Friendly Passages
Supporting Equal Access to Law in Florida
September/October 2013
A Publication of The Friends of the Rupert J. Smith Law Library of St. Lucie County Florida

The End of Summer

JUMPS FENCES. NOT HOOPS.

Trudy Innes Richardson
Litigator
Tallahassee, Florida

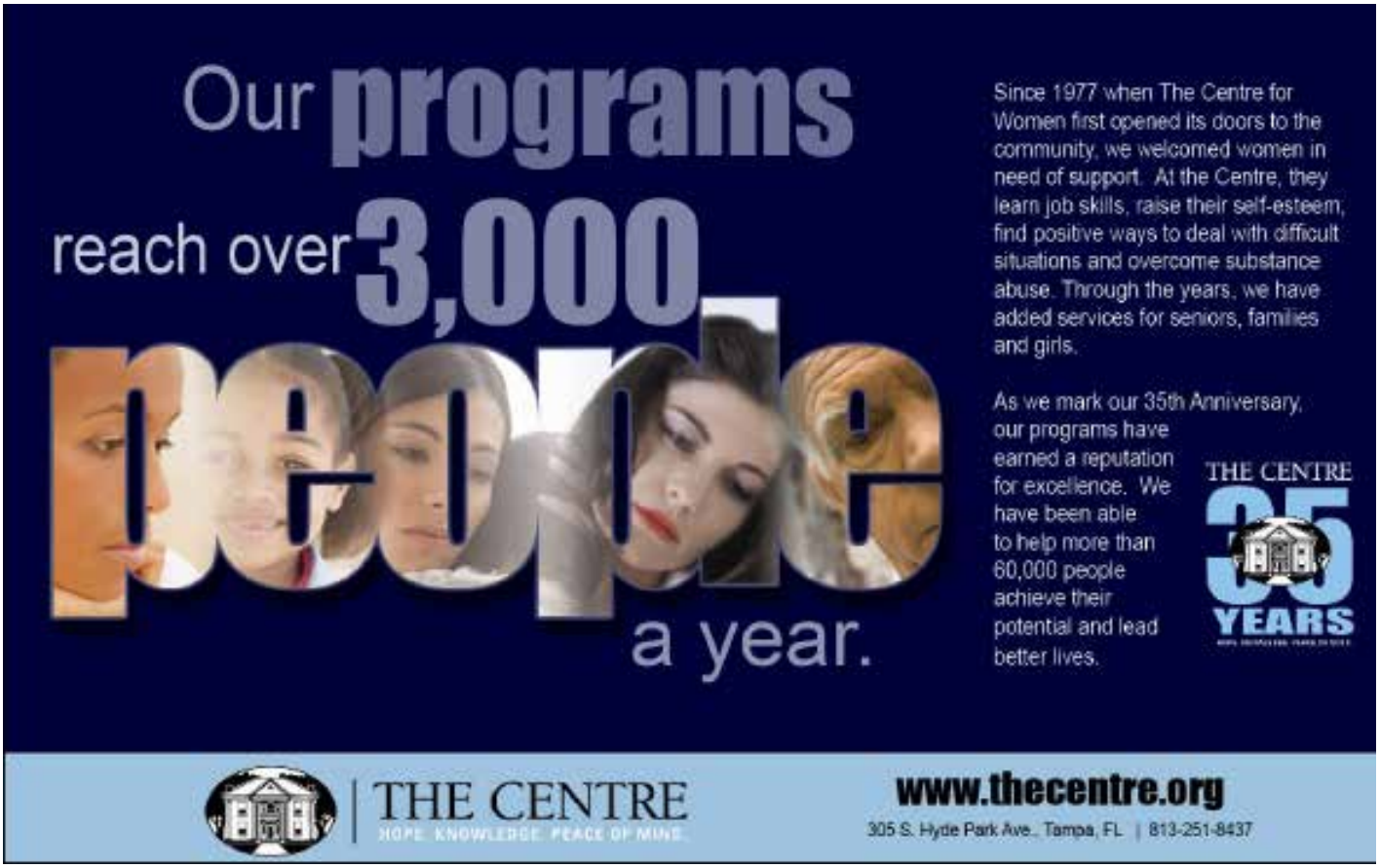
WestlawNext®

"WestlawNext® and the ability to cross-search, email, and save into folders, as opposed to saving into my credenza, means that at the end of the day, I work smarter, not harder. I deliver the same quality services to my clients without overbilling them – and I'm improving my bottom line."
Less time searching, more time to ride.

westlawlifestyle.com

THOMSON REUTERS™

© 2012 Thomson Reuters L-373853/1-12
Thomson Reuters and the Kinesis logo are trademarks of Thomson Reuters.



In This Issue

Friendly Passages — Supporting Equal Access to Law in Florida

September/October 2013

A Publication of The Friends of the Rupert J. Smith Law Library of St. Lucie County Florida

President of the Friends and General Manager
James T. Walker 772-461-2310
Editor: Nora J. Everlove 727-644-7407
Assistant Editor: Katie Everlove-Stone
Assistant Editor: Kim A. Cunzo 772-409-4353
Assistant Editor: Ashley Walker
Graphic Designer: Paul Nucci
By e-mail, you can reach the editor at nora@everlove.net
We thank our authors and other contributors for making this issue a success!

Law Library Telephone 772-462-2370

On The Cover

"SeaTurtle"
Photograph by Jim Wilder
Do you have original art or photographs that would be suitable for the cover of Friendly Passages? If so, send it to Nora@everlove.net

Officers of the Friends of the Rupert J. Smith Law Library of St. Lucie County

James T. Walker, President
Charlie D'Agata, Treasurer
Nora Everlove, Secretary
Kim Cunzo, Chair, Art Contest
Jeff Rollins, Chair, Essay Contest

On Behalf of the Publisher

By James T. Walker
President, Friends of the
Rupert J. Smith Law Library

"The library is not a shrine for the worship of books. It is not a temple where library incense must be burned or where one's devotion to the bound books is expressed in ritual. A library, to modify the famous metaphor of Socrates, should be the delivery room for the birth of ideas --a place where history comes to life."
-- Norman Cousin

During the second season of a popular British science fiction series, "Tooth and Claw", its protagonist, Doctor Who, advises, "You want weapons? We're in a library! Books are the best weapons in the world. This room's the greatest arsenal we could have. Arm yourself!"

Perhaps few in history better understood the power of libraries than did the Egyptian pharaoh, Ptolemy III. Ptolemy III persuaded the Athenians to loan the Royal Library at Alexandria the original scripts of Aeschylus, Sophocles and Euripides. The Athenians agreed, but only on condition that he first post collateral for their return in the fabulous sum of fifteen talents, the equivalent in value to almost one thousand pounds of precious metal. Ptolemy paid the money, but kept the scripts.

The Royal Library at Alexandria benefited enormously from patronage of the Ptolemaic Dynasty. The pharaohs built it into the greatest center of learning in the ancient world. When trading ships called upon the city, the ships were searched for books, which were taken to official scribes who copied them, kept the originals for the library, and gave the copies back to the owners. There were well-funded royal mandates involving trips to book fairs at Rhodes and Athens. The stacks were filled with new works in mathematics, astronomy, physics, natural sciences and the humanities.

International scholars were induced to take up residential study there through payment of travel and lodging expenses, with stipends for their families. When that great collection was finally lost after a series of catastrophic events, history mourned the loss of knowledge.

The lesson of the Ptolemys was not lost on early American leaders, who well grasped the intertwined connection linking education, knowledge, liberty and libraries. Benjamin Franklin founded the first public library in America.

Noah Webster wrote in "An Examination into the Leading Principles of the Federal Constitution"(Oct. 17, 1787): "But while property is considered as the basis of the freedom of the American yeomanry, there are other auxiliary supports; among which is the information of the people. In no country, is education so general --in no country have the body of the people such a knowledge of the right of men and the principles of government. This knowledge, joined with a keen sense of liberty and a watchful jealousy, will guard our constitutions, and awaken the people to an instantaneous resistance of encroachments."

That same high regard for the value of library-based knowledge remains a feature of Florida's legal landscape, through its system of county law libraries. Such libraries serve both the Bar and general population. In an era of personal computers, when appellate decisions and statutes are so conveniently accessible online, the library remains an important tool for lawyers and legal researchers.

"Law libraries may be the only practical means by which the average individual can access legal information without hiring a lawyer."

Some legal information is still found only in print. A few treatises have not made it online especially those from the remaining small publishing houses that are not aligned with Thomson (Westlaw), Reed Elsevier (Lexis), Wolters Kluwer (CCH/Aspen) or the latest big merger, Bloomberg BNA. Not backed by a large advertising budget, users may not even know they exist until they visit their county law libraries.

continued on page 5

LAW FIRM
Hayskar, Walker, Schwerer, Dundas & McCain, P.A.,
(772) 461-2310
● GENERAL CIVIL PRACTICE,
● COMMERCIAL TRANSACTIONS
TRIAL PRACTICE ● DOMESTIC RELATIONS,
● AND WORKERS COMPENSATION

continued from page 4

On Behalf of the Publisher

Matthew Bender, Aspen, BNA, CCH, RIA, Warren, Gorham & Lamont and the Florida Bar treatises and manuals are all available online but they are cost prohibitive. Very few secondary resources are available in the basic packages affordable to the small firm or solo practitioner. Including the most common secondary sources – Florida Jur and a few West and Florida Bar treatises will double the basic subscription cost. In much the same way it was fifty years ago, the County Law Library creates a level playing field. The public law library remains the most comprehensive source as well as the most affordable source of information. The Rupert J. Smith Law Library is a center of learning, offering a vast array of legal information including online and print materials. Additionally free CLE disks and affordable live educational seminars help our attorney patrons keep current.

Law libraries may be the only practical means by which the average individual can access legal information without hiring a lawyer. Libraries are filled with self-help materials designed to guide the novitiate. A quiet setting is provided for students to find background material to write their term papers and theses. A trained librarian familiar with legal research technique is on hand to help the patron find the information he or she is looking for. The librarian acts as information manager, resource evaluator, access facilitator, expert researcher, teacher and trainer.

Law libraries remain essential to the yeoman's world of legal trench work.But best never to loose sight of their more fundamental value to our democratic way of life. So long as it is important that all enjoy equal access to law, whether rich or poor, so long as it is important that all possess equal ability to acquire awareness of their rights and remedies under the law, so long will law libraries remain integral to the fabric of American freedom. In the words of James Madison, "The advancement and diffusion of knowledge is the only guardian of true liberty." Thank you for your support of Florida law libraries.

Back Issues of Friendly Passages

are available
online at: www.rjslawlibrary.org

Integrity. Dedication. Solutions.
McCARTHY SUMMERS BOBKO WOOD NORMAN BASS & MELBY P.A.
Attorneys at Law
2400 S.E. Federal Highway • Fourth Floor • Stuart, FL 34994
(772) 286-1700 • Fax (772) 283-1803

Place Your Ad Here

Please support Friendly Passages and place your ad here. From 1/8th to full page. Call Nora: (727) 644-7407

ROGER W. LAJOIE
ATTORNEY AT LAW

ROGER W. LAJOIE, P.A.
645 BEACHLAND BLVD, SUITE B
VERO BEACH, FLORIDA 32963

TELEPHONE: (772) 234-6547
TELEFAX: (772) 234-6549
E-MAIL: RLAJOIE@BELLSOUTH.NET

by Jonathan S. Coleman

THE DECISIONS ARE IN:

THE SUPREME COURT AND THE "SAME-SEX MARRIAGE" CASES..PART II

> "Today we are witnessing the breakup of patterns thousands of years old. The patriarchal response is predictable: if man on top of woman has been the pattern for all of our known history, it must be right. This of course was the same argument made when slavery was challenged…."
>
> *- Gore Vidal, "Women's Liberation, Feminism and Discontents"*

In the May/June issue of *Friendly Passages*, your author wrote on the then-argued, but not yet decided, "same-sex marriage" cases of *Hollingsworth v. Perry*[2] and *Windsor v. United States*.[3] The results are in.

