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Labor and Employment Law Section
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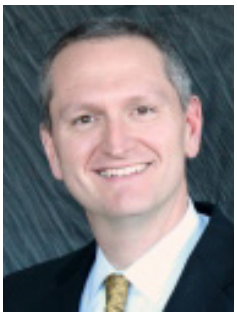
The Labouring Oar



Message from the Chair

By Craig Cowart

The Labor and Employment Law Section is doing exciting things for the benefit of our section members, and there are plenty of ways for you to get involved. We hope you will enjoy the resources and programming our Section provides and find your individual way of contributing to the work of our section.

The 6th Biennial Labor and Employment Law Conference is a featured program for our section. The conference is always dynamic and informative, and the March 12-13, 2015 conference is no exception. New Orleans is a great host city, and the Westin is an excellent venue. With excellent speakers and timely presentations, the 2015 conference is sure to be remembered as a great success.

In addition to our 6th Biennial Labor and Employment Law Conference, our section is committed to providing excellent programming throughout the year. Be on the lookout for the webinars our section will present in the coming months. We are also in the planning stage for a live presentation on labor and employment law basics that can be presented in conjunction with FBA chapters all over the country. If you have any questions about our section programming, please contact either Donna Currault, chair of our Committee on Programming and CLE, or me.

Our section is proud of the valuable and informative publications we provide to our section members. In addition to our quarterly newsletter, *The Labouring Oar*, we also provide *Circuit Updates* with information about labor and employment law decisions from federal appellate courts. We are always looking for Section members with in interest in contributing to our publications. If you would like to discuss opportunities to write for our publications, please contact either Corie Tarara, chair of our Committee on Publications and Public Relations, or me.

The Labor and Employment Law Section is successful because of the talented and committed individuals who serve on the Section Board and Committees. Your hard work is very much appreciated. Thank you!

Thank you for supporting the Labor and Employment Law Section. Your feedback an input is always appreciated. ■

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Is *McDonnell Douglas* Too Burdensome? Circuits Question the Utility of the Decades Old Burden-Shifting Model

Brian T. Rochel, Frances E. Baillon, and Phillip M. Kitzer

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is arguably one of the most influential cases in employment law. In that seminal decision, the Supreme Court articulated the now well-known "applicable rules as to burden of proof [in Title VII discrimination claims] and how this shifts upon the making of a prima facie case." *Id.* at 801. The Court held that after a plaintiff meets the elements of the prima facie case, the burden "then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 804. The inquiry, however, does not end there. Courts were also directed to assess whether the employer's stated reason was pretext for an unlawful motivation.

Although brief in analysis and legal support, *McDonnell Douglas* and its burden-shifting scheme maintained virtually unquestioned authority throughout the next several decades of employment litigation across state and federal courts. But with further developments in case law, legislative amendments, and time, *McDonnell Douglas's* controlling influence has come into question.

Over the twenty years following *McDonnell Douglas*, the Supreme Court case law continued to develop the burden-shifting paradigm, culminating in another influential case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the Court was presented with an employment decision allegedly based on both legal and illegal motives. The Court determined that in cases where mixed motives are alleged, an employer could avoid liability by proving it would have made the same adverse decision even if it had not taken the protected characteristic into account. 490 U.S. at 244-45. The Court disagreed over what quantum of evidence would shift the burden of proof to the employer. According to Justice O'Connor's concurrence, the burden would only shift to the employer when the employee could demonstrate by "direct evidence that an illegitimate criterion was a substantial factor" in the decision. *Id*. at 276 (O'Connor, J. concurring). If the employee could not meet this threshold, Justice O'Connor held the *McDonnell Douglas* paradigm should apply. Only "direct evidence" would eliminate application of the *McDonnell Douglas* paradigm.

Following *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991, which amended Title VII largely in response to a series of Supreme Court decisions. The amendments made clear that an unlawful employment act has occurred where a protected characteristic "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). The amendments also clarified that even if an employer could prove that it would have made the same decision absent an employee's protected status, that proof could only serve as a defense to damages—not liability. 42 U.S.C. § 2000e-5(g)(2)(B).

Despite the amendments, lower courts continued to question the use and appropriate level of persuasion afforded direct and indirect evidence. Courts also diverged regarding how to apply the various methods for determining whether an illegal consideration motivated an adverse employment decision and whether direct evidence was required to shift the burden to an employer in mixed-motive cases, as Justice O'Connor suggested in *Price Waterhouse*.

