman to be an elected judge in Tennessee, the first to be appointed a U.S. bankruptcy judge and the first to be appointed a U.S. District Judge in Tennessee.

As a teenager, though, she once decided to be second. Although public schools in Mississippi, where she grew up, had been desegregated in 1966, she waited until the following year to transfer from her all-black high school to become one of four blacks at the newly desegregated white high school. "I had no desire to be a pioneer," is how she recalls her youthful decision.

Once she enrolled, she saw firsthand what she had suspected. The legal doctrine of *Plessy v. Ferguson* that Mississippi clung to had always been a lie. "I had long suspected that 'separate but equal' was a myth," she once told an interviewer. "But something at that time, my own curiosity, the feeling that there was something better—I just wanted to go and see. Once you commit yourself, there's no turning back."

She carried through that same no-turning-back philosophy once she

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National Meeting continued

decided to become a lawyer.

Judge Donald began her career as a lawyer in 1980 with the Memphis (Tenn.) Area Legal Services. After nine months, she became an assistant public defender in Shelby County, Tenn. A little more than 1½ years later, in 1982, she decided to try for election to a state criminal court seat. At 30 years old and 2½ years out of the University of Memphis Law School, her political opponents dismissed her as young and inexperienced. She won her first race.

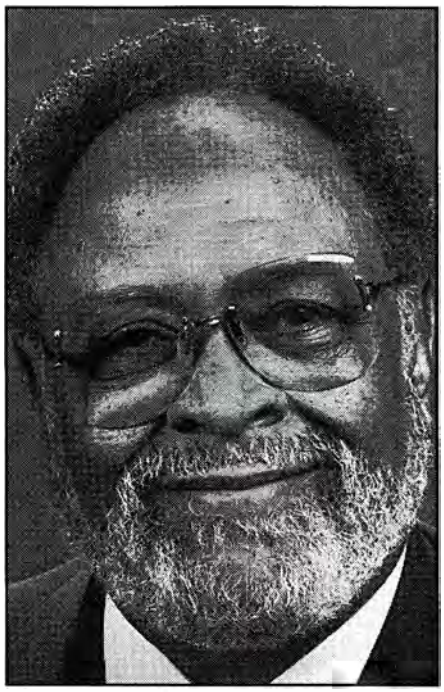
In 1988, state Judge Bernice Donald was appointed United States Bankruptcy Judge in the Western District of Tennessee. In 1996 she became a U.S. District judge in the Western District of Tennessee.

While Gloria Allred speaks out regularly to judges and juries on behalf of clients who have been harassed, battered, abused, or discriminated against, she is equally at home speaking to a broadcast microphone. She is the host of a radio talk show on KABC in Los Angeles, and has been nominated three times for Emmy awards for her commentaries on television station KABC.

In 1985, she was given the NAWL® President's Award. In 1986, President Reagan presented her with the President's Volunteer Action Award for her development of a child support amnesty program in California. Much of her work as a lawyer and as a public policy advocate has been on behalf of women's rights and rights of various minority groups.

In her practice she has represent the family of Nicole Brown Simpson during the criminal prosecution of O.J. Simpson, a woman who the Los Angeles County District Attorney alleges was assaulted by a movie star, and a television soap opera actress who claims that a production company discriminated against her because she was pregnant.

In addition to the celebration of diversity, NAWL® will sponsor several other programs during its meeting in San Francisco.



The Rev. Cecil Williams is a nationally recognized leader in the empowerment of the poor and marginalized, the cause of cultural diversity, and the struggle against violence and community disintegration.

Celia Ruiz (left) and Portia Moore tackle the ticklish topics of gender bias within the legal profession in "The Shoemaker's Children."

On Aug. 1, it will offer "The Shoemaker's Children: Employment Issues Affecting Women & Families Within The Legal Profession." This program will explore developing policies and procedures within the law firm related to gender fairness; part-time and reduced work schedules; maternity, parental and sabbatical leave; sexual harassment complaints; training and prevention programs.

Moderator of the session will be Jana Howard Carey, Baltimore. Panelists will be Susan Bogart, Chicago; Portia Moore, San Francisco; Kim A. Lambert, San Francisco; Celia M. Ruiz, San Francisco; and Marcia A. Wiss, Washington, DC.

Ellen Pansky of Los Angeles and chair of the NAWL® Gender Bias Committee, will release the results of NAWL's 1996 gender bias survey.

Another program will be "Workplace Violence: The Leading Killer Of America's Working Women."

Keynote speaker will be San Francisco labor and employment law attorney and workplace violence expert Rebecca A. Speer. (The second in a series of articles on workplace violence she has written for Women Lawyers Journal begins on page 13 of this issue.) During the seminar, she will explain about the debilitating impact workplace violence has on women: how the migration of violence from the streets and home to the workplace threatens the means women need to escape an abusive relationship and, more generally, to gain personal power and societal influence.

Special honoree at the program will be Sheila Kuehl, speaker pro tempore of the California General Assembly, who has spearheaded state legislation to prevent and punish violence.

A workplace violence workshop will help participants to move beyond the headlines, toward a fuller understanding of workplace violence as it impacts clients and to discuss action to prevent and better manage threats of employee safety from violence. Joining Ms. Speer in a panel discussion will be Judge Eugene Hyman of Santa Clara County (Calif.) Superior Court; Jan J. Kang, assistant general counsel at Lam Research Corp. of Fremont, Calif.; and Loren Brooks of National Assessment Services, San Francisco.

All of these NAWL® programs are underwritten, in part, by Northrup Grumman Corp., Kaiser Permanente, and MBNA Marketing Systems. ✱

San Antonio Highlights: NAFTA Update; Women's Opportunities

After 3 years, U.S.–Mexico trade relations have not only changed, but improved economically

By Gail Sasnett-Stauffer

At the February 1997 NAWL® Midyear Meeting in San Antonio, the first CLE program detailed the impact of the North American Free Trade Agreement (NAFTA) for clients conducting business between the United States and Mexico. Other program sponsors included: the ABA Section of International Law & Practice, the Bexar County (Texas) Women's Bar Association and Texas Women Lawyers.

Moderator of the five-member panel was Patricia Diaz Dennis, senior vice president and assistant general counsel—regulation and law at SBC Communications Inc. SBC is an international telecommunications company, comprised of Southwestern Bell Telephone Co., and other telecommunication and cable service and equipment subsidiaries in Latin America and worldwide.

Attorney Dennis was appointed by President Ronald Reagan to the Federal Communications Commission, where she served three years as FCC commissioner. She has also served on the National Labor Relations Board and as vice president government affairs for Sprint.

An advocate of the NAFTA agreement, Dennis envisions NAFTA as a foundation for economic growth. After three years of NAFTA being in effect, she sees there is a freer exchange of goods and capital, shown by an increase in the number of consumers available for goods and the increase in the gross domestic output. She noted that a 1996 UCLA study found a slightly positive effect in the first three years after NAFTA. The jobs supported by exports are paid better than the jobs that have shifted to Mexico; it is expected that the U.S. will gain more than it will lose. With imported goods displacing other imports rather than domestically produced goods, she believes that NAFTA provides a sound foundation for trade.

Lucinda Low (kneeling, right) joins Sally Lee Foley and NAFTA speakers Adrienne Braumiller, Jane LaFranchi, Lisa Roberts, Patricia Diaz Dennis, Barbara Segovia de Alarcon and Estela Rodriguez Botello on the site of the initialing of NAFTA by Canada, Mexico and the U.S. Photo courtesy of Sally Lee Foley.

Panelist Adrienne Braumiller, a founding member of the Dallas law firm of Braumiller & Rodriguez, discussed recent changes in U.S. Customs laws, including pitfalls and opportunities for importers and NAFTA exporters, how the Customs Modernization Act has changed the functional environment, how Congress has increased liability for compliance

Patricia Diaz Dennis, senior vice president and assistant general counsel for SBC Communications, added the perspective of the telecommunications industry to the NAFTA update.

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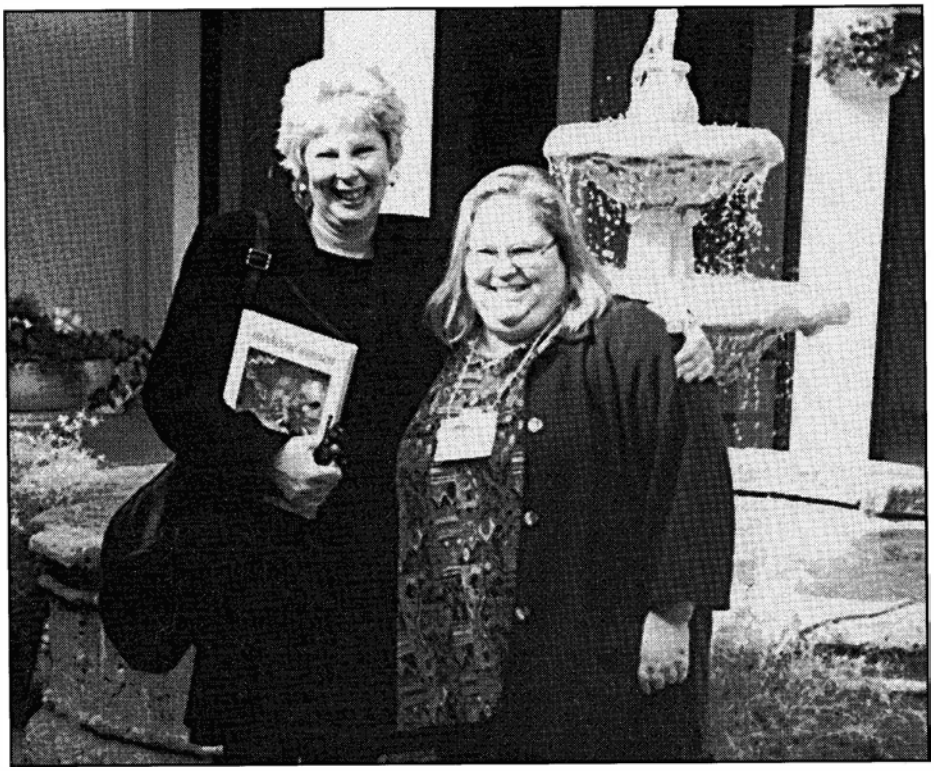
NAFTA continued

and record keeping, and how companies can prepare for an eventual audit. She characterized the U.S. Customs agency as being "as scary as the IRS" with its goal of enhancing trade enforcement while prohibiting illegal merchandise from coming across the border. The new Act requires both importers and exporters to be completely informed about whatever laws apply to their merchandise. Some of the terms within the Act are hard to define and standards of strict liability are sometimes used. We now have an active customs service, with high monetary penalties for not keeping accurate records. She encouraged having an adequate compliance program in place for clients.

Barbara Segovia de Alcaron, Nuevo Laredo, Mexico, recapped the impact on trade involving heavy industry and maquilladoras. The import duty is only paid on final products sold in Mexico. If the finished product is sold in the U.S. or Canada, there is also a duty. She indicated that foreign investment and tax laws have had the most impact in Mexico.

Dallas attorney Emily Barbour, program co-chair for the midyear meeting, organized the international panel discussions on NAFTA and glass ceiling issues in the legal profession. Photo: Janice Sperow.



Patricia Wyatt (left) and Janice Sperow pose in a San Antonio courtyard following Wyatt's presentation on life harmony between work and self. The Santa Fe artist autographed copies of her books, Medicine Women *and* Keepers of the Dream, *available at the lunch. Photo: Sally Lee Foley.*

Estela Rodriguez Botello of Gonzalez Calvillo y Forastieri, Mexico City, and Jane Woods LaFranchi of Strasburger & Price, discussed the impact of NAFTA on retail business. Jane Woods noted that while Mexico has free trade agreements with many South American counties, 80 percent of Mexican exports go to the U.S., and this has risen by 60 percent since NAFTA. U.S. border towns have suffered since merchandise is now available within Mexico. Devaluation of the peso has made a great impact. Grocery stores were hit less, but department stores suffered a 30 percent decrease in 1995 from 1994. They have cut personnel, cut costs, and offered special discounts to counteract the losses. She noted that 50 percent of the Mexican population is under age 19. Estela Rodriguez Botello discussed the rapid increase of foreign investment after NAFTA. With 71.2 percent coming from the U.S. and Canada, the investment has been mostly in manufacturing and financial services. She noted that insurance agents and law firms are moving into Mexico.

