

GUEST COLUMN

Genius of Einstein, or wisdom of Pogo?

By Edwin Reeser

There are at least two courses of action in which bold action by law firm leaders may erupt in the face of adversity to lead their firms to safety in the dangers of the current business environment.

The first derives from a spontaneous and courageous personal initiative by an inspired and thoroughly capable leader. This leader intellectually recognizes and accepts the small truths which accurately demonstrate the challenge. This leader then communicates effectively to the partners of the firm, rallies their support around a shared plan of action, and turns the direction of the firm to a safe and successful outcome. This requires not only a strong intellectual capability (which lawyers constantly trumpet they possess in abundance both individually and collectively as part of their problem solving talent for sale to clients) but a deep appreciation that "we cannot solve our problems with the same thinking we used when we created them."

The second derives not from a

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EDWIN REESER
 Pasadena

DAILY APPELLATE REPORT

CIVIL LAW

Employment Law: Employees' lawsuit asserting pension plan was managed imprudently fails because they did not sue within six years of decision to include new investments in plan. *Tibble v. Edison International*, U.S.C.A. 9th, DAR p. 3763

Intellectual Property: Injunction against torrent web sites that facilitated downloads of infringing copies of film studios' works must spell out terms with greater specificity. *Columbia Pictures Industries Inc. v. Fung*, U.S.C.A. 9th, DAR p. 3783

CRIMINAL LAW

Criminal Law and Procedure: Receptionist who fatally shot supervisor and co-worker after being fired for making threats is properly convicted of first-degree murder and sentenced to death. *People v. Pearson*, CA Supreme Court, DAR p. 3723

Criminal Law and Procedure: Jury foreman's decision to decline request for readback of testimony is not misconduct because only one juror wanted to rehear testimony. *People v. Vallejo*, C.A. 2nd/6, DAR p. 3758



Daily Journal photo

U.S. District Judge Virginia Phillips says more Inland Empire lawyers feel comfortable practicing in federal court.

Limelight on Central District's Eastern Division brightens

By Katie Lucia
 Daily Journal Staff Writer

RIVERSIDE — Whether it's a problem with political standing, small bench numbers, simple isolation or something else, the Eastern Division of the federal court's Central District has struggled for years to come out of the shadow of Los Angeles and other highly populated divisions. But although the region continues to fight to gain additional judgeships and boost its prestige, lawyers and jurists say the federal system encompassing Riverside and San Bernardino counties is beginning to gain momentum. The area's federal bar is rapidly growing, lawyers say, and the U.S. attorney's local branch is adding staff and trying bigger cases. In addition, the court brought on an additional magistrate judge two years ago and will soon have a new district court judge to fill a long vacant seat on the bench.

"In recent years, there's a sense that the Eastern Division has come into its own as the site of some of the district's most high profile and important criminal cases," said Assistant U.S. Attorney Joseph B. Widman, a deputy chief in the Riverside office.

Legal observers say continuing population growth and a new emphasis on cases in the region by the U.S. attorney's office, as well as a surge of collaboration between regional and federal authorities, are helping to boost the standing of the division, home to more than 4 million residents.

Judge Virginia Phillips, one of two district judges and three magistrate judges in the division, said that in the past several years, she's seen growth in the local U.S. attorney's and federal public defender's offices, as well as in the number of civil litigators handling federal matters. Phillips serves as president of the 100-member Inland Empire chapter of the Federal Bar Association.

"We definitely have far more practitioners here who have become comfortable with federal practice," Phillips said. "We have

lots of law firms who practice in the federal area."

The Eastern Division has seen some of the state and nation's most prominent cases over the past few years, both civil and criminal. Central District U.S. Attorney Andre Birotte Jr. said he has been focusing efforts in the Inland Empire, both in terms of growing the office and building partnerships with local law enforcement.

"The Inland Empire is one of the fastest growing and most diverse regions in California," Birotte said. "What we've tried to do is make sure our office is in the position to be responsive to the public safety needs of the area."

Tony Raphael, chief assistant U.S. attorney heading the Riverside office, said he oversees 10 full-time attorneys with two more slated to join the office by the end of the year. He also oversees four special assistant U.S. attorneys — prosecutors on loan from district attorney's offices in San Bernardino and Riverside counties.