Almost twelve years after *Price Waterhouse*, the Supreme Court clarified that direct evidence was not required in order to shift the burden to an employer. In *Desert Palace Inc. v. Costa*, the Supreme Court held that the 1991 amendments made no distinction between direct and circumstantial evidence. Consequently, either direct or circumstantial evidence may be used to shift the burden to the employer in mixed-motive cases because "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." 539 U.S. 90, 100 (2003) (citing *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n.17 (1957)). The Court noted that Title VII cases are no different than criminal cases—or any type of case—in which circumstantial evidence is sufficient to meet the requisite burden of proof, even when that burden is higher than it is in Title VII cases. *Id.* at 101-02.

In the wake of the Supreme Court's decision in *Desert Palace*, the utility and appropriateness of the *McDonnell Douglas* burden-shifting paradigm came into question. Some circuits reasoned that *Desert Palace* altered the burden-shifting test, some circuits held that it did not, and still others simply ignored the possibility that the Supreme Court's decision made any difference to the method applied in deciding Title VII claims.

The Fourth, Ninth and D.C. Circuits allow plaintiffs pursuing mixed-motive claims to proceed using either *McDonnell Douglas's* burden shifting approach or the direct method. *See, e.g., Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) (holding that the plaintiff can prove a claim by "presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated[, at least in part,] the adverse employment decision"); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (holding that a mixed-motive plaintiff "may proceed using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the decision); *Fogg v. Gonzales*, 492 F.3d 447, 451 (D.C. Cir. 2007) (indicating that "a plaintiff can establish an unlawful employment practice by showing that 'discrimination or retaliation played a 'motivating part' or was a 'substantial factor' in the employment decision'" but noting that a "plaintiff may also, of course, use evidence of pretext and the *McDonnell Douglas* framework to prove a mixed-motive case").

The Sixth Circuit has held that *McDonnell Douglas* burden-

shifting does not apply in Title VII mixed-motive cases (at least on summary judgment). *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008) ("This case now presents us with the opportunity to finally clarify how Title VII mixed-motive claims should be analyzed at the summary judgment stage. We do so by holding that the *McDonnell Douglas / Burdine* burden-shifting framework does *not* apply to the summary judgment analysis of Title VII mixed-motive claims."). The Second and Seventh Circuits have apparently not considered whether *Desert Palace* had any impact on methodology for assessing Title VII claims.

The Eighth Circuit rejected the notion that *Desert Palace* had any impact on whether courts should or should not apply the indirect or burden-shifting method in analyzing Title VII cases. *Griffith v. City of Des Moines,* 387 F.3d 733, 736 (8th Cir. 2004) ("[W]e conclude that *Desert Palace* had *no* impact on prior Eighth Circuit summary judgment decisions."). The Eleventh Circuit has also held that *McDonnell Douglas's* burden-shifting test was left untouched by *Desert Palace*. *See Burstein v. Emtel, Inc.*, 137 Fed. Appx. 205, 209 n.8 (11th Cir. 2005); *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004). In contrast, the Fifth Circuit adopted a new, "modified *McDonnell Douglas*" approach following *Desert Palace*. *See Machinchick v. PB Power, Inc.*, 398 F.3d 345, 352 (5th Cir. 2005); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004). In short, the circuits have adopted different approaches across the country that have left district courts (and parties) with little uniform guidance on the appropriate role *McDonnell Douglas* burden-shifting should play in employment litigation.

Amidst the varying approaches in federal district and appellate courts, at least two judges have advocated for doing away with the burden-shifting or indirect method altogether because of the confusion caused by its current application. In *Griffith v. City of Des Moines*, 387 F.3d 733, 748 (8th Cir. 2004), District Judge Paul Magnuson, sitting on the Eighth Circuit panel by designation, concurred specially with the majority, writing separately to express concern over the continued use of the indirect method. Judge Magnuson issued a lengthy exposition of *McDonnell Douglas* and its progeny, noting "courts continued to struggle with the *McDonnell Douglas* paradigm." *Id*. at 741. Judge Magnuson opined that the distinction between direct and indirect evidence, and the interplay with the direct and indirect methods, is problematic for courts. *Id*. at 743 ("The direct/indirect evidence distinction, which courts have applied since *Price Waterhouse*, should have fallen into disuse after Congress amended the Civil Rights Act in 1991."). Judge Magnuson noted that the 1991 amendments clarified that any distinction between direct and indirect evidence is a "legal fiction" that is only further exacerbated by courts clinging to the direct and indirect methods: "Courts that insist that two frameworks still exist improperly create a fictional dichotomy of 'first degree discrimination' and 'second degree discrimination.'" *Griffith*, 387 F.3d at 744.