Revolution in a Decade: From "Crimes Against Nature" to "Same-Sex Marriage"

On June 26, 2003, the United States Supreme Court decided *Lawrence v. Texas* by striking down a Texas sodomy[4] law, effectively making gay sex legal in every U.S. State and territory.[5] This was startling: less than twenty years before, in *Bowers v. Hardwick*, the Supreme Court declared State sodomy laws constitutional.[6] Conservative resistance continues, however: ten years after *Lawrence,* thirteen States – including Florida[7] – maintain (unenforceable) sodomy laws on their books.[8] Even now, Virginia's Attorney General, Ken Cucinelli, is running for Governor on a platform that includes an appeal of a Fourth Circuit decision which rendered Virginia's own "Crimes Against Nature" statute unconstitutional,[9] and Indiana passed a law scheduled to go into effect on July 1, 2014 which would make it a criminal misdemeanor for anyone to solemnize a same-sex wedding in that State. [10]

Exactly one decade after *Lawrence* – on June 26, 2013 – the Supreme Court gave same-sex marriage advocates a qualified win in both *Hollingsworth* (involving California's "Proposition 8", which prohibited same-sex marriage there) and *Windsor* (which involved 83 year-old Edith Windsor's challenge to a substantial tax levied on the estate of her spouse, because under the 1996 "Defense of Marriage Act", their Canadian marriage was not recognized by the federal government -- despite the fact that it was recognized in the couple's home state of New York).[11]

What has changed in the post-*Hollingsworth* and *Windsor* world? Everything and nothing, depending where you live. As the *New York Times* observed: "The rulings leave in place laws banning same-sex marriage around the nation, and the court declined to say whether there was a constitutional right to such unions."[12]

DOMA, "Mini" and "Super" DOMAs – Florida Still Prohibits Same-Sex Marriage

Under DOMA, marriage was defined for federal purposes as "only a legal union between one man and one woman" with "spouse" meaning only "a person of the opposite sex who is a husband or wife."[13] The House Judiciary Committee's explicit intent in enacting DOMA was: "to reflect and honor a collective moral judgment and to express moral disapproval of homosexuality."[14] The section of DOMA challenged in *Windsor* made it possible for States to ignore otherwise valid same-sex marriages.[15]

Please find all endnotes in the online version

continued on page 7

continued from page 6

THE SUPREME COURT AND THE "SAME-SEX MARRIAGE" CASES..PART II

DOMA was a cornerstone of the 2004 (re)election campaign of George W. Bush,[16] but in an ironic twist of fate, his campaign chief Ken Mehlman (also a former Chairman of the Republican National Committee) came out as gay in 2010, and expressed regret at the role he played in cynically exploiting DOMA as a wedge issue.[17]

The States were quick to follow Congress's lead with statutory "Mini-DOMAs", thirty-one of which are still in place,[18] and by 2009, well over a third (nineteen in all) had gone further, by enacting "Super-DOMA" constitutional amendments.[19] Florida did both. In 1997, the legislature overwhelmingly passed the "Florida Defense of Marriage Act" which not only prohibits marriages between persons of the same sex,[20] but also recognition of legal marriages entered into elsewhere. In 2008, Florida voters amended the State constitution in a move cheered by then-Governor Charlie Crist, who has since changed his position (as well as his political party).[21]

Windsor thus changes nothing in Florida.[22] Governor Rick Scott remains hostile to marriage equality,[23] as does Senator Marco Rubio.[24] While Senator Nelson changed his mind about same-sex marriage in April of 2013,[25] legal analysts note that as Florida falls in one of the most conservative federal appellate circuits, any legal challenge might set a bad precedent.[26]

Judgment Day: A Split Supreme Court Cautiously Rules for Marriage Equality

On June 26, the Court in *Windsor* in a 5-4 decision ruled that the federal government could no longer refuse to recognize same-sex marriages *in those states where they were legal* – meaning Connecticut; the District of Columbia; Delaware; Iowa; Massachusetts; Maryland; Maine; Minnesota;[27] New Hampshire; New York; Rhode Island;[28] Vermont; and Washington State.[29] Justice Kennedy, joined by Justices Breyer, Ginsburg, Kagan and Sotomayor, concluded:

> [DOMA] is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Hollingsworth did not involve DOMA, and was thus less sweeping, but the decision that Proposition 8's defenders had no standing had the effect of leaving in place a federal district court and appellate ruling declaring the proposition invalid, permitting same-sex marriage in California. Justice Scalia dissented in both cases (joined by Justices Thomas, Alito, and Roberts).

Significant Questions Remain

By failing to establish a national rule, *Windsor* left many important questions unanswered. What rights do "domestic partners" have in States where marriage is not an option? What happens with same-sex couples who were legally married in places that allow it either reside in, or move to, jurisdictions which do not; are their marriages "erased" at the State line, even for federal benefits like Social Security? What about visa rights for foreign-born same-sex spouses of Americans?[30] Can employers legally fire employees for marrying someone of the same sex, even if the State of employment specifically allows for same-sex marriage?[31] Can a same-sex couple seek a divorce in a State that does not recognize their marriage?[32] The list goes on, as does the litigation.

In July and August, 2013, the ACLU filed suits against Pennsylvania's[33] and Virginia's ban on same-sex marriages.[34] Montgomery County, Pennsylvania began issuing marriage licenses in defiance of Pennsylvania's mini-DOMA, but the State Department of Health is currently attempting to stop the practice,[35] because Attorney General Kathleen Kane announced she would not legally defend the State's law, as she believes it to be "wholly unconstitutional."[36]

In New Mexico, the House Committee on Consumer and Public Affairs voted 3 to 2 to move forward a constitutional amendment which would ask voters to legalize same-sex marriage in that State.[37] Attorney General Gary King has filed documents with the State's highest court taking the position that a prohibition on same-sex marriage would be unconstitutional.[38] In Ohio, where same-sex marriage is illegal, a district judge recently cited *Windsor* in a July 24, 2013 decision ordering the State not to accept the death certificate of a terminally ill man legally married in the District of Columbia, unless it reflected his married status.[39] In Oklahoma, *Windsor* has been the catalyst for new arguments in a case seeking to reinvigorate a long-dormant challenge to that State's Mini-DOMA.[40] These are just examples.

Please find all endnotes in the online version

continued on page 8

continued from page 7

THE SUPREME COURT AND THE "SAME-SEX MARRIAGE"CASES..PART II

The Times, They Are A'Changin'

Acceptance of (or resistance to) marriage equality has a strong a nexus to educational levels. Of the 15 wealthiest States in the country, 12 either recognize same-sex marriage (9), or have strong civil unions laws (3).[41] Conversely, among the 15 states with the lowest median household incomes, most in the South, *none* allow either same-sex marriage or civil unions.

During the oral arguments of *Hollingsworth*, Justice Alito expressed discomfort with the idea that things were rapidly changing: in his widely-reported words, marriage equality was "newer than cell phones or the internet."[42] But while change may be uncomfortable for Justice Alito and others, public opinion on same-sex marriage is evolving at astonishing speed. According to the most recent Gallup poll, and as illustrated in the following graph, as of July 10, 2013, 54% of Americans believed same-sex marriages should be legally recognized, versus only 27% in 1996.[43]

Legal Domestic Partnerships and Civil Unions – Currently Out of Luck

On June 28, 2013, the United States Office of Personnel Management issued a Memorandum to all Federal Executive Departments and Agencies confirming that all legally-married same-sex spouses of federal employees would be entitled to an enviable array of benefits: health, life, dental, vision, and long-term care insurance; retirement benefits; and flexible spending accounts.[44] This does not apply to individuals who live in States which only offer domestic partnership or civil unions (as of August 2013, those States are: Colorado; Hawaii; Illinois; New Jersey; Nevada; Oregon; and Wisconsin).[45] As their relationships are not "marriages", their participants will not be recognized as "married" by the federal government -- putting them in the same category as residents of the 36 States which, like Florida, have enacted "Mini-DOMA" laws and/or State constitutional amendments.[46]

That this hardly seems fair has not escaped the attention of the editors of the *Washington Post*, who wrote: "It shouldn't be the case that same-sex couples can be first-class citizens in the eyes of the federal government, except in certain states."[47] It also poses legal problems for those legislatures which argue that civil unions and domestic partnerships are "as good as" marriage;[48] that is simply not true when the estate tax bill comes, when visas are at issue, or when social security survivor benefits are sought.

The inadequacy of civil unions has especially come to the fore in New Jersey, where Governor Chris Christie vetoed a marriage equality law.[49] In the words of a different *New York Times* editorial: "Mr. Christie is imposing a large ideological tax on thousands of couples and their families whose interests he is supposed to protect. He is depriving them of federal benefits, which their tax payments help underwrite."[50] Undeterred, Christie filed papers in a pending lawsuit, still opposing same-sex marriage.[51]

Conclusion -- How Can Something Affecting So Few Divide So Many?

In a late 2012 Gallup poll, only 3.4% of Americans identify as homosexual.[52] Barely half of the heterosexual population is married.[53] What does this mean?

> *If every gay person in America who wanted to get married could do so tomorrow, significantly less than 2% of the population would be affected. Why then so much hand-wringing over (and resistance to) same-sex marriage?*

The usual two-fold opposition arguments – religion, and "redefining traditional marriage" somehow weakens it for heterosexuals -- remain unpersuasive. Biblical marriage was often polygamous (note Solomon's "700 wives")[54] and civil marriage is not religious at all – it is open to atheists, agnostics, and people of all faiths. Further, expanding marriage to include same-sex couples does not weaken "traditional" marriage any more than extending voting rights to blacks and women somehow destroyed suffrage.

The procreational argument often coupled with the religious argument is similarly unpersuasive: unmarried people can (and do) have children; gays can have natural children, and/or adopt them; society does not force married people to have children; and we do not prohibit sterile people (or users of birth control) from marrying.

continued on page 20

Cryptoquote

HD ZLJJFB VHLYRUVME, VEW MFN BIVN DFOY UFOMNYD UVM GF ZFY DFO, VEW BIVN DFO UVM GF ZFY DFOY UFOMNYD. - PFIM Z. WLMMLGD

For the impatient, e-mail your answer to nora@rjslawlibrary.org for confirmation. For the patient, the decoded quote will appear in the next issue

continued from page 8

THE SUPREME COURT AND THE "SAME-SEX MARRIAGE"CASES..PART II

Marriage equality in reality affects few, but that is not a reason to deny full and equal rights to a minority group. If the current same-sex marriage debate is nothing more than a proxy war between traditional conservative/ religious forces versus progressive/secular values, the momentum, clearly, is with the latter.

Jonathan S. Coleman, who holds a B.A. from the University of Richmond, a graduate degree in History from the University of North Carolina at Chapel Hill, and a law degree from the University of Florida, is a partner at the Tampa office of Johnson, Pope, Bokor, Ruppel & Burns, LLP. He is married.

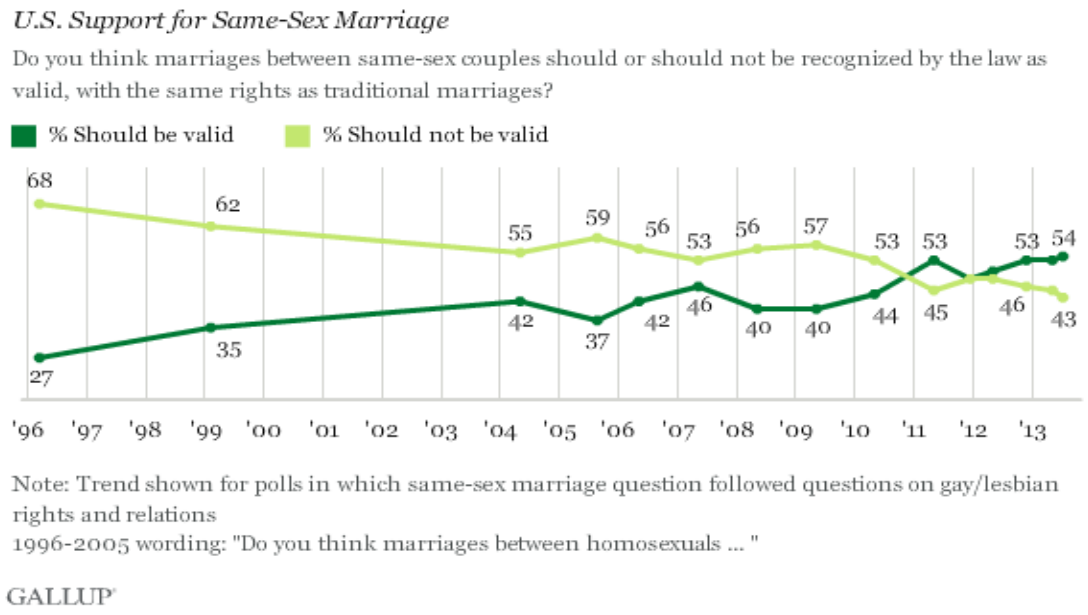
Addendum: On August 29, 2013

On August 29, the Department of the Treasury and the IRS clarified that it will apply a "place of celebration" rule rather than the old "place of residence" rule to determine whether couples are married for tax purposes.

On August 29, the federal Department of Health and Human Services announced that legally married same-sex couples are now eligible for equal benefits and spousal placement in nursing homes that accept Medicare.

On August 29, Consuelo Marshall, a federal judge in California, found that "the exclusion of spouses in same-sex marriages from veterans' benefits is not rationally related to the goal of gender equality."

continued on page 27



Come To The Next Friend's Meeting

Please Come Join Your Friends At Upcoming Meetings At the Rupert J. Smith Law Library

at Noon

Thursday, September 12th
Thursday, October 3rd
Thursday, October 31th
Thursday November 14th

Mark Your Calender

Please come to the law library for WestlawNext training on Wednesday, October 23 at 2:30 in the afternoon. Nicholas James will show us how to get the most of our new Trial Court databases. It's not just about appellate cases anymore!

A Short History of Crimes and Punishments: Stealing Grapes, Witchcraft or Murder - It's all the Same Punishment.

by Lisa Bruno

Are the methods for execution considered barbaric or cruel by today's society as compared to history?

