



ZUCKERMAN SPAEDER LLP

PRO BONO

inaugural edition

MATTERS



Pictured from left to right: Lisa Barclay, Ron Weich and Bill Schultz.

recess appointment CHALLENGED AS UNCONSTITUTIONAL

On June 24, 2004, Zuckerman Spaeder attorneys Bill Schultz, Ron Weich and Lisa Barclay filed a petition for a writ of certiorari to the U.S. Supreme Court on behalf of Shannon Miller, a criminal defendant whose motion to vacate sentence on the ground of ineffective assistance of counsel was denied by a panel of the U.S. Court of Appeals for the 11th Circuit that included William H. Pryor, Jr.

Earlier this year, President Bush used the recess appointment power provided in the U.S. Constitution to seat Judge Pryor, a controversial nominee whom the Senate declined to confirm, during a 10-day adjournment in the middle of the 2nd session of the 108th Congress. The petition for certiorari makes two arguments:

1) that the Constitution does not permit a president to use the recess appointment power during a break in the middle of a Congressional session; and 2) that the Constitution does not permit a president to use the recess appointment power to seat a judge under Article III of the Constitution.

The first argument, that recess appointments are permissible only during the recesses between Congressional sessions, is based upon an analysis of the constitutional text, the purpose and intent of the Framers, and historical use of the Recess Appointment Clause. Available historical evidence establishes that the Framers intended that the early Congresses would meet for uninterrupted sessions, conduct their legislative business, and then recess for months at a time. Therefore, the inclusion of the Recess Appointment Clause was critical to the continued operation of federal government during those long recesses between sessions—allowing the president the ability, under these limited circumstances, to fill critical vacancies while the Senate was not available to provide its advice and consent. The Constitution's reference to "the Recess" suggests that the Framers were referring to a specific type of recess, the extended one that occurs in between sessions of Congress, not the numerous breaks in Senate business that occur in the middle of a Congressional session.

The second constitutional argument focuses on the direct conflict between the Recess Appointment Clause, which confers a temporary commission on the

(continued on page 8)



Pictured from left to right: Marcos Hasbun, Sandy Weinberg, Jr., Lee Fugate and Simon Gaugush.

dna testing PURSUED TO PROVE INNOCENCE

In the mid-1980's a woman and her boyfriend were brutally attacked as they slept in their home. The woman died after being decapitated by what authorities believed was a sharp machete. The man survived the attack, but was left with a deep scar across his face. Blood covered the crime scene.

Mr. H, the woman's ex-husband, was at a lake house miles away from the crime scene at the time of the attack. Authorities suspected Mr. H committed the brutal crime after identifying specks of blood on his nose and forehead during a police interview. Authorities then were unable to determine whether the blood on Mr. H belonged to the victims, or if it belonged to him. A thorough search of Mr. H's home, vehicle and the lake

(continued on page 8)



zuckerman spaeder TEAMS WITH LEGAL AID SOCIETY TO START APPELLATE PROJECT

Zuckerman Spaeder has contributed the services of David Reiser, a lawyer with more than 20 years of appellate experience, to help the Legal Aid Society of the District of Columbia to launch an Appellate Advocacy Project. The project is supported by the DC Bar Foundation as well as by Zuckerman Spaeder.

(continued on page 8)

Pictured from left to right: David Reiser, Barbara McDowell and Graeme Bush at the Legal Aid Society Appellate Project Reception.

contents

- 1 recess appointment challenged as unconstitutional

dna testing pursued to prove innocence

zuckerman spaeder teams with legal aid society to start appellate project
- 2 confrontation clause under crawford interpreted for maryland high court
- 3 zuckerman spaeder protects voters' rights in 2004 election
- 4 legal counsel for indigent individuals: miami office's provision of indigent services under the criminal justice act
- 5 federal pediatric drug testing rule saved by lawyers for children and pediatricians

victory in title vii case

retroactive application of parole guidelines challenged
- 6 making a difference: counsel for abused and neglected children
- 7 dvleap: providing a voice for the national community combating domestic violence
- 9 gateway georgia avenue revitalization project

zuckerman spaeder files amicus brief in guantanamo detainee habeas appeal
- 10 2003 zuckerman spaeder pro bono annual report
- 12 2003–04 community service
- 14 zuckerman spaeder accepts pro bono challenge

pro bono attorney honor roll

aba model rule of professional conduct 6.1
- 15 thank you

confrontation clause UNDER CRAWFORD INTERPRETED FOR MARYLAND HIGH COURT

On November 15, 2004, attorneys from Zuckerman Spaeder filed an amicus curiae brief before the highest court of Maryland, on behalf of the National Association of Criminal Defense Lawyers and the Maryland Criminal Defense Attorneys' Association and in support of the defendant in the matter of *State v. Snowden*. The brief addressed the application of a new and unexplored decision by the Supreme Court that redefined the

testimony, coupled with its decision not to call the girls as witnesses, denied Mr. Snowden his right to be confronted by his accusers, as redefined by the Supreme Court in *Crawford*. The state then petitioned for review by Maryland's highest court, and the court granted review.

The brief, prepared by Elizabeth Taylor and Eric Delinsky of Zuckerman Spaeder, discusses three issues. First, it proposes that the term "testimonial" as used in

The Confrontation Clause requires more than the opportunity for a defendant to call a complaining witness in his own case; when the prosecution introduces the witness' out-of-court statements, it requires that the prosecution actually call the witness in its case.

requirements of the Sixth Amendment Confrontation Clause, by essentially holding that the Confrontation Clause categorically bars the admission of out-of-court statements that are "testimonial" in nature. See *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

Mr. Snowden was charged by the state of Maryland with having sexual contacts with three girls between the ages of eight and ten. At his trial, the prosecution did not call the girls to the stand, even though the girls were in court and available to testify. Instead, over the strenuous objection of Mr. Snowden's counsel, the prosecution invoked Maryland's "tender years" statute, and it called a social worker to the stand in lieu of the girls. The social worker had interviewed the girls after the alleged offenses took place, but before Mr. Snowden was charged. The social worker testified about what the girls told her in those interviews.

