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Grutter Called "Optimistic About Race" at Annual Meeting Discussion

Optimism was the most striking thing about Justice Sandra Day O'Connor's majority opinion in *Grutter v. Bollinger*, said John Payton of Washington's Wilmer, Cutler & Pickering, lead counsel in the case on behalf of the University of Michigan. "It was optimistic about race, and it's been a very long time since a Supreme Court decision was optimistic on race."

In *Grutter*, the Court held that the University of Michigan Law School's admissions program did not unconstitutionally discriminate against white applicants because achievement of a diverse student body is a compelling governmental interest, and the law school's admissions policies were narrowly tailored to achieve that interest.

Payton served as lead counsel for the University of Michigan for both *Grutter* and *Gratz v. Bollinger* at the trial court and at the Sixth Circuit Court of Appeals. He

argued *Gratz* at the Supreme Court.

Payton was a special guest of the Labor and Employment Law Section on a panel at the ABA Annual Meeting that explored the significance of the *Grutter* and *Gratz* decisions. The panel was presented by the Section's Leadership Development Initiative, which promotes opportunities in the Section and the profession for newer lawyers, including women and minorities.

"For those of us inside the case, the decision was not surprising," Payton said. But by stating in her majority opinion that "nothing less than the nation's future is at stake," he added, O'Connor "changed the lead."

The optimism of *Brown v. Board of Education* had receded, Payton said. "The promise of *Brown* was integration, and

that promise was clearly going unfulfilled." In *Bakke v. University of California*, Payton said, the controlling opinion of Justice Lewis

Powell, which found that achieving diversity could be a compelling governmental interest, "was undeniably optimistic, but he was only one judge, and Powell himself rejected the remedial use of race."

Payton reviewed briefly the decisions in affirmative action cases beginning with *Bakke* in 1978, finding them consistently "pessimistic" about any use of race as a selection criterion.

Following those cases, in particular a 1996 Fifth Circuit decision in *Hopwood v. State of Texas*, opponents of affirmative action specifically targeted the University of Michigan's affirmative action policies. In *Hopwood*, the Fifth Circuit had treated Justice Powell's opinion in *Bakke* as "not binding" on the issue of the importance of diversity.

Even some supporters of affirmative action "doubted that having a diverse student body is important, believing that Powell was

From the Majority Opinion in *Grutter v. Bollinger*

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

making it up, providing a subterfuge," he said.

"Our strategy was to put together a massive, overwhelming expert case" on the importance of diversity. The plaintiffs ended up withdrawing their own experts

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Comments



from the Chair

Stephen D. Gordon

As I begin my year as Chair of the Labor and Employment Law Section, I also begin to appreciate even more the efforts of those who have preceded me, especially Jana Howard Carey. In addition to being one of our most active and productive Chairs, Jana supported and encouraged me, as Chair-Elect, to take an active role in developing a number of projects that are now well under way. I look forward to continuing the progress and momentum that the Section has achieved during the past year.

I strongly believe in the idea and principle of “give back.” Membership in our Section enables us to improve professionally, profit financially, and develop personal relationships that provide social and business rewards. But it is equally important that we acknowledge and address the obligation to give back time and effort. From my experience, I know that you always get back more than you put in.

Members have many opportunities for participating in Section projects, ranging from relatively modest time commitments to the more substantial undertakings of leadership positions. However you choose to be involved, you will reap many rewards and realize that each of us can make a difference.

Section Membership has to be one of our highest priorities. Although membership growth certainly is important to finances and influence, it also enables us to fulfill the vision set forth in our Strategic Plan of being “the most valuable source of information and balanced and diverse perspective on labor and employment law issues.” Having more members will enable us to deliver the benefits of Section membership to more colleagues and thereby further improve both our profession and our Section. Having more members also means that more individuals are available to help us deliver the programs and benefits that serve law students, young lawyers, women, minorities, and Section members in general. Our law school outreach program has nearly tripled our number of law student members.

Law students and young lawyers are critical to our Section’s future. For this reason, I am placing a high priority on developing and implementing an Employment Referral Service for third-year law students and young lawyers who are Section members. The service will enable third-year students and young lawyers to post their resumes on the Section website for review by law firms with Section members and also enable those firms to post job openings for review by law student members and young lawyers. This effort is being led by the Outreach to Aspiring and Young Lawyers/YLD Fellowship Task Force, chaired by John Quinn and Dan Schwartz, with the assistance of Council Liaisons Connye Harper and Allen Gross.

Our national mentoring program is designed to attract and retain young lawyers by providing another significant benefit of Section membership. Mentoring panels are being established throughout the country, so that

young lawyers who are Section members can receive mentoring in their area. We are fully implementing this program in the Northeast, and we are processing mentoring requests elsewhere in the country. There is plenty of room for additional mentors, so, if you are interested, complete the mentor application on the Section website.

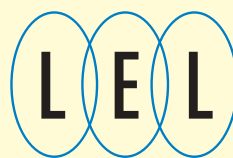
Another high priority will be to develop and implement a tax-deductible Section Program Support Fund through the ABA Fund for Justice and Education (FJE), to help support our continued ability to deliver benefits without putting undue strain on our budget. By working through the FJE, we can establish a fund for tax-deductible contributions from companies, unions, other entities, and individuals. Although the Fund will be administered by the FJE, expenditures will be at the direction of our Section. We will also continue to pursue sponsorship arrangements with various vendors. These efforts will be led by our Sponsorships, Donors, and Grants Task Force, co-chaired by Bob Bush and Larry Casazza, with the assistance of Council Liaisons Pat Scanlon and John Neighbours.

Our Section will also continue to develop and implement many other initiatives, including CLE programming, Federal Court Law Clerk Training, Nationwide Media, Law School Outreach, Law School Trial Advocacy, Pro Bono Awards and Activities, and Outreach to Government Lawyers and Academicians. I will write about these and other initiatives in future newsletters, and you can visit our website to learn more, at www.abanet.org/labor.

We also will continue to play an important role in shaping ABA policy and decisions. ABA President Dennis Archer recently announced that involving government attorneys in the ABA will be a priority of his term. We will supply him with the materials from our Government Fellowships program and offer to work with the ABA and other Sections to implement similar programs. We also have become involved in the controversial matter involving the ABA employees’ pension plan. In addition to having representation on the ABA Pension Review Committee, our Section Council created a Task Force to study the issue and report back to the Council. Hopefully, we will be able to be of assistance to the ABA in reaching a satisfactory resolution to the pension plan issue.

This year will present many challenges. In my view, every challenge is an opportunity—an opportunity to solve a problem, provide or enhance a service or benefit, and make our Section even better. I look forward to working with you and working for you, to accomplish these results. ■

I strongly believe in the idea and principle of “give back.”