In the eighteenth century B.C., the code of King Hammurabi of Babylon codified the death penalty for 25 different crimes, although murder was not one of them.

By Seventh Century B.C. the Draconian Code of Athens and in the Fifth Century B.C.'s Roman law of the Twelve Tablets, death was the only punishment for all crimes. However the death penalty was different for nobility, free men, and slaves. Punishable crimes included publication of libels, and insulting songs, cutting or grazing of another's crops, cheating a client, perjury, willful murder of a freeman, or theft by a slave. The means by which death sentences were carried out were crucifixion, burning, burying alive, impalement (a favorite of Nero) and beating to death. Socrates' execution in ancient Greece is notorious. He was required to drink poison for heresy and corruption of youth.

In the tenth century A.D., hanging was the usual execution method in Britain. In the following century, William the Conqueror would not allow executions for any crime except in times of war for cases of murder. He did however allow criminals to be mutilated for their crimes. During the middle ages, torture was added to capital punishment. High treason carried an execution sentence. Men were hung, drawn and quartered; women were burned at the stake. Most barons had a drowning pit, and gallows were used for major and minor offenses.

Under the reign of Henry VIII an estimated 72,000 people were executed. During the next two centuries, the number of capital crimes continued to rise in Britain. In the 1700's, over two hundred crimes were punishable by death, including stealing from a shop the value of 5 shillings, cutting down a tree, and counterfeiting tax stamps. Because of the severity of the death penalty, juries tended not to convict if the offense was not serious. As a result, in 1823 laws were passed to remove over a hundred crimes from the death penalty. Further reforms continued throughout the nineteenth and twentieth centuries, and more capital punishments were abolished, not only in Britain, but all across Europe.

Death Penalty and the American colonies

Britain greatly influenced America's use of the death penalty. The first recorded execution in the English American colonies was in 1608. Accused of plotting to betray the British to the Spanish, George Kendall of Virginia was executed. Shortly after, Virginia's governor put into practice the Divine Moral and Martial Law which made death the penalty for stealing grapes or trading with the Indians. Seven years later the laws were moderated because Virginia feared that no one would settle there.

There were no uniform laws in the colonies; some were more strict than others in the use of the death penalty. The earliest capital statutes did not come until 1636, under the capital laws of New England. Here the death penalty was passed for pre-meditated murder, sodomy, adultery, witchcraft, rebellion, manslaughter, poisoning, rape, perjury and blasphemy. By 1780 The Commonwealth of Massachusetts only recognized seven capital crimes: murder, sodomy, burglary, buggery, arson, rape and treason.

The New York colony instituted the Duke's Laws of 1665. Under these laws, capital offenses included denying the true God, striking one's mother or father and conspiracy to invade towns or forts in the colony. By 1776 most of the colonies had comparable death statutes that covered treason, robbery, rape, slave rebellion and horse stealing. Hanging was the usual sentence. Rhode Island was more lenient and decreased the number of capital crimes in the late 1700's. North Carolina had more severe sentencing, especially in regard to slavery, including intent to free slaves, inciting slaves to rebel, and slave stealing, in addition to murder and stealing bank notes. It was said that because North Carolina did not have a state penitentiary there was no suitable alternative to capital punishment.

The first reform of the death penalty was the complete revision of Virginia's laws by Thomas Jefferson and four others. Between 1776 and 1800, they proposed a law that recommended the death penalty for only treason and murder. After a rousing debate the legislature defeated the bill by one vote. American intellectuals were influenced by the writings of European philosophers Voltaire, Montesquieu and Cesare Beccaria, an Italian criminologist and economist. In Beccaria's most famous and influential essay, On Crimes and Punishments published in 1764 (translated and published in New York in 1773), he theorized that there was no justification for taking of life by the state. He said that the death penalty was a "war of the whole nation against a citizen, whose destruction they consider as necessary, or useful to the general good."

He identified a pressing need to reform the criminal justice system, citing the present system as "barbaric and antiquated." He asked the question what if the death penalty could be shown not to be useful or necessary for the security or good order of society?

continued on page 19

The "Corporate Rep" Deposition

by Carla M. Barrow

While the market may show signs of recovery from the economic collapse, many companies are no longer around. Government furloughs and cost cutting can also result in the elimination of staff positions, or the transfer and consolidation of agency operations to new locales. Everyday, employees, managers and supervisors leave, move, or get terminated from their workplaces. With them, go their knowledge about activities and events relevant to your case. This can make litigating with large entities and institutions more complex.

How, for example, do you find the right person to depose when you don't know who, particularly, was involved or responsible for an act, or what department they worked under, or where that person is? What if there was a multitude of persons involved, but you have a limited discovery timeframe or budget? The rules of Federal and State civil procedure help us here: Rule 30(b)(6) of the Federal Rules and Rule 1.310(b)(6) of the Florida Rules of Civil Procedure.

Interesting twists and turns can develop when utilizing the rules, providing lessons to get the most out of such depositions, whether you're taking or defending them.

I. The "Corporate Rep Rule."

Rule 1.310(b)(6) of the Florida Rules of Civil Procedure provides:

> "… a party may name as the deponent a public or private *corporation*, a *partnership* or *association*, or a *governmental agency*, and designate with *reasonable particularity* the matters on which examination is requested. The organization so named shall *designate* one or more *officers, directors, or managing agents*, or *other persons* who *consent* to do so, to testify on its behalf and *may state the matters on which each person designated will testify*. The persons so designated shall testify about matters *known or reasonably available to the organization*. This subdivision *does not preclude* taking a *deposition by any other procedure* authorized in these rules." (emphasis added)

The Florida rule mirrors the Federal rule, from which it was adopted.

Before the rule, a party deposing an officer, director or managing agent of a corporate party had two basic alternatives: name the officer, if known, or bandy about from officer to officer in search for clues. The "corporate rep" rule was meant to stop such "bandying" and to aid the discovery process.

II. The Mechanics of the Rule.

The mechanics of the rules are straightforward. Once a requesting party describes with "reasonable particularity" the matters of examination, the responding corporation must: (1) designate a deponent knowledgeable on the topic; (2) designate multiple deponents if more than one is necessary to respond to all designated topics; and (3) prepare the deponent so that he or she can testify on matters both within his or her personal knowledge as well as those reasonably known by the responding entity. The power to designate a representative rests *exclusively* in the entity, not the party noticing the deposition. While you often can identify and produce one key person to testify, if the witness doesn't consent to do so, or if there are other reasons that person would not make a good witness for the client, other person(s) or professional(s) may be appointed to testify and state positions that bind it.

III. The Rule is Not a Mandatory Substitute For Other Depositions.

A deposition taken under the rule explicitly does *not* preclude the deposition of a specific corporate representative known by name. In that case, however, counsel should ensure the deposition notice is accompanied by a subpoena (or a written confirmation/agreement) to command the witnesses' appearance. Counsel should also determine if the named individual has sufficient authority to bind the corporation as a "managing agent" on any topics *beyond* those designated for the corporation. The witness isn't obliged to know, prepare for or investigate matters beyond those noticed. While some courts take the position that the deposition of the corporate representative must be limited to the particular topics designated in the notice, others find the designated topics to be the "floor," not the ceiling for inquiry.

In Federal court, where not just the time, but also the number of depositions are presumptively limited (10 depositions/one day/7 hours), the further you veer beyond the designated topics with the witness, the more you risk not getting all the answers you need; or not getting another day to depose the witness in an *individual* capacity.

Federal court cases also raise the question of how the 7 hour (durational) limit is interpreted when *multiple* witnesses are designated to testify. Commentary to Rule 30(b)(6) provides a ready response: "the deposition of each person designated under rule 30(b)(6) should be considered a *separate* deposition." The time frame can be

continued on page 12

continued from page 11

The "Corporate Rep" Deposition

altered by agreement or by demonstrating good cause and securing a court order. Particularly in complex cases, this deserves some strategic consideration. Budget and use your time wisely.

IV.Drafting the Notice: The"Particularity" Requirement.

In drafting a deposition notice designating areas for testimony, beware not to draft the notice too broadly (e.g., "all issues in this case"). That may trigger a motion for protective order compelling a more detailed designation**.** Drafting the designation too narrowly may unwittingly thwart the scope of information obtained. Track allegations of the complaint, the answer, discovery responses, an offer of proof, mission-critical issues or expert topics to craft a specific, detailed notice that includes multiple areas of testimony sought.

V. Complying by Designating a Knowledgeable Witness to Testify.

Once a deposition notice is issued, the corporation must "make a conscientious good-faith endeavor to designate the persons having knowledge of the matters … to prepare … order that they can answer fully, completely, [and] unevasively." If an organization designates a witness who ultimately proves unable to respond to relevant areas of inquiry, the responding party has a duty to designate an *additional* knowledgeable deponent.

Interjecting self-serving affidavits in lieu of producing witnesses does not satisfy the rule. However, in practice, parties may agree to "fill in gaps" in the testimony by serving sworn responses to the question, or as posed by an interrogatory. Ultimately, if a corporation's designee legitimately lacks the ability to answer relevant questions on listed topics and the entity fails to obtain an adequate substitute, the "we-don't-know" response can be binding on the corporation and preclude evidence at trial on those points.

VI. Preparing the Witness.

Although many attorneys claim otherwise, a corporation cannot escape the rule by claiming all its employees with knowledge have left. But, compliance with the rule can take various forms. The witness designated need not be the most knowledgeable about a subject. In fact, the designated deponent need not have *any* personal knowledge of the facts to which he or she will testify, provided the facts are within the corporation's rubric.
It's sufficient to produce a person "infused" with knowledge reasonably available to the organization, whose testimony will be binding on the party.

The witness may be prepared by interviewing former officers or employees, adopting prior deposition testimony to bind the corporation, and producing former officers or employees or unaffiliated persons to testify on the entity's behalf. The burden has been likened to the standard for answering interrogatories. The organization is only required to prepare and produce a witness for the areas designated, but the deponent may be asked questions like any other witness. A witness' lack of knowledge regarding non-designated areas of testimony does not violate the rules.

Objections to the scope, manner or location, and issues of relevancy and privilege apply. Thus, anticipate motions for protective orders and defenses thereto. Remember to seek protective orders *in advance* of the deposition, as the requirement is not altered by the rule. Like other depositions, sanctions are available to curb violations. Sanctions can be as lenient as producing another witness for deposition, sometimes at the corporation's cost, to the striking or pleadings or preclusion of evidence on key factual matters.

continued on page 13


A LAW FIRM OF S·C·R SCHMITT, CAMBRON & REYNOLDS, PL

• Car Accidents • Wrongful Death
• Brain Injuries • Spine Injuries
• Work Related Injuries • Slip and Fall
• Social Security Disability
• Worker's Compensation
• Truck & Trailer Accidents
• Motorcycle Accidents • Boating Accidents

1330 S. Federal Hwy. Stuart, FL 34994
Call Kelly A. Cambron's 24/7 Cell 772-214-6464
TOLL FREE: 1-877-4 THE HURT
Working Hard for the Injured!
WWW.FEMALEINJURYLAWYER.COM

continued from page 12

The "Corporate Rep" Deposition

VII. Conclusion

No matter how many times you have been around the block, you will continue to deal with large companies, governments and institutions in litigation. A good working knowledge of Rule 1.310(b)(6) and Rule 30(b)(6) will assist you as you dig in to get the information you need. "The life of the law is not logic, but experience." Use yours to get the most out of these depositions.

References:

Quantachrome Corp. v. Micrometrics Instrument Corp., 189 F.R. D. 697, 699 (S.D. Fla. 1999); *Fraser Yachts Florida, Inc. v. Milne, 2007 WL 1113251*(S.D. Fla., 2007) (unpublished opinion); *Anderson Investments Co. Ltd. v. Lynch*, 540 So.2d 832 (Fla. 4th DCA 1988); *Plantation-Simon, Inc.*, 596 So. 2d 1159 (Fla. 4th DCA 1992); *Great American Ins. Co. of New York v. Vegas Const. Co., Inc.,* 251 F.R.D. 534; *Danna v. Bay Steel Corp.*, 445 So. 2d 704 (Fla. 4th DCA 1984); *Rodriguez v. Pataki*, 203 F. Supp. 2d 305 (S.D. N.Y. 2003), *aff'd* 293 F.Supp.2d 315; *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 688-89 (S.D. Fla. 2012); *PPM Finance, Inc. v. Norandal USA, Inc.,* 392 F.3d 889 (7th Cir 2004); *Philips v. American Honda Motor Co.*, 2005 WL 1527685 (S.D. Ala. 2005); *Mitsui & Co. (USA) v. Puerto Rico Water Resources Authority*, 93 F.R.D 62, 67 (D. P.R. 1981); *Cabot Corp. v. Yamulla Enterprises, Inc.*, 194 F.R.D. (M.D. Pa. 2000); *Todd v. Precision Boilers*, 2008 WL 4722338 (W.D. La.); *Carriage Hills Condominium, Inc. v. JBH Roofing & Constructors*, 109 So.3d 329 (Fla. 4th DCA 2013)

Carla Barrow is a partner at Lydecker Diaz, in Miami, FL. She has a strong connection to Ft. Pierce and the Treasure Coast community, where she grew up and attended high school, and where much of her family remains. Her work in Miami and throughout the State focuses primarily on financial litigation, including the prosecution of D&O and other disputed claims in insolvency and receivership proceedings. She has represented banking institutions, state and federal agencies, corporate entities, partners, shareholders, trustees and creditors in a multitude of complex recovery actions in the private and public sectors. She also serves as local counsel to assist firms outside the State and in Latin America. She is fluent in Spanish. For more information, you may contact her at (305) 416-3180, or at cmb@lydeckerdiaz.com.