Mr. Snowden was convicted, but his conviction was vacated by Maryland's intermediate court of appeals. The intermediate court found that the prosecution's use of the social worker's

(but not defined by) *Crawford* be defined by reference to the definition of the term that the Supreme Court has developed in the context of the Fifth Amendment privilege against self-incrimination. Second, it refutes an argument raised by the prosecution—namely, that Mr. Snowden waived his confrontation rights by failing to call the girls as witnesses himself. The brief explains that the Confrontation Clause requires more than the opportunity for a defendant to call a complaining witnesses in his own case; when the prosecution introduces the witness' out-of-court statements, it requires that the prosecution actually call the witness in its case. Third, the brief addresses the concerns for the welfare of child-witnesses that are raised in the briefs in support of the prosecution. It explains that the prosecution's reading of the Confrontation Clause simply would not address these concerns and that, if anything, they argue in favor of Mr. Snowden's position.

On February 7, 2005, the court found in favor of Mr. Snowden and determined that his conviction was unlawful. In so doing, the court adopted a key aspect of the Zuckerman Spaeder brief. ▀

zuckerman spaeder PROTECTS VOTERS' RIGHTS IN 2004 ELECTION



LCCR Executive Director Wade Henderson speaks at its press conference held on October 28, 2004 in front of Republican National Committee headquarters in support of voter rights.

Sunshine Ordered for Secret Justice Department Ballot Security Policies

On behalf of the Leadership Conference on Civil Rights, Zuckerman Spaeder partner Eleanor Smith secured on October 29, 2004, a federal court order compelling the Criminal Division of the Department of Justice to make its ballot security working law under Attorney General Ashcroft available that day to the American public. Ballot security measures can have the effect of discouraging eligible voters from voting. *Leadership Conference on Civil Rights v. Ashcroft*, pending before Judge Lamberth of the U.S. District Court for the District of Columbia, is the first lawsuit brought by the Leadership Conference against the Department of

disclosed previously secret substantive updates made under Attorney General John Ashcroft to the election law prosecution manual that the previous administration wrote and published. The records ordered disclosed in this Freedom of Information Act case reveal the "enhanced priority" placed by Attorney General Ashcroft on ballot security. The Leadership Conference on Civil Rights is the nation's oldest, largest, and most diverse non-partisan civil and human rights coalition.

Minority Voters Win Injunction Against Discriminatory Voter Challenges

Also on behalf of the Leadership Conference on Civil Rights and the Voter Protection Project of America's Families United, Zuckerman Spaeder partner Eleanor Smith prepared and filed on October 28, 2004, an amicus curiae brief seeking to prevent the Republican National Committee and its local affiliates from attempting to suppress votes by minority and disabled Americans. She filed the brief in support of motions by minority voters to intervene and reopen a federal case to enforce consent decrees against the RNC that forbade the RNC from using voter lists without court approval to challenge voters. After an emergency hearing held on October 28, 2004, the federal court

granted intervention, reopened the case, and required immediate discovery. Following another hearing on November 1, 2004, the federal court found the RNC in violation of the consent decrees and enjoined it and its challengers from using voter lists to challenge voters in the November 2, 2004 national election. However, the 3rd Circuit en banc granted the RNC's emergency motion for a stay pending appeal. The case is *Democratic National Committee v. Republican National Committee*, before Judge Debevoise of the U.S. District Court for the District of New Jersey.



November 2, 2004: Volunteers at the Election Protection National Command Center use binders of election laws supplied by Zuckerman Spaeder.

Election Protection Hotline Manuals Provided by Zuckerman Spaeder

Zuckerman Spaeder assisted the non-partisan Election Protection Program by providing the Lawyers' Committee for Civil Rights Under Law with 25 copies of binders of election laws in the 50 states. Volunteers at the Election Protection National Command Center referred to these binders to inform over 100,000 voters who called on election day into the national toll-free Voters' Rights Hotline (1.866.Our.Vote) of their voting rights. Additional information about the Election Protection Program is available at <http://www.lawyerscomm.org/ep04/epintro.html>. ▀

The Leadership Conference on Civil Rights is the nation's oldest, largest, and most diverse non-partisan civil and human rights coalition.

Justice, which is responsible for protecting the rights of U.S. citizens to vote. Under court order, the Criminal Division

legal counsel for indigent individuals: MIAMI OFFICE'S PROVISION OF INDIGENT DEFENSE SERVICES UNDER THE CRIMINAL JUSTICE ACT

More than 40 years ago, the U.S. Supreme Court pronounced in *Gideon v. Wainwright* that every defendant, rich or poor, has the right to competent counsel when charged with a serious crime. An unfortunate reality at many private litigation firms, however, is that Gideon's trumpet often sounds softly, if at all, for indigent individuals.

But not at Zuckerman Spaeder LLP. For years, the firm's office in Miami has provided legal representation to indigent defendants pursuant to the Criminal Justice Act (CJA), a federal public law promulgated in 1964 to afford effective representation to any defendant charged with a felony, class A misdemeanor or other serious crime. Selection under the CJA is a competitive process and Zuckerman Spaeder is one of only four major private law firms with attorneys approved for membership on the CJA panel within the U.S. District Court for the Southern District of Florida.

Among the many benefits of the firm's provision of indigent defense services is the opportunity that such representation has provided for the training of young—and even not-so-young—attorneys. This year alone, for example, seasoned litigator and partner Steve Chaykin has served as a legal consultant to a



pro se defendant in an alleged human trafficking action, and has represented indigent defendants in separate actions involving international drug-smuggling

"The rewards of indigent representation are great on both sides: We not only are investing in the future of the firm and its people, but also helping community members who sincerely need our counsel and truly appreciate our services."

—Steve Chaykin

conspiracies and purported violations of federal firearm laws. Although Steve has overseen the representation of these defendants, "younger" associates Brian James and Frank Massabki both have contributed significant time and resources to these cases.

"The opportunity to gain actual trial experience in a complex federal action, under the watchful eye of a distinguished criminal defense attorney and

former prosecutor, has been an invaluable boon to my legal career," says first-year associate Frank Massabki. Frank sat first chair with Steve during a two-week jury trial in an alleged drug conspiracy case involving cruise ships, drafted many of the pre-trial pleadings in that action and handled most of the client meetings at the federal detention center himself.

In addition to the many professional rewards related to the firm's CJA engagement, the attorneys associated with this cause also highlight the personal satisfaction they have gained in helping to ensure that the liberty interests of indigent people are not compromised simply because these defendants cannot afford to pay for legal representation. Steve adds, "The rewards of indigent representation are great on both sides: We not only are investing in the future of the firm and its people, but also helping community members who sincerely need our counsel and truly appreciate our services."