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Northern District announces furloughs

Court chops hours in response to budget cuts known as sequestration

By Hadley Robinson
 Daily Journal Staff Writer

Courtrooms in the Northern District will close once a month through the end of this fiscal year due to federal budget cuts known as sequestration, officials announced.

Though the courthouses themselves will remain open on furlough days, no staff from the clerk's office will be there, and any emergency filings can be time stamped and placed in a drop box.

The Northern District is the first in the state to announce furlough days and courtroom closures as all sectors of the judiciary struggle to maintain a restricted budget through the end of the fiscal year, Sept. 30.

"Through economies that we've imposed in the office, we believe that at least for the clerk's office, five furlough days will enable us to get through the remainder of the year," Northern District clerk Richard W. Wieking said. The plan was announced Wednesday.

The Central District is expected to announce the impact of the federal budget cutbacks by Friday, a spokesman said, and has yet to release any details. The Eastern and Southern districts believe they can avoid furloughs this year because both are already operating significantly under budget.

"Our folks are willing to double up," Southern District clerk Samuel Hamrick said. "One of my employees decided to go to law school. We are not filling that position. We are assigning those duties around."

In the Northern District, courts in San Jose, San Francisco and Eureka will close on the first Friday of each month starting in May, while the Oakland court remains open. Oakland will close the first Monday of each month. Wieking said they wanted to ensure one courthouse remained open if there is an urgent matter that needs handling.

Though the clerk's office will be closed for furlough days, U.S. marshals, U.S. attorneys, public defenders and other divisions operate separately and could be open, depending on each division's handling of the financial shortage, Wieking said.

Hearings already scheduled for the furlough days will be changed to different dates.

Among the avalanche of bad budget news, a small bright spot materialized this week for public defenders, one of the agencies hardest hit by this year's cuts. A resolution passed both houses that adds \$9 million back into the budget for public defenders, reducing the cuts from 5 percent to 4.2 percent.

All the public defenders are contemplating furloughs, some for several weeks, and the new resolution, if signed by the president, could provide slight relief. Northern District public defender Steve Kalar said he is committed to having a defender available each day the court is open even if he has to furlough employees.

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Alameda judge steps down after charge of elder fraud

By Don J. DeBenedictis
 Daily Journal Staff Writer

An Alameda Superior Court judge accused of having embezzled more than \$1.5 million from a 97-year-old neighbor has agreed to immediately give up his seat on the bench.

The state Commission on Judicial Performance announced Thursday that Paul D. Seeman also agreed never again to serve as a judge.

Seeman's attorney, Kathleen M. Ewins of Long & Levit LLP, said the judge "had a distinguished career" but decided that "this was an appropriate action to take at this time for the good of the court."

Assigned to hear civil cases at

the Hayward courthouse, Seeman has not been back to work since Berkeley police arrested him June 14, according to Ewins and commission Director Victoria B. Henley.

Police accused the judge of befriending his across-the-street neighbor, Anne Nutting, in 1998 after her husband suffered a serious fall, according to news accounts. When authorities declared the couple's home uninhabitable due to their hoarding, Seeman apparently offered to help take care of their affairs.

Seeman reportedly obtained a power of attorney from the couple in January 1999 and took greater control of their assets after the

husband died that December at the age of 90.

"By August 2004, Seeman had taken over almost all of the [Nutting's] financial affairs, putting his name on her bank accounts as joint tenant and on her investment accounts. ... At this time there was in excess of \$2,200,000 in the accounts," an arrest warrant stated, according to news accounts.

Police reportedly began investigating Seeman after Nutting hired a new lawyer in 2010.

The Alameda County district attorney's office filed an amended complaint March 1 charging Seeman with 30 felony counts and two misdemeanors, including theft from an elder, grand theft, forgery

and filing 11 false statements of his economic interests as a judge. *People v. Seeman*, 579641 (Alameda Super. Ct., filed June 14, 2012)

His criminal defense attorney, Cristina C. Arguedas of Arguedas Cassman & Headley LLP in Berkeley, referred questions about Seeman's case to Ewins.