Lisa A. Roberts, general Counsel for the North American Development Bank, explained environmental infrastructure development and the role of the bank, which was formed as a result of NAFTA. She discussed the difficulties with having two state departments running the infrastructure, having a centralized and bifurcated bank that was not truly bi-national, and having grant-funded projects. The bank was never meant to be a bank but to be an "ATM" for the BECC. They provide loans and guarantees to both the public and private sectors, although they have made almost none in its two years. Projects

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just aren't ready because the towns have no experience in doing this. On the U.S. side, the funds are too expensive, so towns go to municipal bonds or state revolving funds. On the Mexican side, there is rate shock. She told of a few projects which the bank is now doing, including providing bridge financing to develop an outlet mall and buying bonds for a non-ratable town.

Women Must Break Through Global Glass Ceiling For Fair Share of Law Work

A workshop followed the presentation. The session moderator, Jane Macon, a partner in Fulbright & Jaworski, San Antonio, works in the international problem-solving arena. Lauren Prescott, principal of Prescott Legal Search in Houston spoke first, beginning a list for how one can position oneself to obtain international practice assignments. First, you want on-point industry experience, so you need to position yourself to get that experience with a firm that does international work. One needs to be able to travel, because you may be gone 60–80 percent of the time or just a little, and not always under great circumstances. It is helpful to have fluency in some language and to have cultural fluence. Read about other countries, learn what a faux pas would be in another culture. Utilize the State Department or Congressional resources for information. Show interest in international law. Expect that it may be difficult to get a visa for some countries.

Laurie Jones, senior consultant, InterActive Training Solutions, from Southlake, Texas, followed, adding to the list and giving examples of barriers women are facing in international work. She noted that Title VII protects U.S. citizens working abroad and here for an international company only if it doesn't violate the laws of the host country. She relayed

Her book, Gender Traps, *was a focal point for consultant Dr. Judith Briles' workshop at NAWL's midyear meeting: Photo: ABAJ/Robert Barnes.*

one EEOC decision from a woman who applied to work overseas where the company won because the host country wouldn't grant a work visa. There are 40,000 sex discrimination suits filed yearly, 12,000 of those for harassment. The glass ceiling is a big issue with women who make up 46 percent of the population and who hold 10 percent of the top executive positions. There are few women in international management, and companies are often unwilling to send them because of a lack of respect and acceptance by their own companies. Ms. Jones cited Nancy Adler's study, which dispells the myth that women don't want to go abroad. She surveyed 100 of the top Fortune 500 companies. From those, 97 percent of the women felt their assignments were successful. Objective criteria bore out: they sent more women and sent the successful women other places. They indicated these women had better interpersonal skills, had an easier adjustment, and were treated well. Foreigners felt the women must be the best if they were sent abroad. Companies wanting a test-run (with a male) can send a no-confidence message, and initial contacts will be difficult if a man is sent along. Having your sponsoring company's support is a way to position yourself to obtain the international work. Also, one must convince the employer that you'll do a good job (better than any man), that you'll be the best. Use the EEOC for leverage only when appropriate, she advised. It is best to roll with the punches as much as you can, even when illegal questions are asked, if it doesn't do harm. She noted that one needs a "rabbi" to help develop rapport, but that building rapport is necessary. "Work your connections." Foreign business travel should include appropriate language dictionaries and a book of "manners."

Emily Barbour, an independent practitioner in international law, Dallas, spoke about the telecommunications industry, noting that there is a lot of competition for new projects. Leadership and rainmaking skills are needed to obtain international work, requiring continual skills development and networking.

Moderator Jane Macon concluded the discussion with additions to the list. Develop a specialty. Concentrate on your client. Lead with your strengths. Often women do the paperwork and then men take the trip to the country. In response, hit their pocketbooks when they double the work by not using you in the first place. ✱

First elected to the NAWL® Executive Board in August 1995, Gail Sasnett-Stauffer has served as Member at Large and Corresponding Secretary. She is Associate Dean for Student Affairs at the University of Florida College of Law in Gainesville.

President's Award Recognizes Excellence With Bit of Wit

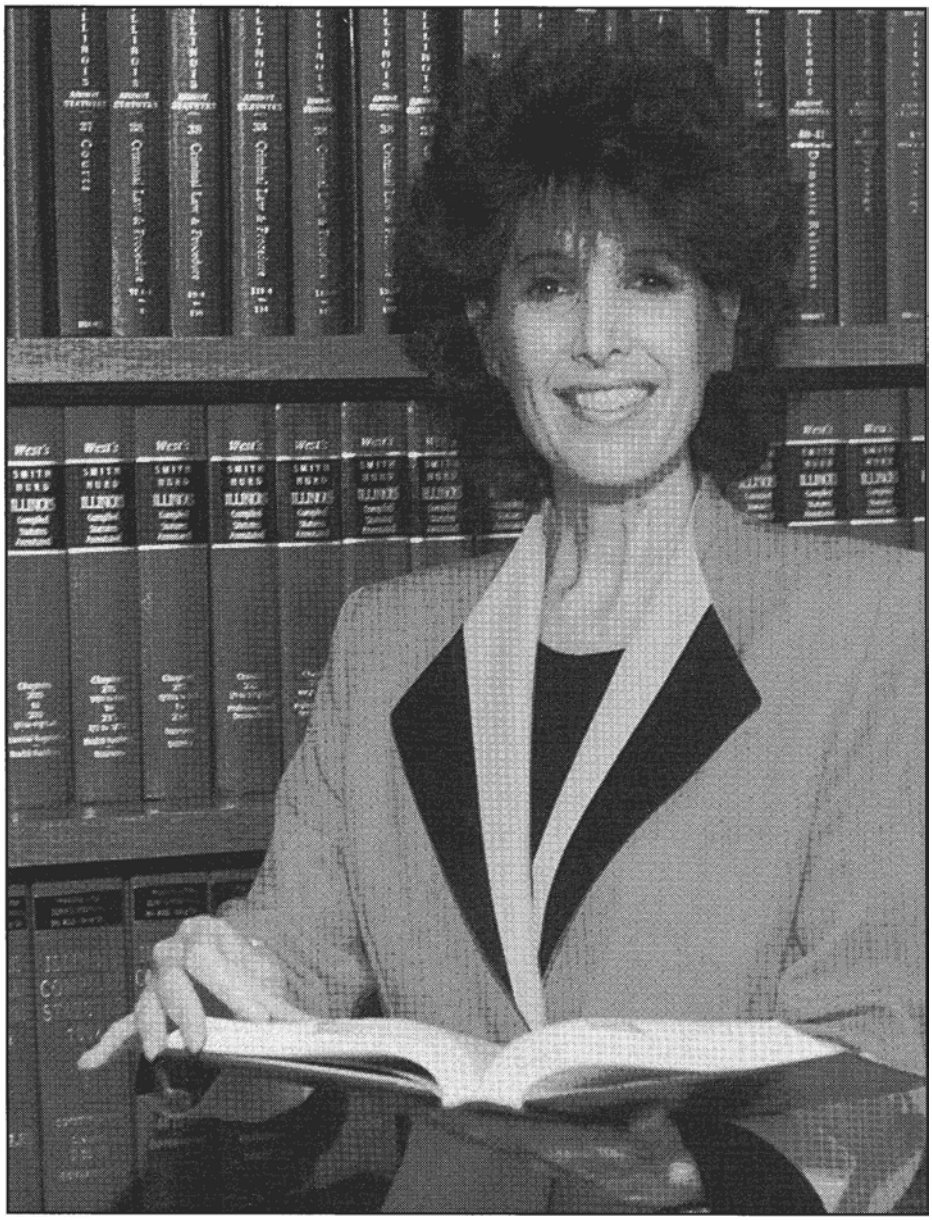
Chicago judge makes sure largest court system works for lawyers and litigants

Judge Judith Cohen, presiding judge of the Circuit Court of Cook County (Ill.) Law Division, was the recipient of the 1997 NAWL® President's Award for Excellence at the regional meeting in Chicago May 2, 1997. The award was presented during the luncheon held in the Jenner & Block Conference Center.

Special guests included Justice Mary Ann McMorrow of the Supreme Court of Illinois and Judge Donald O'Connell, chief Judge of the Circuit Court of Cook County.

Following the luncheon, NAWL® Treasurer Susan Fox Gillis moderated a panel discussion concerning what judges wanted from lawyers and what lawyers expected from judges. Panelists included Judges Lynn Egan and Donald J. O'Brien, Jr., of the Circuit Court of Cook County, and attorneys Jean Golden of Cassiday, Schade & Gloor and Donald Nolan of the Law Offices of Don Nolan.

In her comments prior to the presentation to Judge Cohen, Justice McMorrow noted, "When I learned that NAWL® had chosen Judge Cohen as this year's honoree, I knew that it could not have chosen a better person...Judge Cohen has been very creative and innovative. She has been dynamic. She is energetic. She's beautiful. She's great. She's charming. Judge Cohen is very inclusive. I serve with her on two committees; she insures that everyone on the committee has the chance to participate and that no one is overlooked. The *Chicago Lawyer* recently portrayed Judge Cohen. It said that her focus was to treat everyone alike, to be a decent human being, to do her job the best that she can. As Judge Cohen said, 'The most important lesson I've learned is to be myself. The best way to do my job is to be myself.'"



In addition to receiving NAWL's 1997 President's Award for Excellence in May, NAWL member Judge Judith Cohen was recognized as one of six "Women with Vision" during the Women's Bar Association of Illinois' annual dinner June 5.

Susan Fox Gillis introduced Judge Cohen:

"Since September, 1994 Judge Cohen has run the Law Division of the Circuit Court of Cook County. She administers a 70 judge division

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of the largest court system in the world. She also hears a daily court call, and presides over several major cases, while maintaining a heavy pre-trial and contested motion calendar in complex cases.

"During her tenure in this job—so far—the Law Division has seen the following changes: a reduced backlog of pending cases, a reduction in the time from filing to verdict, creation of a complex litigation management section, initiation of a phone-in procedure when disputes arise in depositions, expansion of the voluntary judicial mediation program and expansion of the number of commercial calendars.

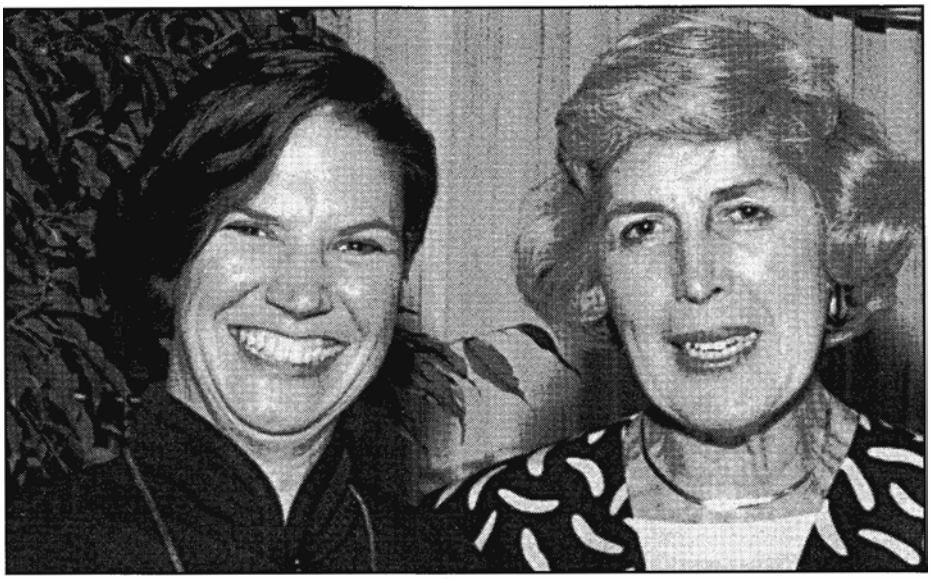
"Judge Cohen has expanded the Law Division to the suburban municipal districts, and created a Law Division bench book to achieve consistency within the Law Division's courtrooms.