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DOL and Congress Working Overtime on Proposed Changes to FLSA Regulations

By Ellen C. Kearns

On March 31, 2003, the U.S. Department of Labor (DOL) issued proposed regulations that would alter the criteria for determining who is a “white collar” employee, exempt from the overtime requirements of the Fair Labor Standards Act (FLSA), and invited public comment.

By June 30, 2003, the closing date for the 90-day comment period, the DOL had received more than 78,000 comments on the proposed regulations—the largest number ever received on a DOL-proposed rule change. According to Tammy McCutchen, Wage and Hour Administrator at the DOL, “[t]he department has many arguments to consider and many decisions to make,” noting that the current language in the duties test has not been changed in 50 years.

The proposed changes would increase from \$250 to \$425 the weekly wage level that determines FLSA exemption and would amend the so-called “duties” test that is used to determine if an employee is an executive, professional, or administrative employee.

According to the DOL, the salary level increase would allow more than 1.3 million low-wage workers to become eligible for overtime wages. These workers are mostly in the retail industry and in the rural South. The DOL contends that the proposed changes to the duties test could result in the reclassification of 640,000 workers who currently receive overtime.

Industry groups generally approved of the proposed regulations, noting that they would reduce the volume of FLSA litigation and protect unwary employers from stumbling into mistakes. However, employee advocates and labor unions were vociferous in opposing the proposed changes, calling the DOL proposal “economic poison.”

At the heart of these advocates’ concern are those employees who are now classified as “nonexempt” and entitled to overtime who will become “exempt” under the new regulations.

In its comments to the DOL, the AFL-CIO wrote that the proposals “would eviscerate an efficient and effective test.” The U.S. Chamber of Commerce basically supported the proposed changes but sent comments to the DOL encouraging it to lower the compensation level for employees to be considered exempt. “The \$425 figure might be too high for employers in the food and agricultural sectors.”

The potential that certain employees might be reclassified as exempt has caused a stir in Congress. On July 10, the House of Representatives by a vote of 213-210 rejected an amendment to the DOL’s FY 2004 appropriations bill that would have blocked major aspects of the proposed regulations. But in late July, Senator Tom Harkin (D-IA) introduced a nearly identical bill in the Senate (S. 1356) that would prohibit the DOL from moving currently nonexempt workers to the status of exempt workers.

Harkin and Senator Edward Kennedy (D-MA) have also introduced the Overtime Compensation Protection Act (S. 1485) that would forbid the DOL from promulgating regulations that would deny overtime pay to workers who can currently receive it. Speaking out on behalf of both bills are Hillary Rodham Clinton (D-NY) and Barbara Mikulski (D-MD).

On July 31, McCutchen appeared before a Senate Subcommittee to respond to the criticism of the proposed rules. McCutchen told Congress that the proposed rules would alter the criteria for determining the exempt status of “executive” and “administrative” employees, but the basic requirements for determining professional workers would remain unchanged from current law. Witnesses for the AFL-CIO disputed McCutchen’s claims. They noted that a study done by the Employment Policies Institute (EPI), backed by the AFL-CIO, asserts that the proposed revisions in the white-collar exemptions would cause 8 million

workers to lose their eligibility for overtime pay, and that the professional exemption would be affected by the changes.

The study cites cooks, licensed practical nurses (LPNs), and technical writers as potential candidates for reclassification under the new proposals. It noted that LPNs are currently classified as nonexempt employees because they do not meet the requirement that they complete a “prolonged course of study.” Under the proposed changes to the professional exemption, workers who have on—the-job experience are likely to satisfy the requirement to be a professional employee. The American Nurses Association also expressed concerns that the proposed changes would render many health care workers ineligible for overtime pay.

Despite the deep divisions among the groups that both favor and oppose the DOL changes, all witnesses at the Appropriations Hearing agreed that there is a need to clarify the existing FLSA regulations. Noting the unanimity on this point, Subcommittee Chairman Arlen Specter (R-PA) asked witnesses from both the U.S. Chamber of Commerce and the EPI to submit suggestions to the Subcommittee.

On Wednesday, September 10, 2003, the U.S. Senate defied a White House veto threat and voted 54 to 45 to approve Harkin’s amendment that would deny any funding for the proposed rules if they caused any worker to lose his or her eligibility for overtime. The amendment was attached to a broader \$138 appropriations bill that would fund DOI, HHS, and DOE for fiscal year 2004.

However, the final fate of the DOL proposed regulations remains unclear. Senator Arlen Specter (R-Pa.) will sit on the conference committee that will resolve the House and Senate versions of the bill. If the final version of the bill mirrors the Senate amendment, President Bush has threatened to veto it. So, for the Harkin bill to become law, both chambers would have to override any presidential veto with a two-thirds vote.

Meanwhile, the DOL is poring over the 78,000 comments. This process will be time-consuming, and McCutchen says she does not anticipate that new regulations will be issued before the end of the first quarter of 2004. ■

Ellen C. Kearns is a partner at the Boston office of Epstein Becker & Green.

Chronicle Covers Military Personnel Rights Panel

With 197,000 reservists and national guard troops currently activated, the Section’s Annual Meeting panel on the legal rights of military reservists returning from active duty received public attention, including coverage in the August 11 *San Francisco Chronicle* (shown above). The panel discussed the laws protecting workers seeking to return to their civilian jobs after military service. Also at the Annual Meeting, incoming ABA President Dennis Archer announced the formation of a “Working Group on Protecting the Rights of Service Members,” to be composed of representatives of numerous ABA entities including the Labor and Employment Section.

A10 *San Francisco Chronicle* MONDAY, AUGUST 11, 2003
Tough laws to protect military reservists
Legal experts gathered in S.F. review employment rights of activated troops

Professor Hylton Praises *Grutter* and *Lawrence* in Review of the Supreme Court Term

Praising the distinctions drawn by the Supreme Court in the University of Michigan affirmative action cases, Section Secretary Maria O'Brien Hylton, a professor at Boston University School of Law, suggested that *Grutter v. Bollinger* and *Gratz v. Bollinger* will force academic institutions to commit greater resources to admissions processes so that they can make the case-specific admissions decisions that the decisions require.

In the annual review of the Supreme Court term presented at the ABA Annual Meeting by the outgoing Secretary of the Section, Hylton noted that the Court had issued few opinions in labor and employment law cases this year. She spoke principally about the affirmative action cases, and predicted that they would have a profound impact on the practice of labor and employment law.