At The Law Library

Book Review: Miller's on Insurance

By Frank Pennetti

A major new update was received to the library's subscription of Miller's Standard Insurance Policies Annotated. This resource breaks down the clauses found in all types of major insurance policies, offering explanations, forms, and case law references that help one understand the language in those complex documents.

The first volume contains all types of standard policies, including life, disability, auto, homeowners, commercial liability, and professional liability. The remaining volumes contain case annotations construing specific clauses of the standard policies.

Aside from its obvious usage among practitioners in the insurance law field, Miller's can be useful even for exploring the breadth of coverage and the true meaning of terms in one's own personal policies. For instance, one can look up the term "bodily injury" in the index section to find samples of forms that have defined that term, and case law citations that show how courts have interpreted that term. On a personal level, this can help one know just how valuable auto insurance is.

The latest 2013 supplement to Miller's is now in the law library and contains more than 7,000 new annotations. The collection includes almost 182,000 case annotations for state and federal case law opinions reported since 1978 to more than 100 basic coverage forms and 1,000 endorsements. The law library contains all twelve printed volumes of this trusted resource. If your work entails the drafting or review of insurance policies, or you are just curious as to what all that mysterious verbiage in your policies mean, the library invites you to review this comprehensive work.

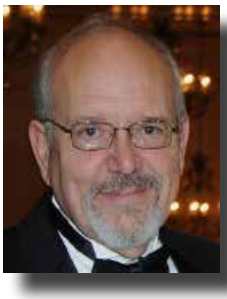
Last Issue's Cryptoquote Answer

KMDDPMZUNABT U RMWKFDCYDFZ AL OUMN-ZM FOUB AF XDDHL! SW UKDXDTAZL PDM FOZ ZMMDM AB DYM XULF ALLYZ. –HUFAZ ZIZMXDIZ-LFDBZ

Proofreading a cryptoquote is harder than it looks! My apologies for the error in our last issue. –Katie Everlove-Stone

The Arts and the Law

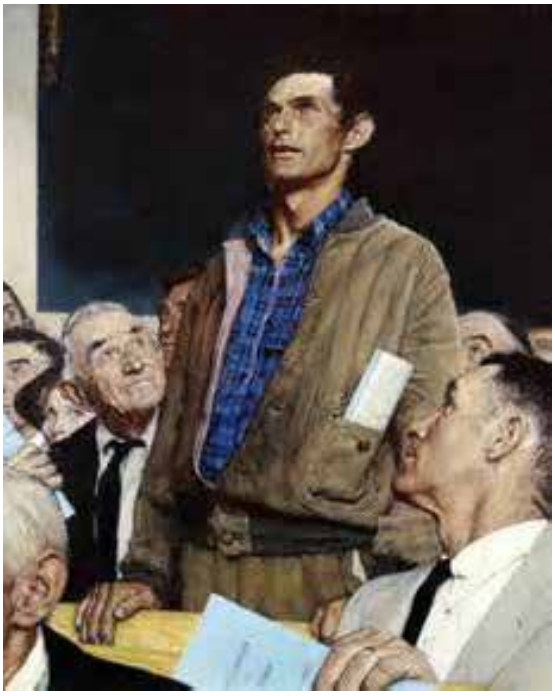
Norman Rockwell and The Four Freedoms



How the paintings of The Four Freedoms evolved from principles enumerated in a speech, to the most widely viewed American artwork, is a wonderful and uniquely American story.

By Paul Nucci

Early in 1942, as America entered World War II, American artist Norman Rockwell created a series of four oil paintings called *The Four Freedoms*. Rockwell was inspired by a speech given before Congress by President Franklin Roosevelt in 1941 in which Roosevelt outlined four principles or "Freedoms" that should be universally protected. The paintings became the most famous American art in history. The viewing of these works and subsequent sale of reproductions played a major role in financing America's war effort. More importantly, *The Four Freedoms* helped provide a greater understanding of what we as Americans were fighting for in a way that speeches and essays could not.



The Freedom of Speech

Roosevelt understood that Americans, still recovering from the Great Depression, did not want to be involved in another European war. In spite of the fact that he had campaigned for the Presidency in 1940 on a pledge to keep us out of war, Roosevelt was preparing for the war he knew was coming. He knew that Americans needed to be convinced. The *Four Freedoms* speech helped make clear what we needed to win for people around the world and, more subtly, what we stood to lose if we didn't fight.

After the war began, The *Four Freedoms* were incorporated into the Atlantic Charter; a joint declaration of principles by the U.S. and Great Britain. At war's end, The *Four Freedoms* were enshrined in the charter of the United Nations.

How the paintings of *The Four Freedoms* evolved from principles enumerated in a speech to the most widely viewed American artwork is a wonderful and uniquely American story.

Norman Rockwell was born in 1894 in New York City. As a child he showed such a talent for drawing, that at fourteen he transferred from high school to enroll in art school. After a series of small but successful illustrations, the nineteen year old Rockwell became the art editor of *Boys Life* Magazine.

Rockwell shared a studio with cartoonist Clyde Forsythe who worked for *The Saturday Evening Post*. With Forsythe's help, Rockwell got an appointment with legendary "Post" editor George Lorimer. A terrified Rockwell, just twenty-one, was relieved to learn that Lorimer liked the illustrations he had brought. Lorimer approved two covers for immediate publication and approved sketches for three more. Though the first cover was accepted as is, Lorimer insisted on five revised versions before approving the second cover.

continued on page 15

The Freedom From Want

continued from page 14

Norman Rockwell and The Four Freedoms

Later, Lorimer confessed that this was a test designed to see if Rockwell could accept criticism and work under pressure. Rockwell was paid $75.00 for each cover. Translated into today's dollars that is more than $2000.00 each. Rockwell went on to produce three hundred and twenty three covers for the "Post" between 1916 and 1963. He once quipped about his "Post" years describing them as "thirty years before the masthead."

The Freedom From Fear

The Freedom of Worship

It is trite to say Rockwell's "Post" covers portray an America from a simpler time. Most covers certainly could be described as idealized slices of everyday life. Rockwell was certainly not alone in his portrayal of an idealized America. Motion Pictures and later, television showed an image of American life that seems absurd today. For a nation rocked by two world wars and the Great Depression, however, real life was grim enough. His name soon became synonymous with American culture.

Fame and financial success came to Rockwell through his work for the "Post" and other magazines, but artistic recognition eluded him. He was hopelessly out of step with the art world of his time. Artists like Picasso and Dali were seen as the leading artists of the day, and the realistic, representative style of Rockwell was seen as old fashioned and unsophisticated. Rockwell himself contributed to this view, calling himself an illustrator rather than an artist.

Rockwell's technique also contributed to the criticism he received. He would hire models and stage them in costume and then photograph the scene. He then would project the photo onto a canvas and trace the photo. He then painted over the tracing using the photograph as a reference. A look at some of the source photos shows how little license he took with the scene once shot.

It is unclear what Rockwell's work would have been like if not for the "Post's" patronage. Little evidence remains of Rockwell's ongoing relationship with "*The Saturday Evening Post*". It is possible that some of his work was rejected as out of line with the "Post's" image. Was he restricted to or merely encouraged to portray a nostalgic view of American life? It is more likely that he simply knew what the editorial stance of the "Post" was and he did his best to keep his patron happy.

In 1942, inspired by Roosevelt's Four Freedoms speech, and seized by patriotic fervor, Rockwell sketched ideas for four paintings, each depicting one of the Four Freedoms. With detailed sketches, Rockwell approached the War Department and offered to donate the series to be used in the war effort. The War Department had been planning to produce posters and other graphic works to build support for the war.

The War Department stonewalled Rockwell's offer of the paintings saying that they had already had "real artists" produce appropriate representations of the four freedoms.

continued on page 23

A Bird's Eye View of Law School:

A First-Year's journey from the LSAT to On-Campus Recruitment

By Ashley Walker

Introduction

When I was in elementary school, my teachers would often remark that I ought to be a lawyer. I proved myself argumentative from an early age, as when I corrected my third grade teacher on the proper pronunciation of the word "mischievous". (For what it's worth, it may be said in two ways: "mis-**chee**-vee-*uh*s", with four syllables, or as "mis-**chee**-v*uh*s", with just three.)

However, law school was not a lifelong dream of mine, at least not at first. After all, my father was an attorney, and like many young kids, I was determined to set myself apart in the world. I wanted to be an actress or a marine biologist, if I couldn't be the first female president of the United States.

I am now a member of the Duke Law Class of 2016, where I am pursuing a joint degree: a JD and an LLM in International and Comparative Law. Most of my fellow classmates will start their law classes in August, when the fall semester begins, but dual degree students are required to start in the summer instead. Thus, I began my first two law classes on June 3rd: Contracts and Torts.

There are currently six standard doctrinal classes required of 1L students at most law schools. These are Contracts, Torts, Civil Procedure, Property, Criminal Law, and Constitutional Law. First-years are also now required to take Legal Research and Writing, although my father, who graduated from law school in 1975, was not required to take the course until his second year. Legal Research and Writing (LRAW) is a two semester course that culminates with students independently writing and researching a complex appellate brief.

Both Contracts and Torts were rigorous and fascinating courses. Throughout the summer, my classmates and I grew to appreciate the importance of briefing cases, outlining, and learning to apply the rules and standards we had learned in class. My exams took place the week of July 29th and were far more difficult than any in-class examination I'd ever taken in college. My Contracts final was four and a half hours long, while Torts was a comparatively brief three hours. We were able to take our exams on our computers, typing essay-long answers using software called "Electronic Blue Book", a program that replaces the physical bluebooks that were previously commonplace for law school exams.

The Application Process

Of course, even before I decided where to attend law school, I needed to go through the process of applying. Students currently apply to an average of six law schools, and many apply to ten or more. I applied to twelve law schools in total and was happy with the results yielded from that number. I was able to choose from several different schools, based on factors ranging from scholarships, location, class size, and academic reputation to student body satisfaction and campus proximity to a Trader Joe's specialty grocery store location. Law school advisors generally advise students to apply to at least four schools, and to select their choices based on the competitiveness of their LSAT and GPA score. There is a very helpful LSAT/GPA calculator at the official Law School Admission Council Website, located at https://officialguide.lsac.org/release/OfficialGuide_Default.aspx.

continued on page 17

continued from page 16

A Bird's Eye View of Law School:

If you don't get the LSAT score that you are hoping for at first, it is possible to retake the test. However, some schools will only look at an average of all scores, so it is very important to be ready for the test before you take it. An applicant can only take the LSAT a maximum of three times within a two-year period, and scores are valid for five years. Prep courses and materials are also available, and it's a good idea to do as many full-length LSAT practices tests as you can before taking the test, because it is the only way to prepare for what can be a very lengthy and grueling experience. It currently costs an applicant $160.00 to take the LSAT, which is another good reason to be ready for the test before taking it. The LSAT has been administered in one form or another since 1948, and the current version of the test has been used since 1991. Scores range from 120 through 180, with the average score being around 150 to 155. The LSAT is administered just four times a year, unlike the GRE and SAT, which are offered much more often. Generally, the LSAT is administered in February, June, late September or early October, and December.

An applicant's LSAT score and GPA are generally the two most important aspects of his or her application. Not all great students are adept at taking standardized tests, though, and many schools recognize this. Some preeminent universities, including Georgetown and the University of Michigan, have implemented programs designed to waive the LSAT score requirement for selected students who have maintained a 3.8 undergraduate GPA at their schools. A student's application also includes a personal statement, which is a two-page essay on a subject of his or her choice. A great personal statement can allow the applicant to expand upon what makes him or her unique and to describe his goals and life experiences. An applicant is also required to submit two to four letters of recommendation, usually from undergraduate professors and employers. Many schools allow students to submit additional essays, often about why he or she is choosing to apply to a particular school.

Before choosing a school, it is also crucial to consider the cost of attendance. Many law schools now cost upwards of $60,000.00 per year, with additional expenses for rent, food, and textbooks. The American Bar Association strongly advises fulltime first-year students to avoid seeking outside employment. Under ABA Standard 304, a student may not engage in employment for more than 20 hours per week in any semester in which the student is enrolled in more than 12 class hours. Most individuals find that the thousands of pages of reading that they are assigned as first-year students leaves them little time for rest or a social life, let alone an outside job. Therefore, planning ahead to avoid long-term financial issues is vital to success in school and beyond.