"In addition to her duties on the bench, Judge Cohen has spoken at numerous seminars and has frequently participated in bar association activities. She has served on the Chicago Bar Association Board of Managers, the Illinois Judges Association Board, and will soon become a board member of the Womens Bar Association of Illinois.

"Even with this demanding schedule, Judge Cohen always approaches her call with great, and good, spirits. She handles her duties with wisdom, fairness and intelligence. She is quick witted, and witty. She takes her work seriously, without taking her self seriously.

"For all of these reasons, the National Association of Women Lawyers® Executive Board has chosen Judge Judith Cohen to be the recipient of the 1997 National Association of Women Lawyers' President's Award."

After presentation of the award by NAWL® President Sally Lee Foley, Judge Cohen, who is known for her offbeat sense of humor, remarked: "Well, I'm speechless. You're chuckling. Actually, I was speechless once—in utero. And my mother swears, in the middle of the night...she would hear this little squeaky voice saying, 'The room service is too slow.'



NAWL Treasurer Susan Fox Gillis (left) and Illinois Supreme Court Justice Mary Ann McMorow introduced Judge Cohen at the NAWL luncheon honoring Judge Cohen.

"For my talk, I thought I'd take a tip from the panel. What do judges want from lawyers? What do lawyers want from judges? I thought, what does the audience want from me? What do I want, when I'm in the audience?

"I want short, sweet, and a little sass to pick it up, and something significant to steal for *my* next speech. Now short is not my long suit. But sweet—I can do sweet, because my heart is filled with gratitude and thanks. From the bottom of my heart I would like to thank the National Association of Women Lawyers® for giving me this very meaningful and important award.

"The National Association of Women Lawyers® does tremendous things, not only on a national level, but also on an international level, attempting to achieve equality for everyone, both in the law and in the greater scheme of things—in the big picture, in life.

"I could thank everybody, because I have learned and I have grown with every person I have dealt with. But time is fleeting. I am a bottom line person. I get right to the nitty-gritty, to the crux...All my thanks to Pam Marmaduke, my Neiman-Marcus sales representative. She risked bodily injury as she wrestled this very jacket from a Highland Park hussy at the Neiman-Marcus store after a third markdown.

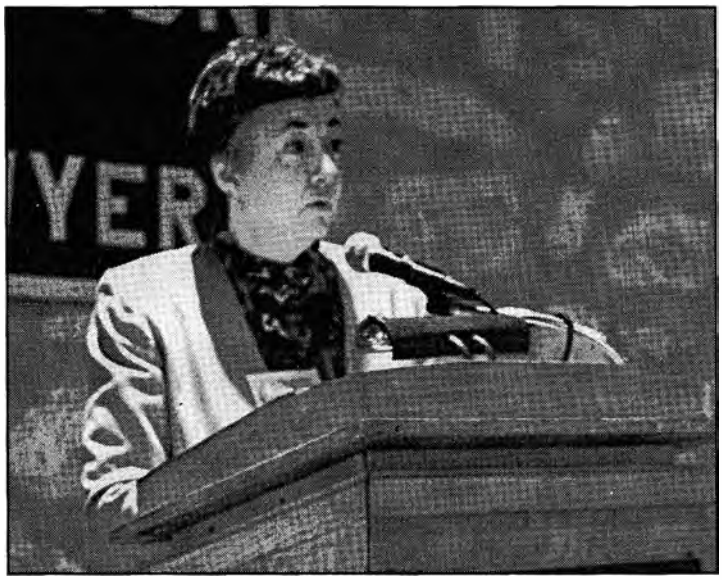
"This may not have been your normal acceptance speech, but understand that it is from the bottom of my heart. This award, and NAWL®, are very, very important to me. Just let me say this—let's do this again sometime!"

Co-chairs of the sold-out event were NAWL® members Margaret Foster of McKenna, Storer, Rowe, White & Farrug, Susan Fox Gillis of Schoen & Smith, and Stephanie Scharf of Jenner & Block. The program was made possible by the support of Jenner & Block. ✱

Compiled from staff and attendees reports.

ON THE RECORD

By Veronica C. Boda, Editor



As editor of Women Lawyers Journal® *and chair of several committees, Veronica Boda, pictured here at the San Antonio midyear meeting, was the popular choice for the Association's 1996 Service Award.*

After Final Coat of Paint, It's Time to Reflect On Work of Hands, Heart

As this will be my last editor's column, I wanted to take the opportunity to make my parting remarks. I am alive and well and living in Brigantine, N.J., an island away from Atlantic City, the world's favorite playground. Since my father's death last year, I am primarily responsible for a piece of real estate I now call home. I spent the last six weeks making repairs and painting the exterior of my house. Outside 10 hours a day has resulted in a slimmer waistline and a terrific tan. Each day I marvel at how many original manufacturer and design defects I find in this 47-year-old house. I have scraped paint, spackled cracks, caulked window frames and doorframes, glazed window sashes, and painted the recommended coats with high-quality primer and paint. A commercial painter told me that I've done "a hell of a job." So I really have had no time to talk on the phone. My constant presence outside during this time should dispel the local myth that I am too rich, too lazy or incompetent to do this work myself.

The next decisions to be made are: What color and type of paint to use on the cinder block boundary walls? Should I propagate more azaleas? How best to repair my front steps?

On the landscaping end, the lawn always needs weeding and edging. After years of dormancy, the irises showed their vibrant violet petals and yellow beards. All the rose bushes are in bloom. I have daffodils and violets galore! The raspberries are near ready for picking. Now my lifestyle is more of a busy homemaker than a legal editor or attorney. And as long as my responsibilities to this property and to my mother continue, my commitments have to change.

I leave my *Journal* duties knowing that I cannot continue to oversee premium content and production—standards that are important to me. How the *Journal* will "evolve" remains to be seen.

Based on nearly 13 years of editing experience, I render this cautionary advice: Unlike the U.S. Marine Corps, the *Journal* needs more than a few good people. The assistance of Grace Kennedy and Peggy Golden has been extraordinarily steadfast and competent, particularly brilliant on many occasions. Many contributors were a genuine joy to work with. Others made the work exceedingly more difficult than a professional publication process warrants. Notwithstanding the natural ups and downs of publishing, the *Journal*'s main needs are a more realistic budget and more contributors to stay in the mainstream. The Association has to be willing to support this enterprise on both fronts. As the first true women lawyers' continuous publication, I urge you to make it a priority.

The profession needs the legal journalists's perspective on issues that shape society. The profession can only benefit by supporting and encouraging quality communication. Unverified Internet information falls way short of traditional journalism standards of dispensing accurate information to the public. The Association should stand committed to getting its message out through the media primarily, and by way of electronic technology concurrently. It can only enhance your reputation among lawyers and nonlawyers alike.

The difficult tasks are the most challenging but by far reap the greatest satisfaction. Life really is like a bed of roses: lovely to gaze at, delicious to smell. And painful to touch with your bare hands. ✱

The Legal Implications of Workplace Violence

Planning can prevent harm, liability

By Rebecca A. Speer

Second in a series

An employee begins acting erratically at work, generating fear among co-workers. A manager's abusive ex-husband repeatedly places harassing telephone calls to the workplace. A disgruntled former client directs veiled threats against an executive. These, and many situations like them, raise one of the most troublesome and complex issues organizations today face: How can, and must, an employer respond to circumstances that bring into question an employee's safety from violence on the job?

Pushed to develop responsible answers by unforgiving jury awards and the high human and economic cost of workplace violence, employers grappling with workplace violence often turn to the law for guidance. What they will find is that courts and occupational safety agencies throughout the country are themselves struggling to define what an employer must do, and indeed how far an employer must go, to safeguard employees from violence.

This article provides a survey of the developing workplace violence debate: the pulling and prodding of occupational safety agencies and courts engaged in efforts to mark the boundaries of an organization's responsibility to prevent and manage acts of violence at the workplace. What emerges is a cautionary tale for any organization tempted to take a back seat on workplace violence. New administrative guidelines requiring workplace violence prevention and innumerable legal theories advanced in litigation throughout the country have produced a collective call to organizations not only to properly respond to pressing threats to employee safety from violence, but, to the extent possible, to proactively prevent workplace violence.

Workplace Violence: OSHA's New Frontier

For decades, the U.S. Department of Labor Occupational Safety and Health Administration (Fed-OSHA) and its state counterparts have battled danger to employees from fire, toxic chemicals, heavy equipment, scaffolding, and countless other hazards. In recent years, though, as statistics have revealed a shocking incidence of employee injuries from assaults, homicides, and other criminal acts—and as more traditional dangers have been abated—Fed-OSHA and state occupational safety agencies have turned their attention to the new frontier of workplace violence.

Fed-OSHA's Call to Action Against Workplace Violence

Fed-OSHA has moved in two ways to encourage employers towards workplace violence prevention: by citing employers under the Occupational Safety and Health Act's "General Duty Clause" for failing adequately to prevent violence, and by issuing voluntary guidelines requiring certain employers to implement workplace violence prevention programs.

The "General Duty Clause," Section 5(a)(1) of the Occupational Safety and Health Act of 1970, requires employers to provide a place of employment that is "free from recognizable hazards that are causing or likely to cause death or serious harm to employees." Fed-OSHA has interpreted the General Duty Clause as requiring employers to provide a workplace safe from violence and, in a few instances, has cited employers who failed to prevent or abate a recognized hazard from violence.[1] One regional Fed-OSHA office, through its work as part of the Long Island Coalition for Workplace Violence Awareness and Prevention, has stated that the General Duty Clause may require employers who have experienced acts of workplace violence, or who become aware of "threats, or intimidation or other potential indicators showing that the potential for violence in the workplace exists or has the potential to exist," to implement workplace violence prevention programs.[2] By suggesting that the General Duty Clause may require violence prevention programs in workplaces where "the potential for violence potentially exists"—that is, nearly all workplaces—this latter statement illustrates the extent of Fed-OSHA's commitment to workplace violence prevention.

In addition to asserting a need for violence prevention under the General Duty Clause, Fed-OSHA has issued voluntary guidelines encouraging employers to implement violence prevention programs. In advisory, and in the latter case draft, guidelines, Fed-OSHA requires employers in the health care and social

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service industries, and night retail establishments, to implement a full workplace violence prevention program that includes, among other components, a risk analysis conducted by a threat assessment team, specified administrative controls, training, and record keeping.[3] Further, in a resource document aimed at *all* employers, a regional Fed-OSHA office provides a model workplace violence prevention program that it maintains *every* employer should implement in some form.[4]

Though the precise nature and extent of an employer's obligation for violence prevention under the federal Occupational Safety and Health Act remains yet to be clearly defined, Fed-OSHA's above pronouncements indicate a decided commitment to push employers towards violence prevention and to cite employers who fail, especially in light of patent threats of violence, to take adequate preventive steps.[5]

State Occupational Safety Agency Efforts

Several state occupational safety agencies have joined Fed-OSHA's move towards workplace violence prevention.

For instance, California has issued comprehensive guidelines for violence prevention targeted at employers generally and at the health care and community service industries, which experience an especially high rate of violence. In its voluntary *Guidelines for Workplace Security*, the California Department of Industrial Relations, Division of Occupational Safety and Health (Cal-OSHA) requires *all* employers to conduct a risk assessment to determine the level of danger from three identified sources of violence: thieves and other strangers who enter the workplace to commit a crime; customers, patients, and others who have received a service from the organization; and current or former employees and acquaintances of the victim. If the assessment fails to exclude a potential for violence, the guidelines require employers to implement a workplace violence prevention program as part of a broader Injury and Illness Prevention Program mandated by the California Labor Code and relevant regulations.[6] Second, Cal-OSHA has issued guidelines to help the health care and community service industries implement a workplace violence prevention and response program required of some facilities by health and safety statutes.[7]

The states of Washington and New Jersey, among others, also have adopted workplace violence prevention guidelines directed at certain industries.[8]

What These Efforts Say About An Employer's Responsibility to Properly Manage and Prevent Workplace Violence

Despite ongoing discussion, and in some cases outright controversy, concerning the substance and force of the voluntary workplace violence prevention guidelines—and of federal and state OSHA's proper roles in assessing and enforcing an employer's responsibility in the face of violence—the guidelines express a clear intent by the occupational safety agencies to scrutinize employer violence prevention efforts. Employers' broad obligation under the federal General Duty Clause and relevant state statutes[9] to maintain a safe workplace, taken together with the published workplace violence prevention guidelines, should encourage all employers to conduct a risk assessment and to implement a comprehensive preventive program containing suggested components and tailored to meet the level and nature of risk to the organization from violence.