In *Grutter*, the Court upheld the affirmative action program of the University of Michigan Law School, finding that it was narrowly tailored to attaining the compelling governmental interest in achieving a diverse student body. In *Gratz* the Court ruled that the

affirmative action program practiced in undergraduate admissions at Michigan was not sufficiently narrowly tailored in its award of extra points to minority applicants.

Hylton expressed agreement with the Court's conclusion that only through individualized case-by-case review of applicants is the giving of racial preferences in admissions constitutionally permissible. "Society has a right to demand that kind of individualized approach, given the other injustices that affirmative action creates," she said.

Admissions processes that simply assign points for race, she said, are responsive to the institutional impulse to do something "short and cheap" to improve diversity in student populations. Such a practice is now invalidated under *Gratz*. Noting that "diversity is now such a deeply held value on campuses," Hylton expressed confidence that universities will find the resources necessary to undertake the more labor-intensive review of student applications required by the Court. She stated that already universities are hiring

additional personnel to read files and interview applicants.

Expressing concern about intractable gaps in test scores among black, Latino, and white students at every level, Hylton mentioned her own experience as a member of the Admissions Committee at Boston University Law School. "We are looking for people where the test scores don't reflect the kind of potential they have."

She said that given the testing gap as well as "the gap in the life of a typical black or Latino child and a white child in the United States," those uncomfortable with affirmative action programs must "pose alternative policy proposals that would address the problem of a permanent underclass."

Hylton expressed pessimism at the suggestion in Justice O'Connor's opinion that affirmative action programs might not be necessary in 25 years. Noting the testing data and dropout rates, she doubted that one generation would be sufficient to eradicate the problems that necessitated affirmative action admissions programs.

Hylton said she was frustrated by the angry, emotional quality of much of the public conversation on affirmative action. She expressed particular dismay at the critical commentary about the views of Justice Clarence Thomas, who opposes affirmative action and dissented in *Grutter*. "I have heard comments so disrespectful that it is staggering, as if he has no right to speak his mind."

Hylton also discussed *Lawrence v. Texas*, in which the Court struck down the Texas criminal statute prohibiting homosexual sodomy, overturning *Bowers v. Hardwick*. Justice Anthony Kennedy's opinion noted the due process interest in private consensual intimacy. Hylton also noted that the opinion stressed did not purport to relate to mi-

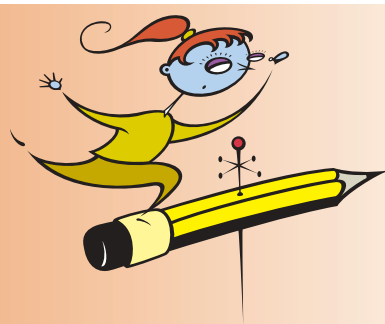
nors, coercive conduct, public conduct, or legal recognition of homosexual relationships. She commented that the decision does not suggest growing sensitivity by the Court to other kinds of personal privacy.

Hylton opined that the outcome of *Lawrence* was predictable from a "pragmatic, human resources standpoint," stating that there is a broad social consensus that scarce law enforcement resources are not best utilized policing consensual sexual conduct.

Hylton, whose teaching and scholarship include employee benefits, also discussed *Kentucky Assoc. of Health Plans, Inc. v. Miller*, in which the Court held that two Kentucky "any willing provider" provisions prohibiting health insurers from discriminating against providers who were willing to meet the terms and conditions of the insurer were not preempted by ERISA. She also commented on *Black & Decker Disability Plan v. Nord*, in which the Court held that an employee benefit plan need not give special deference to the determination of disability made by the participant's treating physician, rejecting application of the "treating physician rule" used in Social Security disability cases.

Hylton noted that the Court had decided no cases arising under the National Labor Relations Act. She suggested it might be that "something that we don't understand" is causing the decline in union membership, and that "we see the decline on the output end" in the form of fewer Supreme Court decisions.

Hylton's paper reviewing all the labor and employment cases from the Court's term will be published in the Section's journal, *The Labor Lawyer*. A draft of the paper is currently posted on the Section's website at www.abanet.org/labor. ■



Seeking Writers

The editors of *Labor and Employment Law* invite Section members to contribute articles. We can provide a topic, but we are also interested in your ideas for articles containing information

that our Section members can use. Topics might include coverage of important cases or other developments, or issues or trends in an area of labor and employment law. You may contact newsletter editor Monica Buckley at buckley@mstaff.abanet.org.

The Perspective of a Judging Couple

By Jonathan Ben-Asher

Though many married people sometimes worry that their spouses might reverse their most careful family decisions, J. Frederick Motz, Judge of the U.S. District Court for the District of Maryland, has this concern at work as well—at least in theory. His wife, Diana Gribbon Motz, sits on the Court of Appeals for the Fourth Circuit. At this year's Annual Meeting, both judges gave Section members unique insight into how federal judges think. The Judges Motz addressed the Annual Section Luncheon on "How and Why Lawyers Succeed and Fail as Leaders and Problems Solvers in Litigation."

Judge Frederick Motz was appointed to the bench by President Reagan in 1985, and for seven years served as the District's Chief Judge. He was previously U.S. Attorney for the District of Maryland. Judge Diana Motz was appointed by President Clinton in 1994. Before that, she spent many years with the Maryland Attorney General's office and was Chief of Litigation there.

The judges discussed how lawyers can address, rather than create, problems in counseling clients: discovery, summary judgment motions, appeals, settlement negotiations, and professional life.

Discovery: To Judge Frederick Motz, discovery battles are the most difficult problem for a judge to resolve because they occur "in uncharted waters." As a result, he never refers these disputes to a law clerk. To be effective, a lawyer must propose a "single, principled answer" to the discovery conflict; as Judge Diana Motz noted, a lawyer must show the court that the lawyer is trying to solve, not create, a problem.

Judge Frederick Motz uses an unusual method to prevent litigants from undertaking "scorched earth" discovery: He limits the number of depositions in accor-

dance with the amount in dispute—one hour of deposition for every \$10,000. While he considers this formula "too generous," he doesn't apply it mechanically. His advice to lawyers is to "get in, ask the questions, and go home."

Summary judgment: Judge Fred Motz views summary judg-

menting any case, she first reads the district court's opinion.

"The grayer our hair gets," she explained, "the more important we realize the facts are." Lawyers should write their briefs with a reference to the joint appendix for every factual assertion—and those facts must be scrupulously accu-

they may feel makes them appear too eager to settle a case.

Lawyering: Both judges have strong opinions about what some attorneys do that is counterproductive to problem solving. "Blowhards" who trumpet their supposed expertise in an area do their clients no favors, noted Judge Diana Motz. Because "everything you've heard about the egos of federal judges is true," lawyers should not suggest they know more about the law than the court. Instead, they should demonstrate their expertise with the facts.