Student loans are a popular source of tuition and cost-of-living income. According to the *U.S. News and World Report*, the average amount of debt for students from nine of the fourteen top schools exceeds $100,000. A list of the law school graduates with the most debt may be found here. http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings

Thomas Jefferson School of Law in San Diego, California occupies spot number one on that list, with 98% of its 2012 graduates in debt and an average debt of $168,800.00. In-state students who choose to attend the Levin College of Law at the University of Florida currently pay about $22,181.00 for tuition and expenses, versus a cost of $41,545.00 for non-residents. (When I applied to law school, however, I was a resident of Virginia. In-state students at the University of Virginia pay about $47,900 per year, while out-of-state students pay $52,900.)

Duke Law School

Many law students attend law school because they wish to contribute to society and help to improve the state of their fellow human beings, but shouldering a debt of more than $100,000.00 can make long-term occupation in the non-profit sector seem like an impossible dream. However, the federal government currently administers the Public Service Loan Forgiveness (PSLF) Program, which allows qualifying students to have their federal student loan debts forgiven after they have contributed ten years of public service. Many law schools also offer Loan Repayment Assistance Programs, or LRAP, designed to make low-paying public interest careers more financially feasible for their graduates. These differ widely in levels of support depending on the school. Most schools require graduates to work in a law or law-related position and to make under a certain income. At the University of Chicago Law School, for example, eligible incomes are capped at $72,000 per year. The University of Florida does not offer LRAP, partially because the cost of tuition for in-state students is so much lower than at other universities. The average debt for University of Florida Law students who graduated in 2008 was a comparatively moderate $56,053.

continued on page 21

OTHER INSURANCE CLAUSES

by Daniel W. Raab, Esq.

An area of law which comes up from time to time is that of the other insurance clause. This clause can be found in an insurance policy and comes into play where there are two or more policies covering the same risk. These "Other Insurance Clauses" often state that the policy becomes excess to any other coverage, while others state that they are prorated with other policies. Another type of clause is an escape clause which states that if there is any other insurance, the insurer will escape any responsibility for coverage. Lastly, some policies carry no such clauses.

In Florida, if two policies have excess insurance clauses, they will cancel each other out. See the case of *Travelers Ins. Co. v. Lexington Ins. Co.*, 478 So.2d 363 (Fla. 5th DCA 1985).

The way that this would work with two policies cancelling each other out is as follows: Policy "A" provides coverage for losses up to $50,000.00 and policy "B" provides coverage up to $25,000.00, and the claim is for $7,500.00. The larger policy will cover $5,000.00 of the claim and the other one will cover $2,500.00. The excess clause contributions are computed based on the amount of coverage.

A pro rata clause is one that states that the policy will be prorated with any other policy with the same coverage. It works similar to the example given in the preceding paragraph when there is another pro rata clause.

If one policy has an excess insurance clause and the other has a pro rata clause, then the pro rata clause under Florida Law becomes primary and the other policy becomes secondary. See *Demshar v. AAACon Auto Transport*, 337 So.2d 963 (Fla. 1976).

A more unusual clause is an escape clause which states that there is no responsibility for the insurer if there is other primary insurance. *Cont'l Cas. Co. v. Old Republic Ins. Co.*, 2007 U.S. Dist. LEXIS 90979 (S.D. Fla. Dec. 11, 2007) and *American Bankers Ins. Co. v. Leatherby Ins. Co.*, 350 So.2d 353 (Fla. 2nd DCA 1977) have held that an escape clause makes an excess clause the primary insurance as it will be upheld by the Courts under Florida law.

Another situation which you can come into contact with is where one insurance policy has an "Other Insurance Clause" and the other one does not have any such language. In that instance, the policy without the other insurance clause becomes primary.

In a cargo setting, if one policy attaches prior to the time of the other, the policy that attaches first may become primary. See *St. Paul Fire & Marine Ins. Co. v. Marine Transp. Services Sea-Barge Group, Inc.*, 727 F. Supp. 1438 (D. Fla. 1989). The carrier's first party insurance attached after the shipper's other insurance, which became primary.

It is a good idea for your clients to review their insurance policies and see to what extent they have overlapping insurance coverage. At least under Florida law, some primary insurance may provide an extra layer of insurance. This is also an important issue for insurers and their defense counsel.

Daniel W. Raab, Esq. is an attorney with offices in Miami Dade County, Florida. He is a graduate of the Johns Hopkins University and the University Of Miami School Of Law. He is the author of Transportation Terms and Conditions, Chapter 47 of the New Appleman Practice Law Guide, Chapter 5 of the Benedict on Admiralty Desk Reference Book, and a Contributing Author to Goods In Transit. (See below). He has taught as an Adjunct Professor of Law at the University of Miami School of Law, St. Thomas University School of Law, and the Florida International College of Law.

Goods in Transit

Benedict on Admiralty Desk Reference

continued from page 10

A Short History of Crimes and Punishments:

"By what right can men presume to slaughter their fellows? It seems absurd to me that the laws which are the expression of the public will, and which execrate and punish homicide should themselves punish homicide, should themselves commit one and that to deter citizens from murder they should order a public murder." Beccaria went on to denounce the use to torture to punish criminal conduct, writing "a man judged infamous by the law, should not suffer the dislocation of his bones."

Beccaria's influence during his lifetime was modest. In 1786, the Grand Duke of Tuscany adopted a Tuscan penal code that totally eliminated the death penalty, and one year later, Joseph II abolished Austria's death penalty save for crimes against the state. Beccaria died in 1794 during the bloody French Revolution. Two years later Dr. Guillotine invented the guillotine, a less torturous, more humane execution than a beheading by sword or ax, which took at least two blows to kill the condemned.

Hanging by the gallows was the most popular means of execution in the American colonies during this time, although the firing squad was common until 1848. In search for a more humane way of execution, the "long drop" method was introduced. Conventional gallows dropped the prisoner through a trap door four to six feet below, the distance was usually not sufficient to break the neck, the person struggled and death came one to 3 minutes later by strangulation. The long drop used a formula calculating the height and weight of the prisoner to insure the neck would break and cause death quickly.

Organizations were formed in different colonies to abolish the death penalty and to relieve poor prison conditions. Reform bills were introduced state by state resulting in reducing capital offenses. New York went from thirteen capital offenses to three, and Pennsylvania reduced its capital offenses to only murder. A few states were contrary: Rhode Island restored the death penalty for rape and arson. New Jersey, Connecticut and Massachusetts increased death crimes from six to ten, including sodomy, maiming, robbery, and forgery. Southern states made more crimes capital, especially for those dealing with slaves.

Significant reforms emerged between 1833 and 1835, mostly by a small but powerful clergy. Public executions were attacked as cruel. Hangings were spectacles attracting thousands of eager viewers. Local merchants sold alcohol and souvenirs. Fighting and drunkenness were commonplace. The public started to attack public hangings as cruel, and by 1846 twenty states enacted private hangings. The abolitionists opposed these laws, believing that public execution would eventually lead the general population to rise against capital punishment, and put an end to hanging in the United States.

The onset of the civil war halted the anti-death penalty crusade and delayed progress of the abolition movement. After the Civil War, unprecedented levels of lynching or extra judicial hanging carried out by mobs became common especially in the South. From 1882 to 1920, an estimated 4,314 men and women were lynched, almost half of whom were African American.

America's entry into World War I and the Great Depression in 1930's dealt another blow to the movement making criminal law reform extremely difficult. In fact there was significant growth supporting the use of capital punishment during this time. From the 1920's to the 1940's there was a revival in the use of the death penalty, due in part to the writings of criminologists, who argued the death penalty was a necessary social measure. There were more executions in the 1930's than in any other decade in U.S. history with an average of 167 per year.

Although the privatization of executions reduced public consciousness, it also led to more humane methods of inflicting punishment. A growing faith in science to make a better society, one that was not barbaric, lead to the use of electrocution as a swift method of execution. In 1888, New York tore down its gallows and the first electric chair was built and put to use in 1890. Death took over two minutes. Once the switch is flipped 500- 2000 volts are raised and lowered until the heart stops beating; the prisoners body is red with third degree burns.

More states converted to electric chairs and cyanide gas. Nevada was the first state to use the gas chamber in 1924. Death takes but a moment but there is extreme suffering as the toxic gas makes it impossible to breath and the prisoner is asphyxiated. The gas chamber was used in Colorado, Arizona, New Mexico, North Carolina and Oregon. Arizona was the last state to use the gas chamber in 1999.

In the 1950's public sentiment began to turn against capital punishment, the debate resurfaced in part because of death row inmate Caryl Chessman's autobiography Cell 2455, and later, Death Row. Also many allied nations around world either abolished or limited the death penalty. But trying to end capital punishment state by state was difficult so activists turned to the courts during the 1960's civil rights movement. In 1966 support for capital punishment reached an all time low, and the number of executions dropped to 191 between 1960 and 1976.
In 1972 the Supreme Court ruled that the death penalty "constitutes cruel and Unusual Punishment" in violation

continued on page 25

Fulton's Steamboats and the Supreme Court

By Richard Wires

Gibbons v. Ogden (1824, 22 U.S. 1) stands among the landmark decisions in Constitutional law for the Supreme Court's ruling on interstate trade under the "commerce clause" (Article 1, Section 8, Clause 3). It established a broad interpretation of federal authority that remained controversial among supporters of states' rights. Yet probably few know the case's background involving Robert Fulton and a monopoly granted to his steamboat business. John Marshall used an appeal challenging the award of special rights by New York State to define interstate commerce and assert the exclusive power of Congress. Looking into the case's origins provides an interesting insight to events in our early history.

First there are two common beliefs that are not true. Fulton did not "invent" the steamboat, others having already built and run steam-powered vessels, both in Europe and in America. But he was first to demonstrate that steamboats had a practical use and role to play. In August 1807 his boat carried invited passengers 150 miles up the Hudson River from New York to Albany in about 32 hours running time and then back down in only 30 hours. That was phenomenal speed in the pre-railroad era. Fulton's boat was also not the "Clermont." He called and registered it as the "North River Steamboat" of Clermont. Clermont was the upstream estate of his financial partner, Robert R. Livingston. Clermont was not part of the name of the vessel, but the public liked Clermont over the more cumbersome "North River Steamboat." The Hudson was then called the North River.

Livingston was a major figure in New York with many roles in early America: he had been in the Continental Congress, helped draft the Declaration of Independence, administered the oath to George Washington in 1789, and served as minister to France, arranging for the Louisiana Purchase in 1803. Fulton was in Europe experimenting with nautical devises and steamboats in Paris when he met Livingston. The politician had obtained from the New York legislature a grant of monopoly for steamboat operations on all New York waters if certain conditions were met. Obviously the idea was to reward a patent holder for the costs of research and development. The grant covered a twenty-year period upon demonstration of a steamboat reaching at least four miles per hour. The Clermont's success activated the grant, extendable for three years for every additional boat up to a thirty-year maximum, which Fulton's further steamboats soon ensured.

Livingston died in 1813 and Fulton in 1815. But their successor interests carried on. They operated steamboats they owned and sold licenses for other routes. Because many services were ferries connecting New York and New Jersey communities, the traffic crossed state lines. The monopoly pitted officials of New York and New Jersey and powerful businessmen against each other.

For years each state passed laws in a war of words and court rulings. New Jersey claimed jurisdiction to the middle of the Hudson northward to its own state boarder, for instance, while New York said that a royal grant had given it control of the entire Hudson. Meanwhile the Livingston-Fulton interests repeatedly got injunctions against any unlicensed New Jersey steamboats. Enter Thomas Gibbons and Aaron Ogden. A former New Jersey governor, Ogden had purchased a Livingston-Fulton license to run steamboats on routes across the Hudson; Gibbons began operations in 1818, using a steamboat registered under a 1793 federal law but without a Livingston-Fulton license. He also had backing from another owner of steam ferries, Cornelius Vanderbilt, who wanted to break the monopoly and extend his fleet. Those ferries would become the basis of his fortune.

In 1820 Ogden got an injunction against Gibbons in New York. The court had supported the state's power to regulate trade on its water. When Gibbons brought suit against Ogden in New Jersey in 1822, the case reached the state's highest court, which ruled for Gibbons under a New Jersey statute of 1820. New Jersey's chief justice even suggested that Gibbons appeal the New York injunction to the nation's Supreme Court. He did so. Presenting each side's views and arguments in February 1824 were very prominent attorneys of the era. Gibbons, Vanderbilt, and New Jersey state officials relied on popular politician Daniel Webster; in his appearance United States Attorney General William Wirt support their side; the Livingston-Fulton interests were represented by the respected Thomas Emmet and Thomas Oakley.

Robert Fulton

continued on page 21

continued from page 20

Fulton's Steamboats and the Supreme Court

Webster argued that under the commerce clause the regulation of all interstate trade was assigned to Congress. He pointed out too that federal laws already governed the enrolling and registering of boats used in the nation's coastal waters. The monopoly's attorneys stressed the state's concurrent powers, noted that other states also had issued grants, argued the need to protect patent holders' rights and raised a number of situations as parallels. They essentially wanted a narrow construction of the commerce clause. But the Fulton-Livingston interests could not overcome the clarity of the Constitution's language. Early in March the Court announced its 6-0 decision. In his opinion Chief Justice Marshall wrote with certainty: the Constitution gave power over interstate commerce to Congress. His interpretation of its reference to commerce "among the several states" was logical and required little elaboration. That the commerce in this instance occurred across rivers and lakes or inlets and harbors which formed state borders clearly made it interstate trade. In that area Congressional power was exclusive. A state could regulate commerce conducted entirely within its borders, however, and had certain rights in matters of health and safety. But the law granting the monopoly on all waters New York claimed assumed authority assigned to Congress and in consequence the law and grant were void.