Zuckerman Spaeder attorneys serve on CJA panels in Baltimore, New York, Tampa and Washington, DC. ▀



Pictured from left to right: Frank Massabki, Steven Chaykin and Brian James.

victory IN TITLE VII CASE

Washington partner Elizabeth Taylor and associate Logan Smith represented a Title VII litigant who was suing the federal government, alleging that the agency where she worked had discriminated against her on the basis of race and national origin and created a hostile work environment. The litigant was pursuing the action pro se, and Judge Ellen Segal Huvelle, for whom Mr. Smith had clerked, called him to see if the firm would be willing to represent her on a pro bono basis. Ms. Taylor agreed to work on the case, develop strategy, and oversee Mr. Smith's work.

Over the course of 2004, in the midst of discovery, Zuckerman Spaeder ultimately negotiated a settlement on behalf of our client that included a promotion with back pay to May 2002. The settlement will enable our client to retire next year at a higher pay grade, which was a very important element of the settlement for her. This case was very rewarding for the client in that it provided her with a sense of gratification that she was compensated for her injuries. ▀

retroactive application OF PAROLE GUIDELINES CHALLENGED

The U.S. Court of Appeals for the DC Circuit appointed Zuckerman Spaeder partner Bill Schultz to serve as amicus curiae and make arguments on behalf of Thaddeus Fletcher, a pro se DC prisoner challenging the retroactive application of parole guidelines, promulgated in 1998, to his 1978 conviction. Fletcher brought a Section 1983 suit alleging that the retroactive application of the parole guidelines violated the ex post facto clause of the Constitution.

In support of Fletcher, associate Allison Baker argued that DC prisoners may use Section 1983 to bring civil suits to challenge parole guidelines without first obtaining a writ of habeas corpus. The DC Circuit agreed, handing the prisoner a rare habeas victory. The court, however, went on to find that the 1998 guidelines were not laws but merely guidelines, and therefore could not violate the Constitution's ex post facto clause. The prisoner, who is now represented by counsel, intends to file a petition for rehearing or rehearing en banc before the full DC Circuit on the ex post facto issue. ▀

federal pediatric drug testing rule SAVED BY LAWYERS FOR CHILDREN AND PEDIATRICIANS

My pro bono experience with partners Bill Schultz and Carlos Angulo began as a small project for Bill when our clients, the American Academy of Pediatrics and the Elizabeth Glaser Pediatric AIDS Foundation, came to him and expressed their concern that the government was not going to appeal the judicial invalidation of the Pediatric Rule. The Pediatric Rule was a final federal regulation that required drugs used to treat children's diseases be tested specifically in the pediatric population. [See 63 Fed. Reg. 66,632 (Dec. 2, 1998)] The rule addressed the major public health problem caused by the fact that approximately 75 percent of drugs that pediatricians prescribe have never been tested in children and have no labeling about the appropriate dose. During the Pediatric Rule's 2-1/2 years in existence, the rule was having a substantial impact on improving the drug treatment options available for children, as approximately 50 drugs were studied in children as a result of the rule, and the FDA has mandated pediatric studies for hundreds of others. The court invalidated the rule after organizations that receive funding from the pharmaceutical industry challenged it, and the loss of the rule severely impacted children, pediatricians and pediatric researchers.

In 2002 and 2003, Bill developed a dual litigation and legislative strategy to assist the AAP and the Pediatric AIDS Foundation to combat the invalidation of the rule. In December 2002, with the government vacillating on whether to defend its own regulation on appeal, and with the clock tick-



ing for when a timely appeal could be filed, we filed a motion to intervene to safeguard the interests of children and pediatricians. The court granted a motion for expedited consideration and the motion to intervene. Ultimately, the government decided not to appeal, and the pediatric groups were the only ones left in the case to defend the rule on appeal.

In the DC Circuit, we confronted a vigorous procedural challenge from the organizations that had successfully overturned the rule. These organizations moved to dismiss on the ground that the pediatric groups did not

(continued on page 6)

have standing to defend a rule where the agency had not appealed. We survived this challenge, and the case proceeded for a hearing on the merits scheduled for January 2004. We fully briefed the issues for the DC Circuit, arguing that the FDA acted well within its broad authority and the court should have deferred to the FDA's reasonable interpretation.

At the same time that we were pursuing legal avenues, we were also assisting the pediatric groups in obtaining new legislation from Congress that would

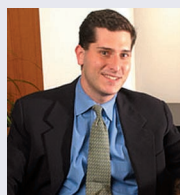
safety and well being of infants, children, adolescents and young adults. It has over 57,000 members worldwide and includes pediatricians, pediatric medical subspecialists and pediatric surgical specialists. Among its many activities, the AAP furthers the professional education of its members, develops positions and programs concerning pediatric care, and promotes public awareness of health care for pediatric patients. The Elizabeth Glaser Pediatric AIDS Foundation is dedicated to identifying, funding and conducting critical pediatric research that will lead

It was an incredibly enriching experience to be a part of the firm's efforts to give children better access to medical care and to help achieve a major victory for children with the passage of the Act. It was very rewarding to work for such noble clients, and I am grateful that the firm so strongly supported this work.

codify the Pediatric Rule. Finally, over a year after the rule was invalidated, and less than two months before oral argument was set to take place, Congress passed this new legislation, the Pediatric Research Equity Act, in December 2003.

It was an incredibly enriching experience to be a part of the firm's efforts to give children better access to medical care and to help achieve a major victory for children with the passage of the act. It was very rewarding to work for such noble clients, and I am grateful that the firm so strongly supported this work. Additionally, it was interesting to see the impact that the appellate litigation had by prompting Congress to act swiftly on new legislation to restore the requirements and protections of the Pediatric Rule. Congressional staff stated that the continuation of the lawsuit was one of several motivating factors in moving strong and unambiguous legislation through Congress. The American Academy of Pediatrics is dedicated to promoting the health,

to better treatments and prevention of human immunodeficiency virus (HIV) infection in infants and children; reducing and preventing HIV transmission from mother to child; and accelerating the discovery of new treatments for other serious and life-threatening pediatric diseases. Among other things, the foundation raises substantial funds to promote pediatric HIV/AIDS research, offers research grants to stimulate collaborative and focused scientific research on pediatric HIV/AIDS and other serious and life-threatening pediatric diseases, and sponsors programs throughout the world to prevent mother-to-child transmission of HIV/AIDS. ▽



by Logan Smith,
Washington, DC
(Associate)

making a difference: counsel for abused and neglected children

Since May 2001, Zuckerman Spaeder attorneys in Miami have volunteered with Lawyers for Children America (LFCA), an organization that engages lawyers and their law firms to help address the issues of child abuse and neglect. Jennifer Coberly and Frank Massabki currently represent a 12-year-old girl who was removed from her home three years ago based on allegations of sexual molestation and physical abuse. Jennifer and Frank have helped place the child in a therapeutic foster home that is able to meet the child's daily emotional, educational, physical and basic needs. They are also working to resolve issues between the child and her mother so that they may live together again.