Lawyers also shirk their role as problem solvers when they "skate through" problems in a case, rather than confront difficult issues. "I can understand why they do it," said Judge Diana Motz, "to avoid embarrassment." But even if the court doesn't focus on these problems at oral argument, it will do so when drafting an opinion. Judge Fred Motz also criticized lawyers who are "bullies," lawyers who "butter up" the court, and lawyers who over-brief issues and make them more complicated than they really are.

Finally, Judge Fred Motz cautioned that strict hourly billing discourages problem solving because it gives lawyers an economic disincentive to create a solution early on. Young associates, who enter the profession to solve problems, are particularly affected by this because of how their careers can suffer if they are perceived as low billers. He advised lawyers to examine how hourly billing is affecting their relations with clients and the reputation of the bar. These days, he noted, clients will pay a premium for a quick and easy solution to a legal problem. ■

Jonathan Ben-Asher is a partner in Beranbaum Menken & Ben-Asher LLP in New York City.



Judges Diana Gribbon Motz and J. Frederick Motz answer questions at the Annual Meeting Luncheon.

PHOTOS BY JOEL A. D'ALBA



ment motions as a "wonderful tool to unclog the system" of cases where there is no material dispute of fact. Lawyers briefing these motions should not put up a "smoke screen," but rather demonstrate their ability to deal with the real problems in a case. Attorneys can only lose credibility with the court if they are caught not acknowledging a tough problem.

Appeals: Judge Diana Motz noted that lawyers appealing a district court decision face a formidable barrier, particularly if they are challenging a jury verdict. After all, the case comes to an appellate court having been passed on by another judge. In re-

rate. "Overstate one fact, and you're done with me," she said. "You don't have any more credibility."

Settlement: "Ninety percent of the practice of law is diplomacy," counseled Judge Fred Motz. "Ten percent is battle." Therefore, lawyers must be strong with their adversaries and their clients, and must learn what is achievable and what is not.

Because he believes that a good mediator or judge increases the odds of settlement, Judge Fred Motz always raises ADR with the parties, although he rarely orders it. A judge has the responsibility to relieve the parties of the burden of asking for mediation, which



Profile

Two Very Different People

Asked about her relationship with her mentor, management lawyer Philip Lyon, Professor Cynthia Nance of the University of Arkansas Law School says this: “Look, this can work. If you have a person who is really committed, then it is no big deal at all. And there is no reason why more of it is not going on.”

“When Phil comes to the law school, the students see that we are two very different people who have a wonderful, warm rapport. I am an outspoken, pro-labor, Yankee woman of color,” she says, “and Phil is from southeast Arkansas, wears purple ostrich cowboy boots, and his firm has a reputation for aggressive representation of management.”

It’s not clear who made the initial phone call in 2001. Nance says she had been given Lyon’s name in connection with a mentoring program for law students. “He had been told that I was going to call him, but he thought that I wanted a mentor. Frankly, I really didn’t!”

“I had been appointed management co-chair of the Section’s Ethics and Professional Responsibility Committee, and we needed a plaintiff’s side co-chair,” recalls Lyon, who, as a founding partner at Jack, Lyon & Jones, PA, has established a national labor practice in Little Rock and an entertainment practice in Nashville. He had met and been impressed with Nance. “So I called and asked her to co-chair the Committee.”

Nance, who had never been active in the Section, told Lyon that she knew little about the ethics issues in labor and employment law. “But Phil said we would muddle through together. And that’s the thing. He’s been there every step of the way and made himself available personally.”

When Nance arrived for her first Midwinter Meeting, Lyon phoned her hotel room. “It’s very hard to be new,” she says. “Phil



Cynthia Nance speaking at the Section’s Leadership Development Luncheon at Annual Meeting

introduced me to everyone. He was watchful for any problem. I was always welcome at dinner with Phil and his family. Always knowing that he was there if I wanted to hang out . . . that’s a really good feeling.”

Nance grew up in Chicago, the daughter of a Teamster. She left college her senior year and worked as a domestic, a security guard, and a cashier before returning to school. She supported herself during her last two years at the University of Iowa Law School by teaching labor education for the university’s Labor Center to workers in communities across Iowa, relying on her own experience in low-wage work.

Nance joined the Arkansas law faculty in 1994. “I really think I’m supposed to be here. There are large employers here with strong anti-union commitments and not enough labor rabble rousers.”

She assisted in the founding of the Northwest Arkansas Workers Center, which provides assistance to low-wage workers, and is a board member of the Chicago-based National Interfaith Committee for Worker Justice with which it is affiliated. She co-chairs the advi-

sory committee to a project in Greensboro, North Carolina, dedicated to remembering and coming to terms with mass murders by Ku Klux Klan and Nazi party members on the eve of a march for social justice in 1979. After watching several law students “spin out of control” from alcohol abuse, she approached the Arkansas Bar and was appointed to the committee that obtained the approval of the Arkansas Lawyers Assistance Program.

Lyon graduated with honors from the University of Arkansas School of Law in 1967 at age 23, after serving as editor-in-chief of its law review. When the union law firm to which he had applied declined to interview him, he joined a large Little Rock firm that represented management.

He became involved in bar activities from the start, taking an early interest in what is now called practice management. “I was excited about helping lawyers in their practice.” By the late 1970s, however, Lyon found himself “as deep in the throes of alcoholism as one could imagine.” In recovery for 22 years, Lyon has been active in the development of lawyers’ alcohol and substance abuse programs.

Lyon credits his early involvement in two Section committees as keys to developing his national labor practice. The out-of-state lawyers Lyon met through his ABA activities were the principal source of his client referrals.

In 1986, he and two partners left their firm and formed Jack, Lyon & Jones, which today has 20 lawyers and four offices. Shortly thereafter, Lyon started an entertainment practice in Nashville, spending one or two days there each month, assisted by a secretary who brought her typewriter from home.

In 1988, the Country Music Association rejected his application

for membership because he lacked music industry experience, and for years Lyon was frustrated by the practice’s glacially slow growth. Things began to change when Lyon attempted to position his firm as Nashville’s only entertainment practice with labor and employment expertise. The practice has now firmly taken root and represents major country music clients, including the Country Music Association.

Lyon and Nance continue to co-chair the Section’s Ethics and Professional Responsibility Com-

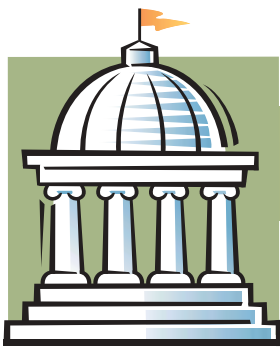


Philip Lyon at the Section’s Leadership Development Luncheon at Annual Meeting

mittee, discuss their work in lawyer assistance programs, make joint presentations to law students, and enjoy a good friendship. From her work on the Ethics Committee, Nance has received additional professional opportunities. Lyon takes great personal pride in Nance’s accomplishments and in his relationship with her.

