

Spring 2012

Corporate and Association Counsel Division
Federal Career Service Division
Senior Lawyers Division
Younger Lawyers Division

Divisions Digest

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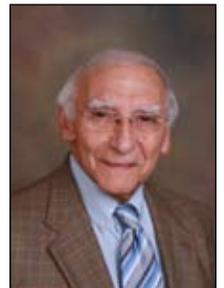
Senior Lawyers Division—Chair's Message by Robert Rappel

I am honored and privileged to again assume the responsibilities as chair of the Senior Lawyers Division of the Federal Bar Association. The Senior Lawyers Division Bylaws currently mandates and the Senior Lawyers Division currently serves four distinct purposes: (i) to represent the interests of the membership of the Federal Bar Association who are 55 years of age or older; (ii) to stimulate the interest of "other" senior members of the Federal Bar Association who are not currently members in the activities of the Federal Bar Association and specifically the Senior Lawyers Division; (iii) to conduct programs of interest and value to the other senior members of the Federal Bar Association; and (iv) to assist the Federal Bar Association and its Chapters, Divisions and Sections in the coordination of activities that are of interest to senior members of the Federal Bar Association. This year, as in the past, we will be seeking members in the Senior Lawyers Division who are willing to "step-up" to the challenge and accepting a leadership role in the Senior Lawyers Division as either an officer and/or committee chairman. Specifically, we are soliciting Senior Lawyers Division members who are interested in the following: chair-elect, secretary, treasurer, vice chair of Social Security, and vice chair of Legislation.

The time has come to bring members of the Senior Lawyers Division in the governmental and private sector together to discuss and address the legal issues that currently affects seniors and those that will affect our daily work lives as senior attorneys in the

future. The way the Senior Lawyers Division can best affect a change and serve its current members and attract new members is to concentrate on and sponsor a "meet and greet" business meeting at the Annual Meeting and Convention of the Federal Bar Association to be held in San Diego, Calif., on Sept. 19–22, 2012, to reorganize the Senior Lawyers Division. So, I reach out to all members of the Federal Bar Association who are eligible, especially government attorneys, to join with us and actively participate in the Senior Lawyers Division of the Federal Bar Association.

In closing, I thank all of you for your continued membership and interest in the Senior Lawyers Division. If you are not a present member of the Senior Lawyers Division, I strongly encourage becoming a member. We are looking to improve the Senior Lawyers Division and its delivery of services to you as a member. If you wish to be considered for any of the above positions, you may contact me directly at (772) 778-8885 or electronically at dr@rappelhealthlaw.com.



Senior Lawyers Division—Editor's Message

by Edward A. Charron

Having served as your editor of the *FBA Senior Lawyer* for several years, all the while cajoling others in our midst to please submit ANYthing in writing to aid in the creation of our newsletter, what follows is mostly autobiographical. It is a retirement saga that may or may not be of interest or inspirational.

A legal career that was mainly civil rights and labor relations problems for a Southern-based railroad had its share of challenges. Too often a win or a reasonable settlement was hard-earned. Class action suits and a sometimes oppressive government clouded the scene. Railroad mergers and the union crossfire were added aging influences. Early retirement beckoned and at age 58 (having had gainful employment since age 14) home to a welcoming wife. What to do?

It might be interjected here that at lunch the other

day with an also retired lawyer, he described a typical day in decidedly boring terms. The preferred answer for your editor was the acceptance of this task, among others. To continue on various boards (a large credit union, Friends of the Library, Nature Conservancy local committee, railroad retirees' projects—plus church activities) was logical. Twenty-one years later: while writing authoritative legal treatises is beyond my present scope, there is a tinge of pride when this editor's effort is appreciated. It says: keep your hand in! Get involved! Retirement offers a great volunteer opportunity. A busy day is a day to treasure.

Lastly, once again, one more nagging request: serve your seniors in the FBA with your article, suggestion, feedback, whatever. Let this be your New Year's resolution to your profession!

Federal Career Service Division—Chair's Message

by Mark A. Flessner

Our biggest event continues to be the Washington, D.C./Baltimore Public Service Career Fair, which was held on Friday, Jan. 27, 2012, from 9:00 a.m.–5:00 p.m. at George Mason University School of Law. For the 10th year running, the Career Fair drew in a wide pool of talented law students who have found a calling in public service and brought them together with scores of employers to meet and discuss public-sector and public-interest opportunities in the Washington, D.C., area.

