



## Highlights

### LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA

**Zuckerman Spaeder Assists the Legal Aid Society of the District of Columbia for Another Successful Year**

*page 5*

### U.S. SUPREME COURT

**Zuckerman Spaeder Argues for Retirees Denied Benefits After Pregnancy-Related Disability in U.S. Supreme Court Amici Brief**

*page 7*

### IMMIGRATION

**Appellate Court Victory for Longtime Permanent Resident Threatened with Deportation**

*page 9*

### COMMUNITY SERVICE

**Attorneys and Staff Rebuild Washington, DC Home**

*page 12*

## | DEATH PENALTY |

### Zuckerman Spaeder Honored with 2008 Beacon of Justice Award

In 2008, Zuckerman Spaeder LLP was honored with the Beacon of Justice Award by the National Legal Aid and Defender Association (NLADA). This award, presented at NLADA's Exemplar Awards Dinner on June 11, 2008, honors the firm's commitment to providing pro bono representation to death row inmates.

Zuckerman Spaeder has a long tradition of working on behalf of defendants eligible for the death penalty and death row inmates. Some of the cases for which the firm was recognized include the following:

- Since 1994 Zuckerman Spaeder has represented a woman on death row. The firm conducted hundreds of hours of investigation, including interviews that revealed the trial judge's frequent ex parte contacts with jurors during the trial and the client's long history of mental illness and abusive relationships. The firm has litigated in the state trial and appellate courts claims of ineffective assistance of the client's original trial counsel, as well as claims of the denial of a fair trial and sentencing proceeding.
- Zuckerman Spaeder joined a national effort led by the American Bar Association's Death Penalty Representation Project in August 2006 to ensure that a 2005 amendment to the Antiterrorism and Effective Death Penalty Act of 1996 does not eliminate state prisoners' access to collateral review of their capital sentences in federal courts. Zuckerman Spaeder is responsible for evaluating the state of Mississippi's post-conviction process for capital prisoners and, if necessary, challenging any attempt by the state to opt in to the limited habeas regime. *continued on page 4*



# Thoughts on the Death Penalty

After Zuckerman Spaeder LLP won the Beacon of Justice Award for its death penalty work, attorneys at the firm who have been involved in these cases were each asked to describe their experiences and observations arising from that work. Set forth below are some of their reflections.

## Why choose death penalty work?

*Elizabeth G. Taylor:* Our system of justice works well only when the significant resources of the government are matched with resources on the side of those whom the government has determined to prosecute. The need for those resources are at their height when the government seeks to execute someone. The people charged with capital crimes generally are society's least attractive members, and the conduct of which they are accused is horrific. These cases challenge our commitment to an adversary system of justice. If we really believe that justice is served when the government's accusations are opposed and tested, it is obvious where we need to apply our talents and resources. The other reason for choosing death penalty work on a system-wide basis is the risk of unfairness and error in the use of the death penalty. The weight of the death penalty falls disproportionately on the poor and on racial minorities. We do not yet have a system that guarantees against erroneous convictions, and those errors are more likely to occur where the offense is horrible and the accused without money or status. The risk of executing someone who did not have a fair trial or who is actually innocent is too great to allow the government to impose the sanction of death.

*Francis D. Carter:* Our criminal justice system, unlike the processes which exist in other countries, has multiple safeguards and rights provided to any person who may find themselves the focus of criminal allegations by the government. While the words on the charging paper are viewed as mere allegations, more often than not persons subject to criminal charges will find themselves in the eyes of many equated with the actions with which they are charged, despite all our constitutional and case law protections. Anyone faced with these circumstances can find it daunting in any case, but especially so in a death-eligible indictment. If the state seeks to put a person to death, the individual charged deserves a vigorous and thorough defense. Too often this is not the case. Since I had achieved a certain level of competence in the area of criminal defense, I wanted to participate in the defense of those charged with death-eligible crimes.

*Eric R. Delinsky:* It is the apex of our profession to be called upon to represent an individual facing a death sentence, or life without parole. These are the most serious cases over which our courts preside. There are no cases in which the role of defense counsel is more important, or more solemn.

*Amy E.B. Kapp:* We know that our current system allows the execution of innocent people. We know that, statistically, if a defendant is a person of color or poor, the chances that he or she will be sentenced to death are much higher. We know that our current system does not always ensure that people accused of a capital crime have adequate legal counsel. We know, too, that our legal system often does not adequately diagnose people with mental illness or mental disabilities,

which prevents their attorneys from mounting adequate defenses and ensuring appropriate sentencing. So, doing death penalty work is my way of fighting back against these injustices.

## How would you describe the death penalty case(s) on which you have worked, your role, and what stands out the most in your mind from the experience(s)?

*Blair G. Brown:* My first case was hopeless and tragic. When I became involved in the case in 1988, the client had already been through state and post-conviction review once, represented by an attorney who filed cursory habeas petitions that did not address trial counsel's failure to develop the client's mental retardation as a mitigating factor at sentencing. Everything that I filed was considered a "successive petition" by the courts, although I helped keep the client alive for four years. On the night of the client's execution in 1992, in response to our cert. petition and motion for a stay of execution, three U.S. Supreme Court justices voted for a stay of execution, one short of the four needed for a cert. grant. Had the client's case been pending in 2002, when the Supreme Court decided *Atkins* (prohibiting execution of the mentally retarded), we would have had an excellent chance of keeping the client alive by convincing a court of the client's mental retardation.