“It’s like in AA,” he says. “The only way to keep sobriety is to give it away to others. And the only way to keep the law as a revered profession is to give to other lawyers.” ■

—Mark Risk



Casenote

By Inara K. Scott

Defining “Employee”: Supreme Court Resolves Questions in *Clackamas v. Wells*

Many employment statutes apply to “employees,” but not all statutes provide a helpful definition of that term. For example, the Americans with Disabilities Act (ADA) defines an employee as “an individual employed by an employer.” Determining whether an individual is an employee can be crucial to fixing an organization’s liability to that individual with regard to the ADA and other employment statutes. Yet, many employers remain confused as to what makes an individual an employee—as opposed to an independent contractor, co-partner, or other party having no employment relationship.

The Supreme Court recently addressed this question in *Clackamas Gastroenterology Assoc. v. Wells*. In *Wells*, the Court reversed and remanded the Ninth Circuit’s opinion that shareholders of a professional corporation should be considered employees for purposes of the ADA. In doing so, it provided a general framework for determining if an individual is an “employee” and resolved a split between the Second and Ninth Circuits and the Seventh Circuit that implicated not only the ADA, but also Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act (ADEA).

The Seventh Circuit was the first to address the question of whether shareholders should be considered employees for purposes of employment discrimination laws. Using a so-called economic realities test, the Seventh Circuit concluded that shareholders acted more like partners than shareholders of a general corporation, and, as such, should not fall under the protection of Title VII. In contrast, in *Hyland v. New Haven Radiology Assocs., P. C.*, the Second Circuit refused to strictly

apply an economic realities test in a similar fact scenario. Whether or not the shareholder acted as a partner was irrelevant, the Second Circuit held, because the corporation had identified the shareholder as an employee in an employment agreement, and the roles of employee and partner were mutually exclusive.

Following the Second Circuit, the Ninth Circuit rejected the economic realities approach and focused instead on the broad, remedial purposes of the ADA. The Ninth Circuit noted that the individuals in question participated in the management and operation of the medical organization and were designated employees under the terms of their employment agreements.

The Supreme Court’s reversal of the Ninth Circuit decision abrogates both the Seventh and Second Circuits’ analyses. The economic realities approach favored by the Seventh Circuit was unhelpful, the Court found, because in certain contexts a partner could be an employee, and this approach failed to address the central question of what defined an employee under the terms of the statute. The Second and Ninth Circuits failed, according to the Court, by looking too broadly at the purposes of the statute, thereby running afoul of countervailing legislative intent to preserve aspects of the common law and shelter small businesses from the reach of anti-discrimination laws.

In its opinion, the Court focused on the importance of common law agency concepts and guidelines, just as it had in a previous case, *Nationwide Mut. Ins. Co. v. Darden*, which examined the definition of “employee” in the context of the Employee Retirement Income Security Act (ERISA). Although the corporate form at issue in *Wells*, the profes-

sional corporation, did not exist at common law, the Court found that the common law element of control was nonetheless the “principal guidepost” that should be used when determining whether an individual receives statutory protection as an “employee.” The Court suggested that this analysis can be used in any context in which Congress uses the term “employee,” but fails to helpfully define that term, including Title VII, the ADEA, and the ADA.

The primary consideration of the control test, originally advocated by the Court in *Darden* and reiterated in the EEOC guidelines, is whether the employer controls the “means and manner of the worker’s work performance.” The control test does not provide a definitive list of necessary or conclusive factors. Rather, “all the incidents of the relationship” must be considered, “with no one factor being decisive.” In the context of a

shareholder/director inquiry such as the one at hand, the Court looked at the factors suggested by the EEOC, which includes factors such as the organization’s right to hire, fire, and set the rules and regulations of an individual’s work.

It remains unclear what outcome the parties in *Wells* can expect. The Court notes that some facts in the case, particularly the fact that the shareholders at issue controlled the operation of the clinic and shared its profits, support a finding that they are not employees, but remanded for a fact-specific analysis using the EEOC standard. Thus, it is evident that in the context of anti-discrimination laws, there remain no bright-line rules—only more shades of gray. ■

Inara Scott is an associate at Ater Wynne LLP, Portland, OR. She would like to thank Stacey Mark for her assistance on this article.

Section Treatises Available from BNA Books

New editions of Section treatises being published include *Elkouri and Elkouri: How Arbitration Works*; *Equal Employment Law Update*; *International Labor and Employment Laws, Vol. I*; and *Trade Secrets*. Supplements to the following treatises will soon be available: *Covenants Not to Compete*; *The Developing Labor Law*; *Employee Benefits Law*; *Employment Termination*; *The Fair Labor Standards Act*; *How to Take a Case Before the NLRB*; and *International Labor and Employment Laws, Vol. II*.

New editions and supplements are continually being released. A list of current and forthcoming titles was mailed to every Section member in September. For a full list of titles, tables of contents, contributor lists, and publication dates, visit www.bnabooks.com/ababna/bnatitles.html. Order at www.bnabooks.com, or by calling BNA Books at 1-800-960-1220 or e-mailing to books@bna.com. When ordering, be sure to include the Section discount code ABAL.

and conceding for purposes of the lawsuit the educational benefits of diversity.

By making its own explicit finding that achieving a diverse student body is a compelling governmental purpose, Payton said, *Grutter* removed the issue of whether Justice Powell's opinion in *Bakke* had binding precedential effect.

Payton further noted that a sixth Justice, Anthony Kennedy, endorsed diversity as a compelling interest in his opinion in *Grutter*, disagreeing only about the issue of whether the law school's affirmative action policies were narrowly tailored enough. Kennedy has agreed, Payton said, that "having a diverse student body makes us a better country."

Payton also credited what he termed the "unbelievable and unprecedented" *amicus* support for

the university, including support from the ABA, major corporations, religious organizations, and the military.

Payton noted, however, that the earlier cases on affirmative action in employment remain good law. Noneducational organizations wishing to use affirmative action programs must show that diversity is essential to their mission and that that mission is a compelling interest. This might be most achievable for the military and law enforcement organizations, but will remain problematic for other employers.

Payton said he was skeptical about Justice O'Connor's comment that affirmative action programs would no longer be necessary within 25 years "because of how difficult and embedded the issues of race have proven to be." He added, "We should accept it as a challenge, however."

"K through 12 education is bro-



John Payton, lead counsel in the recent *Gratz v. Bollinger* and *Grutter v. Bollinger* affirmative action cases, shared his thoughts on the rulings.