Similarly, in the most recent and leading opinion challenging the continued use of the burden-shifting method, Seventh Circuit Chief Judge Diane Wood issued a concurring opinion (which both panel judges joined) setting out a well-reasoned critique of the indirect method. *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. Ill. 2012) (Wood, J. concurring) ("I write separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike."). Chief Judge Wood expressed concern about confusion within courts around the county regarding the appropriate method to apply when analyzing discrimination and retaliation claims. "Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, as this case well illustrates, the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation (including cases alleging retaliation) could not be handled in the same straightforward way." Chief Judge Wood's concerns echo those raised nearly a decade earlier by Judge Magnuson in *Griffith*, and are illustrated in the years following as circuit courts adopted varying approaches to when and how burden shifting should be applied—and in district courts even further disparity in attempting to apply the tests the circuits set out for them.

Interestingly, the Supreme Court appears willing to consider life without the use of *McDonnell Douglas's* burden-shifting paradigm—at least in contexts outside of Title VII. In *Gross v. FBL Financial Servs. Inc.*, 557 U.S. 167 (2009), the Supreme Court questioned the applicability of *McDonnell Douglas* to ADEA claims: "[T]he Court has not definitely decided whether the evidentiary framework of [*McDonnell Douglas*], utilized in Title VII cases is appropriate in the ADEA context." *Gross*, 557 U.S. at 175 n.2 (citations omitted). The Court has called the burden-shifting scheme into question in the ADEA context on at least two other occasions. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000) ("This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under [Title VII] also applies to ADEA actions."); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) ("We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it."). However, since the Supreme Court has not directly addressed the issue, circuit courts have continued to apply *McDonnell Douglas* in the ADEA context.

Federal and state courts will continue to grapple with applying *McDonnell Douglas's* burden-shifting test and the direct method of proof, and the confusion between those tests' interplay with direct and circumstantial evidence. At the same time, two concurring opinions from different federal circuits have openly questioned the utility of *McDonnell Douglas* test.

And the Supreme Court has questioned using *McDonnell Douglas* in at least some contexts. All of this suggests that the Supreme Court may soon be faced with the question of whether the burden-shifting test should continue to be used at all. ■

Brian T. Rochel represents employees in trial and litigation of discrimination, wrongful termination, whistleblower, retaliation and all types of employment law claims, as well as advises and negotiates employment contracts and severance agreements for employees. Frances E. Baillon, of Baillon Thome Jozwiak & Wanta LLP, practices exclusively on behalf of plaintiffs in the area of employment law. Baillon litigates and tries employment cases in state and federal court involving sexual harassment, discrimination and retaliation. She has also successfully argued cases before the Minnesota state and federal

district courts, the Minnesota Court of Appeals, the Minnesota Supreme Court, and the Eighth Circuit Court of Appeals. Baillon is an MSBA Board Certified Labor & Employment Law Specialist, Vice President of the Minnesota Chapter of the National Employment Lawyers Association and Chair of its Amicus committee. Baillon is also consistently recognized as a Super Lawyer and Rising Star. Phillip M. Kitzer's practice consists solely of representing employees in employment-related disputes. He represents clients in matters involving whistleblower retaliation, employment discrimination and retaliation, and workers' compensation retaliation. He is a past President of the Minnesota chapter of the National Employment Lawyers Association, and currently serves as ex officio and Chair of the Legislative Committee.

Sixth Annual FBA Hawaii Conference

Craig Cowart was a speaker at the Sixth Annual FBA Hawaii Conference in December 2014. Cowart gave a presentation on recent cases from the United States Supreme Court and federal appellate courts that are making a big impact on federal employment law litigation. The Hawaii Conference was a great success with judges and practitioners from across the United States in attendance. ■

Pictured L - R: Robert E. Kohn, Chair, FBA Federal Litigation Section; Craig A. Cowart, Chair, FBA Labor and Employment Law Section; Hon. Robin E. Feder, Immigration Judge and Chair, FBA Immigration Law Section; and Hon. Virginia A. Phillips, United States District Court for the Central District of California.