The Career Fair was hosted by seven area law schools and the Federal Bar Association. Employers had the opportunity to hold formal rounds of 20-minute interviews, conduct informal table-talk sessions, or simply collect resumes to review on their own time.

You can find more information about participating in the next Career Fair at the FBA's website, www.fedbar.org, or if you have additional questions, you can contact the event coordinators, Christina Jackson of American University Washington College of Law and Jennifer Pollard of Maryland University School of Law, who may be

reached at cjackson@wcl.american.edu and jpollard@law.maryland.edu, respectively.

Lastly, there are many tasks for a division, and there is a place for everyone. Please consider helping us become more active through the many leadership opportunities within our division, including planning CLE events, reaching out to our membership, or providing input to our legislative agenda. FCSD is not limited to Washington-area members. We would love to involve members from around the country. We will meet via teleconferences, so consider spending your lunchtime or late afternoon with us.

Please respond to FBA Manager of Sections and Divisions Sherwin Valerio at svalerio@fedbar.org if you are interested in becoming more active in our division.

Mark Flessner is a partner at SNR Denton LLP in Chicago, Ill.



Younger Lawyers Division—Editor's Message

by Glen R. McMurry

On behalf of the Younger Lawyers Division of the Federal Bar Association, I hope each of you and your families enjoyed a very happy holiday season.

2011 was a very successful year for the Younger Lawyers Division. Last March, the YLD hosted a national moot court competition with over 25 competing teams. In May, we also organized and executed our annual U.S. Supreme Court Admissions Ceremony and this summer we presented our Summer Law Clerk program (including over 25 agencies and 200 law interns). 2012 promises to be an even better year for our division.

Included in this month's issue is an excellent guide

for attorneys entering the exciting world of law firm practice. In the following months, we will also offer tips for those new attorneys entering public sector practice.

Additionally, for those interested in publication themselves, *The Federal Lawyer* magazine is actively seeking volunteers to author judicial profiles of our many district court and magistrate judges. If you are interested in profiling a member of our federal bench, please contact tfl@fedbar.org.



Multijurisdictional Practice in the Federal Court System

by John Okray

When attorneys discuss multijurisdictional practice it is usually in the context of attorney admission to state bars. However, admission practices to the approximately 200 federal courts may be equally important when your practice involves federal law. It should be noted that courts have held that under the Supremacy Clause, in a conflict between federal court and state rules relating to attorneys practicing federal law, the federal court rules take precedent. This article provides a high level summary of admission practices in the various types of federal courts.

U.S. District Courts

Like the state court system, admission practices to U.S. district courts are inconsistent among and even within states. Many U.S. district courts require membership in good standing with the state bar in the state or territory where it is located. Several others allow for admission based on being a member in good standing of the highest court of any state, the District of Columbia or another federal court. Finally, some courts allow for reciprocity based on admission to another U.S. district court, sometimes for U.S. district courts within the same state and sometimes offered to U.S. district courts in a few other select states. U.S. district courts often require a member of the same court to sponsor an applicant, they always require an oath (sometimes in writing, sometimes in person), and the admission fees generally range from \$150 to \$200. A handful of U.S. district courts actually impose their own examinations for admission or legal education requirements. Pro hac vice admission practices vary widely, but they often involve the payment of a fee and/or having a member sponsor.

U.S. Bankruptcy Courts & Bankruptcy Appellate Panels

In most cases, an attorney admitted to a specific U.S. district court may practice before its corresponding U.S. bankruptcy court. Some of the regional federal judicial circuits have also established bankruptcy appellate panels to hear appeals from bankruptcy courts located in the circuit. Attorneys may typically practice before a bankruptcy appellate panel if they are a member in good standing of the circuit court, a U.S. district court in the circuit, or a U.S. bankruptcy court in the case or proceeding on appeal. It should be noted that some state bars have sought to discipline attorneys who are members of the U.S. bankruptcy court they are practicing in but who are not also admitted to the state bar where that court sits.