*Cyril V. Smith:* I actually got involved in a pro bono death penalty case by accident. I serve on the District of Maryland's Criminal Justice Act panel, and was appointed to represent a defendant in a small-scale possession with intent to distribute case that had been initially charged in state court, then moved to federal court. Not long after the arraignment, the federal grand jury returned a superseding indictment charging a decade-long racketeering and narcotics conspiracy as well as a homicide. This was my first, first-chair federal criminal trial. I dove into the case as if it were a typical white-collar case, pushing the government on discovery, motions in limine, and motions to suppress. Some of the best evidence came out of a three-day suppression hearing held immediately before trial.

This case taught me how to be a trial lawyer and why—no matter who you're representing in a criminal case—the Sixth Amendment is such an important protection for the accused. I have a vivid recollection, in my two-hour closing argument, of the prosecution objecting repeatedly, being overruled, and then going hard at the prosecutors, telling the jury that they were the only thing standing between the accused and a runaway prosecutor who "wanted to be judge, jury, and executioner, all rolled into one."

*David A. Reiser:* Most of my experience has been in post-conviction cases, beginning in the early 1980s. At one time I worked full-time (and more) as an attorney in a state agency that did nothing but post-conviction death penalty cases. We were very successful at staying executions in the short run, less so at ultimately overturning sentences and convictions. Some of our losing battles were later vindicated by U.S. Supreme Court rulings, but not always in time for our clients. That work had some of the same feel of an emergency room or a MASH unit. It could be both exhilarating and exhausting.



The government's failure to win a death sentence in this case has curtailed efforts to seek federal death sentences in jurisdictions, like the District of Columbia, that do not have the death penalty.

**Zuckerman Spaeder has defended individuals charged with capital offenses, in addition to stepping in to represent those already sentenced to death. Is one approach more deserving, beneficial, or cost effective than the other in the pursuit of equal justice under law?**

*Francis D. Carter:* No. The criminal justice system and each individual charged with a death-eligible crime need more and better resources on the defense side at every stage of the process. The prosecution will always have sufficient and extensive resources available.

*Eleanor H. Smith:* In the 1990s, when my husband was an assistant public defender in Virginia, he asked Zuckerman Spaeder to provide pro bono assistance for a client charged with capital murder. The firm and the court agreed to a limited purpose representation to allow Zuckerman Spaeder to handle the challenge to Virginia's death penalty law. In short order, we filed a comprehensive challenge requesting the court to declare the state death penalty statute unconstitutional. On the eve of oral argument on that motion, while preparing my presentation, the Commonwealth's Attorney agreed to amend the indictment to drop the capital murder charge in exchange for a plea to murder, which included parole eligibility. The client's life was spared, and he had an opportunity for rehabilitation and release. Zuckerman Spaeder's participation was an exhilarating example of teaming public defenders and private, pro bono defense counsel, and of how aggressive pre-trial work can bring great results.

*Francis D. Carter:* Death penalty cases are exhausting. The weight of a potential result, which could take a person's life, literally, forces efforts beyond measure in investigation, innovative and comprehensive legal challenges, pleading development, coordination of people who assist you, document collection, internal systems to track everything, handling a client and his or her family, as well as working with everyone from prosecutors and law enforcement to victims, witnesses, community members, courtroom staff, and judicial chambers' personnel. The entire process wears on the mental and physical well-being of the client, judges, marshals, prosecutors, and yourself (as well as your own family members, who live through the case with you).

A few years ago, I was appointed as successor counsel to represent a man who faced multiple charges related to a very complex narcotics conspiracy, including multiple murders, weapons violations, and other offenses. The Attorney General of the United States authorized the federal prosecutors to seek the death penalty for my client on three counts of continuing criminal enterprise murder. In January 2003, he was found guilty of 119 of 131 counts, which included 19 of 22 charged murders. After multiple notes, the jury (for the third time) declared itself unable to reach an unanimous decision on the sentence of death. The trial court announced that it would, as allowed by statute, drop its pursuit of the death penalty and instead sentence my client to life in prison without release.

*Blair G. Brown:* Both approaches can be immensely helpful to the clients and to those who regularly represent capital defendants. Because many states do not appoint counsel for post-conviction representation, private law firms have more frequently assisted pro bono at that stage. However, most observers recognize that substantial front-end assistance by a firm can go a long way in helping a client avoid a death sentence at trial.

*David A. Reiser:* My answer has changed over time. At one time, it seemed possible to have a systemic impact on the administration of the death penalty through strategic post-conviction litigation. The Supreme Court subsequently rejected most of the systemic challenges, including many that were based on promises about how the death penalty would be administered when the court upheld state laws in the *Gregg-Jurek-Proffit* trilogy in 1976. In addition, the adoption of the *Teague* standard and the enactment of the Antiterrorism and Effective Death Penalty Act in 1996 significantly reduced the potential of post-conviction litigation to change the law. Finally, there is now much greater awareness of the potential for convicting and sentencing the innocent because of some notorious cases and exonerations by DNA evidence. The calculus has shifted so that now the benefits of effective trial and direct appeal representation are greater than post-conviction cases. The point is illustrated by the tremendous success of federal defenders and a cadre of skilled appointed lawyers in defending federal death penalty cases (including Zuckerman Spaeder's own Frank Carter).

**What is the change you most want to see in the way death penalty cases are handled in the United States?**

*Blair G. Brown:* Quality, well-funded defense and the exercise of greater discretion by federal and state prosecutors to limit the number of cases in which they seek the death penalty.

*Amy E.B. Kapp:* I would like to see those accused of capital crimes consistently represented by talented, dedicated attorneys who have learned how to defend these cases at the trial level. This would help ensure that justice is served in the first instance and limit the need to resort to appellate and post-conviction processes to eliminate death sentences.