With the monopoly's end steamboat construction and traffic on the river boomed. Soon after the Court's ruling the completion of the Erie Canal in 1825 opened a water route to Lake Erie ports and boosted trade and the nation's westward movement. The steamboat age ended with the growth of railroads and then highways. But intense debate over states' rights and interpretations of the commerce clause has never stopped.

Richard Wires holds a doctorate in European History and a law degree. He served in the Counter Intelligence Corps in Germany and is Professor Emeritus of History at Ball State University, where he chaired the department and later became Executive Director of the University's London Centre. His research interests include both early spy fiction and actual intelligence operations. His books include "The Cicero Spy Affair: German Access to British Secrets in World War II. "

continued from page 17

A Bird's Eye View of Law School:

In the next part of this series, I will describe my classroom experiences in law school so far. Because I started law school in the summer, I was able to finish two of my doctrinal classes early, and I will be able to take upper-level courses in the fall and spring of this year. This fall, I will be enrolled in Civil Procedure, Criminal Law, Legal Research and Writing, International Law, and Foundations of the Law. I look forward to sharing stories and observations, hopefully giving former law school graduates a chance to revisit time spent in law school and provide a sense of what the experience is like nowadays.

Ashley Walker is a first-year law student at Duke University. Before coming to law school, she was a legal assistant with the firm Lichtman and Elliot, PC, in Washington, D.C., specializing in immigration and asylum law. She graduated from Dartmouth College in 2010 after studying English Literature and Arabic. While in college, she participated in Arabic language study abroad programs and held internships in Fez, Morocco, Cairo, Egypt, and Jerusalem, Israel. Subsequently, she was a paralegal with Cleary Gottlieb Steen & Hamilton, LLP, working primarily on antitrust litigation and securities.

At The Law Library Live CLE Programs

Autumn will be a busy season at the Rupert J. Smith Law Library! The following programs are scheduled by the Friends:

- **Common Estate Planning Mistakes and How to Avoid Them**
  - By Bruce Abernathy
  - Friday, September 13
- **Representing the Criminal Case 101**
  - Steve Ziskinder
  - Friday, October 25
- **Preservation of Error Regarding Jury Verdicts and Final Judgments**
  - Hon. Burton Conner
  - Friday, November 22

The Friends of the Rupert J. Smith Law Library are sponsoring these three programs as the last in the 2013 series. Each seminar offers one hour of CLE credit. $25 includes your delicious lunch.

Lions, Tigers, and Motions to Disqualify...Oh My!

Part Two of the Series

By Leonard D. Pertnoy

III. The Lawyer-as-Witness Rule: Origins, Evolution, and Limitations

The prohibition against lawyers serving as witnesses for their clients originated as a rule of evidence in an 1846 case in which a trial judge, citing no precedents, declared inadmissible a lawyer's testimony for his client based on the argument that the jury "might have considerable difficulty in separating those statements which they had heard from a person as advocate, from those which they had heard from the same person as witness."[1] Now well established as a rule of professional conduct rather than a rule of evidence, the Attorney-Witness Rule recognizes that a lawyer generally may not act as an advocate and a witness at the same trial.

The Arizona Supreme Court elaborated on the problems that arise when attorneys testify at their client's trials:

> When an attorney persists in acting both as witness and advocate, ordinary procedural safeguards designed to give the parties a full and fair hearing become problematic. For example, the familiar mechanics of question-and-answer interrogation become impossible. The rule excluding witnesses from the courtroom may be invoked, yet the advocate-witness obviously must be allowed to remain. The advocate who testifies places himself in the position of being able to argue his own credibility. This special witness can take the stand, objectively state the facts from personal knowledge, then press home those facts by argument to the jury.[2]

The Attorney-Witness Rule also protects against the possibility that a lawyer's credibility as an advocate may be enhanced once he is sworn as a witness;[3] and against the opposite possibility that the lawyer whose honesty on the stand has been successfully attacked will find that his diminished credibility as a witness jeopardizes his persuasiveness as an advocate.[4] Additionally, the rule protects the non-testifying lawyer from being put in the awkward position of having to cross-examine his opposing counsel and impeach his credibility, even if only on the obvious ground of interest in the outcome of the case.[5]

In 1969, the American Bar Association's Model Code of Professional Conduct (Model Code) codified the Attorney-Witness Rule as DR 5-101(B)[6] and DR 5-102.[7] A primary disadvantage of the Model Code's attorney-witness formulation was the ambiguity of its formula prohibiting representation where it is "obvious" that the lawyer or his associate "ought" to be called as a witness on the client's behalf.[8] This "Ought to be Called" test led to inconsistent results in the case law: some jurisdictions imposed a high threshold of necessity before deeming the lawyer to be a witness and therefore subject to disqualification,[9] while other jurisdictions deemed the lawyer to be subject to disqualification even if the testimony was not so crucial or indispensable.[10]

Endnotes for this article may be found on the last pages of our online edition at: www.rjslawlibrary.org

continued on page 27

continued from page 15

The Four Freedoms

Reading accounts of these meetings one gets the feeling that the War Department felt that their need was more for recruitment purposes than for the support of the general public. Rockwell actually may have embellished this rejection in later years. Some sources published after Rockwell's death, question whether the government was truly as discouraging as Rockwell claimed. They cite an encouraging correspondence with the Office of War Information. There is evidence to suggest that fragmentation within the War Department actually caused the rejection of Rockwell's work. At that time three government agencies had responsibility for producing materials in support of the war. Each agency had its own idea of what message to convey and how to convey it.

Frustrated by the War Department's indifference, Rockwell took his sketches to Ben Hibbs, his editor at the "Post". Hibbs immediately saw an opportunity. In the years of the great depression, The "Post" had become a harsh critic of Roosevelt's "New Deal" policies and it was vehemently opposed to any involvement in the coming war in Europe. This stance cost the "Post" a great number of readers when the war finally did come. Recognizing the power of Rockwell's images, Hibbs instructed Rockwell to drop any other cover assignments he had been given and complete the series as soon as possible. Hibbs arranged for publication of *the Four Freedoms* as a series of covers for the "*Post"*. In addition, each edition would be accompanied by essays by some of the leading writers of the day, on what each freedom meant.

Hibbs quite likely saw a way to restore the image of the "Post", tarnished by its earlier opposition to the war. Hibbs wisely continued to position the "Post" solidly with the war effort by having Rockwell chronicle the wartime adventures of the fictional "Willie Gillis" from his enlistment to his homecoming.

The *Four Freedoms* series took Rockwell seven months to complete. He wrestled with the series for two and a half months before he actually began to paint.

The ideas that came to him seemed inadequate to convey the powerful message of the *Four Freedoms* speech. The single minded intensity of his effort actually caused him to lose fifteen pounds which, on his six foot, 135 lb. frame was significant. After many sleepless nights, an idea for the first painting came to him and he set to work.

"*The Freedom of Speech*", was inspired by an actual town meeting Rockwell attended in which an individual stood up and expressed an unpopular opinion. Rockwell observed that the audience, while not in agreement with the speaker, recognized his right to speak and listened. A portion of Rockwell's face appears in the upper left corner of the painting.

The blackboard behind the speaker and the angle of view imbue the speaker with a sense of individualism that forms the core of the freedom of speech. Rockwell is said to have considered this painting his best work.

The Freedom from Want, depicting a bountiful holiday table surrounded by family came to represent an ideal Thanksgiving in the minds of Americans for decades. It would be easy to imagine this scene as a greeting card.

The Freedom from Fear is one of the most moving examples of Rockwell work. I have a vivid memory as a young father looking at this painting. Two parents are looking at their sleeping children. While the mother tucks the children in, the father looks on holding a newspaper with the headline, "BOMBING HORROR", just visible. The clothing and furnishings accurately date the painting, but the sentiment and emotion are as moving and relevant today as they were then.

Rockwell struggled most with the last painting of the series, producing four versions of "*The Freedom of Worship*". Each version found critics among his neighbors, many of whom modeled for one of the four versions. His final version of the *Freedom of Worship* represents a dramatic change in Rockwell's style. The figures are in profile and place the viewer as a participant rather than a witness. Two of the figures are obviously praying. There are only two props: a set of Rosary beads, and what looks like a Bible. This painting contains nothing else other than the figures themselves. There is no worldly setting. The figures are bathed in a light that might be described as spiritual. The painting is inscribed with; "EACH ACCORDING TO THE DICTATES OF HIS OWN CONSCIENCE". Rockwell felt the inscription was needed to establish what the people were doing. When Rockwell was asked where he found the inscription he said he read it somewhere but could not remember where. It actually can be found in the writings of Mormon leader Joseph Smith. The inscription was later deleted in the poster version of the painting produced by the War department.

The Four Freedoms are all approximately 4 feet by 3 feet. They are somewhat more muted in color than Rockwell's usual work. The models used for the paintings are all neighbors of Rockwell's Vermont home. Oddly, one person, Jim Martin, appears in all four paintings.

Rockwell's Four Freedoms *Freedom of Speech*, *Freedom of Worship*, *Freedom from Want* and *Freedom from Fear* were first published on February 20, February 27, March 6 and March 13, 1943. Upon publication *The Saturday Evening Post* received millions of reprint requests. Rockwell's version of the story is that only after the public demanded reprints did the Office of War Information get involved by producing 2.5 million sets of *Four Freedoms* posters. It seems more likely that the War Department, now organized under one department, finally recognized

continued on page 24

continued from page 23

The Four Freedoms

Rockwell's images as an important fundraising tool. By the end of the war, the Office of War Information produced 4.5 million sets of the posters.

Up to that time, no image or series of images had ever sold as many copies. Hardly a school or public building could be found that did not display the series. Rockwell himself received over seventy thousand letters expressing what the "*Freedoms*" had meant to them.

After publication of the Rockwell works and subsequent demand for reprints, a tour was planned highlighting the popular paintings as a marketing device for the sale of War Bonds. During the subsequent 16-city tour, which included various celebrities, public officials, and entertainers, approximately 1.2 million people throughout the United States viewed the paintings, which helped to raise $132 million ($18.533 million for the Second Loan Drive alone) for the war effort though the sale of war bonds. According to *The New Yorker* in 1945, The *Four Freedoms* "were received by the public with more enthusiasm, perhaps, than any other paintings in the history of American art". In a fitting testimony to what one individual can do, Rockwell is widely credited with contributing to the success of the war effort.

Despite the success of *The Four Freedoms*, 1943 was a difficult year for Rockwell. A fire in his studio in April destroyed thirty of his paintings and virtually all of the costumes and props he had used throughout his career to evoke the appropriate time and place of his themes. Though devastated, Rockwell made no effort to replace old costumes, instead beginning to move to more contemporary subjects and themes.

From an artistic standpoint as well, "*The Four Freedoms*" represents a turning point in Rockwell's career. For decades he had produced homespun scenes of Americana that would evoke nostalgia or amusement. Beginning with *The Four Freedoms*, Rockwell began to use his art to elevate and inspire. His work began to deal with larger social issues and ideas. This change suggests that Rockwell had begun to see himself as an artist with a broader vision and purpose than an illustrator.

It might be tempting to see Norman Rockwell as one of the characters in his paintings. Harmless looking and steeped in small town New England, one artist called him the "Rembrandt of Punkin' Crick". The truth is that Rockwell's life was far removed from the carefully crafted image he created of himself and the idealized world he portrayed. He and his first wife divorced due largely to numerous affairs by both of them. His second wife was plagued by alcoholism and mental illness. Rockwell himself was a workaholic, painting seven days a week, often slipping of to his studio in the midst of social gatherings to paint. He once confided to a therapist, "I paint happiness, but I haven't found it."

Norman Rockwell

Norman Rockwell died in 1978 at age 84. He would be pleased at the recognition he now receives. After decades of being dismissed as an illustrator, a rank sentimentalist, an amateur, Norman Rockwell has finally assumed his rightful place as an eminent American artist. Recent exhibits in bastions of modern art such as the Museum of Modern Art and the Guggenheim Museum in New York have signaled his re-emergence. In 1999, *The New Yorker* art critic Peter Schjeldahl said of Rockwell in *ArtNews*: "Rockwell is terrific. It's become too tedious to pretend he isn't." His works regularly sell in the millions and tens of millions of dollars. A touring exhibition of his work across the country has introduced new generations to his work.

Rockwell produced over 4,000 artworks during his lifetime. Sadly, many have been lost to fire, theft, and other disasters. A large number are in public collections and many are in the Rockwell Museum in Sturbridge Massachusetts.

It has always been fashionable for critics to dismiss works that find wide popularity with the public. A noted art critic once panned another artist noting that "People in the future will find it astonishing that John Singer Sargent was once considered an artist." Fortunately, critics are forgotten but timeless works like *The Four Freedoms* endure.