In Washington, DC, Zuckerman Spaeder lawyers have been trained by Women Empowered Against Domestic Violence, a not-for-profit dedicated to protect women and children against abuse and to serve as guardian ad litem for children in abuse and neglect cases. Lawyers in the Washington office recently assisted the maternal grandmother of a boy who recently lost his mother, whose father denied paternity, and whose grandmother wants to continue to care for him in her home where he has always lived.

Washington associates Lisa Barclay, Miles Clark and Sasha Miller were recently trained by the Children's Law Center (CLC) to handle adoption proceedings. Lisa and Sasha accepted an adoption case referred to them by CLC in which Lisa successfully handled a contested proceeding that should allow the adoption to occur in 2005.

CLC helps at-risk children in the District of Columbia find safe, permanent homes and the education, health care and social services they need to flourish by providing a comprehensive range of legal services to children, families, and foster and kinship caregivers. ▽



dvleap: PROVIDING A VOICE FOR THE NATIONAL COMMUNITY COMBATING DOMESTIC VIOLENCE

A police officer threatens his wife and her sister with his service gun, which he brandishes, while drunk, and threatens to blow the sister's head off. The wife goes to court to seek a protection order. After a four-day contested trial, the court awards the protection order and orders the abuser's guns removed. Sometime later, in

Smith heard about the case from me, she was moved to offer the firm's pro bono assistance. The result has been a wonderful partnership and an excellent experience for both DVLEAP and Zuckerman, in the "pilot" case of DVLEAP's pro bono program. With David Byrd's research and writing, supported by his background as a bulldog journalist (my

tested trial, pursuant to the protection order judge's considered exercise of discretion. Thus, while it would in any case be untenable to "punish" a victim for causing an abuser's guns to be removed (and all the briefs made that argument), in this case, it was even more outrageous because the decision was not in fact in the control of the victim.



the parties' divorce hearing, the divorce judge denies the wife/victim any share of the husband's pension (the primary marital property) on the ground that her protection order caused him to lose his job as a police officer and left him unemployed.

Sound bizarre? It is, yet this decision was not only issued by a single divorce judge, but was upheld on appeal by a three-judge panel of the Washington State Court of Appeals, in *In re the Marriage of Muhammad*, 119 Wn. App. 166, 79 P3d 483 (2003). The appellate court also denied the wife's motion for rehearing.

This case engendered a nationwide outcry among advocates for victims of domestic violence. As the executive director of the new Domestic Violence Legal Empowerment and Appeals Project (DVLEAP), when I heard about it, even though DVLEAP was not officially "open for business" yet, I felt compelled to offer to provide an amicus brief to the lawyers representing the wife, the Northwest Regional Women's Law Center. And, in a similar manner, when Zuckerman's Pro Bono Partner Eleanor

term—judging from his persistence in digging out difficult-to-find facts), we put together a powerful though concise amicus brief in support of the wife's petition for certiorari to the Washington Supreme Court.

DVLEAP's brief was especially valuable, I believe, because, in addition to providing a "Brandeis brief" educating the court about the well-documented links between guns, domestic violence and homicide, and the widespread and inadequately addressed problem of police domestic violence, the DVLEAP team, through its in-depth research into the trial record and the law, discovered a flagrant legal error in the trial judge's reasoning. The court held that federal law required the protection order judge to remove the respondent's guns, once a protection order was entered—and that the victim knew or had to know that the guns would be removed. However, in fact the federal gun ban for domestic abusers against whom a protection order is issued contains an explicit exception for law enforcement personnel. And in this case, the guns were only ordered removed after a four-day con-

DVLEAP was joined in its brief by over 20 other domestic violence and legal service organizations at the national, state, and local levels, demonstrating to the state Supreme Court that the nation is watching this case. Additional amicus briefs were also filed by the Battered Women's Justice Project, Columbia Legal Services (in Washington State), and, with Zuckerman Spaeder's urging and assistance, the Washington Attorney General's office. We expect to hear in early September whether certiorari will be granted, at which point a second brief "on the merits" will be submitted by both the parties and at least some of the amici (most probably including DVLEAP, et al). DVLEAP is very grateful to Zuckerman Spaeder and Eleanor and David for their dedicated assistance with such an important and high-publicity case, ensuring that DVLEAP's first case will make a splash.

*The Washington Supreme Court granted the petition for a writ of certiorari in *In re the Marriage of Muhammed* and heard oral argument in the case on October 28, 2004. ▼

by Joan Meier, DVLEAP,
Washington, DC

Joan Meier is a professor of Clinical Law at The George Washington University Law School, and in 2003, launched the Domestic Violence Legal Empowerment and Appeals Project (DVLEAP), a nonprofit organization dedicated to filling a gap in legal advocacy for battered women and their children.

DNA CONT'D FROM PAGE 1

house at which he told authorities he had been during the time of the attack revealed absolutely no traces of blood. Nonetheless, authorities charged Mr. H with his ex-wife's murder and her boyfriend's attempted murder based on scant circumstantial evidence, which included the unidentified blood specks found on Mr. H. The first trial resulted in a hung jury. A second jury, however, concluded Mr. H had committed the crime. The conviction was premised in large part on the theory advanced by the state of Florida that the unidentified blood specks on Mr. H's head and nose came from the victims as he allegedly struck them repeatedly with a machete.

Mr. H has steadfastly proclaimed his innocence. Over twenty years later, DNA testing may be able to prove his innocence by identifying the source of the blood specks found on Mr. H's head and nose. Zuckerman Spaeder, working in conjunction with the Florida Innocence Initiative, filed a motion for DNA testing on Mr. H's behalf. The state vigorously resisted DNA testing in this case based on its belief that even if the DNA testing demonstrated that the blood did not belong to either of the victims, there nevertheless would have been enough remaining evidence to have convicted Mr. H. After a contentious hearing on Mr. H's motion, the court believed that there would have been a reasonable probability of acquittal had the blood specks been shown not to have belonged to the victims, and had that information been disclosed to the jury. The results of DNA testing are pending. It is hoped that the results of this testing will either exonerate Mr. H, or at the very least grant him a new trial to prove his innocence. ▀



by Marcos Hasbun,
Tampa (Associate)

RECESS APPOINTMENT CONT'D FROM PAGE 1

person appointed until the end of the next Congressional session, and the protections of life tenure and freedom from salary reduction that Article III federal judges are afforded. The recess appointment of federal judges directly undermines the clear intent of the Fram-

Supreme Court should have decided the issue in the first instance.