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## Zuckerman Spaeder Received 2008 Beacon of Justice Award from NLADA *continued from page 1*

• Zuckerman Spaeder represented the lead defendant in a seven-defendant superseding indictment in the U.S. District Court for the District of Maryland in Baltimore. The client was charged with leading a decade-long drug trafficking and racketeering conspiracy, in addition to being charged with committing one murder personally and being involved with at least two more—allegations that made him eligible for the death penalty. Zuckerman Spaeder presented the case against the death penalty to representatives of the Attorney General at the Department of Justice in Washington, DC, who ultimately chose not to seek capital punishment. The firm then tried the remaining murder, narcotics, and racketeering case to an acquittal on the murder count.

In addition to these and other earlier representations of individuals accused of capital crimes or sentenced to death, Zuckerman Spaeder also supports death row inmates through amicus briefs and volunteerism with groups such as the Fair Trial Initiative, which provides internships, fellowships, and other opportunities for attorneys to assist in representing indigent defendants in capital trials. Partners William W. Taylor III, of the Washington, DC

office, and Jack E. Fernandez Jr., of the Tampa office, serve on the board of directors of the Fair Trial Initiative. Partner Blair G. Brown helped start the local DC Innocence Project (now the Mid-Atlantic Innocence Project) and served as the first chairman of its board of directors from 2000-2002. Mr. Brown also currently serves on the board of directors for the Southern Public Defender Training Center, an innovative program designed to improve the quality of indigent defense in the South. The firm and many of its attorneys have supported the Southern Center for Human Rights, which has worked tirelessly against the death penalty in the South and to improve the quality of indigent defense.

Zuckerman Spaeder is proud of its years of dedication to this important cause and committed to continuing its pro bono work in this area. The firm will continue to look for more ways to make important contributions in the quality of its representations and its efforts to change public policy to limit, if not eliminate, the use of the death penalty in America.

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In 2008, Zuckerman Spaeder LLP attorneys Eric R. Delinsky, Alexandra W. Miller, and R. Miles Clark took on a capital case in their pro bono representation of a man charged in federal court with murder in the course of a car-jacking. The case was originally brought in state court, but when the state judge deemed the prosecutor's fingerprint evidence unreliable, the state asked federal prosecutors to take over the case. Thereafter, Zuckerman Spaeder was appointed as co-counsel to represent the defendant in the new federal proceeding. One year later, the federal government has elected not to pursue the death penalty, and the court scheduled trial for early 2010.

# Zuckerman Spaeder Assists the Legal Aid Society of the District of Columbia for Another Successful Year

The Legal Aid Society of the District of Columbia Appellate Project underwent major changes in 2008 because of the illness of Barbara McDowell, who led the program since 2004. Zuckerman Spaeder LLP attorney David Reiser took on increased responsibility for helping Legal Aid evaluate cases, research and draft briefs, and prepare for oral arguments while Ms. McDowell was undergoing treatment for the malignant brain tumor that caused her untimely death in January 2009. The Appellate Project continued to be very successful, winning its first case in the District of Columbia Circuit as well as important decisions concerning child custody, unemployment benefits, consumer rights, and landlord-tenant issues in the District of Columbia Court of Appeals.

## Child Custody and Support

Among the most important cases that Zuckerman Spaeder takes on with Legal Aid are matters involving child custody disputes and parental rights issues. In 2008, Mr. Reiser worked on the briefs and with volunteer lawyers at Hogan & Hartson who argued a significant child custody case in Ms. McDowell's stead. The case remanded a custody decision because the trial judge failed to give appropriate consideration to the father's physical assaults on the mother. The Court of Appeals agreed that acts of domestic violence counted against granting custody to the father. The importance of the case was reflected in the participation of domestic violence organizations as amici curiae in support of the mother's position.

Another parental rights case involved Mr. Reiser in an appeal in a criminal case arising out of the conviction of a Legal Aid client, a victim of domestic violence, for so-called attempted felony parental kidnapping. Mr. Reiser agreed to represent the client pro bono in the criminal case while Legal Aid represented her in an ongoing custody case. Mr. Reiser persuaded the Court of Appeals that the District of Columbia had failed to prove its claim that the client had committed attempted felony parental kidnapping, and also raised substantial questions about whether the Office of the Attorney General (as opposed to the U.S. Attorney) is empowered under the Home Rule Act to prosecute parental kidnapping claims at all. The client prevailed in her custody case as well, and now lives safely with her child. (The District of Columbia Court of Appeals has ruled in a subsequent case that the Office of the Attorney General for the District of Columbia is without authority to prosecute major crimes in the District of Columbia.)

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With respect to child support, Mr. Reiser and Zuckerman Spaeder associate Allison Baker-Shealy teamed with the Legal Aid Society to successfully prosecute an appeal from a Superior Court of the District of Columbia order reviving past-due child support orders dating from the early 1990s and even earlier, based upon the client's settlement, without the assistance of counsel, of a more than decade's-old criminal contempt proceeding. The Zuckerman Spaeder brief, filed in 2008, argued that the criminal contempt order could not serve as a basis for revival of the civil child support orders and that, in any event, the District failed to revive the criminal contempt order, which itself was more than 12 years old, in a timely manner. Also objectionable was the use of the criminal contempt consent order by the District to insist—contrary to federal law—that the client pay child support out of his Security Disability Insurance payments after it became his only source of income. Zuckerman Spaeder filed its brief in 2008 and shortly thereafter was contacted by District lawyers with an offer of settlement. Zuckerman Spaeder, with input from the Legal Aid Society, negotiated a settlement that fully absolved the client of his child support arrears in this matter.