Paul Nucci is a musician and an artist and occasional contributor of articles about the arts and the Law.

continued from page 19

A Short History of Crimes and Punishments:

of the Eighth and Fourteenth Amendments (*Furman v. Georgia*, 408 U.S. 238). The Court found the manner in which the death penalty laws were applied were "harsh, freakish and arbitrary." By a vote of 5 to 4, the Court held that Georgia's death penalty statute, which gave the jury complete sentencing discretion, could result in arbitrary sentencing. The Supreme Court effectively voided 40 death penalty statutes, thereby commuting the sentences of 629 death row inmates around the country and suspending the death penalty because existing statutes were no longer valid. This decision effectively invalidated laws in the rest of the states and put a hiatus on executions. In a knee jerk response advocates of capital punishment began proposing new capital statutes that would end discrimination in capital sentencing, in hopes of satisfying a majority of the Court. Florida was the first state to rewrite its death penalty statute five months after *Furman*; shortly after Florida 34 other states enacted new death penalty statutes.

In 1976 the Supreme Court reinstated the death penalty in one of the most controversial decisions in the Court's history. *Gregg v. Georgia*, 428 U.S. 153, determined that capital punishment itself was not always cruel and unusual punishment under the Eighth Amendment. "We now consider specifically whether the sentence of death for the crime of murder is a per se violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that the history and precedent strongly support a negative answer to this question". *Gregg* held that punishment fit the crime; the penalty of death was not excessive as applied to murder and the "cruel and unusual argument" could not be applied to the methods of execution. Firing squad or electrocution cannot be considered as cruel and unusual because "the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life." Thus, what was stipulated in *Furman* four years before had been completely reversed and ruled out.

Gregg v. Georgia relies also upon the perception of the death penalty by the public opinion: "It is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction."

In 1975 thirty states had again passed death penalty laws and almost two hundred prisoners were on death row. Death row executions would resume after a ten year moratorium, the first being in 1977 by firing squad in Utah. Oklahoma, searching for new ways to execute condemned prisoners because the state's electric chair was broken and expensive to fix ($200,000.00), enacted the first lethal injection statute. With minimal research legislators selected a specific method of lethal injection. Medical professionals refused to help develop a drug protocol citing ethical concerns. Oklahoma's medical examiner Dr. Jay Chapman agreed to draft a lethal injection statute despite "having no experience in this sort of thing" and did not consult with other medical experts. Chapman developed a three-drug protocol, a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent given intravenously until pronounced dead by a licensed physician. Although the statute specifies two drugs, Chapman added a third drug potassium chloride because as he told the Human Rights Watch organization, even though the other chemicals would kill the prisoner "you just wanted to make sure the prisoner was dead at the end, so why not just add a third lethal drug." Texas immediately passed its lethal injection statute and in 1982 was the first state to execute by lethal injection.

The protocol that Oklahoma adopted more than 35 years ago had been little changed until Europe began limiting drug supplies. The key component is the sedative sodium thiopental, which is manufactured in Italy by U.S. drug maker Hospire. Hospire ceased making the surgical sedative two years ago because the Italian government wanted a guarantee that the drug would not be used in executions. Efforts by U.S prisons to substitute propofol (Michael Jackson's lethal drug) met with opposition from German healthcare company Fresenius citing the use of the drug is contrary to FDA-approved indications and inconsistent with Fresenius' mission of "caring for life." The EU now is considering adding propofol to its torture goods restricted list. As a result, states are now forced to adapt lethal injection protocol, replacing three drugs with a single substance, others continue three-drug sequence with another anesthetic.

Lethal injection raises a number of human rights challenges relating to the diverse range of protocols and the level of physician involvement. Thirteen states have formal execution protocols though recent court litigation suggests a lack of knowledge of the procedures by corrections staff and unreliable implementation of procedures in many cases. A number of death row prisoners in Florida sought emergency legal protection following a botched execution. The humaneness of this method remains a mystery; one cannot know whether lethal injection is really painless but there is evidence to the contrary. As the U.S. Court of Appeals observed, there is "substantial and uncontroverted evidence… that execution by lethal infection poses a serious risk of cruel, protracted death." Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own asphyxiation. (*Chaney v. Heckler*, 718 F.2d 1174)

continued on page 26

continued from page 25

A Short History of Crimes and Punishments:

Although the Supreme Court held in 2008 that Kentucky's three-drug lethal injection procedure did not violate the Constitution's ban on cruel and usual punishment, it is unclear whether states adapted procedures can pass muster. In 2012 a Ninth Circuit Court of Appeals three-judge panel admonished the Arizona Department of Corrections, stating that its approach to execution "cannot continue" and questioning the "regularity and reliability" of protocols that give complete discretion to the corrections director to determine which and how many drugs will be used for each execution. The Missouri Supreme Court imposed a temporary moratorium on executions in August 2012 declaring it would be "premature" to set execution dates for death row inmates given a pending lawsuit on whether the state's lethal injection procedures are humane. Similar lawsuits are pending in other states, but not all protocol challenges have succeeded. In Texas and Oklahoma, executions have continued despite questions about protracted death and cruelty.

Since first published two hundred and fifty years ago, Baccaria's views continue to build widespread acceptance and influence throughout the world. Europe is now a death penalty free zone and the European Union requires its abolition as a precondition to membership.

Canada and Mexico are abolitionists. Many poor and developing countries, such as Albania, Angola, Cambodia, Colombia, Haiti and Nicaragua have totally barred executions. South Africa declared death sentences unconstitutional over a decade ago. As of 2012, more than two thirds of the countries (140) in the world have abolished the death penalty either by law or practice. [12] The holdouts: Acts of torture still occur and sixty countries still authorize capital punishment for ordinary crimes. Among them are Afghanistan, China, Cuba, The Democratic Republic of Congo, Iran, Iraq, Libya, Malaysia, North Korea, Pakistan, Saudi Arabia, Somalia, Uganda and Yemen. Many of the governments in the list have abysmal human rights records, many are dictatorships or totalitarian regimes, and some are conspicuous highly industrialized countries, such as Japan and the United States.

The abolition of the death penalty is rapidly becoming the norm of international law. The United States is becoming increasingly isolated from the world community because of ongoing legal and political struggles over capital punishment. The international community and some U.S. States (18)[23] have rejected the death penalty as an appropriate form punishment because of many well-documented flaws in the capital punishment system.

American's colonists suffered under harsh criminal codes. No matter if the crime was stealing grapes, practicing witchcraft or committing murder or treason, the punishment was the same, death by hanging or the firing squad. Were these methods of execution any less cruel or torturous than electrocution, the gas chamber or lethal injection?

In Beccaria's time there were no prison systems to incarcerate criminals for long periods of time. Today the United States has a well developed prison system that can house murderers, terrorists and other violent offenders. The United States is now a stable democracy unlikely to fall into a state of anarchy that was common in the eighteenth century. Thus executions are unnecessary and unwarranted in this day and age. This is a time in which we have a growing awareness of the concepts of human dignity and human rights.

If history is any indication, American executions will disappear as the death penalty's many flaws are exposed by the courts, activist organizations and pressure from the world community.

Lisa Bruno is a law librarian, free lance writer and New York Times contributor. She serves as president of the Northeast Chapter of the American Civil Liberties Union and is a community activist working for social reform locally and nationally. An avid traveler and adventurer Lisa is on a six week tour of our national parks from Florida to New Mexico, Nevada, Colorado and all points in between before returning to the East coast. Lisa lives in Atlantic Beach, Florida.

continued from page 22

Lions, Tigers, and Motions to Disqualify...Oh My!

Because of these ambiguities, the Model Code's Attorney-Witness Rule was highly susceptible to use as a tactical measure to disrupt an opposing party's preparation for trial.

In efforts to alleviate the susceptibility of the Model Code's Attorney-Witness Rule to tactical maneuvering by opposing counsel, the ABA adopted the Model Rules of Professional Responsibility (Model Rules) Rule 3.7, "Lawyer as Witness" in 1983.[11] Designed to replace the Code, the Rules set forth the duties of a lawyer, and are mandatory.[12] Under the Model Rule formation, a lawyer may be disqualified when it is "likely" that the lawyer will be a "necessary" witness, unless he qualifies under one of three exceptions.[13] If there is likely to be substantial conflict between the testimony of the lawyer and the testimony of the client, the conflict of interest makes the representation improper "whether the lawyer is called as a witness on behalf of the client or is called by the opposing party."[14]

Courts consider the three-pronged attorney-witness exceptions of Model Rule 3.7 particularly important to the prevention of tactical misuse.[15] Florida, in particular, prohibits lawyers from advocating at trials in which they are likely to be necessary witnesses unless such testimony will relate to (1) unrelated issues; (2) matters of formality where there are no reasons to believe that substantial evidence will be offered in opposition; or (3) to the nature and value of legal services rendered.[16] Lawyers are also permitted to act as advocates, regardless of the Attorney-Witness Rule, if disqualification would work substantial hardship on their clients."[17] Likewise, Model Rule 3.7(a)(3) continues the "substantial hardship" provision of DR 5-101(B), allowing lawyers and firms to act as advocates when disqualification would result in substantial hardship to clients.[18] Unlike the Model Code, however, the Model Rule formulation does not require disqualification if the lawyer's testimony is merely cumulative.[19]

The next installment of this article will appear in the next edition of Friendly Passages.

Leonard D. Pertnoy is a Professor of Law at St. Thomas University School of Law in Florida Practice, Professional Responsibility, and Real Estate Transactions. A.B., 1964, University of Vienna, Austria; J.D., 1969, University of Miami, B.A., 1966, University of Louisville. He would like to extend special thanks to his research assistant Erin Pogue for her excellent work in preparing this article.

Upcoming Bar Events

St. Lucie County:

Regular Meetings

Friday, September 6, 2013 at noon
Friday, October 4, 2013 at noon
Friday, November 1, 2013 at noon
At Cobb's Landing

Portrait Dedication of the Four Florida Supreme Court Justices from St. Lucie County
Wednesday, September 25, 2013
5:00 to 7:00 p.m. in the Jury Room

For more info: www.SLCBA.org

Port St. Lucie Bar Association:

Regular Meetings

Wednesday, September 18, 2013 at noon
Attorney Ad Litem Presentation with Judge Schack & Guests

Wednesday, October 16, 2013 at noon
Congressman Patrick Murphy

Wednesday, November 13, 2013 at noon

At Carrabba's Italian Grill
1900 SW Fountainview Blvd.

For more information: www.pslba.org

Indian River County:

Regular meetings

For more info: www.IRCLaw.org

Martin County:

Regular Meetings

Friday, September 20, 2013 at 11:45
"Ethical Issues in Hiring, Supervising & Parting Ways with Law Firm Employees"
Speaker: Robert S. Turk
Friday, October 18, 2013 at 11:45
Friday, November 15, 2013 at 11:45

Kane Center at 900 SE Salerno Road in Stuart

Fall Judicial Reception
Thursday, October 24, 6:00 to 10:00 pm

For more info: www.MartinCountyBar.org

Florida Bar CLE Programs At The Law Library

Borrow our CLEs, please!

The Rupert J. Smith Law Library of St. Lucie County will lend CLE disks to all Florida Bar Members. Please call us or email us if you would like to borrow one of our programs. If you are at a distance, we will mail them to you. You are responsible for mailing them back after having them a week. If you keep them longer, the overdue fine is $1 per day. Only one program at a time, please. We want to fulfill as many requests as soon as possible. We hope you are able to take advantage of this opportunity.

Course #	Title	Expiration Date	General Hours	Ethics Hours
1464C	Survey of Florida Law	11/24/2013	12	4
1473C	Guardians and Attorneys Ad Litem	1/25/2014	2.5	0
1425C	32nd Annual RPPTL Legislation	1/27/2014	8	1
1428C	2012 ELULS Annual Update	2/9/2014	16.5	1
1577C	An Introduction to E-Filing and E-Discovery	3/21/2014	2	2
1332C	New Frontiers in Post Litigation	3/20/2014	4.5	3
1577C	An Introduction to E-Filing & E-Discovery	3/21/2014	2	0
1544C	Practice Management Track6th Annual Solo & Small Firm Conference - The Extraordinary Lawyer: Minding Your Own Business	3/21/2014	9	2
1543C	Technology Track: Solo & Small	3/21/2014	10	3
1484C	Nuts and Bolts of Workers' Comp Appeals	4/15/2014	1.5	0
1431C	Annual Ethics Update: Ethics Technology & Trust Accounting	4/18/2014	5	5
1525C	Basic Bankruptcy, Collections and Foreclosures	4/19/2014	8	1
1475C	2012 Case Law Update: Stay Up to Date and Learn About Recent Developments and Notable Decisions in Family Law That Will Impact Your Practice	4/24/2014	2.5	0
1434C	Bankruptcy Law & Practice: View From the Bench 2012	5/8/2014	4.5	0
1560C	Deposing the Expert Witness	6/11/2014	2	0
1444C	Sunshine Law, Public Records & Ethics	8/8/2014	9	6
1510C	Probate Law 2013	8/21/2014	7.5	1
1494C	Masters of DUI 2013	8/22/2014	8	1.5
1557C	Till Divorce Do Us Part...The New Beneficiary Designation Legislation	8/26/2014	1	1
1495C	Topics in Evidence 2013	9/15/2014	7.5	2
1529C	Basic Criminal Practice	10/26/2014	7	2
1459C	36th Annual Local Government in Florida	11/10/2014	12	2
1501C	Hot Topics In Appellate Practice 2013	11/17/2014	8	1
1094C	Building a Business in a Down Economy	12/26/2014	2.5	1

continued from page 9

THE SUPREME COURT AND THE "SAME-SEX MARRIAGE"CASES..PART II

ENDNOTES

1 Gore Vidal, "Women's Liberation, Feminism and its Discontents," *New York Review of Books* (7/22/71).

2 *Hollingsworth v. Perry*, 133 S.Ct. 2652 (6/26/13).