The Zuckerman Spaeder team previously had filed a motion on behalf of The Sierra Club and Georgia Forest-Watch to disqualify Judge Pryor from

The recess appointment of federal judges directly undermines the clear intent of the Framers to have a judiciary that was isolated from outside political pressure from the other branches in an effort to protect litigants before the courts.

ers to have a judiciary that was isolated from outside political pressure from the other branches in an effort to protect litigants before the courts.

On October 14, 2004, the 11th Circuit en banc considered these constitutional questions in the case of *Evans v. Stephens*, No. 02-16424, and found that Judge Pryor's recess appointment was constitutional. However, the *Evans* opinion included one dissent on the merits and one dissent that concluded that the

participating in a case pending in the 11th Circuit, arguing that Judge Pryor's recess appointment was unconstitutional. However, the *Evans* decision rendered moot that disqualification motion.

The Supreme Court initially considered our petition for certiorari in its October 29, 2004 conference. However, the Justices have yet to decide whether to grant or deny certiorari. The case is *Miller v. United States*, No. 04-38. ▀

ZUCKERMAN SPAEDER TEAMS CONT'D FROM PAGE 1

The goal of the Appellate Advocacy Project is to provide the highest-quality appellate representation in civil matters to poor people in the District of Columbia. The project is led jointly by David Reiser of Zuckerman Spaeder and Barbara McDowell, who recently left the Office of the Solicitor General at the Department of Justice to become the in-house appellate attorney at Legal Aid.

On June 23, 2004, David argued the first case briefed by the new Legal Aid Society Appellate Project before the District of Columbia Court of Appeals. The case presents the question whether anyone other than a parent may sue a parent for cus-

tody in a private civil action, and, if so, what the standards governing such a custody action should be. That issue has surfaced in a number of District of Columbia decisions, but it has not been squarely addressed. The lower court ruled that the non-parent (the mother's ex-husband but not the child's father) could not satisfy the standard for custody, ruling that continuing to separate the child from his mother was not in his best interests.

It did not decide the threshold standing question. The Appellate Project represents the mother on the ex-husband's appeal from the order denying custody. ▀

gateway georgia avenue REVITALIZATION PROJECT

Although more work is necessary before Upper Georgia Avenue becomes the marketplace local residents hope for, the road to that dream just got a little shorter. With the addition of some new partners working with Gateway to acquire and develop property on Georgia Avenue, Gateway is moving to lead the effort to create a retail corridor that serves the needs of the surrounding communities.



"We already have a broad-based coalition to support gateway's efforts to become a direct participant in developing property on DC's Georgia Avenue," said Gateway Executive Director Marc Loud. "With the groundwork laid, what we needed were some partners who could lend Gateway their expertise in developing urban properties." Enter Yachad, Inc., a Jewish-based economic development organization that works to mobilize the resources of the Jewish community to help rebuild urban neighborhoods.

"Thank G-d for Mayorga," says Audrey Lyon, Executive Director of Yachad, referring to the day last fall that she ran into Loud over a cup of coffee. Yachad forms partnerships with nonprofit and faith-based community groups and helps them forge the nec-

essary relationships with architects, lawyers, developers and financiers with development experience. "The timing was perfect," says Loud. "I knew Audrey from way back, and running into her at Mayorga certainly helped Yachad to become Gateway's newest development partner."

Yachad joins Ted Carter of the National Capital Revitalization Corp. and Marshall Wolff of the law firm of Zuckerman Spaeder LLP in providing development expertise to Gateway. "Ted and Marshall have been invaluable in advising Gateway on getting the development process started," says Loud. "The keys to developing this end of Georgia Avenue are money and experience, and Yachad, NCRC and Zuckerman Spaeder bring phenomenal expertise to Gateway."

Ward 4 Councilmember Adrian Fenty, Councilmember Harold Brazil, in his role as chair of the City Council's Economic Development Committee, and Mayor Tony Williams have also supported Gateway's efforts to bring new mixed-use development to the DC-side of Gateway's service area. Councilmember Fenty had been especially helpful in getting Gateway the initial resources to get started.

Gateway looks forward to working with the Upper Georgia Avenue neighbors as well. "We'll be meeting with the community as we move through the redevelopment process. Advisory Neighborhood Commissioners Jourdinia Brown and Doug Payton, and representatives from the Shepherd Park Citizens' Association and Concerned Neighbors, Inc. have been invited to join our development team," said Loud. ▀

Reprinted with permission by Gateway Georgia Avenue Revitalization Corporation. Originally published in Gateway News, June/July 2004.

by Beth Allaben, Gateway Georgia Avenue Revitalization Corporation

zuckerman spaeder files amicus brief IN GUANTANAMO DETAINEE HABEAS APPEAL

Zuckerman Spaeder filed an amicus curiae brief in the DC Circuit for the National Association of Criminal Defense Attorneys (NACDL) in *Hamdan v. Rumsfeld*, a federal habeas corpus action brought by a detainee at Guantanamo Bay. The government has appealed the federal district court's ruling that the military commission established at Guantanamo Bay lacks jurisdiction to try Hamdan. Judge Robertson's widely reported ruling first rejected the government's argument that it should abstain from deciding Hamdan's challenges to the commission's procedures. He then held that the Geneva Conventions applied to those held at Guantanamo Bay, that the president cannot unilaterally decide otherwise, and that Hamdan is entitled to the presumptive status of "prisoner of war." Judge Robertson concluded that if Hamdan can be tried in a military forum, then Congress and articles of the Geneva Conventions require such military trials to be general courts-martial under the Uniform Code of Military Justice (UCMJ). Judge Robertson further concluded that the military commissions established by the government did not comport with fundamental protections afforded the accused under the UCMJ, especially the right to be present at all stages of the proceedings and to confront witnesses.