## Public Benefits

In 2008, the Appellate Project continued its successful representation of claimants seeking public benefits such as unemployment compensation, housing vouchers, and food stamps. Mr. Reiser helped attorneys at Legal Aid draft briefs and argue a number of petitions for review from decisions of the Office of Administrative Hearings denying unemployment benefits. One case established that the administrative law judge had an obligation not to confuse or mislead a pro se litigant about the law (in this case the burden of proving that she quit voluntarily), in addition to clarifying the standard for denying benefits based on the employee's own decision to quit. The Court of Appeals remanded for further proceedings concerning whether the employer's failure to give the employee any work assignments made her departure involuntary. A second case was remanded for fact-finding on whether the claimant's failure to receive notice of a decision in time to appeal was due to excusable neglect, while another reversed a dismissal for untimeliness because of a conflict between the instructions given to claimants about how to appeal a denial of benefits and the governing regulation. Mr. Reiser also assisted Legal Aid in one of the first appellate decisions in the country interpreting the "enhanced voucher" provisions of the Section 8 housing subsidy program, which was also the first appellate decision in the District interpreting



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the provision of the District of Columbia Human Rights Act that forbids discrimination on the basis of “source of income.” Legal Aid’s clients prevailed both on their enhanced voucher claims and on their Human Rights Act claims. Mr. Reiser was an essential participant in the briefing of the case, particularly with respect to the Human Rights Act claim, where he provided knowledge about antidiscrimination law. Mr. Reiser also provided key insights during two moot courts for the Legal Aid lawyer who argued the case.

In another case involving public benefits, the Court of Appeals invited the Appellate Project to file an amicus brief in *Schliefsteiner v. District of Columbia Dept. of Human Services*, on the standard for forgiving food stamp overpayments in whole or in part. Although the District had already filed a brief, after receiving the brief prepared by Legal Aid with assistance from Mr. Reiser, the District changed its position, agreed that the federal food stamp regulations had been violated, and agreed to work with Legal Aid on revising its procedures.

### Consumer Rights

Mr. Reiser and Cyril V. Smith, a partner in Zuckerman Spaeder’s Baltimore office, co-authored an amicus brief for Legal Aid in a consumer case that raises important and unsettled questions about when consumer arbitration clauses are unconscionable and unenforceable in the District of Columbia. The arbitration agreement in this case was markedly one-sided—it allowed the dealer (and its lender) to sue the consumer, but required the consumer to arbitrate all disputes. Also, the agreement did not identify the arbitrator (whom the dealer could select, subject to a veto), unlike many agreements that specify arbitration under rules that limit costs for consumer arbitrations. Instead of bringing a judicial action in forma

pauperis, the consumer faced the possibility of thousands of dollars in arbitration costs. Legal Aid’s brief drew on the firm’s experience in arbitration issues, including a recent victory by Mr. Smith and fellow Baltimore partner P. Andrew Torrez in the U.S. Court of Appeals for the District of Columbia Circuit. The brief speaks to the pervasive problems of mandatory arbitration clauses in consumer contracts, and in particular to the disproportionate impact such clauses have on low-income and unsophisticated consumers.

### Landlord-Tenant Law

Zuckerman Spaeder is also instrumental in the Appellate Project’s extensive work in the area of landlord/tenant law. In 2008, Mr. Reiser assisted Legal Aid lawyers in briefing and arguing a landlord-tenant appeal as amicus curiae. The Court of Appeals affirmed the trial court’s decision dismissing the landlord’s eviction complaint for failing to give proper notice to cure the violation. The court ruled that the issuance of a prior notice for the same violation was insufficient if the earlier violation was cured.

Another successful landlord-tenant appeal reversed the dismissal of the tenant’s counterclaim for money damages for rent abatement because of numerous housing code violations. Zuckerman Spaeder helped Legal Aid lawyers brief and argue the case. The Court of Appeals agreed that the landlord’s complaint was an action for nonpayment of rent, entitling the tenant to bring a rent abatement counterclaim.

**The brief speaks to the pervasive problems of mandatory arbitration clauses in consumer contracts.**

Mr. Reiser also co-authored a brief and helped Legal Aid argue a case involving the Housing Authority’s obligation to pay the tenant’s attorneys for their efforts in pursuing a rent abatement claim based on housing code violations. Because the Housing Authority was paying the tenant’s rent, it was entitled to the abatement damages when it decided to intervene in the case. Legal Aid argued that tenants would have no incentive to pursue rent abatement claims, weakening housing code enforcement, unless the Housing Authority was obligated to provide compensation for the benefit of the services provided by the tenant’s counsel. The case was argued in 2008, and in June 2009 the Court of Appeals agreed. The Housing Authority has indicated that it plans to seek rehearing of this decision.

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## Zuckerman Spaeder Argues for Retirees Denied Benefits After Pregnancy-Related Disability in U.S. Supreme Court Amici Brief

In November 2008, Zuckerman Spaeder LLP partner Eleanor H. Smith and associate Laura E. Neish filed an amici brief in the U.S. Supreme Court on behalf of the Lawyers' Committee for Civil Rights Under Law, the Asian American Justice Center, the National Council of La Raza, and People for the American Way in support of the respondents in *AT&T Corporation v. Hulteen et al.* This case addressed the question of when an employee can bring a legal challenge to a retirement plan that discriminates on the basis of race, religion, sex, or national origin. The suit was the latest in a series of U.S. Supreme Court cases to address the issue of time limits on the period in which an employee may file suit for discrimination. Statute of limitations concerns are particularly acute in employment discrimination cases because unlawful practices may be in place for many years before employees become aware of or are harmed by them.

Noreen Hulteen and the other individual respondents in the case are retired AT&T employees who took pregnancy disability leave from the company in the 1960s and 1970s. When the respondents retired, AT&T calculated the amount of their pension, but did not include credit for the period in which they were on pregnancy disability leave prior to 1979. This meant that the respondents' retirement benefits were lower than those of employees who had taken other types of disability leave before 1979. The women filed suit under Title VII of the Civil Rights Act of 1964, charging that AT&T's failure to credit their pregnancy leave taken in the 1960s and 1970s in the calculation of their retirement benefits constituted discrimination on the basis of sex.