Traditional Legal Theories Meet the Challenge of Workplace Violence

Courts asked to consider varied theories advanced by victims of workplace violence have joined the discussion concerning the nature and limits of an employer's legal obligation to provide a workplace free from violence. As shown here, judicial decisions too reflect a growing need for organizations to step up to the workplace violence plate.

Premises Liability

Employees, customers, and even passersby harmed by assaults, mass shootings, and botched robberies at the hands of third parties and employees all have asserted claims of premises liability in their effort to hold business and property owners accountable for failing to protect them from violence. In assessing liability under premises liability claims, courts apply a traditional negligence analysis that looks to whether a special relationship existed between the premises owner and victim giving rise to a duty to protect the victim from violence; whether the violent act was legally "foreseeable"; if so, whether the owner took reasonable preventive steps; and if not, whether that failure legally caused the injury in question.

Despite a stated reluctance to hold property owners liable for the criminal acts of third parties, courts have permitted claims of premises liability when, despite an adequate level of foreseeability of violence, the property or business owners failed to take reasonable preventive steps.[10] Some courts have expressly articulated an affirmative duty on the part of property owners to investigate the potential for violence: that is, to discover criminal acts being committed or likely to be committed on their premises.[11]

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Courts seemingly concerned with the potential broad reach of premises liability claims have limited owner liability for on-premises violence to instances where the foreseeability of violence was high, and indeed marked by a history of prior similar violent acts;[12] where the alleged negligence was directly and definitively responsible for the injuries in question;[13] and where the injury occurred directly on premises, as opposed to adjacent property arguably in the property owner's control.[14] However, despite these limitations, premises liability still provides wide latitude for victims of violence—including employees and invitees of all types—to seek damages from business and property owners for criminal acts they arguably should have foreseen and prevented.

Respondeat Superior and the Dangerous Employee

Under the principle of respondeat superior, employers remain vicariously liable for the acts of employees within the "course and scope" of employment, even if the acts are unauthorized, unforeseeable, and criminal. Because an employer's vicarious liability thus extends beyond the purely lawful, authorized acts of employees—at least when those acts fall within the scope of employment—many victims turn to respondeat superior in an effort to hold organizations liable for the violence of its employees.

Courts apply various, and not altogether consistent, tests in determining whether an act falls within the "course and scope" of employment, triggering vicarious liability. However, generally, courts impose liability where the act in question is at least broadly incidental to the employer's enterprise and is "foreseeable" in the sense that the conduct is not so unusual given the nature of the employee's duties that it would be unfair to hold the employer accountable for losses resulting from it.[15] Some, but not all, courts look to whether the act occurred in furtherance of a business interest.[16]

Many courts have categorically declined to hold employers vicariously liable for the violent acts of employees, reasoning that such acts by their very nature promote a personal, rather than business, interest and therefore fall outside the course and scope of employment.[17] Other courts, though, have extended vicarious liability in at least four circumstances involving employee violence.

First, courts have imposed liability when the employee's violent act was in some way connected to a pursuit of the employer's interests or engendered by the employment. For instance, courts have imposed vicarious liability where a bartender's physical assault grew from an attempt to stop a fight among patrons; where a union steward assaulted a union member who spoke out against a strike; and where an employee assaulted another due to his mistreatment of a third employee.[18] Second, courts have imposed vicarious liability when the employee's violence arose from a dispute over the performance of the employee's duties.[19] Third, in cases involving sexual assault, some courts have imposed vicarious liability when the offending employee held a unique position of trust over the victim by virtue of his employment.[20] Finally, at least one court has suggested that vicarious liability may attach when a violent act is motivated by emotions fairly attributable to work-related events or conditions.[21]

Together, these cases indicate that some courts remain willing to hold employers liable under respondeat superior principles for the violent acts of employees, even when they are unauthorized and unforeseeable and not committed in the performance of duties intended to benefit the employer.

Negligent Hiring, Retention, and Supervision and An Employer's Failure to Screen Out or Kick Out Dangerous Employees

Where claims of respondeat superior focus on an employer's vicarious liability for the wrongdoing of employees, claims of negligent hiring, retention, and supervision focus on an employer's own failures. By creating direct liability based on an employer's independent duty to screen out potentially violent job applicants and to properly supervise, discipline, and terminate employees who present a potential threat, claims of negligent hiring, retention, and supervision work to erode the limited protection an employer may otherwise find under respondeat superior principles.

Theories of negligent hiring and retention arise most commonly in cases where the employer failed to perform a pre-hiring background check that would have exposed an employee's violent past, or failed to terminate an employee with known violent propensities. For instance, courts have permitted claims of negligent hiring where an off-duty Army private with a prior record for aggravated burglary and rape, aggravated burglary and theft, and unlawful use of a firearm murdered an officer's wife on-base; where a bar employee with prior convictions for assault and battery, intent to commit rape, and kidnapping assaulted and battered a customer; where a hotel employee who was known to become violent when intoxicated sexually assaulted a guest; where a supermarket manager who the employer knew at least once had engaged in an unprovoked attack severely beat a four-year-old boy in the supermarket parking lot;

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where a laundry employee with a history of burglary and molestation hired through a rehabilitative job program severely beat a customer; and where a supervisor repeatedly raped a co-worker, allegedly with the employer's constructive or actual knowledge.[22]

Courts have permitted claims of negligent supervision where proper supervision would have exposed the employee's on-the-job wrongdoing.[23]

Though courts in these and other cases have sent a clear message that employers must screen out or kick out persons with a violent past, other courts have questioned how far that duty properly should reach. Some courts, for instance, have held that background checks are not always necessary, especially if employment calls for minimum contact with people.[24] Other courts have held that a past criminal record does not—and indeed should not—automatically preclude employment.[25] Some courts have pointed to the difficulty of interpreting a criminal record, or declined to extend liability where the past criminal record exposed the mere possibility of violence, rather than a true violent propensity.[26] Other courts have attempted to limit employer liability by applying strict standards of causation that trigger liability only if the employer's failure to conduct a background check definitively led to plaintiff's injuries.[27]

These cases affirm that employers wishing to minimize liability for employee violence should perform a pre-hiring background check within legal limits;[28] should employ responsible policies to screen out employees with past convictions for violent crimes;[29] should adequately supervise especially those employees who regularly interact with the public; and should without exception move quickly to discipline or terminate employees who commit or threaten violence on the job.

Negligent Infliction of Emotional Distress

Parties harmed by an employer's failure to provide a safe workplace also have advanced claims of negligent infliction of emotional distress. Courts in some jurisdictions have permitted such claims where an employer's conduct physically endangered the employee and resulted in severe and verifiable emotional injuries.[30] Though not yet extensively litigated in the workplace violence context, claims of negligent infliction of emotional distress appear to leave employers vulnerable to liability when their failure to end harassment or keep employers reasonably safe from threatening conduct leads to emotional injury.

Duty to Warn

Both federal and state occupational safety statutes require employers to warn employees of latent dangers. Some states even impose severe criminal liability on employers who fail properly to inform employees of concealed dangers that could lead to death or severe physical injury.[31] To supplement those statutory obligations—which arguably may be cited as grounds for holding employers liable for failing reasonably to warn employees and others about potential violence—at least one court has imposed a common law duty for employers to issue warnings concerning the violent propensity of its employees. In that case, the court applying Oregon law held that a customer assaulted by a postal worker could advance a claim for negligent failure to warn where evidence showed the customer had not been warned of the employee's known violent propensities.[32]

Though employers must assess the necessity and propriety of issuing warnings of potential violence on a case-by-case basis, their duty under occupational safety statutes should prompt employers who become aware of threats to employee safety from violence to promptly and responsibly warn employees of that threat, in addition to taking reasonable steps to abate the danger.

Sexual Harassment

When employee-on-employee sexual harassment leads to sexual assault, courts have held employers strictly liable for resultant injuries. To trigger liability, the assault must have grown out of the employment relationship, though it need not have occurred on-premises. For instance, courts have permitted claims of strict liability for sexual assault in cases where a supervisor used his position of authority or other business reason effectively to coerce an employee off-premises where the assault was then committed.[33]

These few cases raise staggering implications for employers who, despite what may have been responsible and exhaustive efforts to prevent workplace violence and full compliance with OSHA and all relevant regulations, may nonetheless be hit with strict liability for an employee's violent acts that fall within the rubric of sexual harassment. Such strict liability raises the ante on adequate employee screening and monitoring, and the swift and effective handling of all sexual harassment complaints.

Negligent Referral

Either out of concern for potential defamation claims from disgruntled former employees or a genuine interest in protecting confidential employment information, many employers refuse to disclose substantive information to prospective employers who call for a "reference check." However, one recent decision should cause employers to reexamine that

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policy.

The California Supreme Court recently ruled that employers who reveal some information during a reference check are required to give the "whole truth" rather than potentially misleading "half-truths" about the fitness of a former employee. In that case, the court upheld a tort claim based on a school district's failure to inform a prospective employer of the employee's past sexually inappropriate conduct. The employee, who was hired based on what appeared to be unequivocally positive recommendations, later sexually assaulted a student.[34]

At least in California, this recent proclamation requires employers to rethink their referral policies. Indeed, this recent decision should be taken as an opportunity by all employers to reexamine their referral policies in light of clear human need to warn potential employers of violent employees.[35]

Mismanagement of Threats to Safety

All told, the above statutes and cases make clear that employers who fail reasonably and proactively to implement preventive steps to avert workplace violence may readily face liability on numerous fronts. However, employer liability does not end with preventive efforts, as an employer—even the most well-intentioned and quick to act in circumstances that raise a concern about workplace safety—still may incur substantial liability if it mismanages its efforts to address or defuse a threatening situation.

An employer who fails uniformly and responsibly to apply a workplace violence prevention policy;[36] who hastily fires an employee who, though exhibiting behavior perceived as threatening, may in fact be suffering from a psychological disability triggering protection and employer obligations under the Americans with Disabilities Act;[37] who even in a laudable effort refers a potentially threatening employee to counseling but fails then to properly respect resultant privacy rights;[38] and who in an attempt to thoroughly investigate a claim of threatened violence unreasonably detains suspected employees[39] all have been held accountable under varied theories, including claims of discrimination, violation of privacy, wrongful termination, defamation, infliction of emotional distress, and false imprisonment.

Those and other cases make clear that employer efforts to prevent workplace violence often butt against competing interests that an employer must recognize and negotiate in its efforts to prevent and manage threatening situations.

What's An Employer To Do?

Though they fall short of supplying precise answers to the dilemma of workplace violence, the above statutes and cases convey an unavoidable message: that employers should take reasonable steps to prevent workplace violence and responsibly manage its efforts at violence prevention. The specter of OSHA citations and damaging liability based on numerous common law claims should encouraged all employers to determine the level and nature of threat their organization faces from violence, and to implement responsible and effective preventive policies and practices that respect the many competing interests that must be accommodated as issues concerning workplace violence arise in an organization.

1. United States Department of Labor, Occupational Safety and Health Administration, *Frequently Asked Questions.*

2. Long Island Coalition for Workplace Violence Awareness and Prevention, *Workplace Violence Awareness and Prevention, Facts and Information.* The Coalition is comprised of a regional Fed-OSHA office, as well as various labor unions, insurance companies, law enforcement agencies, and other agencies concerned with occupational safety and health.

3. *See* United States Department of Labor, Occupational Safety and Health Administration, *Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers* (OSHA 3148-1996); *(Draft) Guidelines for Workplace Violence Prevention Programs for Night Retail Establishment* (June 28, 1996).

4. Long Island Coalition for Workplace Violence Awareness and Prevention, *Workplace Violence Awareness and Prevention, Facts and Information* (stating that "every employer should establish, implement and maintain a written [workplace violence] Prevention Program" reflecting "the level and nature of threat faced by the employee(s)/employer").