Executive Branch Pushes Agency Action to Enforce Stalled Rule Making: No Website Left Behind

The Legislation and Congressional Relations Committee has committed to bringing you the latest news regarding legislative developments that may affect the practice of Labor and Employment law. In this installment, the committee is focusing on recent active agency action that may signal early enforcement of anticipated rule making by the DOJ and the EEOC.

Since July 2010, the Department of Justice (DOJ) has promised new guidance on how to apply the Americans with Disabilities Act (ADA) to websites. Although the business community is still eagerly waiting for the scheduled Notice of Rule Making anticipated mid-2012 (RIN 1190-AA61), the project has been indefinitely stalled. However, in lieu of formal rule making, the DOJ has recently moved to agency action enforcing ADA compliance on websites operated by entities allegedly covered under a new, expanded scope of Title III. As more and more websites are covered by the broadening protections of the ADA, forward-thinking companies will be moving to enact the new anticipated guidelines in advance of formal rule making, insulating employers from lawsuits and engaging a more diversified workplace well ahead of the competition.

The Road Traveled

No doubt, the ADA's broad and expansive nondiscrimination mandate reaches goods and services provided by employers operating brick and mortar customer service establishment who also operate websites over the Internet. Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182(a). Title III of the ADA and its corresponding regulations define a "place of public accommodation" as a facility whose operations affect commerce and that falls within at least one of the following 12 categories:

(1) An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;
(2) A restaurant, bar, or other establishment serving food or drink;
(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(4) An auditorium, convention center, lecture hall, or other place of public gathering;
(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(7) A terminal, depot, or other station used for specified public transportation;
(8) A museum, library, gallery, or other place of public display or collection;
(9) A park, zoo, amusement park, or other place of recreation;
(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Further, it is no surprise that each "place of public accommodation" requires that the covered entity hire numerous employees to keep the operation in business.

A Shift in the Wind

Most courts considering the application of the ADA to commercial websites require a website to have a "nexus" to a physical place. *See Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (finding a website is only covered if it affects access to a physical place of public accommodation); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-16 (9th Cir. 2000) (requiring some connection between the goods or services complained of and an actual physical place); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998) (finding no nexus between challenged insurance policy and services offered to the public from insurance office); 28 CFR § 36.

Regardless, some courts have already considered the ADA applicable to websites providing goods and services that do not operate "brick and mortar" establishments, the current regulations do not address any enforcement of such rules. *See National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (finding in a website-access case that "[t]o limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute"); *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002) (finding that discrimination did not have to occur on-site in order to violate the ADA); *see also Carparts Distribution Ctr.*, 37 F.3d 12 (concluding that title III is not limited to provision of goods and services provided in physical structures, but also covers access to goods and services offered by a place of public accommodation through other mediums, such as telephone or mail).

As a result, the DOJ asserts that Title III reaches websites of entities that provide goods or services that fall within the 12 categories of "public accommodations" irrespective of any affiliation with a brick and mortar customer service establishment. But, the new scope of sites over which the DOJ has jurisdiction does appear to have its limits. For example, the DOJ is considering proposing

explicit regulatory language that makes clear that Web content created or posted by website users for personal, noncommercial use is not covered, even if that content is posted on the website of a public accommodation or a public entity. This would include individual participation in popular online communities, forums, or networks in which people upload personal videos or photos or engage in exchanges with other users. The DOJ may also choose to exempt public accommodations and entities from liability for inaccessible content posted to their sites by individuals not under their control as long as they provide their website users the ability to make their posts accessible.

Current Enforcement Activity

In one example, a recent settlement agreement with Peapod, LLC signals that the DOJ is moving forward to enforce ADA compliance on employers that do not maintain physical establishments for providing covered goods and services, despite the stalled regulations under Title III. Peapod, LLC (www.peapod.com) operates a purely-online grocery service, wholly unrelated to any physical place of public accommodation; however, as a type of "grocery store" offering goods to the public, the DOJ has assumed jurisdiction pursuant to Title III of the ADA. *See* Peapod, LLC Settlement Agreement, November 11, 2014, at www.ada.gov/peapod_sa.htm (last accessed 2/1/2015). The Settlement Agreement requires Ahold USA., Inc. and Peapod, LLC (Peapod) to make the Peapod website and mobile applications accessible to the disabled, including persons with vision, hearing, and manual impairments.