An en banc panel of the U.S. Court of Appeals for the Ninth Circuit upheld the women's claims, and AT&T appealed to the Supreme Court. AT&T argued that its decision to treat the respondents' pregnancy-related disability differently from other types of disability was lawful at the time, because it predated the passage of the Pregnancy Discrimination Act of 1978. To allow the respondents to bring discrimination claims now, AT&T claimed, would be an impermissible retroactive application of the law.

In its amici brief supporting the retirees, Zuckerman Spaeder noted that the intent of the civil rights laws is to allow employees to file suit when they are harmed by a discriminatory practice. In the case of discrimination in retirement benefits, the harm to the employee occurs at retirement, when the pension benefits are calculated. The brief explained that in 1991, Congress made this intent explicit by amending Title VII to provide that, with respect to a discriminatory seniority system, an unlawful employment practice occurs at three different time periods: when the system is adopted, when it is applied

to an employee, and when the employee is injured by the system. The brief further demonstrated that Congress passed the amendment in response to the Supreme Court's decision in *Lorance v. AT&T Technologies*, which ruled that the time to bring suit to challenge a discriminatory seniority system began running when the system itself was adopted, even though employees may not be affected by the system until years later. In passing the 1991 amendment, Congress intended to overturn the result in *Lorance*, and ensure that employees had the ability to challenge unlawful discrimination at the most logical point in time—when they are harmed by it.

The Supreme Court heard oral argument on December 10, 2008, and on May 18, 2009, ruled in favor of AT&T in a split decision. Associate Justice Ruth Bader Ginsburg, writing for the dissent, declared that "from and after the effective date of the Act, no woman's pension payments are to be diminished by the pretense that pregnancy-based discrimination displays no gender bias."

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## Zuckerman Spaeder Urges U.S. Supreme Court to Avoid Expansion of RICO

In November 2008, Zuckerman Spaeder LLP attorneys from the firm's Washington, DC and New York offices—William W. Taylor III, Shawn P. Naunton, and Jane M. Ricci—filed an amicus curiae brief in the U.S. Supreme Court on behalf of the National Association of Criminal Defense Lawyers (NACDL) in support of petitioner Edmund Boyle in *Boyle v. United States of America*. At issue before the court in *Boyle* was whether an "associated in fact" enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO) must possess structure or organization (such as an ongoing existence, a decisional hierarchy, and defined roles for its members) independent of the enterprise's underlying racketeering acts.

In its amicus brief, Zuckerman Spaeder (together with lawyers from the NACDL and two other law firms) argued that structure was required by the plain language and legislative history of RICO—which was to combat organized crime and thereby target enterprises that possess an independent structure or organization—and decisions of the U.S. Supreme Court and other courts of appeals so construing the statute. Otherwise, the "enterprise" element of a RICO offense would be interchangeable with that offense's "pattern of racketeering element," rendering important statutory phrases superfluous in violation of fundamental principles of statutory construction. The Zuckerman Spaeder brief highlighted that eliminating RICO's structure requirement will lead to a host of deleterious consequences not intended by Congress. In that event, RICO would effectively merge with the predicate offenses, federalize state crimes, and become the functional equivalent of a recidivism statute. Indeed, RICO's merger with its predicate offenses would radically increase the sentence for acts that are punished elsewhere in the federal criminal

code, and would affect other aspects of criminal liability, including charging decisions and plea-bargaining.

On June 8, 2009, in an opinion by Justice Samuel A. Alito Jr., the court agreed that an “associated in fact” enterprise must have an ascertainable structure, but held that the enterprise’s structural features could be inferred from the enterprise’s pattern of racketeering activity. The court also observed that, pursuant to the terms of RICO, an “associated in fact” enterprise must have at least three structural features: “a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.”

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## Zuckerman Spaeder Amici Brief Cautions Against Creation of Private Prosecution of Criminal Law

In a case now pending before the U.S. Supreme Court, John Robertson, represented by the Public Defender Service, seeks review of the affirmation by the Court of Appeals for the District of Columbia of his conviction in the Superior Court of the District of Columbia on three counts of criminal contempt for violation of a civil protection order (CPO). Mr. Robertson argues that his prosecution for criminal contempt of the civil order was foreclosed by the plea agreement he entered into with the U.S. Attorney’s office in which the government pledged not to pursue any criminal charges stemming from the exact same events that gave rise to the criminal contempt charges.

Zuckerman Spaeder LLP filed an amici brief on behalf of the National Association for Criminal Defense Lawyers and the District of Columbia Association of Criminal Defense Lawyers in support of rehearing en banc by the Court of Appeals for the District of Columbia. In the amici brief, partner Blair G. Brown and associate Stephanie L. Schmid argued that the holding by the District of Columbia Court of Appeals that the criminal contempt action is a private action brought in the name and interest of the holder of the CPO, rather than on behalf of the government, was incompatible with fundamental principles of criminal law, U.S. Supreme Court precedent, and long-established case law of the District of Columbia and other jurisdictions. They explained that the court’s opinion opened up a Pandora’s box of problems and challenges that both the courts and the parties will face if forced to navigate the uncharted waters of a private criminal action, ranging from the applicability of *Brady* to the availability of clemency.