5. Fed-OSHA is committed to workplace violance education and awareness, and indeed has cited employers in a few instances involving violence, but currently has no stated policy concerning the enforcement of employer violence prevention efforts through citations under the General Duty Clause.

6. *See* Cal-OSHA *Guidelines for Workplace Security* (revised March 30, 1995); Cal-OSHA *Model Injury and Illness Prevention Program for Workplace Security* (March 1995); Cal. Lab. Code §§6307 and 6401.7; 8 Cal. Code of Regs. §3203.

7. *See* Cal-OSHA *Guidelines for Security*

At the Aug. 1, 1997 NAWL® half-day conference on workplace violence, Ms. Speer will discuss potential approaches to the problem of workplace violence and provide practical tools for workplace violence prevention and management. In so doing, NAWL hopes to give employers, and the lawyers who counsel them, helpful guidance through the mine field of issues and problems engendered by this challenge of the 90's.

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and Safety of Health Care and Community Service Workers (1993); Cal. Health & Safety Code §§1257.7 and 1257.

8. *See* Washington State Department of Labor and Industries, *Late Night Retail Workers Crime Protection* (WAC 296-24-102, 296024-10203). New Jersey Department of Labor, *Guidelines on Measures and Safeguards in Dealing with Violence or Aggressive Behavior in Public Sector Health Care Facilities.*

9. *See* California Occupational Safety & Health Act of 1973, Cal. Lab. Code §§6300, *et seq.*

10. *See, e.g., Onciano v. Golden Palace Restaurant, Inc.,* 219 Cal. App. 3d 385, 395 rev. den. 1990 Cal. LEXIS 2755 (1990) (holding that customers assaulted in restaurant parking lot could assert premises liability claim against restaurant owner); *see also Ann M. v. Pacific Plaza Shopping Center, et al.*, 6 Cal. 4th 666, 673 (1993) (noting owners' duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of precautionary measures).

11. *See, e.g., Ann M., supra*, 6 Cal. 4th at 679; *Peterson v. San Francisco Community College Dist.,* 36 Cal. 3d 799, 807 (1984).

12. *Ann M., supra*, 6 Cal. 4th at 678-79 (employing a "balancing test" and holding that, the greater the burden of providing the proposed security measures, the higher the degree of foreseeability that must exist before a duty to provide those measure will be imposed).

13. *See, e.g., Nola M. v. University of Southern California*, 16 Cal. App. 4th 421, 437, *rev. den.* 1993 Cal. LEXIS 5067 (1993) (holding that "abstract negligence" unconnected to the injury in question will not support liability).

14. *See, e.g., Balard v. Bassman Event Security, Inc.,* 210 Cal. App. 3d 243, 247 (1989) (dismissing claim by customer assaulted on public street adjacent to owners premises); *Medina v. Hillshore Partners*, 40 Cal. App. 4th 477, 485 (1995) (dismissing claim of tenant whose son was killed by "foreseeable" gang-related gun fire on streets adjacent to premises).

15. *See, e.g., Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4th 992, 1003 (1995) (carefully distinguishing "foreseeability" in the respondeat superior context to the "foreseeability" analysis conducted with respect to negligence claims, which instead means "the level of foreseeability which would lead a prudent person to take effective precautions"); *Aaron v. New Orleans Riverwalk Assoc.,* 580 So. 2d 1119, 1121 (La. App. 1991), *cert. den.* 586 So.2d 534 (1991) (stating that, in determining whether an employee was acting in the course and scope of employment, the employee's conduct must be so "closely connected in time, place and causation to his employment duties as to be regarded a risk of harm fairly attributable to the employer's business"); *Oslin v. Minnesota*, 543 N. W. 2d 408, 413 (Minn. App. 1996), *rev. den.,* 1996 Minn. LEXIS 231 (1996) (holding that the test of vicarious liability is not whether the conduct was authorized or forbidden, but whether it fairly could have been foreseen from the nature of the employment and the duties relating to it).

16. *See, e.g., Ernest v. Parkshore Club Apartments Ltd. Partnership*, 1993 U.S. Dist. LEXIS 10758 (N. D. Ill. 1993) (holding that, under the doctrine of respondeat superior, "an employer may be liable for the negligent, willful, malicious and even criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer"); *but see Oslin, supra*, 543 N. W. 2d at 414 (noting that Minnesota courts had rejected standard that imposes vicarious liability solely where the employee's conduct was done in furtherance of the employer's interests); *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, 12 Cal. 4th 291, 297 (1995) (stating that California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or in part, by a desire to serve the employer's interests).

17. *See, e.g., Farmers Ins. Group, supra*, 11 Cal. 4th at 992 (county not liable for lewd and physically offensive conduct of sheriff because conduct cannot fairly be regarded as typical of or broadly incidental to the operation of a county jail); *Thorn v. City of Glendale*, 28 Cal.App. 4th 1379, 1383 (1994), *rev. den.,* 1994 Cal. LEXIS 6424 (1994) (no vicarious liability for arson by fire marshal during an inspection resulting from a "personal compulsion"); *Doe v. WTMJ, Inc.,* 927 F. Supp. 1428, 1435 (1996) (employer not liable for radio announcer's off-premises sexual assault of young listener because announcer's assault was impelled by purely personal motives); *Slaton v. B&B Gulf Service Center*, 344 S. E. 2d 512, 513 (Ga. App. 1986) (employer not liable for assault by employee gas station attendant because assault was unconnected to attendant's duties and did not advance employer's interest); *Aaron, supra*, 580 So. 2d at 1121 (employer not liable for employee's misconduct leading to rape of plaintiff because employee's wrongdoing was "purely personal in nature" and did not further the employer's interest).

18. *See, respectively, De Rosier v. Crow*, 184 Cal. App. 2d 476, 480 (1960); *Caldwell v. Farley*, 134 Cal. App. 2d 84, 90 (1955); *Sullivan v. Matt*, 130 Cal. App. 2d 134, 141 (1955).

19. *See, e.g., Fields v. Sanders*, 29 Cal. 2d 834 (1947) (employee truck driver beat motorist with wrench during dispute over employee's driving on a company job); *Carr v. Wm. C. Crowell Co.,* 28 Cal. 2d 652, 654 (employee of general contractor threw hammer at subcontractor during dispute over construction procedure).

20. *See, e.g., Simmons v. U.S.,* 805 F. 2d 1363, 1368-71 (9th Cir. 1986) (federal agency liable for mental health counselor's sexual involvement with client); *Richard H. v. Larry D.,* 198 Cal. App. 3d 591, 596 (1988) (clinic liable for psychotherapist's sexual relations with client); *White v. County of Orange*, 166 Cal. App. 3d 566, 571-72 (1985) (county liable for deputy sheriff's threats to rape motorist); *Turner v. Louisiana*, 494 So. 2d 1292, 1295-96 (La. App. 1986) (state liable for National Guard recruiter's sexual misconduct with applicants); *Applewhite v. City of Baton Rouge*, 380 So. 2d 119, 121-22 (La. App. 1979) (city liable for policeman's rape of detainee); *Marston v. Minneapolis Clinic of Psychiatry*, 329 N. W. 2d 306, 310-11 (Minn. 1982) (clinic liable for therapist's sexual relations with patient); *but see John R. v. Oakland Unified School District*, 48 Cal. 3d 438 (1989), reh g den., 1989 Cal. LEXIS 1733 (1989) (rejecting claim that sexual molestation of student during a school-sponsored program was sufficiently connected to teacher's employment to warrant school district's vicarious liability because the teacher's job placed him in a position of trust that enabled the molestation).

21. *See Lisa M., supra*, 12 Cal. 4th at 300 (holding that hospital not vicariously liable for medical technician's sexual molestation of patient because employee's "motivating emotions" were not attributable to work-related events or conditions).

22. *See, respectively, Mulloy v. U.S.,* 937 F. Supp. 1001, 1014 (Mass. 1996); *Foster v. The Loft, Inc.,* 526 N. E. 2d 1309, 1312 (Mass. App. 1988), *rev. granted*, 403 Mass. 1102 (1988); *Pittard v. Four Seasons Motor Inn*, 688 P. 2d 333, 340 (N. M. App. 1984); *Bryant v. Livigni*, 619 N. E. 2d 550, 556 (Ill. App. 1993), *app. den.,* 154 Ill. 2d 557 (1994); *Perkins v. General Motors*, 911 F. 2d 22, 32 (8th Cir. 1990), *cert. den.,* 499 U.S. 920 (1991).

23. *See, e.g., Simmons, supra*, 805 F. 2d at 1371 (claim for negligent supervision may be sustained where employer, through adequate supervision, would have learned of employee's misconduct); *John R., supra*, 48

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Cal. 3d 438 (student sexually assaulted by teacher permitted to pursue claim of negligent hiring and supervision).

24. *See, e.g., Connes v. Molalla Transport System*, 831 P. 2d 1316, 1321 (Colo. 1992) (trucking company had no duty to perform a background check of non-vehicular convictions because long-haul driver has no more than incidental contact with people); *Garcia v. Duffy*, 492 So. 2d 435, 441-42 (Fla. App. 1986) (employer had no duty to make independent investigation of job applicant's background where applicant sought position that involved only incidental contact with the public).

25. *See, e.g., Yunker v. Honeywell, Inc.*, 496 N. W. 2d 419, 422 (Minn. App. 1993) (holding that a policy deterring employers from hiring workers with a criminal record would "offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community"); *Ponticas v. K.M.S. Investments*, 331 N. W. 2d 907, 913 (Minn. 1983) (remarking that duty to perform check of job applicant's criminal record would contravene policy in favor of rehabilitation of past offenders).

26. *See, e.g, Patton v. Southern States Transportation*, 932 F. Supp. 795, 801 (S. D. Miss. 1996) (stating that mere possibility of violence, as opposed to a violent propensity, is insufficient to sustain negligent hiring claim).

27. *See, e.g., M.L. v. Magnuson*, 531 N. W. 2d 849, 858 (Minn. App. 1995) (dismissing claim of negligent hiring because a reasonable investigation would not have revealed employee's violent past); *Ort v. Estate of Stanewich*, 92 F. 3d 831,837 (9th Cir. 1996), *cert. den.*, 117 S. Ct. 950 (1997) (dismissing claim of negligent retention because police officer's on-the-job record of excessive force and unwarranted violence in arrest and detention did not render his brutal attack, torture, and murder of a detainee foreseeable); *Patton, supra*, 932 F. Supp. at 800 (dismissing claim of negligent hiring because truck driver's prior conviction for possession of a firearm and of cocaine did not evidence a propensity towards violence that rendered his assault of a co-worker foreseeable); *Doe v. Capital Cities*, 50 Cal.App.4th 1038, 1054 (1996), *rev. den.*, 1997 Cal. LEXIS 1130 (1997) (dismissing claims of negligent hiring and retention because casting director's use of serious mind-altering drugs did not give sufficient notice of his potential for a violent sexual assault against an aspiring actor).

28. For instance, California does not permit employers to use in its hiring process information concerning arrests that did not lead to conviction, and concerning the applicant's referral to and participation in a pretrial or post-trial criminal diversion program. Cal. Lab. Code §432.7.

29. The policy should strike a thoughtful balance between the needs of the organization to prevent violence by excluding from its employment potentially violent persons, and a societal interest in facilitating the rehabilitation and re-integration of those convicted of crimes in the past.

30. *See, e.g., McMillan v. National Railroad Passenger Corporation*, 648 A.2d 428 (D.C. App. 1994) (examining claim in context of employer's failure to end co-worker's harassment of victim).

31. *See, e.g.,* California Corporate Criminal Liability Act of 1989, Cal. Penal Code §387, which holds corporations and managers criminally liable for knowingly failing to inform employees in writing of a known "serious concealed danger" that could result in death or great bodily harm. The maximum penalty for each violation of the provision is three years in state prison and/or $25,000 for each manager and $1 million for the corporation.

32. *See, e.g., Senger v. U.S.,* 103 F.3d 1437 (9th Cir. 1996).