3 *Windsor v. U.S.*, 133 S.Ct. 2675 (6/26/13).

4 Sodomy, in *Black's Law Dictionary*, includes both oral and anal sex.

5 *Lawrence v. Texas*, 539 U.S. 558 (6/26/03).

6 *Bowers v. Hardwick*, 478 U.S. 186 (1986).

7 Section 800.02 Fla. Stat..

8 Stern, Mark Joseph, "You Can Still be Arrested for Being Gay in Red-State America," www.slate.com (8/5/13).

9 Sheppard, Kate, "Virginia Gov. Candidate Cucinelli Defending Law That Forbids Oral Sex," *Mother Jones*, 4/3/13. The case is *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013).

10 Indiana Code §31-11-11-7, "Solemnization of marriage between persons prohibited from marrying."

11 The couple was legally married in Canada, and resided in New York, where that Canadian marriage was recognized. The issue was the federal government's failure to recognize the marriage as well, resulting in an estate tax which would not have been levied on an opposite-sex couple.

12 Liptak, Adam, "Supreme Court Bolsters Gay Marriage With Two Major Rulings," *New York Times* (6/26/13); Sasson, Eric, "America's Long Engagement With Same-Sex Marriage," *Wall Street Journal* (6/26/13).

13 1 U.S.C. §7.

14 Goodwin, Liz, "Lawmakers' 'Moral Disapproval' of Gay People in 1996 Could Doom DOMA law in Supreme Court," www.yahoo.com (3/27/13).

15 28 U.S.C. §1738C.

16 "Bush Calls for Ban on Same-Sex Marriages," www.cnn.com (2/25/04) (no author).

17 Melman admitted he "was aware that Karl Rove, President Bush's chief strategic adviser, had been working with Republicans to make sure that anti-gay initiatives and referenda would appear on November ballots in 2004 and 2006 to help Republicans." Ambinder, Marc, "Bush Campaign Chief and Former RNC Chair Ken Mehlman: I'm Gay," *The Atlantic* (8/25/10).

18 Talbot, Margaret, "Now for the Mini-DOMAS," *The New Yorker* (7/3/13).

19 Pinello, Daniel R., "Location, Location, Location: Same-Sex Relationship Rights by State," American Bar Association's *Law Trends & News Practice Area Newsletter*, Vol. 6, No. 1 (Fall 2009).

20 Section 741.212 Fla. Stat.

21 Weiner, Rachel, "Charlie Crist Endorses Gay Marriage," *Washington Post* (5/9/13).

22 Cox, John Woodrow and Nohlgren, Stephen, "Gay Unions' Uncertain State: The DOMA Decision Brings Mixed Benefits in Florida Because of its Marriage Law," *St. Petersburg Times* (7/1/13).

23 Munzenrieder, Kyle, "Rick Scott on DOMA Repeal: Nothing Changing in Florida," www.miaminewstimes.com (6/26/13); Rothaus, Steve, "Gay Married Couples, Still Single n The Eyes of Florida Law," *Miami Herald* (7/18/13).

24 Gibson, William, "Marco Rubio: Supreme Court Mistaken on Same-Sex Marriage," *Sun Sentinel*, (6/26/13).

25 Leary, Alex, "Bill Nelson Changes Position, Supports Gay Marriage," *Tampa Bay Times* (4/4/13).

26 Deslatte, Aaron, "Equality Florida Urges Advocates to Hold Off on Same-Sex Marriage Legal Challenges," *Orlando Sentinel* (7/22/13).

27 Same-sex marriage became available in Minnesota effective August 1, 2013. Collins, Jon, "Same-sex Marriages Legal in Minn. Beginning at Midnight," www.minnesotapublicradio.org.

28 Rhode Island began to allow same-sex marriages the same day as Minnesota: August 1, 2013. Keppler, David, "Same Sex Marriages Begin in Rhode Island," www.abcnews.go.com (8/1/13).

29 "Same-Sex Relationship Recognition," www.aclu.org.

30 "Napolitano Confirms Gay Couples Can Seek Visa for Foreign Spouse After Court Ruling," www.foxnews.com (no author) (7/2/13). On July 17, this pronouncement was confirmed in a ruling from the Board of Immigration Appeals, which effectively changed the former "place of domicile" analysis to a "place of celebration" rule. *Matter of Zeleniak*, 2013 WL 3777692 (BIA 7/17/13).

31 This scenario just presented itself in California, where a Catholic school fired a teacher who had worked there without incident for almost two decades, simply because the teacher married his same-sex partner. Pinion-Whitee, Melissa, "Glendora Catholic School Dismisses Gay Rancho Cucamonga Teacher After Publicized Wedding," *San Bernardino County Sun* (7/31/13). The California Department of Fair Employment and Housing prohibits sexual orientation discrimination, but contains an exemption for religious institutions. For a summary, *see* www.dfeh.ca.gov/Publications_FEHADescr.htm.

32 "First Gay Divorce Finalized in Colorado," *USA Today* (citing the *Associated Press*) (7/30/13).

33 Gabriel, Trip, "A.C.L.U. Lawsuit Aims to Overturn Pennsylvania's Ban on Gay Marriage," New York Times (7/9/13). The Pennsylvania lawsuit is *Whitewood et al. v. Corbett et al*., Case No. 1:13-cv-01861-JEJ (M.D. Pa. 2013).

34 Lavers, Michael, "Groups to Challenge Virginia Marriage Ban," *Washington Blade* (7/31/13).

35 Matheson, Kathy, "Pa. Sues to Stop Issuance of Gay Marriage Licenses," *Associated Press* (7/30/13); Parks, Jessica, "Pa. Courts Still Mum on Gay Marriage", www.philly.com (8/1/13); Hessler, Carl Jr., "Montgo Fights Same-Sex Marriage License Suit," www.montgomerynew.com (8/2/13).

36 Levy, Marc, Pennsylvania Attorney General Won't Defend Gay Marriage Ban," www.abclocal.go.com (7/11/13).

37 "NM Committee Oks Proposal for Same-Sex Marriage," *Las Cruces Sun-News* (no author) (1/31/13).

38 Massey, Barry, "NM Attorney General Not Defending Gay Marriage Ban", *Miami Herald* (7/22/13), Wing, Nick, "Gary King, New Mexico Attorney General, Calls for End to State's Prohibition on Gay Marriage," www.huffingtonpost.com (7/23/13)..

39 Lai, Jennifer, "Ohio Gay Couple Wins Right to be Buried Together," www.slate.com (7/24/13); Myers, Jennifer, "Cincinnati Gay Couple Wins Fight to be Buried Together," *The Columbus Dispatch* (7/23/13).

Endnotes for, *continued from page 8*

THE SUPREME COURT AND THE "SAME-SEX MARRIAGE"CASES..PART II

40 Casteel, Chris, "Supreme Court Decision Bolsters Challenge to Oklahoma Gay Marriage Ban, Couple Argues in State Case", *The Oklahoman* (7/31/13).

41 Sadowski, Michael, "DOMA and the Gap Between the Haves and the Have-Nots," *The Advocate* (7/8/13).

42 Logiurato, Brett, "Justice Alito: Gay Marriage is 'Newer Than Cell Phones or the Internet," *Business Insider* (3/26/13).

43 www.gallup.com/poll/117328/marriage.aspx.

44 This memo is available at www.chcoc.gov/transmittals/TransmissalDetails.aspx?TransmittalID=5700. See also, Hicks, Josh, "Obama Administration Extends Federal Employee Benefits to Same-Sex Couples," *Washington Post* (7/1/13).

45 "Same-Sex Relationship Recognition," www.aclu.org.

46 Hicks, Josh, "Federal Benefits Won't Extend to Domestic Partners Under DOMA Ruling," *Washington Post* (7/8/13).

47 "Equal Marriages – and Now Equal Benefits," *Washington Post* (editorial board) (7/21/13).

48 *See eg*., Ford, Zack, "It's Official: Civil Unions Are Not Equal to Marriage Under Federal Law," www.thinkprogress.org (7/8/13).

49 Zernike, Kate, "Christie Keeps His Promise to Veto Gay Marriage Bill," *New York Times* (2/17/12).

50 Editorial Board, "The Future of Same-Sex Marriage," *New York Times* (7/14/13).

51 Mulvihill, Geoff, "NJ Urges No Quick Ruling to Allow Gay Marriage," *Associated Press* (8/2/13).

52 Gates, Gary and Newport, Frank, "Special Report: 3.4% of U.S. Adults Identify as LGBT," www.gallup.com (10/18/12).

53 Francis, Enjoli, "Marriage Rate Falls to Record Low in U.S., Pew Says," www.abcnews.go.com (12/14/11).

54 1 Kings 11.1-3.

Lions, Tigers, and Motions to Disqualify...Oh My!

Stones v. Byron, 4 Dowl. & L. 393, 394; See generally 6 Wigmore, Evidence §1911 (Chadbourn rev. ed. 1976) (noting that proscription was "repudiated in the same jurisdiction within [six] years by a court in banc").

Cottonwood Estates Inc. v. Paradise Builders Inc., 624 P.2d 296, 300 (Ariz. 1981).

see Bottaro v. Hatton Assocs., 680 F.2d 895, 900 (2d Cir. 1982) (lawyer enhances credibility as advocate by taking oath as witness); accord MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981), and Comden v. Superior Court, 576 P.2d 971 (Cal. 1978);

See Cottonwood Estates Inc. 624 P.2d at 299 (Ariz. 1981); Gen. Mill Supply Co. v. SCA Servs., 697 F.2d 704 (6th Cir. 1982).

See Ford v. State, 628 S.W.2d 340 (Ark. Ct. App. 1982) (opposing counsel handicapped in cross-examining and arguing credibility of lawyer-witness); see also Model Code EC 5-9 ("If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case").

The text of DR 5-101(B) reads:

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

The text of DR 5-102 reads:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

American Bar Associations Model Code of Professional Conduct.

DR 5-101(B).

E.g., Universal Athletic Sales Co. v. Am. Gym, Recreational & Athletic Equip. Corp., 546 F.2d 530 (3d Cir. 1976) (explaining that a lawyer comes within rule only when he or she has crucial information which must be divulged).

E.g., MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981) (holding that the lawyer should be disqualified if his or her testimony "could be significantly useful" to client).

ABA Model Rules of Professional Conduct 3.7. The text of Model Rule 3.7 reads:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9. Id.

Model Rules of Professional Conduct, Scope (1989).

See generally ABA Model Rules of Professional Conduct 3.7; E.g., Weigel v. Farmers Insurance Co., 158 S.W. 3d 147, 155 (Ark. 2004).

Commt. 6 to Model Rule 3.7, e.g. Weigel, 158 S.W. 3d at 150. Contra Purtle v. McAdams, 879 S.W.2d 401 (Ark. 1994) (finding that Rule 3.7 applies only to situations where lawyer is to be witness on behalf of client, and not when called by opposing party). Compare DR 5-102(B) of the Model Code, which did not require withdrawal when the lawyer might be called as a witness by a party other than the client.

See Weigel, S.W. 3d at 153. In efforts to strike "a reasonable balance between the potential for abuse and those instances where the attorney's testimony may be truly necessary to the opposing party's case," courts are expressly "mindful of the legitimate concern . . . that Rule 3.7 might be used as a ploy by an opposing party to delay or otherwise hinder the other party's case." Id. at 155.

Florida Rules of Professional Conduct 4-3.7(a)

Id. The hardship exception will be discussed more fully in section IV, infra.

Compare Model Rule 3.7(a)(3) with Model Code DR 5-101(B).

Compare Kalmanovitz v. G. Heileman Brewing Co., 610 F. Supp. 1319 (D. Del. 1985) (holding that Model Code requires disqualification whenever lawyer's testimony would corroborate client's account of events in question) and People v. Pasillas-Sanchez, 2009 Colo. App. LEXIS 449 (Colo. Ct. App. 2009) (finding that the uncontested issue exception does not allow a lawyer to testify about uncontested facts that are material to a central issue in the case), with Cannon, 669 F. Supp. at 96 (holding that Model Rule 3.7(a) requires that corroborative testimony be necessary and not merely cumulative) and State v. Van Dyck, 827 A.2d 192, 195 (N.H. 2003) (holding that the lawyer's testimony was not necessary since it would be merely cumulative of other witness's account of what occurred).