The amicus brief filed on behalf of NACDL focused on the history of American military commissions, which date back to the mid-19th century, and the significant role of Congress, pursuant to its war powers, in regulating those commissions. The brief also argues that pursuant to the 1949 Geneva Conventions ratified by the United States, Congress expanded the in personam jurisdiction of the UCMJ to now include persons accused of "war crimes," thus negating any military necessity for convening a military commission. Moreover, the brief asserts, there is no "inherent" presidential authority to create these military commissions and challenges to their jurisdiction via habeas corpus have long been recognized in American military law. Zuckerman Spaeder partner Blair Brown, who chairs NACDL's DC Circuit amicus committee, is counsel of record on the brief. Donald G. Rehkopf, Jr. of the law firm of Brenna & Brenna, in Rochester, New York and co-chair of NACDL's Military Law Committee, was the principal draftsman of the brief. ▀

2003: ZUCKERMAN SPAEDER PRO BONO ANNUAL REPORT

In 2003, Zuckerman Spaeder devoted 2940 hours to pro bono legal representation to individuals on death row, claiming innocence, or seeking political asylum, to associations of pediatricians and their patients who are dedicated to government required testing for safety of drugs to be used on children, and to other persons in need. In so doing, the firm more than doubled its attorney time committed to pro bono since 2002, involved over half of its partners, of counsel and associates in pro bono matters, and increased the number and variety of pro bono matters undertaken. 2002 marked the inaugural year of the firm's Pro Bono Committee, its appointment of a Pro Bono Coordinator and the institution of a firm-wide pro bono policy. The depth and breadth of the firm's pro bono practice is illustrated in the following brief descriptions of matters handled by the firm in 2003.

criminal law

death SENTENCE

DC attorneys Bill Taylor and Blair Brown are in their eighth year of representing a convicted murderer in her challenge to her death sentence. Over the years, more than 40 firm professionals have assisted, and the firm has invested more than \$1.5 million, in representing her. In 2003, Bill and Blair were assisted by other DC attorneys Norm Eisen, David Reiser, Jennifer DiToro and Virginia Sadler.

DC attorneys David Reiser, Eleanor Smith and Caroline Judge were successful in helping the U.S. Supreme Court to decide to vacate a death sentence imposed in Maryland upon a person who did not receive adequate counsel. They filed an amicus curiae brief on behalf of the National Association of Criminal Defense Lawyers, the Maryland Criminal Defense Attorneys' Association and the National Legal Aid and Defender Association.

innocence PROJECTS

The Tampa office of Zuckerman Spaeder took on two matters for the Florida Innocence Initiative to challenge convictions based on DNA evidence. Attorney Marcos Hasbun, with assistance from attorneys Simon Gaugush, Sandy Weinberg and Lee Fugate, handled the case described on page 1 of this newsletter. The second matter was also handled by Simon and Marcos.

DC attorneys David Reiser, Eleanor Smith, and Blair Brown, with assistance from Roberta Colton, prepared and filed an amicus brief on behalf of the Innocence Project of the National Capital Region in the first case before the District of Columbia Court of Appeals to consider the District of Columbia Innocence Protection Act.

dc circuit appointment AMICUS CURIAE

DC associate Allison Baker argued before the DC Circuit in support of recalculating the parole date of a person litigate in a case to which the DC Circuit appointed the firm amicus curiae. Other attorneys assisting with the preparation of briefs and for argument were Bill Schultz, Aitan Goelman, David Reiser and Virginia Sadler. This case is described in an article on page 5 of this newsletter.

criminal justice ACT

Zuckerman Spaeder attorneys from Baltimore, Miami and Tampa represented indigent criminal defendants by court appointment.

In Baltimore, Gregg Bernstein and Andrew Torrez defended a person accused of bank robbery, while Martin Himeles and Andrew Torrez represented a witness in a firearms investigation and Herb Better and Karen Eisenberg handled a sentencing reduction proceeding.

Steve Chaykin and Paul Calli of Miami and Simon Gaugush of Tampa defended at trial a person accused of human trafficking. Steve and Paul, with assistance from summer associates Jennifer Papy and Lindsay Glassman, defended at trial a person charged with cocaine distribution.

In Tampa, Marcos Hasbun and Bobbi Camp represented a person accused of misusing a social security number.

ethics

Steven Salky and Logan Smith, attorneys from the DC office, handled a conflict-of-interest matter.

DC attorneys Mark Foster, Karen Dietrich and Mary Peters handled an ethics matter for the DC Public Defenders Service.



civil law

child WELFARE

DC attorneys Bill Schultz, Logan Smith and Carlos Angulo succeeded in filing an amicus curiae brief on behalf of health associations in a lawsuit challenging regulations by the Food and Drug Administration requiring drugs used on children to first be tested to ensure that they are safe for pediatric use. They also succeeded in intervening in that lawsuit to appeal a decision against the FDA and, ultimately, in 2004, secured federal legislation to require testing of drugs for use in children.

Miami attorney Jennifer Coberly represented children referred to the firm by Lawyers for Children America. Our work for Lawyers for Children America is further described in an article on page 6 of this newsletter.

DC attorney Kristen Flynn, with assistance from Eleanor Smith, represented a mother in proceedings in the District of Columbia to protect her minor children.

employment

DC attorney Virginia Sadler, with assistance from Michael Smith, successfully represented a delicatessen employee who sought back pay and overtime for wrongful termination.

indentured SERVITUDE

DC attorneys Mark Foster and Lisa Barclay prosecuted a civil claim against a family for keeping their housekeeper as an indentured servant.

domestic VIOLENCE

DC attorneys David Byrd and Eleanor Smith undertook the first appellate brief by the Domestic Violence Legal Empowerment and Appeals Project, DVLEAP. Further details about our work for DVLEAP appears on page 7 of this newsletter.

real ESTATE

Miami attorney Walter Taché represented a homeowners association.

election LAW

Tampa attorney Bob Hearn served as local counsel to Public Citizen in a case challenging the constitutionality of various charitable contributions rules in Pinellas county.

ethics

Tampa attorney Simon Gaugush represented an attorney in a discipline proceeding.