PHOTO BY JOEL A. D'ALBA

ken on the public side," Payton said. "Fixing education K through 12 is a challenge for absolutely everybody."

"Segregation has come back, and it has surprised us," he said. Payton noted that in urban areas

minority cities are surrounded by mostly white suburbs. "We have to do something about persistent segregation in residential patterns. The park and the shopping mall seem integrated, but these are impersonal settings."

Payton stressed that in his mind the issue of affirmative action does not simply collapse into a discussion of social class inequality. "Race is separate from class. Race confounds all of us. Not just white people; we're all confounded by it."

Another panelist, Frank Scruggs of Greenberg Traurig in Miami, said the question now is what institution "will be the first to fumble the benefits of *Grutter*" by failing to implement its affirmative action programs as required by the decision. Scruggs reminded "that four justices called the law school program 'a sham'" that merely masqueraded as race-based admissions decisions. ■

Inductees in the Class of 2003

The College of Labor and Employment Lawyers, Inc., headquartered in Washington, DC, was founded in 1995. It is a nonprofit professional association honoring the leading lawyers nationwide in the practice of labor and employment law. Established through an initiative of the Section's Council, the College operates as a freestanding nonprofit organization.

Fellows are nominated exclusively by other fellows and elected by the Board of Governors after appropriate due diligence has established that a nominee meets the highest standards of the profession. For more information on the College, call 202/955-8225 or go to www.laborandemploymentcollege.org.

The Section congratulates the following lawyers who were inducted as fellows on Sunday, August 10th in San Francisco.

Fred W. Alvarez, Palo Alto, CA
James G. Baker, Overland Park, KS
Patricia C. Benassi, Peoria, IL
Edwin H. Benn, Glencoe, IL
Harlan Bernstein, Portland, OR
Nancy Bornn, Marina del Rey, CA
G. Ross Bridgman, Columbus, OH
Thomas B. Buescher, Denver, CO
David R. Cashdan, Washington, DC
Julia Penny Clark, Washington, DC

Jonathan A. Cohen, Washington, DC
James M. Dawson, Minneapolis, MN
Edward J. Dempsey, Hartford, CT
Victoria de Toledo, Stamford, CT
Anthony E. Dombrow, Chicago, IL
Jacquelin F. Drucker, New York, NY
H. Reed Ellis, Newark, NJ
B. Frank Flaherty, Garden City, NY
Michael R. Fox, Madison, WI
Leonard D. Givens, Detroit, MI
Melva Harmon, Little Rock, AR
Edwin A. Harnden, Portland, OR
Margaret A. Harris, Houston, TX
Janet E. Hill, Athens, GA
Peyton S. Irby Jr., Jackson, MS
T. Warren Jackson, El Segundo, CA
Wendy L. Kahn, Washington, DC
Ellen C. Kearns, Boston, MA
I. Harold Koretzky, New Orleans, LA
Louis B. Kushner, Pittsburgh, PA
Homer LaRue, Columbia, MD
John T. Lavey, Little Rock, AR
Mary Lee Leahy, Springfield, IL
Charisse R. Lillie, Philadelphia, PA
Donald R. Livingston, Washington, DC
Judith A. Lonnquist, Seattle, WA
Michael Maroko, Los Angeles, CA

Peggy Renate Mastroianni, Washington, DC
John A. McGuinn, San Francisco, CA
J. Joseph McKittrick, North Hampton, NH
Raymond E. Morales, San Juan, PR
Neil Mullin, Montclair, NJ
Harvey A. Nathan, Chicago, IL
Samuel J. Nicholas Jr., Jackson, MS
Martha Clewis Perrin, Atlanta, GA
Michael L. Pitt, Royal Oak, MI
Donald J. Polden, Memphis, TN
Harry R. Pringle, Portland, ME
Charles M. Quinn, Birmingham, AL
Russell J. Reid, Seattle, WA
Nancy A. Richards-Stower, Merrimack, NH
J. Lewis Sapp, Atlanta, GA
Margaret L. Shaw, New York, NY
G. Phillip Shuler III, New Orleans, LA
Thomas F. Sonneborn, Western Springs, IL
Harry R. Stang, Santa Monica, CA
Stanley R. Strauss, Washington, DC
Howard S. Susskind, Coral Gables, FL
James E. Tobin, Detroit, MI (Emeritus)
W. Gary Vause, Gulfport, FL (posthumously)
Kathryn T. Whalen, Portland, OR
Gwynne A. Wilcox, New York, NY
Pearl Zuchlewski, New York, NY ■

Calendar of Events

2003

October 16–18

Sports and Entertainment Labor Law Committee Fall Meeting
Westin New York
at Times Square
New York, New York

December 5

FMLA/FLSA Basic Law and Procedures
Atlanta, Georgia

December 9

The Ultimate Arbitration Update
Satellite Seminar

February 5–7

State and Local Government Bargaining and Employment Law Committee Midwinter Meeting
Presidente InterContinental
Cozumel, Mexico

February 8–11

ADR in Labor and Employment Law Committee Midwinter Meeting
Westin Regina Resort
Puerto Vallarta, Mexico

March 4–5

Worker's Compensation Committee Midwinter Meeting
L'Auberge Del Mar
Del Mar, California

March 10–12

Railway and Airline Labor Law Committee Midwinter Meeting
Westin Savannah Harbor Resort
Savannah, Georgia

October 17

Federal Labor Standards Legislation Committee Fall Meeting
Morgan, Lewis & Bockius, LLP
Washington, D.C.

October 22

Equal Employment Opportunity Basic Law and Procedures
Denver, Colorado

2004

January 14–17

Labor and Employment Law: The Basics
Capital Hilton
Washington, D.C.

February 18–20

Federal Labor Standards Legislation Committee Midwinter Meeting
Wyndham Sugar Bay Resort & Spa
St. Thomas, U.S.V.I.

February 19–21

State Labor and Employment Law Developments Committee Midwinter Meeting
Wyndham Sugar Bay Resort & Spa
St. Thomas, U.S.V.I.

March 24–27

Employment Rights and Responsibilities Committee and Equal Employment Opportunity Committee Joint Midwinter Meeting
Westin Mission Hills Resort
Rancho Mirage, California

April 16

Antitrust, RICO and Labor Law Committee Midyear Meeting
Washington, D.C.