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## Ellen D. Marcus Receives 2008 Maryland Pro Bono Service Award

Zuckerman Spaeder LLP partner Ellen D. Marcus received the 2008 Maryland Pro Bono Service Award from the Pro Bono Resource Center of Maryland. This award recognized Ms. Marcus’s work in recovering damages for Maryland day laborers who were not paid for clean-up work they did on the Gulf Coast in the wake of Hurricane Katrina. In total, the defendants agreed to pay the workers \$251,000. The awards ceremony was held at the Maryland State Bar Association’s annual meeting on June 14, 2008, in Ocean City. For more information about the Pro Bono Resource Center of Maryland, please visit [www.probonomd.org](http://www.probonomd.org). Additional information about the successful litigation on behalf of the Maryland day laborers is available in the previous issue of *Pro Bono Matters*, which is available at [www.zuckerman.com](http://www.zuckerman.com).



## Zuckerman Spaeder Takes a Stand Against Torture in U.S. Court of Appeals for the Third Circuit

In April 2008, Zuckerman Spaeder LLP attorneys Eleanor H. Smith and Jane M. Ricci filed an amici brief in the U.S. Court of Appeals for the Third Circuit on behalf of the Organisation Mondiale Contre la Torture (OMCT) and the Redress Trust (REDRESS) arguing against the U.S. government's use of diplomatic assurances to deport people to countries in which they face a high likelihood of torture. OMCT is a nonprofit group based in Geneva, Switzerland, that supports a global coalition of nongovernmental organizations (NGO) working to end torture around the world. REDRESS is an international human rights NGO based in London that assists survivors to prevent further torture and to seek reparations.

After years of immigration proceedings, Sameh Sami S. Khouzam was granted a deferral of his removal order because it was deemed more likely than not that he would be tortured if he was returned to Egypt. In 2007, without any notice or a hearing, the U.S. Department of Homeland Security detained Mr. Khouzam and prepared to remove him to Egypt based on diplomatic assurances from the Egyptian government that he would not be tortured if returned. U.S. Department of Justice regulations that implement the Convention Against Torture (CAT) permit the U.S. government to determine that the threat of torture does not exist based on diplomatic assurances from another country.

In the amici brief for OMCT and REDRESS, Zuckerman Spaeder took the position that diplomatic assurances categorically violate the clear, absolute, and nonderogable obligation under CAT, to which 146 nations are parties, as well as other norms of international law not to return a person to a situation in which he likely faces torture. The brief traced the international law on returning people to countries that torture, and the hostile reaction of international courts to the use of diplomatic assurances.

Although the Third Circuit rejected the argument that diplomatic assurances are never sufficient, the court did agree that Mr. Khouzam was entitled to due process before he could be removed. The Third Circuit held that Mr. Khouzam was entitled to an opportunity to test the reliability of Egypt's diplomatic assurances before the Board of Immigration Appeals.

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## Appellate Court Victory for Longtime Permanent Resident Threatened with Deportation

In 2008, Zuckerman Spaeder LLP attorneys Paula M. Junghans, Linda Singer, and Brynna Connolly obtained dismissal of a U.S. Department of Homeland Security (DHS) appeal. The dismissal allows their client, who has lived in the country for almost three decades, to remain in the United States.

The client entered the United States with his parents as a small child. He grew up in the United States with his extended family and is raising his young children here. In early 2008, the client was detained and placed in deportation proceedings as a result of earlier convictions for drug use and injury to a domestic partner. Weighing heavily the client's rehabilitation, his nearly 30-year residence in the United States, and the welfare of his children, the immigration judge granted him relief from deportation. The DHS appealed to the Board of Immigration Appeals (BIA), seeking reversal on the ground that the immigration judge improperly weighed the relevant factors.

Working with the Catholic Legal Immigration Network, Zuckerman Spaeder attorneys argued that the BIA should defer to the immigration judge's determinations of the client's credibility and rehabilitation, holding that the immigration judge properly evaluated those factors, as well as his long history and family ties in the United States, in favor of allowing him to remain here. In 2008, the BIA agreed and dismissed the government's appeal. The client has since been released from detention to his home and family.

\* \* \*

**The immigration judge granted him relief from deportation.**



## Tampa Attorneys Help Small Family Business in Dispute with Corporate Landlord

Zuckerman Spaeder LLP partner Jack E. Fernandez Jr. and associate Maegen Peek Luka of the firm's Tampa office came to the aid of tenants when their landlord obtained a judgment against them for an eviction from the building they leased for their small furniture refinishing business.

The tenants had been renting the building on a month-to-month basis for two years prior to the new landlord purchasing the building. The new landlord required the tenants to sign a one-year lease, which included additional penalties for late payments. Although the property was in terrible condition and in violation of a number of building codes, the landlord also substantially raised the amount of the rent.

After the tenants paid their rent late on several occasions, the landlord initiated an eviction. The tenants vacated the property within 10 days, but did not realize that they also needed to respond to the eviction notice by filing a document with the court. The landlord, proceeding

pro se, sought a default judgment for back rent, future rent, and costs associated with the eviction. When the court awarded a final judgment, the landlord hired a large firm in Tampa to begin the collection process. The tenants came to Mr. Fernandez and Ms. Luka the day before they were to appear for a hearing to show cause why they should not be held in contempt of court for failing to respond to an order for an affidavit of their assets.

Ms. Luka convinced the court that the tenants should not be held in contempt. The court gave the tenants a week to submit the affidavit of assets, which Ms. Luka then helped them complete. She also prepared a motion to set aside the default judgment, pointing out the landlord's apparently fraudulent inflation of the damages amount and raised issues regarding the duress under which the lease was signed (questioning whether it was enforceable) as well as the habitability of the building.

After Mr. Fernandez and Ms. Luka sent a courtesy copy of the motion to opposing counsel, the landlord recognized that, given the number of issues raised by the motion, it would cost several times the value of the judgment just to litigate the issue of whether the judgment was indeed valid. After two weeks of negotiations, Ms. Luka was able to reach a settlement that represented a fair figure and a payment plan that the tenants would be able to manage.