33. *Compare Doe v. Capital Cities, supra*, 50 Cal. App. 4th at 1048-52 (1996) (brutal sexual assault of aspiring actor by casting director at his home was sufficiently work-related to warrant strict liability of employer for sexual harassment because, among other reasons, actor's visit to director's home was motivated by a business purpose) and *Huitt v. Market Street Hotel Corp.,* 1993 U.S. Dist. LEXIS 9665 (Kan. 1993) (supervisor's sexual assault of employee during car ride to employee's home was sufficiently work-related because supervisor allegedly used his authority to place employee in the position of having to accept a ride home from him) to *Capitol City Foods v. Superior Court*, 5 Cal. App. 4th 1042, 1049-50 (1992), rev. den. 1992 Cal. LEXIS 3655 (1992) (sexual assault of restaurant employee by supervisor at motel was not sufficiently work-related because employee voluntarily accompanied supervisor to motel during a non-work-related date).

34. *See Randi W. v. Muroc Joint Unified School District*, 14 Cal.4th 1066 (1997); *but see Moore v. St. Joseph Nursing Home*, 459 N. W. 2d 100, 102-03 (Mich. App. 1990) (holding that the "great societal interest" in protecting confidentiality of employment records outweighs any purported duty of employer to warn prospective employers of former employee's violent propensities).

35. *See, e.g.,* R. Adler and E. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, Washington and Lee Law Review (1996).

36. *See Moodie v. Federal Reserve Bank*, 862 F. Supp. 59, 63 (S.D.N.Y. 1994), *aff'd* 58 F. 3d 879 (1995) (noting that a company's failure to apply its workplace violence policy uniformly and in a nondiscriminatory fashion could support a Title VII claim); *Ward v. Bechtel Corp.*, 102 F.3d 199 (5th Cir. 1997) (noting that employer's reasonable handling of a workplace violence complaint could preclude claim of hostile environment under Title VII).

37. The Americans with Disabilities Act prohibits discrimination against persons with psychiatric disabilities. Though the Act does not cover persons who present a "significant risk" of "substantial harm" to others due to their disability, the Act and EEOC guidelines clarify that an employer must base its threat assessment on the most current medical knowledge or best available objective evidence. Employers who terminate or deny employment to persons based on fears generated by speculation, stereotypes, or myths about the mentally ill may be held liable for violating the Act.

38. *See Pettus v. E. I. Du Pont De Nemours & Co.*, 49 Cal. App. 4th 402 (1996) (holding that employer's access to confidential information related to a psychiatric examination of an employee, conducted after the employer learned of perceived threats of violence by the employee, seriously interfered with employee's right to privacy).

39. *See, e.g., Cavanaugh v. Burlington Northern Railroad Co.,* 941 F. Supp. 872 (permitting claim of false imprisonment based on showing that employer detained and interrogated employees accused of threatening acts six or seven hours, during which employees were not permitted to leave the room unsupervised, even to use the restroom).

REBECCA SPEER *is an employment and labor law attorney in San Francisco.*

Memories of My Aunt

By Jim Fraiser

I asked her opinion as to the most important quality, apart from competence, that a lawyer should possess. "Integrity," she replied, without hesitation...

NAWL® member Martha W. Gerald of Jackson, Mississippi, passed away on January 6, 1997, at the age of 77, of complications due to post-polio syndrome. Born in the small Mississippi Delta hamlet of Leland to a lawyer/farmer father and a mother who taught second graders in a little red schoolhouse, Martha experienced the Mississippi River Flood of 1927, the Great Depression, and the effects of World War II on their close-knit community. Those times imbued her with the qualities essential to becoming, as her former partner Joe Jack Hurst once wrote, "one of the state's outstanding women lawyers, and without peer among oil and gas lawyers in Mississippi."

She graduated *cum laude* from Millsaps College in 1941, and received her law degree from the University of Mississippi in 1944, where she served as the Editor-in-Chief of the Mississippi Law Journal. Recognized as a leading authority in her specialties of energy law, banking and bankruptcy, she become senior partner in the firm of Gerald, Brand, Waters and Cox in 1977, and in 1991, was included in the prestigious listing of the *Best Lawyers in America*. Martha served as president of many professional organizations, including the Hinds County Bar Association and the Mississippi Oil and Gas Association, and was president and co-founder of the Mississippi Association of Women Lawyers®. She also served on the district Board of Directors for the National Association of Women Lawyers®. But her distinguished legal career is only part of the impressive legacy of my aunt, third parent and mentor, Martha Gerald.

1966: President Martha W. Gerald, Mississippi Association of Oil & Gas Lawyers

1991: Gerald chosen as one of the "Best Lawyers in America"

Roman emperor and stoic Marcus Aurelius, one of Martha's favorite authors, best summed up her character, when, in his "Meditations," he spoke of his goal of a disposition to "do good, and to give to others readily, and to cherish good hopes and cheerfulness in all circumstances, as well as in illness, and to be able, by moral character, to think and act as I speak...." One of her good friends, United Methodist Bishop Clay Lee, who knew Martha long before she became the first chairwoman of the governing body of Jackson's Galloway Methodist Church, and who nominated her for service on the General Council on Finance and Administration for the United Methodist Church, eulogized her as "an authentic human being who understood and accepted her vulnerability, and offered it in the best spirit possible, by not taking herself too seriously and by not seeing others as objects to be manipulated and exploited."

Indeed, Martha utilized these estimable qualities, along with a lively and engaging wit, in every aspect of her life, whether as accomplished attorney, supportive family member or pioneer in women's rights. Although a lifelong Republican and finance chairperson for George Bush's presidential campaign in Mississippi, she once eschewed the Republican platform because it failed to endorse the ERA. "If you support women's rights, you must support the ERA. It's a simple matter of justice," she said. When a party mem-

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ber urged that the party believed in equal rights and even placed women on a pedestal, Martha replied that "women can't make a living on a pedestal." As always, she acted as she spoke, promoting the hiring of women lawyers in her firm, and serving as their mentors in a state that, until the advent of the 1970s, had known few women lawyers, and almost no female senior partners.

She did no less for her own family. She offered my sister Martha (her namesake) her first paralegal position, and guided her into becoming one of Mississippi's first female oil & gas "landmen." When my mother Adelyn (her sister) divorced in 1975, Martha advised her to quit teaching high school and attend the Institute for Paralegal Studies in Philadelphia. This venture lead to my mother's new career and employment with the Vinson & Elkins firm in Houston. When Adelyn returned to Jackson several years later, Martha deeded her the next-door lot upon which to build a new home and begin a new life.

Of Martha's numerous contributions to me, one of the most important was her advice on life and the law. Upon my graduation from law school, I asked her opinion as to the most important quality, apart from competence, that a lawyer should possess. "Integrity," she replied, without hesitation, "and remember that you can no more be a little dishonest than you can be a little pregnant. The accident of your birth insured that you'd never be pregnant, " she said, sporting a familiar wry grin , "now you make certain that you're never dishonest."

Although she recognized that charity begins at home, she also practiced that virtue in all of her relationships. By example, she induced even the most reluctant colleages to treat their associates, legal assistants and secretaries as equals. She opened her guest house and pool to all her friends and neighbors, and took in more stray dogs than St. Francis. She offered her support and leadership to numerous good causes, including Jackson's YWCA, the Central Mississippi Legal Services for the poor, the Kappa Delta sorority at Millsaps, and the United Methodist Missions, among many others. For her service to the community, she was named the Millsaps College Alumnus of the Year in 1981. Percy McDonald, her carpenter, general handyman, neighbor, and good friend of 30 years, said at her wake, that "there ain't gonna be no more of 'em like Martha Gerald."

As lawyers, we all hope that this carpenter's judgment was not infallible, and that we, too, will become or remain accomplished attorneys, as well as beloved family members, faithful friends, generous public servants and highly desired mentors. How Martha Gerald achieved these goals is no mystery to anyone who knew her. Late last year, while enduring considerable hardship from her physical infirmities, I prevailed upon her to consider retirement, or at the very least, place a handicap sticker on her car to avoid walking several blocks to her office. The surprise registered upon her face reminded me that she had never, for one moment, considered herself to be laboring under any handicap, whether due to the physical pain endured during her later years, or the obstacles she faced during her early career. Throughout all her life, her indomitable spirit remained intact, and she never hesitated to joyously offer the support that any of us needed in order to rise to her level of perseverance through unavoidable difficulty.

Several days later, when she found me despairing of human goodness after a week of hard-fought litigation, she invited my family to her home for dinner, and as we parted, handed me a copy of the text of an address delivered by William Faulkner to the 1952 Oxford, Miss., high school graduating class. Whenever I read those words of advice, they remind me of the courage Martha Gerald exhibited in overcoming long odds to live her life on her own terms, terms which always included never being "afraid to raise your voice for honesty and truth and compassion against injustice and lying and greed. If individual men and women will do this, [they] will eventually change the earth."

She always acted in accordance with those beliefs, and those of us who benefited from her kind thoughts, considerate words and generous deeds, feel eternally thankful for having known Martha Gerald. ✱

J. James (Jim) Fraiser III received his law degree from the University of Mississippi in 1979. A former county Assistant District Attorney, he is currently serving as a Mississippi Special Assistant Attorney General, Civil Litigation Division, specializing in tort claims act litigation. His recent publications include an article for the Spring 1996 issue of the Mississippi Law Journal; two 1997 annotations for the ALR 5th series, all regarding tort claims act notice, limitations and constitutional issues; and the novel, Shadow Seed *(Montgomery: Black Belt Press, 1997). Photographs provided by Mr. Fraiser.*

PSYCHIATRIC MALPRACTICE
Stories of Patients, Psychiatrists and the Law

by James L. Kelley
240 pages, hardcover
Rutgers University Press, 1996
ISBN: 0-940675-45-5
For information, call Lisa Hanson 908/445-7762, ext. 626

Reviewed by Gail McKnight Beckman

Medical malpractice is a well-plowed field. Psychiatric malpractice is almost a virgin wood. Constituting only about .3% of all medical malpractice claims between 1974 and 1978, since 1985 the number has increased dramatically. According to the author, this phenomenon is attributed to the shifting balance between negative factors—like a reluctance to go public with a lawsuit and the problem of finding a lawyer willing to take a case having no visible permanent injury or prospect of a six figure jury verdict—against the attraction of suing members of a profession associated with uncertain results, hefty fees and the release of repressed hostility (pp. 1-2).

Author James Kelley's intent is to write for the general reader interested in psychiatrists and patients. Hence this quite readable volume is neither a traditional legal casebook nor a collection of social science case studies, though it is closer to the latter. The operative word in the book's subtitle seems to be "stories"—stories based largely on court testimony, psychiatric records and interviews. Although Kelley asked several psychiatrists to read his manuscript to eliminate biased statements about their discipline, he has not hesitated at times to be quite judgmental about jury verdicts and court proceedings since he has a law degree.

This is explicitly not a how-to book. Yet Kelley does delineate five elements which plaintiff must prove to succeed in a malpractice lawsuit (p. 11):

- The existence—subject to a few major exceptions—of a psychiatrist-patient relationship between defendant and plaintiff (or plaintiff's family or victim);
- The standard of care applicable to diagnosis and treatment;
- Psychiatrist's breach of that standard of care;
- Proximate cause or a close cause-and-effect relationship between breach of the standard of care and the injuries for which one sues; and
- The monetary value of those injuries: medical costs, lost wages, pain and suffering, need for future care, or survivors' loss in cases of suicide.

Also involved are some important doctrines: the respectable minority of psychiatric opinion; duty to warn of threats despite the duty of confidentiality; informed consent; and the statute of limitations—often three years unless the discovery rule exception applies. With this brief explanation of malpractice law in chapter two, the lay reader should be able to follow the cases, trials and outcomes.

The number and nature of lawsuits against psychiatrists can be infinite. For example, one recent incident involved an alleged embezzlement of over $10 million by psychiatrist-professors retained to test psychotropic drugs for pharmaceutical companies. Since not all conceivable cases can be covered in a slim book, the author has chosen to concentrate on four areas: the psychiatrist's sexual misconduct, the patient's violence against others, standards of psychiatric care and psychiatric treatment terminating in suicide. The contrasting cases in each section are followed by a brief legal-psychiatric analysis by the author. Even for the lay reader it is eminently readable.