November 5–8

Labor and Employment Law: The Basics
Doubletree Suites
Boston, Massachusetts

January 16–18

Ethics and Professional Responsibility Committee Midwinter Meeting
Camino Real
Puerto Vallarta, Mexico

February 23–26

Practice and Procedure under the NLRA Committee Midwinter Meeting
Grand Bay Hotel
Isla Navidad Resort
Manzanillo, Mexico

April 21–23

Technology Committee Midyear Meeting
The National Hotel
Miami Beach, Florida

November 7

Employment Litigation Skills
Miami, Florida

January 28–30

Civil False Claims Act and Qui Tam Enforcement
Washington, D.C.

May 16–22

International Labor Law Committee Meeting
Stockholm, Sweden and
St. Petersburg, Russia

November 13–15

ERISA Litigation
Sponsored by the Joint Committee on Employee Benefits
Chicago, Illinois

February 4–7

Employee Benefits Committee Midwinter Meeting
Ritz-Carlton
New Orleans, Louisiana

February 29–March 3

Development of the Law under the NLRA Committee Midwinter Meeting
Mauna Lani Bay Hotel
Big Island, Hawaii

May 18–21

Labor and Employment Law: The Basics
Sheraton University City Hotel
Philadelphia, Pennsylvania

November 20

National Labor Relations Act Basic Law and Procedures
Cleveland, Ohio

February 4–10

ABA Midyear Meeting
San Antonio, Texas

March 2–5

Occupational Safety and Health Law Committee Midwinter Meeting
L'Auberge Del Mar
Del Mar, California

For more information on any of these events, please contact the Section office at 312/988-5813 or check the Calendar Web page at www.abanet.org/labor/calendar.html.



Section News

Section Launches Nationwide Media Program

What is news? How do reporters do their jobs? What do they want from an interviewee? What are the do's and don'ts for working with the media? These and other questions were answered at the ABA Section of Labor and Employment Law *Nationwide Media Project PR Boot Camp*, which took place at the ABA Annual Meeting in San Francisco.

The Section Council, representing some 22,000 labor and employment lawyers, initiated the Nationwide Media Program and appointed a committee to oversee its administration. The program's purpose is to enhance media coverage of labor and employment law issues by providing reporters with a list of experienced Section lawyers willing and able to provide commentary and background information on labor and employment issues in the news.

The media training program was one of the early steps in mak-

ing this project a success. Section members learned how to develop and deliver key messages to the media and other important audiences, ABA policy on speaking to the media, essential tips for giving effective TV and radio interviews, and how to communicate in today's cluttered, competitive, and cynical media environment. Members also learned how to take control of a news interview by exercising their rights to

- Determine interview time and place
- Get a description of the reporter's intended story
- Learn the reporter's deadline
- Learn who else is being interviewed
- Refuse personal questions
- Challenge questionable assertions

Participants were also reminded of the Section's message platform:

We are the most valuable source of information and have the most balanced and diverse

perspective on labor and employment issues.

Those interested in participating in the Nationwide Media Program are required to have at least seven years of labor and employment law experience in their particular areas of practice, to be a Section member, and to be a member of at least one of the Section's substantive committees. Participants must identify which of these committees' substantive content they wish to comment on, as well as their affiliation—employer, union, employee, neutral, or government.

To submit an application, check out the Section website at www.abanet.org/labor/media.html. For more information, contact Lori Boguslawski, public relations specialist and Section liaison, Division for Media Relations and Communication Services, at 312/988-6147, or Keith Maziarek, marketing and communications manager, Section of Labor and Employment Law, at 312/988-5591.

son, taking into consideration the overall composition of the committee (i.e., employer, union, employee, neutral, or government).

The Task Force Chairs expect to fill all state and local liaison positions by December 31, 2003. Liaison positions are for a two-year term and can be renewed; vacancies will be filled within one month of the vacancy. If you are interested in this important mission, please complete an application found on the Section's website at www.abanet.org/labor under "Section News."



Improve Your Discovery Techniques: A Treasury of Ideas from Section Leaders

In just three hours, learn practical ways to improve your discovery techniques from experienced employment lawyers. The program, produced by the CLE Committee of the Section of Labor and Employment Law, covers:

Part I: Informal discovery and investigation, declarations and affidavits, documents and requests for production, interrogatories and requests for admissions, medical exams and medical records, depositions, and preparing the plaintiff for the deposition.

Part II: Deposing the plaintiff, deposing defense witnesses, Rule 30(b)(6) depositions, documents at deposition, video depositions, after-acquired evidence, planning discovery, dealing with the obstructive opponent, and losing a case in discovery—mistakes to avoid.

The program is available on DVD, CD, video, and audiotape. For more information or to order the program go to www.abanet.org/cle/catalog or call 800/285-2221, select 2.

National Bar Association Honors Sherri Jefferson



Sherri Jefferson, the Section's liaison to the ABA Young Lawyers Division, has received the Junius W. Williams Award from the National Bar Association Young Lawyers Division in recognition of her "accomplishments in the legal profession, courage, and her continuous commitment to the National Bar Association and the community." Jefferson, who is corporate counsel at Starbucks Coffee Company in Seattle, is extremely active in both the ABA, the Washington State Bar Association, and the National Bar Association.

The NBA is the country's oldest and

largest national organization of predominantly African-American lawyers and judges.

Pro Bono Honor Roll and Award Approved

The Pro Bono Committee is pleased to announce that at the Annual Meeting, the Section Council approved the Section's Pro Bono Honor Roll and the Frances Perkins Award for 2004.

The Honor Roll will provide an opportunity for Section members to meet their ethical obligation under ABA Model Rule 6.1 to perform 50 hours of pro bono work in 2004, as well as receive recognition from the Section. The Frances Perkins Award will recognize outstanding achievement by a Section member or an organization that includes Section members in providing pro bono services. Enrollment and application forms are being drafted. Details about the Honor Roll and the Frances Perkins Award will be announced in the Section's next newsletter.

Ideas and Best Practices for Diversity Plan Implementation

The Section's **Committee on Equal Opportunity in the Legal Profession** is charged with overseeing the Section's diversity efforts. Among other things, the committee seeks to identify "Best Practices" employed by various Section entities to implement the Diversity Plan.

The goals of the Section's Diversity Plan are to recruit minority lawyers, women lawyers, lawyers with disabilities, and newer lawyers to Section membership; foster an atmosphere of inclusion; assist in retaining lawyers once they become Section members; seek participation of minority lawyers, women lawyers, lawyers with disabilities, and newer lawyers on committees, panels, task forces, and working groups; and provide those lawyers with opportunities and training to take on leadership roles at both the committee and the Section level.

In the Summer 2003 issue of this newsletter, we highlighted a few of the "Best Practices" from this year's committee midwinter meetings; we are pleased now to

offer more great ideas from seven additional committees that submitted midwinter meeting diversity reports. Congratulations to these committees for their admirable efforts to enhance diversity.