\* \* \*

## Zuckerman Spaeder Attorneys Protect Voting Rights in 2008 Primary and General Election

In 2008, nine Zuckerman Spaeder LLP attorneys helped protect citizens' right to vote by participating in the national nonpartisan Election Protection program during the spring primaries and fall presidential election. Election Protection is designed to effectively address and document problems voters face at the polls. The program helps to train volunteer attorneys to interact with local and state elections officials to raise concerns, monitor polling places, and assist voters who are having trouble voting via a live hotline (1-866-OUR-VOTE). As a last resort, attorneys engage in litigation to address the issues that arise. The program is led at the national level by the Lawyers' Committee for Civil Rights Under Law, the NAACP, the National Bar Association, and People for the American Way Foundation.

During the spring primary in Maryland, four Zuckerman Spaeder associates—Nora Miles Rigby, Jill F. Dash, Amy E.B. Kapp, and Stephanie L. Schmid—served as the Election Protection program's liaisons with the supervisor of the Board of Elections for Montgomery County, MD. When poll monitors and hotline calls indicated

problems, the firm's attorneys brought those problems to the county supervisor's attention to ensure the problems were addressed appropriately and timely. They then reported back to the poll monitors to make sure that the problems were resolved. Zuckerman Spaeder staff attorney Meghan Smith also served as a poll monitor, reporting problems to the Maryland Election Protection program liaisons and troubleshooting on the spot at the polls.



Before and during the general election in November, Zuckerman Spaeder attorneys Caroline E. Reynolds, Jason M. Knott, and Susan Laeger Sturc took calls at the 1-866-OUR-VOTE hotline, answering voters' questions about registration, polling places, and voting issues. Ms. Sturc and associate Douglas R. Miller served as mobile legal volunteers in local Maryland counties, visiting poll sites to ensure that everything was running smoothly on Election Day.

Mr. Knott also served as part of the Maryland Election Protection Local Committee, which managed the organization's efforts in the state.

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## 2008 PRO BONO HONOR ROLL

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Laura Jo Barta	Maegen Peek Luka *
Gregg L. Bernstein	J. Omar Mahmud
Herbert Better	Ellen D. Marcus
Blair G. Brown *	Thomas B. Mason
Francis D. Carter	Francis Massabki
R. Miles Clark *	Caroline Judge Mehta
Jennifer R. Coberly	William K. Meyer *
Brynna L. Connolly *	Alexandra Wang Miller
Lani Cossette	Douglas Ryan Miller *
Jill F. Dash	Shawn P. Naunton *
Matthew T. Davidson	Laura E. Neish *
Geoffrey A. Davis	Peter M. Nothstein *
Eric R. Delinsky *	Holly A. Pal
Marissel Descalzo	Jo Ann Palchak
Margaret M. Dotzel *	David Reiser *
Jack E. Fernandez, Jr.	Caroline E. Reynolds
Mark W. Foster	Jane M. Ricci *
Lee Fugate	Nora Miles Rigby
Simon A. Gaugush	Steven M. Salky
Robyn L. Ginsberg	Stephanie L. Schmid *
Marcos E. Hasbun	William Schultz *
Steven N. Herman	Allison Baker Shealy *
Martin S. Himeles, Jr. *	Linda Singer
Brian T. James	Cyril V. Smith
Paula M. Junghans	Eleanor H. Smith *
Matthew G. Kaiser	Meghan Smith
Amy E. B. Kapp *	Michael R. Smith
Leslie Berger Kiernan	Lisa J. Stevenson
Susan Dudley Klaff	C. Evan Stewart
Jason M. Knott	Susan Laeger Sturc *
Peter R. Kolker	Elizabeth G. Taylor *

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*\* 50 or more pro bono hours in 2008*



# ZUCKERMAN IN THE COMM

## Historical Society of the District of Columbia Circuit Student Outreach, Mock Oral Argument Program

Zuckerman Spaeder LLP has played an integral part in the Historical Society of the District of Columbia Circuit Court of Appeals' Annual Student Outreach, Mock Oral Argument Program since its revival in 2006. The program, which is held at the E. Barrett Prettyman U.S. Courthouse, invites every public, private, and charter high school in the city to participate.

In 2008, volunteers from Washington, DC law firms, including Zuckerman Spaeder attorneys William A. Schreiner and Matthew G. Kaiser, tutored and coached student participants. Each student was given the opportunity to select a side of the argument from an array of cases litigated in the jurisdiction, such as a traffic stop resulting in a criminal arrest or the arrest of a high school student for eating french fries on a subway platform. The volunteer attorneys helped the students practice their arguments and prepare for potential questions from the presiding judge.



On April 25, 2008, each student was given approximately 10 minutes to present his or her legal argument and to respond to substantive questions from one of eight presiding judges from the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia. At the conclusion of the arguments, the entire group of 67 students assembled in the Ceremonial Courtroom, where the best student advocates received awards. The opportunity to argue in an actual federal courtroom can be a daunting task even for law school graduates, but the program helps students build confidence.

In addition to the attorneys who volunteered with the Mock Oral Argument Program, Zuckerman Spaeder partner Francis D. Carter co-chairs the Historical Society of the District of Columbia Circuit's Education Committee. Partner William B. Schultz is also the organization's treasurer. The Education Committee, with the assistance of Zuckerman Spaeder legal secretary Tisha Jackson, prepared the case summaries materials, communicated with the volunteer attorneys, developed certificates for each participating student, and provided general administrative assistance.