Federal Circuit Courts of Appeals

The federal circuit courts of appeals are the bright spot in the U.S. federal court system. Under Rule 46(a)

of the Federal Rules of Appellate Procedure, an attorney is “eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands and the Virgin Islands).” Upon taking the prescribed oath and payment of a fee typically between \$150 and \$200, an attorney may generally be admitted to the bar of that court—although some courts also require the applicant have a sponsor who is a member of that court.

Federal Subject-Matter Specific Courts

A number of federal subject-matter specific courts have similar admission criteria as the federal circuit courts of appeals, such as the U.S. Court of Federal Claims, U.S. Court of International Trade, U.S. Court of Appeals for Veterans Claims, and the U.S. Tax Court. However, the U.S. Court of Appeals for Veterans Claims and the U.S. Tax Court also allow certain nonattorneys to practice where they have an eligible sponsor or pass the prescribed examination, respectively. Practice before the Foreign Intelligence Surveillance Court, Foreign Intelligence Surveillance Court of Review, and Alien Terrorist Removal Court is administered by the attorney general and the judges of those courts.

Military Courts

The U.S. Court of Appeals for the Armed Forces and the courts of criminal appeals for the Air Force and Navy-Marine Corp generally allow for admission based on membership in another state bar or federal court. The Army Court of Criminal Appeals requires an examination and the Coast Guard Court of Criminal Appeals allows civilians to be appointed pro hac vice if the defendant sought to add civilian counsel to her/his defense team.

Supreme Court of the United States

Admission to the Supreme Court of the United States requires membership in any U.S. state, commonwealth, territory, possession or District of Columbia in good standing for at least 3 years before application. A certificate of good standing, personal statement, two sponsors, taking an oath, and payment of a \$200 fee are required. An attorney qualified to practice in the courts of a foreign state may be permitted to argue pro hac vice.

Possible MJP Solutions

The inconsistent patchwork of admission practices

IRS Prepares for Increased Employment Tax Audits

by Vivian D. Hoard

According to the IRS 15 percent of employers misclassify 3.4 million workers as independent contractors costing employment tax losses of \$2.7 billion annually. Furthermore, independent contractors who do not receive a Form 1099 from their employer only report 29% of their income resulting in income tax losses for the IRS as well. The IRS aims to plug these tax loss holes soon. In 2010, the IRS began an employment tax compliance study as part of the National Research Program (NRP). As part of the study the IRS will initially audit 2,000 companies annually for three years and develop data that will assist the IRS in more cost effectively targeting employers who are not in compliance for future audits. The IRS has hired new agents to help with this enforcement initiative.

The IRS is not alone in targeting worker misclassification. The Department of Labor (DOL) has also ramped up enforcement. To prove their resolve the IRS and DOL have signed a memorandum of understanding to share information. The DOL will refer violators it catches to the IRS. The IRS cannot reciprocate due to IRC § 6103 making tax information confidential, but they hope to help the effort with training assistance to the DOL.

Worker classification is important for a myriad of tax and labor law reasons. Worker classification determines whether the worker is subject to the employment tax regime (FICA) or the self-employment tax regime (SECA). For employees, unreimbursed business expenses are subject to the 2 percent floor of IRC § 67, as well as the itemized deduction limit of IRC § 68. Employees are eligible for an employer's retirement plan and health insurance plan. A contractor can fund his own retirement plan and possibly save much more than under an employer plan provided he is properly classified as an independent contractor. Worker classification is important for labor law purposes as well. Employees are protected by the Fair Labor Standards Act (FLSA), Americans with Disabilities Act, and worker's compensation laws among others.

The stakes are high. Cascading tax penalties apply if a worker is misclassified as an independent contractor. Failure to file, deposit, and pay penalties can accrue along with interest on the tax and penalties. In addition, any responsible individuals within the employer could be held personally liable for the trust fund portion of the employment tax liability for failing to collect the tax and pay it over to the IRS.

No bright line test distinguishes an employee from an independent contractor. The answer turns on the facts. Even the Internal Revenue Code defers to case law by defining an employee as a common law employee under IRC §3121(d). Rev. Rul. 87-41 outlines a well known 20 factor common law facts and circumstances test with the right to control what shall be done and how it shall be done being the primary criteria in

determining worker classification. The financial risk of the worker is also an important factor.