intellectual PROPERTY

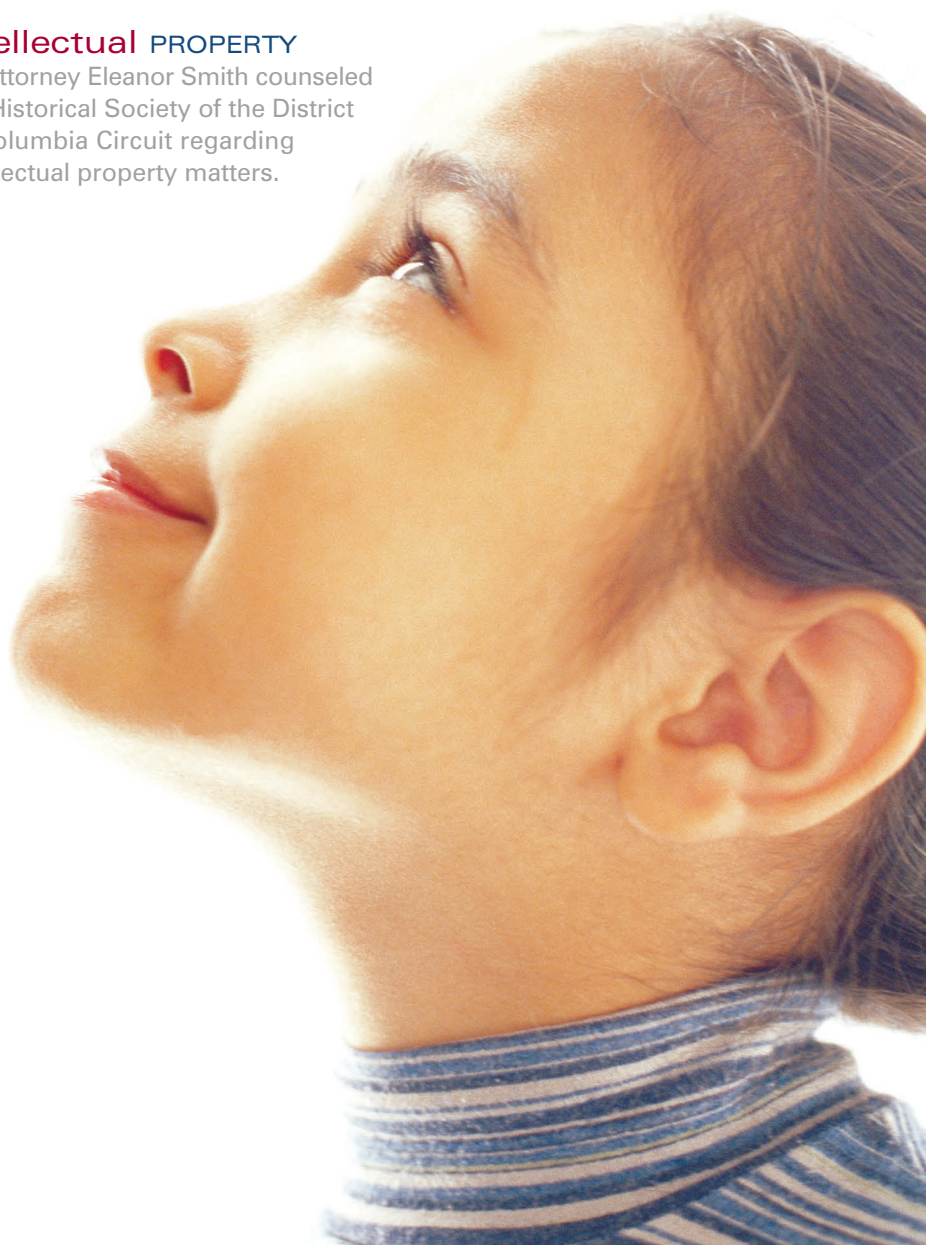
DC attorney Eleanor Smith counseled the Historical Society of the District of Columbia Circuit regarding intellectual property matters.

immigration / ASYLUM

DC attorneys Carlos Angulo, Eleanor Smith and Steve Salky were successful in obtaining asylum for women who fled political persecution in Sudan.

education

DC attorneys Elizabeth Taylor and Mary Peters represented a school in addressing a subpoena for records for a divorce proceeding. ▽



2003–2004 community service

Below are some highlights from the firm's 2003–2004 community service projects.



Zuckerman Spaeder employees deliver gifts to the Salvation Army Angel Tree program volunteers. Pictured from left to right: Dee Payne, Melissa Elliott, Joan Pancamo, Beatrice Payton and Abby Bonder.

salvation army angel tree

For over a decade, the Washington office of Zuckerman Spaeder has participated in the Salvation Army Angel Tree program. In 2003 and 2004, firm personnel purchased gifts for 75 and 100 children respectively. This program is designed to provide holiday gifts for less fortunate children in Washington, DC, who would not otherwise receive any, and allow participants to feel the joy that comes from unselfish giving. Dee Payne, secretary in the Washington, DC, office, coordinates the firm's Angel Tree campaign and has done so since 1997.

ms walk

Meeting its goal and raising over \$10,000, Zuckerman Spaeder was the top fundraiser for the Washington, DC, 2004 MS Walk. Partner Aitan Goelman led the team of co-workers in the 16th Annual MS Walk on Saturday, April 17, 2004, in honor of Joseph Hartzler, lead prosecutor in the case against Timothy McVeigh for bombing the Oklahoma City federal building, and currently an Assistant United States Attorney in Springfield, Illinois. Mr. Hartzler was diagnosed with multiple sclerosis in

1988 and is a top fundraiser for the Springfield MS Walk. In addition to the donations submitted by Zuckerman Spaeder employees, the firm matched funds raised by the MS Walk team.

blood drive

Due to the ongoing shortage of blood in our region, Zuckerman Spaeder and building management Mack-Cali teamed up to sponsor an American Red Cross blood drive on September 30, 2004. In all, 50 people participated and gave 40 pints of blood.



Julie Allard, secretary in the Washington office of Zuckerman Spaeder, planned and coordinated the event for all tenants of the building. Special thanks go to property manager Mike Hueston, who provided access to a private room, rented the required chairs and obtained permits for the reserved parking space for the Red Cross truck.

dc scores

For the second straight year, Zuckerman Spaeder fielded a team in the Sharks vs. Suits shootout, a seven-on-seven, all-day coed soccer tournament. The shootout benefits DC Scores, a local nonprofit organization that provides after-school soccer and creative writing programs for DC youth, for which Managing Partner Graeme W. Bush serves on the board of directors. This year's tournament, held at Trinity College on Saturday, June 26, 2004, featured 16 teams representing DC-area businesses and law firms in a day of friendly competition for a great cause.

stoddert soccer

Managing Partner Graeme Bush serves as chairman of the DC Stoddert Soccer League, Inc., a nonprofit, youth soccer league that provides the opportunity for competitive athletic activity to over 5000 girls and boys ages 4½–19, and includes scholarship support to hundreds of children who would not otherwise be able to play.