\* \* \*

## Attorneys and Staff Rebuild Washington, DC Home

On May 3, 2008, a group of attorneys and staff from Zuckerman Spaeder LLP's Washington, DC office participated in a community service project with Rebuilding Together, a nonprofit organization that provides free home repair for low-income individuals and families. The Zuckerman Spaeder team was assigned the home of a woman who was no longer able to work or maintain her home due to illness and disability. The firm's volunteers spent the day painting, cleaning, installing grab bars, replacing flooring, and completing other repairs.

When the dust settled after a long day of hard work, the homeowner was left with a safe home and uplifted spirits.

\* \* \*

## Lawyers' Committee for Civil Rights Under Law

Zuckerman Spaeder partner Eleanor H. Smith is secretary of the board of directors for the Lawyers' Committee for Civil Rights Under Law (LCCRUL), which provides legal services to address racial discrimination. The firm was a sponsor of LCCRUL's 45th Anniversary Gala Dinner held on September 15, 2008, in New York City.

\* \* \*

# SPAEDER UNITY

## Tampa Associate Jo Ann Palchak Mentors “Legal Leaders of the Future”

For three hours almost every Monday evening, Jo Ann Palchak, an associate in Zuckerman Spaeder LLP’s Tampa office, can be found mentoring approximately a dozen inner-city high school students as an advisor to a law explorer post entitled “Legal Leaders of the Future.” With the help of the local bench, bar, and law enforcement, as well as with support from Zuckerman Spaeder, Ms. Palchak has facilitated a mock trial involving all phases of a felony criminal proceeding. The mock trial included a first appearance in court, drug dog demonstration, competency hearing, drug court mitigation, motions to suppress, voir dire, opening and closing statements, witness examination, and sentencing. “The students really enjoyed acting as lawyers and prosecutors,” Ms. Palchak said. “It was inspiring to hear them formulate opinions on both sides of an issue and learn how to articulate their arguments.”

\* \* \*

## Southern Center for Human Rights

The firm and its attorneys support the Southern Center for Human Rights, which has worked tirelessly against the death penalty, and its Southern Public Defender Training Center, a program designed to improve the quality of legal defense available to indigent individuals.

\* \* \*

## The Mid-Atlantic Innocence Project

In 2008, Zuckerman Spaeder continued to support the Mid-Atlantic Innocence Project, an organization that partner Blair G. Brown helped to found in 2000. Amit Mehta now serves on the board of directors and other attorneys at the firm are active in this organization, which provides investigative and legal assistance to incarcerated people who have been wrongly convicted.

\* \* \*

## NACDL Foundation for Criminal Justice

Zuckerman Spaeder is a longtime supporter of the National Association of Criminal Defense Lawyers (NACDL) and its Foundation for Criminal Justice. In 2008, the firm continued its sponsorship of the foundation, which supports the work of NACDL in preserving and promoting the core values of America’s justice system guaranteed by the Constitution.

\* \* \*

## The Constitution Project

Partner Blair G. Brown was a host of the Constitution Project’s 2008 fundraiser, which the firm also sponsored. The Constitution Project is a nonprofit organization that addresses difficult legal and constitutional issues through bipartisan dialogue, scholarship, and public education efforts.

\* \* \*

## Washington Lawyers’ Committee for Civil Rights and Urban Affairs

Zuckerman Spaeder partner William W. Taylor III serves on the board of directors of the Washington Lawyers’ Committee for Civil Rights and Urban Affairs (the Committee). Zuckerman Spaeder sponsored the winning team from J.O. Wilson Elementary School at the 2008 Geoplunge tournament, organized by the Committee. Geoplunge is an inter-school competition that challenges elementary age children to learn about the 50 states and the District of Columbia.

\* \* \*

## Ayuda

In 2008, Zuckerman Spaeder was a sponsor of Ayuda’s annual gala. Ayuda is a nonprofit organization that protects the legal rights of low-income immigrants in the Washington, DC metropolitan area.

\* \* \*

### Salvation Army Angel Tree

Again in 2008, Zuckerman Spaeder employees participated in the Salvation Army's Angel Tree Program, an annual holiday gift campaign for children from poor and low-income families. The firm has participated in this program for more than a decade.

\* \* \*

### Lawyers Have a Heart

A team of Zuckerman Spaeder professionals participated in the Lawyers Have a Heart 5K Race and Walk on June 14, 2008. The annual race raises funds for the American Heart Association.

\* \* \*

### Constitution in the Classroom

In celebration of Constitution Day 2008, associates Douglas R. Miller and Cory T. Way served as teachers in Constitution in the Classroom, a joint project of the American Constitution Society and the National Capital Area American Civil Liberties Union. Mr.

Miller and Mr. Way led District of Columbia public school sixth-graders in an interactive curriculum designed to foster understanding of the branches of government, the role of courts in interpreting the Constitution, and the individual rights the Constitution guarantees.

\* \* \*

### Cell Phones for Soldiers

In 2008, Zuckerman Spaeder employees held a cell phone drive to collect phones for U.S. soldiers so that they may talk to their families while serving abroad.

\* \* \*

### American Red Cross

In April and December 2008, Zuckerman Spaeder employees donated blood to the American Red Cross during on-site blood drives. Our participation in these blood drives continues years of commitment by firm employees to this life-saving service provided by the Red Cross.

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## PRO BONO MATTERS

*Pro Bono Matters* is a publication focusing on the commitment of Zuckerman Spaeder LLP to pro bono service. To contribute to the next edition of *Pro Bono Matters* or to recommend a pro bono project, please contact Eleanor H. Smith at [esmith@zuckerman.com](mailto:esmith@zuckerman.com), 202.778.1838, or Zuckerman Spaeder LLP, 1800 M Street, NW, Suite 1000, Washington, DC 20036.

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Zuckerman Spaeder LLP commends in this newsletter the pro bono work performed on behalf of the firm by its current and former attorneys and paralegals in 2008.

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- Marshall S. Wolff

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