For employers wanting to come clean the IRS has announced a Voluntary Worker Classification Settlement Program. If an employer meets the required criteria for acceptance into the program, then the cost of reclassifying the worker is payment of 10% of the employment tax liability on compensation paid to the worker for the most recent tax year. No interest or penalties will apply. To be accepted into the program the employer must have consistently treated the workers as nonemployees, filed all Forms 1099 for the previous three years, and not currently be under audit by the IRS, DOL, or any state agency concerning worker classification.

Those employers playing the employment tax audit lottery may still avoid cascading penalties under other mitigating provisions. Some employers may qualify for relief under Section 530 of the Revenue Act of 1978. To qualify for that relief all Forms 1099 must have been filed, the business must have consistently treated the worker and other similarly situated workers as independent contractors, and the business must have a reasonable basis for treating the workers as independent contractors. Reduced employment tax rates may apply in some circumstances. The Classification Settlement Program might shield other employers provided they have filed all Forms 1099. Interest free adjustments might also apply to misclassified workers.

If the employer does not meet any of the requirements for mitigation relief, then the regular three year audit cycle applies thus increasing the employer's risk. Corporate counsel should review worker classification issues with their clients now to protect them from the harsh consequences of a worker classification audit later.

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Tips for Success for All New Associates

by Laura A. Balson

You accepted an offer at a law firm, and you passed the bar—congratulations, you are now ready to enter the world of private practice. The bad news is that the first year of your career as a practicing attorney will undoubtedly be marked with apprehension and the sinking feeling that you do not know what you are doing. The good news is that there are several golden rules to practicing at a private law firm (regardless of where or how big it is) that you can learn to improve your chances of being successful as an associate. Here is a list, which is by no means exhaustive, but which will give you a good start:

- Always carry pad of paper and pen to meetings.
- Keep detailed notes of what you are told by attorneys and by clients (and add to your notes later if you cannot get it all down during the conversation).
- Always ask when a project is due or the date by which it is needed (ask of attorneys and clients).
- Especially in an economic recession, efficiency is very important to clients, so you need to gauge how much time is appropriate to spend on each project by asking the assigning attorney.
- Do not pretend to know something you don't, even if you feel like you should know it.
- It is ok to answer a question with "let me look into it and get right back to you." And if you are having trouble finding an answer, don't be afraid to go to someone slightly more senior than you for help.
- Read carefully and proofread everything you write, three times (at least).
- Excellent work is even more important than quick work, especially for new associates.
- Keep track of your time contemporaneously.
- Always bill all of the time you actually spend on a project and leave any reductions to the billing attorney.
- Make the descriptions of your time entries reflective of the cost to the client, and try to reflect the value that you added, not just that it came across your desk.
- Be respectful and professional to everyone, inside and outside the firm. Being kind is not the same as being weak.
- Think carefully about your position so that you can state it with confidence.
- Remember that clients need you to protect them but not condescend to them.
- Never yell at a staff member or client, no matter what they have done.
- Be meticulous about calendaring dates and deadlines.
- Make all cases your own, and if something comes up, assume you are covering it unless you are told otherwise.
- If you give a project to a partner for review or comments, it is still your responsibility to make sure the document is finished on time. You may need to remind the partner (repeatedly).
- Ask before you delegate a project to a junior associate, paralegal or secretary, and only do so for the client's benefit. It is still your responsibility to make sure the project is done timely, accurately and properly.
- Jump at every opportunity to work with someone new at the firm.
- Seek criticism of your work and don't personalize it. Criticism is the only way to improve your work product.



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across U.S. district courts could be easily resolved if Rule 46(a) of the Federal Rules of Appellate Procedure (discussed above) was adopted into the Federal Rules of Civil and Criminal Procedure. Alternatively, Congress could enact legislation under the Full Faith and Credit Clause, allowing a lawyer admitted in any state the right to practice law in any other state, in matters affecting interstate commerce or where the legal issues are predominately federal.

John Okray is the assistant general counsel of American Beacon Advisors Inc. and chair-elect of the FBA Corporate & Association Counsel Division. He is also the author of U.S. Federal Courts: Attorney Admis-

sion Requirements. He can be reached at john.okray@ambeacon.com.

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