The **State and Local Government Bargaining and Employment Law Committee** advised that it sponsored "new attorney" scholarships to defray the costs of attending the midwinter meeting, and that a female attorney and an African-American attorney received these scholarships. In addition, one of the Committee Co-Chairs obtained a scholarship for a government speaker from a state agency that allowed an African-American male attorney to participate in the midwinter meeting.

The **Employee Benefits Committee** has established a standing Subcommittee on Diversity, and its midwinter meeting included a Subcommittee presentation regarding diversity efforts. The Committee attributes its significant increase in midwinter attendance in part to a steady stream of e-mail reminders about the meeting to Committee members, as well as its use of key "list-servs." It also sponsored a reception at the John Marshall Law School that was helpful in promoting diversity and attendance at its midwinter meeting.

The **Ethics and Professional Responsibility Committee** recruited new attendees through emails and welcomed new meeting attendees at an opening reception and a farewell dinner. The **Practice and Procedures Under the NLRA Committee** immediately involved new members in Committee activities—as Annual Meeting speakers and in leadership positions.

The **Federal Labor Standards Legislation Committee** identified diversity as a specific item in its marketing materials and encouraged first-time attendees to participate in preparing subcommittee reports and committee publications. The **State Labor and Employment Law Developments Committee** encouraged new attendees through co-chairs' personal attention, as well as outreach efforts through the American Corporate Counsel Association. After its meeting, the **Equal Employment**

Section Elects New Officers

At the Annual Meeting, the Section elected the following officers:

Chair-Elect (Employer):
Howard Shapiro, New Orleans, LA

Section Vice-Chair (Employer):
Patricia Slovak, Chicago, IL

Section Vice-Chair (Union & Employee):
Charles Werner, St. Louis, MO

Secretary-Elect:
Samuel Estreicher, New York, NY

Section Delegate to the House of Delegates (Union & Employee, 2003–2006):
Sorrell Logothetis, Dayton, OH

Section Governance Liaison (Union & Employee, 2003–2006):
Leonard Page, Sheboygan, MI

Council Member (Employer, 2003–2007):
Ellen Kearns, Boston, MA

Council Member (Employer, 2003–2007):
Peter Zinober, Tampa, FL

Council Member (Union & Employee, 2003–2007):
Christopher Hexter, St. Louis, MO

Opportunity Committee emailed all new attendees, thanking them for their attendance and soliciting comments and suggestions.

In addition, at the Annual Meeting events hosted by the Committee on Equal Opportunity in the Legal Profession this year, a number of innovative ideas were presented for possible use by the committees in future meeting planning. Ideas included preparing a letter thanking law firms for sending attorneys to meetings as a way of encouraging participation and support by law firms and tapping the faculties of local bar association programs and regional programs to enhance speaker diversity.

We encourage all Section entities to consider these and other innovative ideas for enhancing diversity and attendance at upcoming meetings. The Committee on Equal Opportunity in the Legal Profession will continue to highlight "Best Practices" in the Section newsletter, on the website, and in other communications. For more information on the Section's Diversity Plan and/or the work of the committee, please contact any of its co-chairs: Kay Baldwin, at katherine.baldwin@usdoj.gov; Denise Clark, at dmclark@heriufund.com; Gail Golman Holtzman, at gholtzman@constangy.com; or Helen Norton, at helennorton@excite.com.

News for Law Students

The Section's Law School Outreach program is coming to law schools throughout the country. A panel of distinguished local attorneys representing the diverse perspectives of labor and employment law practice (employer, union, employee, neutral, or government) will meet with students to discuss real-life experiences and current opportunities for a career in this challenging and rewarding field. If you want to attend the Section's outreach program, contact the outreach coordinator for your law school. The coordinator's name and contact information appear on the Section webpage, www.abanet.org/labor. Go to the Law Student Information page and click on Law School Outreach Program. For more information on Section programs for law students, contact Kevin Kaempfer, kaempfk@staff.abanet.org.

Annual Meeting Program Materials Available

If you were unable to attend the 2003 ABA Annual Meeting in San Francisco, you can still get a copy of the program materials. Order the two-volume set of papers, which costs \$60, by calling the Section Office at 312/988-5523. Copies of most papers are also available on the Section website at www.abanet.org/labor under the "Publications" tab. ■

1	GRUTTER CALLED OPTIMISTIC
3	DOL PROPOSED CHANGES TO FLSA
4	HYLTON PRAISES DECISIONS
5	A JUDGING COUPLE
6	PROFILE
7	CASENOTE: <i>CLACKAMAS</i>
9	CALENDAR OF EVENTS
10	SECTION NEWS



Section of Labor and Employment Law
American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611

NONPROFIT
ORGANIZATION
U.S. POSTAGE
PAID
AMERICAN BAR
ASSOCIATION



Section Launches National Media Program

(See page 10)



Spotlight on...

Sports and Entertainment Labor Law Committee's Fall Meeting Lineup

The second annual meeting of the Section's Sports and Entertainment Labor Law Committee will take place October 16–18 at the Westin New York Hotel at Times Square. The meeting will feature substantive presentations by some of the most knowledgeable and recognized persons in entertainment and sports law.

The meeting will begin with a welcome reception from 6:30–8:00 P.M. on Thursday, October 16, at the Westin. General sessions will be held Friday from 8:15–11:30 A.M. The morning session will start with a panel on "Multi-Employer Bargaining in Entertainment and Sports," presented by

George Cohen, Daniel Silverman, and John Truesdale. This panel will be followed by a mock baseball salary arbitration featuring arbitrator Reginald Alleyne; Michael Weiner, Associate General Counsel of the Major League Baseball Players Association, and Francis X. Coonelly, General Labor Counsel, Major League Baseball.

How did Major League Baseball avoid a devastating strike? This topic will be tackled at the



Friday luncheon by Robert Manfred and Gene Orza, principal negotiators for the owners and the players.

Friday's festivities will include a fascinating afternoon backstage tour of the Metropolitan Opera and an evening cocktail reception and dinner for attendees, spouses, and guests. These events will allow participants and their guests to mingle and continue to build the social and professional bonds that have been the hallmark of the Labor and Employment Law Section and its committees.

Participants will enjoy the Saturday morning session, which will feature the negotiators from the

legitimate theater discussing the issues and resolution of its labor contract negotiations. William Moriarity from the AFM, and Tony DePaulo from IATSE will be faced in this panel by Bernard Plum, chief negotiator for the League of American Theaters and Producers, and an additional management colleague.

The program will conclude with a panel that will focus on the impact of new technology and runaway productions in television. Experts discussing this issue will be Harry Isaacs of CBS, management lawyer Jerry Kauff, and union lawyers Tony Segall and Frank Moss. ■