This recent enforcement activity demonstrates that the DOJ is reviewing and/or monitoring websites and mobile apps for accessibility and remains aggressive in its push to extend the requirements of Title III of the Americans with Disabilities Act (ADA) to all websites and mobile apps—even when the sites are unrelated to actual physical places of public accommodation, broadening the scope of the employers covered by the anticipated regulations regarding ADA compliance of websites and mobile applications.

Advice to Forward-Thinking Employers

All customer-oriented websites or mobile applications available to the public will likely be considered "places of public accommodation" under the ADA going forward. As such, the process of converting these resources into accessible tools for all can start now. Even without a formal rule making by the DOJ, the Peapod Settlement agreement specifies the minimum standard the DOJ's regulation will likely require websites and mobile applications to meet.

No specific published technical requirements are available that define how the ADA must be applied to the internet; however, the Peapod Settlement Agreement requires www.peapod.com and Peapod's mobile apps to comply with the Web Content Accessibility Guidelines 2.0, Level AA (WCAG 2.0 AA), which is the intermediate accessibility standard. The Peapod Settlement Agreement further requires Peapod to designate a Website Accessibility Coordinator to coordinate compliance with the agreement; adopt a Website and Mobile Application Accessibility Policy; post a notice on its home page on its accessibility policy, which would include a toll-free number for assistance and a solicitation for feedback; annually train website content personnel on conforming Web content and apps to the WCAG 2.0 AA; seek contractual commitments from its vendors to provide conforming content, or (for content not subject to a written contract) seek out content that conforms to the WCAG 2.0 AA; modify bug fix priority policies to include the elimination of bugs that create accessibility barriers; and conduct automated accessibility tests of the website and apps at least once every six months and transmit the results to the government.

Business improves when more customers have access to the goods and services available, creating a strong business incentive for entities to adopt the best practices for website and mobile application ADA compliance. However, some benefits to employers may not be so apparent. Employers must attract talent and diversity in order to stay competitive. And, the Equal Employment Opportunity Commission (EEOC) requires that everyone, including applicants with disabilities, be given a fair shot at employment. As such, employers must pay special attention to portions of their websites and mobile applications listing job announcements, qualifications and benefits of positions available, online or downloadable employment applications, employee handbooks or policies, and/or any internally or externally employee-accessible content and maintain this content to the same standard as customer-oriented content. Thus, these resources must also meet the minimum standards for ADA compliance. Inaccessible content will offend not only the DOJ, but also the EEOC.

As the DOJ's focus for Title III ADA accessibility shifts to online content, no employer is immune from scrutiny, regardless of whether the employer maintains a physical "place of public accommodation." Early detection of inaccessible content will prove to be the best plan of action going forward. And, it is always a good time to review how employers can work to address ADA accessibility issues that may create liability in existing employment and hiring practices. ■

Resources

For more information on how to develop ADA accessible content:

Web Content Accessibility Guidelines (WCAG 2.0) - www.w3.org/WAI/intro/wcag

Accessibility Evaluation Resources - www.w3.org/WAI/eval/Overview.html

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Federal Bar Association

Annual Meeting and Convention

September 10–11, 2015 ▲ Salt Lake City

Join the FBA at its most diverse meeting of the year for more than 20 CLE sessions on a wide variety of topics, networking with fellow federal practitioners, and FBA business meetings. Hosted this year by the Utah Chapter, the convention will convene in the heart of the Rockies at The Little America Hotel and features an offsite reception for all attendees at the Utah Natural History Museum, awards luncheons honoring the great work of dedicated practitioners, the Fellows of the Foundation of the FBA, and FBA leaders. The program will conclude with the Presidential Installation Banquet, at which Mark Vincent will be sworn in as the next FBA President. Support the Foundation of the FBA by bidding on items in the Silent Auction—last year's top-grossing item was a guitar autographed by Simon and Garfunkel! There's something for everyone at the FBA Annual Meeting and Convention—visit **www.fedbar.org/FBACon15** today.

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