Throughout the psychiatric records and the analysis of jury verdicts, there is much stress on the importance of the extent of insurance coverage and managed care to the psychiatrists' choice of options, but this is not as central to the theme of this book as one might have expected. Sex distinctions are also underplayed although clearly female patients are more likely to be involved in sexual misconduct cases and, as Kelley notes, male patients are more likely to be successful in their suicide attempts since they use guns, as evidenced by the cases in his book.

Some of these stories conceal the identity of the patient to protect living relatives who probably were injured themselves. Others have attracted national publicity on account of the parties involved or landmark rulings of the court. Even Kelley appears to find some of the court decisions unexpected. He does not fail to cover the fre-

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quent "battle of the psychiatrists" in their courtroom testimorny even when the losing one is cited throughout the book or served as a consultant. It clearly is not an exact or predictable science when malpractice comes to trial.

In his insightful "Afterword," Kelley compares such trials to a "crap shoot." Nevertheless, he believes patients need to know their rights just as psychiatrists should be forewarned of the malpractice potential, though it tends to cause them to "practice defensively" in keeping records and hospitalizing patients. Kelley is unexpectedly opposed to arbitration since it too often just precedes the trial instead of replacing it, thereby proving the traditional arguments for alternative dispute resolution—cost or speed—inapplicable. He argues that the constitutional right to a trial will prevail in this field and has faith in the ability of jurors to resolve even these complex cases. Of course, the judge and the appellate court may trim or reverse unreasonable verdicts (pp. 207-11).

Members of the legal profession can enjoy this readable non-fiction book. ✱

Gail McKnight Beckman, who says, "I've never been to a psychiatrist," is a past president of NAWL®.

RULES OF THE ROAD FOR THE INFORMATION SUPERHIGHWAY: ELECTRONIC COMMUNICATIONS AND THE LAW

by Legal Research Network, Inc.
MCI Communication Corporation
Yochai Benkler

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For information: call 800/778-8090 ext. 75094

Reviewed by Susan E. Maloney

Computer technology has made incredible progress in the past half century. In 1945, there were no stored-program computers. Today, a few thousand dollars can buy a personal computer that is faster, has more main memory, and more disk storage than a $1 million computer bought in 1965. These improvements have come both from advances in the technology used to build computers and from innovation in computer design. Digital information technology and electronic communication continue to enter every individual's daily life.

Digital information is more malleable than information in any form previously known to us, except oral communications. It is mutable, and can be represented in writing, sound or color. It also allows us to communicate over distances and speeds of which we could only dream of not too many years ago. This new mode of communication—its malleability, transmissibility, networking capacity and processibility—affect our lives in many surprising ways. So, this ever-evolving technology raises many new legal questions. This book surveys the legal issues and concerns that have been raised thus far as a result of the introduction of electronic communications into our commercial, personal and political lives.

The section of the book on electronic mail (e-mail) interested me very much as someone who has used e-mail for years. For someone like myself, e-mail has come to supplement not only internal memos, but also telephone conversations, office-cooler chats and hallway conversations. Employees are using e-mail for everything from work-related communications to office gossip, from "flaming" the boss to organizing office parties. A variety of attributes of e-mail led employees to consider e-mail messages very much their own private communications. The need for passwords; the person-to-person addressing of mail; the use of the terminology "mail" in e-mail, which refers to the most confidential form of communication delivered by the postal service; the ability to "delete" messages after reading them—all combined to produce the effect of private communications generally under the control of the communicating parties. Many people have come to learn the hard way, however, that e-mail is anything but private and in some cases their messages might belong to their employer.

Many users like myself are connected to a Local Area Network (LAN). LAN e-mail is an open book to the systems administrator, whether or not the users conscientiously delete the messages after they read them or not. LAN e-mail is stored on the computer that runs the LAN, and from there messages are retrieved by the addressees. But parties to a communication cannot block the systems operator (sysop) from accessing their e-mail. It is up to the sysop to design procedures that ensure con-

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Rules of the Road continued

fidentiality and privacy, or to maintain a review backup to monitor use of the system. As the book points out, in many cases employers reviewed and monitored e-mail much as they reviewed and monitored all employee activity and use of corporate tools.

The inevitable clash between privacy expectations of employees, which were technologically baseless, and the monitoring practices of employers—who knew of the privacy expectations and never bothered to dispel them—produced a number of lawsuits. Some of these cases were settled. But none have yet produced significant law that can provide effective guidance as to the degree to which employers can monitor, or employees can be free of monitoring.

No comprehensive national law currently provides a framework within which to resolve disputes over employee privacy in the workplace. Disputes over e-mail privacy are currently subject to a variety of federal and state laws that together comprise the legal framework governing employees' rights to privacy with respect to electronic communications in the workplace. Had it become law, the "Privacy for Consumers and Workers Act" would have provided more direct authority to limit the monitoring of personal data in e-mail. But it would by no means have resolved all the issues relating to e-mail privacy. In the absence of a definitive solution in federal employment law, employees and employers will likely find themselves litigating the effects of other sources of law on the question of who controls the access to e-mail messages sent by employees over an employer's system. Several sections of the book discuss different laws that have been cited in e-mail litigation.

The authors have arranged this book into eight parts. Part I defines the scope of the book and explains the nature of digital technology and the various models of digital communication. Here, some of the problems associated with binary files, file transfer protocol (FTP), the world wide web (WWW) and e-mail are introduced. Electronic data interchange (EDI) and electronic funds transfers (EFT) between banks are mentioned. Also discussed is how this new technology warrants a change in legal inquiry.

Part II deals with the law of commercial transactions between users of e-mail and EDI. It discusses digital contracts: formation, authentication, interpretation of conflicting provisions of offers and acceptances, and issues of agency raised by transactions between computers without human intervention. A closer look at EFTs and financial EDI can help you determine your rights in this area, and is particularly useful if your paycheck does not get deposited on time.

Part III explores the law of public networks. Part IV deals with the problems raised by e-mail in the workplace, including the use of computers to monitor productivity, the monitoring of employee e-mail, and the effect of the "Electronic Communications Privacy Act" as it relates to such activities. Part IV also looks at the liability of employers for injurious messages sent by company e-mail, such as sexual harassment, and the use of e-mail to conduct labor organization activities. Part V discusses the liability of injury caused to others, such as defamation and invasion of privacy. Part VI discusses electronic filing with courts and agencies, discovery of digital records and e-mail messages, and discovery of digital data stored with third parties. This part also discusses choice of law in cases where some or all of the disputed events occurred in cyberspace.

Part VII addresses copyright law issues. Part VIII deals with the government's obligation to store and maintain information, and to make it accessible to citizens, corporations and governmental agencies.

This book is primarily intended for the attorney and for the consumer of legal services. If you are an attorney, this book offers tools with which to approach a problem pertaining to digital communications. If you are a consumer, this book will help you to identify areas of concern and help you to determine how and for what purposes you might benefit from legal analysis of your particular situation. In either case, this book is an excellent research tool in the area of electronic communications. At a broader level, this book is intended for any reader interested in the law and politics of the fast-growing world of cyberspace. ✱

NAWL® member Susan Maloney is an electrical engineer at the Naval Undersea Warfare Center, Newport, R.I. She is also a sole practitioner in New Bedford, Mass., concentrating on intellectual property and family law. She is currently helping to create the Association's home page.

IN MEMORIAM

Portia Derry Brown has notified us of her mother's death, **Laura E. Miller Derry** of Louisville, April 15, 1993. She had been a Life Member of NAWL®.

In May the Association received notice of the death of **Deborah Greenberg Feldman** of Quincy, Mass., and more recently, Delray Beach, Fla. She had been a Special Member since 1984

Dorothy Frooks, a Special Member of NAWL® since 1979, died April 13, 1997, in New York. She was featured in the Association's ***75 Year History*** book, page 452.

THE NINA FISCHMAN MYSTERIES

"Practicing law is like being caught in the middle of a nightmare. You want to wake up but you need the sleep."
—Personal Effects

Reviewed by Valerie Diamond

Manhattan practicing attorney/author Marissa Piesman transports us to the Big Apple in the '90s to meet the attorney heroine of her Nina Fischman Mysteries.

Nina Fischman is a New York woman—not the glossy magazine-ad kind, but a pear-shaped public interest lawyer entering her third decade of dating. A native New Yorker, Nina is an expert on the subway system and kills cockroaches with her bare hands. Even her work wardrobe comes in colors like "greige"—the drab New York shade reminiscent of dirty snow and old subway tokens.

Nina, a Chinese food addict, views dieting as a way of life, favors big hair to balance her hips and resents it when people tell her she has "such a pretty face." As the series opens Nina is still single at 35 and beginning to worry about it. She works hard for her elderly indigent clients at New York Legal Services Project for Seniors, yet never really loving the law. She's a regular at aerobics classes, but knows she will never have thin thighs.

Nina is a secular Jew, but wonders if she isn't missing something as she watches her sister light the *Shabbas* candles on Friday nights. Her sister, Laura, is a settled young matron with a doctor-husband, children, town home and beach cottage, while Nina still feels trapped in late adolescence. When she looks back at the tie-dyed days of her rebellious youth, she can scarcely believe she has turned into a sedate, suited lawyer with little pearls in her ears.

Nina's career is on the slow track. Though articulate and argumentative, she dreads each court appearance, and is slowly burning out scrambling to satisfy the perpetual needs of the aging urban poor. She would like a new job, but is embarrassed to show her résumé, with all the years since her law school graduation spent in the same unsatisfying position.

In fast-paced Manhattan, time is Nina's scarcest commodity. She rarely has the leisure to pick up a novel, and does her housecleaning between the buzzing of the intercom and the knock on the door of her fourth-floor walk-up. Her anxiety about returning them on time prevents Nina from renting a video or borrowing a library book, and the skirt of her good suit is still turned up with tape.

"Interesting" is Nina's favorite word. She chooses clothing, food, cases—even men—simply because they seem interesting. Nina's comical taste in men includes a commitment-phobic minister's son from Milwaukee, her marijuana-smoking moot court partner, the young lawyer who announces his engagement (to someone else) on their fourth date, and the charming architect who pleads guilty to voluntary manslaughter. When Nina finally does meet an eligible man, he promptly becomes a murder suspect and takes a job that threatens to whisk him away to the West Coast.

"Unorthodox Practices" (1989) opens the Nina Fischman series with a wonderful portrayal of Nina's relationship with her mother, Ida, an indomitable retired teacher who owns her own co-op and sees every new play with her senior citizen's discount. When two healthy old ladies in Ida's neighborhood drop dead of heart attacks, Ida and Nina suspect foul play and go into action. Posing as potential co-op buyers, they search the apartments of the dead women for clues. What they find takes them to the office of the District Attorney, an Orthodox Jew who makes an unusual play for Nina. Nina's nerve-wracking days in Housing Court and her growing discontent over her familial role as the still-single older sister are leavened with Piesman's unique brand of tongue-in-cheek humor.

"Personal Effects" (1991) mingles tragedy and comedy as Nina's oldest friend, Susan, is strangled while on a personals-ad date. Nina teams up with the police to act as a decoy, trolling the personals for Susan's killer. As she risks her life, Nina provides a hilarious commentary on the agony and the ecstacy of dating.

Acting as executor of Ida's best friend's will leads Nina to uncover a murder plot in "Heading Uptown" (1993). The decedent's son and would-be heir died when his car went off a lonely road late one night, and Nina can't resist when his daughter, a precocious and lonely teen, asks for her help in proving that the fatal car wreck was no accident. The investigation also allows Nina to rekindle the flame of an old law-school romance.

In "Close Quarters" (1994) Nina finally gets out of the

The Nina Fischman Series

"Unorthodox Practices." New York, NY: Pocket Books, Simon & Schuster, Inc., 1989.
"Personal Effects." New York, NY: Pocket Books, Simon & Schuster, Inc., 1991.
"Heading Uptown." New York, NY: Dellacorte Press, 1993.
"Close Quarters." New York, NY: Dellacorte Press, 1994.
"Alternate Sides." New York, NY: Dellacorte Press, 1995.
"Survival Instincts." New York, NY: Dellacorte Press, 1997.

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Mysteries continued

city and takes a vacation. Unfortunately, as soon as she reaches Fire Island, Nina remembers that she hates sunburn, wearing shorts, and all that a beach vacation entails. Things pick up when she meets Jonathan, who seems like a male version of Nina herself. But when Barry, the sleazy seaside Don Juan, is found dead in his bed, Jonathan becomes a prime suspect. Is he her soulmate or a homicidal maniac? Nina is highly motivated to do her best sleuthing in this summer romance with a twist.