welfare law center

Zuckerman Spaeder partners Eleanor Smith and Ron Weich served on the Benefit Committee for the Welfare Law Center Awards Ceremony and Dinner held March 1, 2004, in New York. The firm contributed to the event as a "friend"-level donor. In addition, Adam Rosman was recently



Lawyers Have Heart team pictured from left to right: Ciara and Abbie Mulvihill, Monica Phillips, Ellen Marcus, Adam Rosman, Blair Brown, Susan Gerone, Geoffrey Davis and Carlos Angulo.

elected to a three-year term on the center's board of directors. The Welfare Law Center is a national law and policy organization dedicated to ensuring social and economic justice for the most disadvantaged members of society.

kids computer workshop

Washington partner Norman Eisen serves on the board of the Kids Computer Workshop (KCW), a program he helped found in 1998. The program helps about 300 at-risk DC kids each year to learn computer skills.

lawyers have heart

A team of 20 runners and walkers participated in the Lawyers Have Heart 10K run and 3K fun walk on Saturday, June 12, 2004, in Washington, DC, helping to raise money and awareness for the American Heart Association. A team from Zuckerman Spaeder has participated in the event since 2002. During the last decade, Lawyers Have Heart has raised over \$2.8 million to benefit the American Heart Association, whose mission is to reduce disability

and death from cardiovascular disease (CVD) and stroke.

lawyers' committee for civil rights under law

The Lawyers' Committee for Civil Rights Under Law held its 40th Anniversary Gala Dinner on June 19, 2003, in Washington, DC. Eleanor Smith, a member of the board of trustees for the Lawyers' Committee, served on the Honorary Host Committee. The firm was a patron of the gala.

children's law center

The firm was a sponsor of the Children's Law Center 2004 Celebration and Benefit at the Kennedy Center on September 22nd, a fundraiser to advance the efforts of the center.

horton's kids, inc.

Washington associate Lisa Barclay serves as vice chairman of the board of directors for Horton's Kids, Inc. (HKI). The firm was a corporate sponsor of the 13th Annual Horton's Kids Holiday Fundraiser on November 20, 2004. HKI

is a nonprofit organization that provides an array of services to children in one of the poorest and most dangerous neighborhoods in Washington, DC. Through its many services, including tutoring and mentoring, HKI strives to improve the quality of the children's daily lives and to nurture their desire and ability to succeed.

facilitating leadership in youth (fly)

Washington partner Bill Taylor and his wife Susan helped found FLY in 1999 and have supported the organization through fundraising and financial contributions. FLY is a not-for-profit organization supporting youth ages 8 to 16 in Washington, DC, east of the Anacostia River, in achieving their educational goals, developing their talents, and expanding their leadership roles. FLY's Youth Council recently published "Why? Guns Killin Youngins," a magazine in response to the increasing violence in Anacostia that includes real life scenarios of people living east of the river. ▀

pro bono service award

In December 2003, Baltimore partner Herb Better received the Peter A. DiRito Award from the Federal Bar Association for his outstanding and dedicated service to the U.S. District Court for the District of Maryland and the Federal Bar Association. In 2001, Herb received the U.S. District Court for the District of Maryland's Pro Bono Service Award. The judges selected Herb for his many years of leadership and service on the court's Liaison Committee and the Attorney Admissions Fund Committee, committees of judges and lawyers who strive to improve the practice of law and the administration of justice in the court, as well as for his work as a member of the Magistrate Judge Selection Panel and on projects such as the Discovery Guidelines.

zuckerman spaeder ACCEPTS PRO BONO CHALLENGE

In 2004, the Washington, DC, office of Zuckerman Spaeder took a stand and committed to “annually contribute, at a minimum, an amount of time equal to 3 percent of the [office’s] total billable hours or 60 hours per attorney to pro bono work.” By signing the Pro Bono Institute’s Law Firm Pro Bono Challenge, we are pleased to join with other firms across the country in subscribing to the Institute’s Statement of Principles and in pledging our best efforts to achieve the voluntary goals of the Pro Bono Challenge. To read the Statement of Principles, visit <http://www.probonoinst.org/challenge.text.php>.

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pro bono ATTORNEY HONOR ROLL JANUARY 1–DECEMBER 31, 2004

Jason Acton	Paul Calli	Kristen Flynn*	Ellen Marcus	Virginia Sadler*	Andrew Torrez
Carlos Angulo	Steve Chaykin*	Simon Gaugush	Frank Massabki*	Melinda Sarafa	Sean Vitano
Allison Baker	Jennifer Coberly	Marcos Hasbun	Amy McNamer	William Schultz*	Ronald Weich
Lisa Barclay*	Roberta Colton	Bob Hearn	Tom Meeks	Eleanor Smith*	Steve Wisotsky
Gregg Bernstein	Geoff Davis	Martin Himeles	Sasha Miller	Logan Smith*	Marshall Wolff
Herb Better	Matthew Davidson*	Brian James*	Mary Peters	Michael Smith	
Blair Brown*	Eric Delinsky*	Deborah Jeffrey	Ellen Quattrucci	Elizabeth Taylor	
David Byrd*	Norman Eisen	Peter Kolker	David Reiser*	William Taylor	

* Congratulations for dedicating 50 or more hours of time in 2004 to one or more pro bono representations.

american bar association 2004 MODEL RULE OF PROFESSIONAL CONDUCT 6.1

The American Bar Association Model Rule of Professional Conduct 6.1 states that all lawyers have a professional responsibility to provide legal services to those unable to pay. Zuckerman Spaeder is proud to adhere to Rule 6.1 Voluntary Pro Bono Publico Service and encourages you to review it online at <http://www.abanet.org/legalservices/probono/rule61.html>.

pro bono COMMITTEE MEMBERS

- Eleanor H. Smith, coordinator
- Ronald B. Ravikoff
- William W. Taylor, III
- Marshall S. Wolff

pro bono matters EDITORIAL STAFF

- Eleanor H. Smith
- Monica H. Phillips
- Julie L. Allard

Zuckerman Spaeder, LLP is a member of the District of Columbia Bar Pro Bono PARTnership.



thank you TO EVERYONE WHO CONTRIBUTED
TO THE INAUGURAL EDITION OF

PRO BONO MATTERS

Pro Bono Matters is a publication focusing on Zuckerman Spaeder's commitment to pro bono service. To contribute to the next edition of *Pro Bono Matters* or to recommend a pro bono project, please contact Eleanor Smith at esmith@zuckerman.com, 202.778.1838, or Zuckerman Spaeder, 1201 Connecticut Ave., NW, Washington, DC 20036.

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