"Alternate Sides" (1995) finds Nina and Jonathan making tentative plans for the future. Jonathan wants Nina to share his Upper East Side apartment, but Nina panics over losing the freedom and privacy of the single lifestyle. When Jonathan reveals that he may be transferred to Los Angeles, Nina must reassess her priorities. Meanwhile, mild-mannered Jonathan has drawn the eye of the police once again. This time prostitutes, pimps and postal workers lead Nina, Jonathan and Ida through a maze of mystery when the doorman is gunned down while parking Jonathan's car.

A surprise is in store with Piesman's newest, "Survival Instincts" (1997), when Nina becomes a career leaver. After jettisoning her job, apartment and health club membership to accompany Jonathan to California, Nina, unable to function so far from New York, flies home and moves in with her mother. Together, Nina and Ida take on the project of exonerating Laura's husband, now a suspect in the death of a business partner. Despite Ida's warnings that adult life is not supposed to be an extended college spring break, Nina finds herself enjoying the novelty of free time. In this latest episode, Nina Fischman discovers that being unemployed presents a welcome opportunity to reinvent herself.

Nina is a funny, likeable, contemporary woman—someone you would like to have for a friend except that she has already cultivated more friends than she can possibly keep up with. Her ambivalence about the demands of career versus family, of being smart versus being pretty strikes a familiar chord. Nina is a woman who wants to be known for her ready wit, yet hesitates to sit down in shorts for fear of thigh-spread.

Author Marissa Piesman's insights into today's urban culture are timely and germane, even if you have never lived in New York. The mysteries are fast-moving page-turners wonderfully evocative of New York life in the Jewish community, yet accessible to anyone who enjoys a sophisticated mystery and a good laugh. ✱

Valerie Diamond is the Collection Development/Reference Librarian at the University of Maryland School of Law, Thurgood Marshall Law Library, Baltimore. Her review of Judith Van Gieson's Neil Hamel Mystery Series appeared in the January 1997 issue (Vol. 83, No. 1).

NEWS ABOUT MEMBERS

Emily S. Barbour has joined one of the largest law firms in Dallas, Gardere & Wynne, as senior attorney in the communications practice group. She will continue to focus her practice on international and domestic transactions involving telecommunications. Her address is Gardere & Wynne: 1601 Elm St., Suite 3000, Dallas, TX 75201. Telephone 214/999-4854; fax 214/999-4667.

NAWL® President **Sally Lee Foley** has joined the firm of Plunkett & Cooney, 505 N. Woodward, Suite 3000, Bloomfield Hills, MI 48304. Telephone 248/901-4000; fax 248/901-4040.

Karen M. Fingar Kahane, the 1995 NAWL® Outstanding Law Student for the University of Florida, has joined the firm of Steel Hector & Davis, LLP, 777 S. Flagler Dr., 1900 Phillips Point W., West Palm Beach, FL 33401. Telephone 561/650-7254; fax 561/655-1509.

Martha A. Mills has joined the firm of Bellows & Bellows, 79 W. Monroe, Suite 800, Chicago, IL 60603. Telephone 312/332-3340; fax 312/332-1190.

The *Women Lawyers of Sacramento* established a scholarship in honor of founding WLS member and NAWL® past president **Virginia Mueller**. The scholarship is targeted for grants to graduating law students preparing for bar exams. Virginia Mueller will be attending the International Association of Lawyers Congress in Philadelphia Sept. 3-7 and the International Federation of Women in Legal Careers' 16th Congress in Naples, Italy, Sept. 17-21. *(For more information about these international conferences, call NAWL® Executive Director Peggy Golden, 312/988-6186.)*

Chicago attorney **Beverly Pekala** has been installed as corresponding secretary for the *Women's Bar Association of Illinois*.Her latest book, ***Don't Settle for Less: A Women's Guide to Getting a Fair Divorce and Custody Settlement*** (Doubleday) is now available in paperback. The book provides step-by-step counsel for the woman going through a divorce, custody battle, or paternity case. Additionally, there are chapters on prenuptial agreements, post-decree issues and cohabitation. A bestseller since its publication, ***Don't Settle for Less*** is available through local bookstores or The Law Offices of Beverly A. Pekala, P.C., telephone 312/251-0737.

Teresa L. Sittenauer of Polsinelli, White, Vardeman & Shalton, P.C., has a new address: One AmVestors Place, 555 Kansas Avenue, Suite 301, Topeka, KS 66603. Telephone 913/233-1446; fax 913/233-1939.

NAWL® President-Elect **Janice L. Sperow** has become a partner in the firm of Ruiz & Sperow, LLP (formerly Ruiz & Schapiro). The San Francisco firm continues to specialize in education, employment and labor law. Telephone 415/974-1101; fax 415/974-1113. ✱

Commentary

By Peggy L. Golden, NAWL® Executive Director

History has been on my mind lately

Gary Trudeau's *Doonesbury* lampooning of Bill Clinton not withstanding, I suspect we all seek our place in history: to be more than a photo in the family album, initials on an overpass or a name on a tombstone. Whether as a footnote, a byline, a captioned photograph, part of a published list if not actually published, we leave proof of our existence. Unlike fossilized dinosaur tracks, there is intention, although our traces may not tell much more than a bit of bone.

For women, history can be a particularly painful subject. Too often, when books mention us at all, it's as the mistress of the artist or the hostess of the salon, not as the painter of the masterpiece or the architect of the intellectual movement. The legal profession is no different. As NAWL® prepares for the next millennium and plans for its centennial celebration in two years, we try to capture history—the history of women who studied, practiced, or impacted the law, and consequently, impacted society.

On June 15, 1869, Arabella Babb Mansfield (1846-1911) of Iowa became the first American woman admitted to a state bar. In 1969, the National Association of Women Lawyers®, in concert with other women's organizations, marked the centennial of Mrs. Mansfield's achievement by declaring a "Centennial Year" to focus public attention on the contribution of women to American society. They were aware that many of the goals of the dedicated women who had fought for women's rights in the last half of the 19th century were still not fulfilled. In celebrating "Belle" Babb Mansfield's success, they chose to celebrate not only the valuable contributions of women lawyers, but those of all women. This same sensitivity marked the decision to name our association's most prestigious award for Arabella Babb Mansfield in 1996, incorporating recognition of contribution to life as well as to the profession.

Belle was born and educated in Iowa, attending Iowa Wesleyan University in Mount Pleasant during the Civil War and graduating valedictorian of her class of three in 1866. She joined her brother in studying law at the Mount Pleasant office of H. & R. Ambler, passing the Iowa Bar Examinations in June 1869. An Iowa court rendered the opinion that "the affirmative declaration that male persons may be admitted is not implied denial to the right of females." She subsequently received a Bachelor of Laws degree from Iowa Wesleyan in June 1872, continuing to take courses in the law, as well as in art history, while visiting London and Paris.

In her day, "Belle Mansfield Esq." was a well-known speaker in Iowa, discoursing on topics from woman suffrage to principles of government and the art of various European cities. She was a journalist, a lecturer, a world traveler, an educational leader, and a mentor to law students. A self-sufficient lady, from 1883 she worked to support herself and to care for her husband's extensive medical expenses until his death in 1894. Although circumstances did not provide her the financial security to pursue the practice of law, she was admitted as an honorary member of the all-male law student fraternity at DePauw, Delta Chi, in 1893. Associated with both Iowa Wesleyan and DePauw University, at different times she served as a professor of English Literature, a professor of history, a mathematics teacher, dean of the School of Art and the School of Music simultaneously (at DePauw), taught free-hand art classes, cataloged a university library, and played the viola in a university orchestra. This well-rounded woman was once described in her hometown newspaper, the *Mount Pleasant Journal*, as "eager as ever to add to the sum of human happiness in social as well as scholastic ways."

Her biographer, Louis A. Haselmayer, observed, "There was a quiet determination and dedication in every event of the life of Belle A. Mansfield which led her to study law and be admitted to the Bar, although her later career was conditioned by the events of her family obligations. There is abundant evidence that her scholarly interest in the law was influential upon others.... Her legal experience was of untold value in her successful organizational work, administrative tasks and in the challenge of her teaching and lecturing. It made its contribution, even though it was not directly related to the law office or the court room."

Martha Barnett of Holland & Knight, Tallahassee, Fla., was the first recipient of NAWL's Arabella Babb Mansfield Award. Most of you know Martha as the first woman to chair the ABA House of Delegates. You may not know that Martha, with Stephen Hanlon from Holland & Knight, proposed the Florida bill approved by the state legislature in 1994 compensating the survivors of the infamous Rosewood mobbing and lynchings.

The Hon. Bernice B. Donald will be the second recipient of the award, during the Celebration of Diversity luncheon at our Annual Meeting Aug. 2 in San Francisco. Judge Donald was the first African-American female judge elected in Tennessee, the first African-American female bankruptcy judge appointed in the United States, and the first African-American female district court judge appointed in Tennessee. She has also served as president of the National Association of Women Judges, chair of the National Project on Domestic Violence, and currently chairs the ABA Commission on Opportunities for Minorities in the Profession.

Martha Barnett and the Hon. Bernice Donald are becoming history.

Maybe it's time Arabella Babb Mansfield was better noted in history as well. Her name in the National Women's Hall of Fame might be nice, joining Ernestine Louise Potowski Rose, Myra Bradwell and Margaret Brent. What do you think? ✱

Mrs. Mansfield's history is recounted in "Belle A. Mansfield," by Louis A. Haselmayer, Ph.D., Women Lawyers Journal®, *Vol. 55, No. 2, Spring 1969, pp. 46-54. Her picture appears on page 413 of the "75 Year History" of the Association (1975), edited and compiled by Mary H. Zimmerman and now out of print.*

ROSTER OF PRIVATE PRACTITIONERS*

*NAWL® members in private practice who have paid to be in this reference listing

Areas of Practice—Abbreviation Key

Ad	Administrative	Cor	Cooperatives & Condominiums	GC	Government Contracts	N	Negligence
Adm	Admiralty	Cr	Criminal	Gu	Guardianship	NP	Nonprofit Organizations
App	Appellate Appeals	DR	Alternate Dispute Resolution; Arbitration	H	Health	PI	Personal Injury
At	Antitrust	De	Defense	I	Immigration	Pr	Product Liability
AttMa	Attorney Malpractice	Dis	Discrimination—age, sex, etc.	Ins	Insurance	Pro	Probate
Ba	Banks & Banking	Disc	Attorney Discipline	Int	International & Customs	Pub	Public Interest
Bd	Bonds, Municipal	Ed	Education	IP	Intellectual Property:C(Copyright); P(Patents); TM(Trademark); TS(Trade Secrets)	RE	Real Estate; Real Property
Bky	Bankruptcy & Creditors' Rights	El	Elder Law			RM	Risk Management
Bu	Business	Em	Employment; EEO; ERISA	La	Labor	Sec	Securities
CA	Class Actions	Ent	Entertainment	Ld	Landlord, Tenant	Sex	Sexual Harassment; Assault
Ch	Children; Custody; Adoptions	Env	Environmental	Le	Legal Aid, Poverty	SS	Social Security and Disability
Ci	Civil; Civil Rights	Eth	Ethics	Leg	Legislation	T	Tort
C	Collections	F	Federal Courts	Li	Litigation	TA	Trade Associations
Co	Corporations & Partnerships	Fi	Finance; Financial Planning	LU	Land Use	Tx	Taxation
Com	Commercial	FL	Family Law including Matrimony, Divorce & Domestic Violence	Mar	Maritime	U	Utilities—Oil & Gas
Comp	Computer	Fo	Foreclosure, Creditors' Rights	M/E	Media & Entertainment	W	Wills, Estates & Trusts
Con	Condemnation and Municipalities	Fr	Franchising; Distribution	Me	Mediator	WC	White Collar
Cons	Constitutional	GP	General Practice	MeMa	Medical Malpractice	WD	Wrongful Death
Cs	Consumer			MeN	Medical Negligence	Wo	Workers' Compensation
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