The judicial commission started its investigation in June 2011, but it suspended its probe in exchange for the judge's agreement to step down.

Seeman also agreed "not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accept a

reference of work from any California state court, at any time in the future," the commission announced.

A graduate of UC Santa Cruz and UC Berkeley School of Law, Seeman focused on criminal and juvenile matters for 24 years as a sole practitioner. He became a juvenile court commissioner in 2004, and Gov. Arnold Schwarzenegger named him to the Superior Court in 2009.

He is set to next appear in court for a pretrial hearing April 18, according to a district attorney's spokeswoman. If convicted of a felony, Seeman could be disbarred, according to a State Bar spokeswoman.

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Litigation/Corporate

Lax, Not Lazy

Lawyers say James R. Ritchie brings a lenient air to court but doesn't hesitate to rule.

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Dealmakers

Sullivan & Cromwell LLP advised Phoenix-based Cole Holdings Corp. on American Realty Capital Properties Inc.'s \$9 billion offer to acquire Cole Credit Property Trust III Inc.

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Law Firm Business/Perspective

More Than a Point of View

Maureen Dorney, who co-founded a transactional boutique in 2008, relies on attorneys and staff with vast experience to set the firm, Paradigm Counsel, apart from the rest.

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Pistorius and the media

In the wake of the Oscar Pistorius shooting, the media seemed enamored with his athletic accomplishments, while ignoring a systemic problem in South Africa. By Joseph Sorrentino

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Perspective/Verdicts & Settlements

Get busy livin'

In her book "Among Murderers," Sabine Heinlein explores what it is like for a convicted murderer who has spent decades behind bars to suddenly taste freedom.

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Law became ADR's labor of love

Mediator Joel Franciosa didn't seek out the line of law he went on to practice. But he fell for it.

Verdicts & Settlements

Justice on trial in South Africa

By Joseph Sorrentino

Once a pariah nation for apartheid, South Africa is now a culture of brutal misogyny, where domestic violence against women is rampant, where rape is an epidemic, where the president of South Africa, Jacob Zuma, himself was charged with rape. Not surprisingly he was found "not guilty." Only 7 percent of reported rapes in South Africa lead to conviction. See Ximena Ramirez, "The Women's Rights Cause."

"Although women comprise about 52 percent of the South African population, it has been acknowledged that they constitute one of the most marginalized and vulnerable groups in this country," writes Professor Waheeda Amien, of the University of Cape Town. "Recent Developments in the Area of Women's Rights in South Africa: Focus on Domestic Violence and Femicide," 2001. She notes that the power structure has "forced women into a subordinate position to men and has impeded their full advancement in the social, cultural, political, and economic spheres of society." More alarming, South Africa has a horrific record of femicide. At least three women a day are killed by a partner in this nation. Some 2,500 women are murdered every year. On Valentine's Day, Reeva Steenkamp was fatally shot several times by Oscar Pistorius. What is troubling about the Pistorius case is the media focus on the heroics of an Olympian, while the real story should be the pervasive violence against women in South Africa.

The charge that South Africa is a culture of misogyny has been reaffirmed by the media's fawning over Pistorius. Writing for The Nation, Jessica Valenti points out: "Just one day after shooting Steenkamp four times, Pistorius has been called 'calm and positive,' and 'inspirational.' Steenkamp? She's been called 'a leggy blond.'" Reeva held a law degree from the University of Port Elizabeth. Applying to the bar, she hoped to be a lawyer next year. She was becoming a strong voice against the scourge of domestic violence in South Africa.

The Pistorius residence was located in the luxurious Silverwood estates, voted "the most secure estate in South Africa." The homes are secured by a giant wall with electric fences and manned controlled access. Armed guards are



Olympian Oscar Pistorius stands following his bail hearing, as his brother Carl, center, and father Henke look on, in Pretoria, South Africa, Feb. 19, 2013. Associated Press

on duty around the clock. On the eve of Valentine's Day, Reeva came to spend the night with Pistorius. A short distance from her side of the bed is an open bathroom suite with a toilet chamber, i.e., an enclosed toilet with a door for privacy. In an affidavit crafted with his defense team, Pistorius claims that he and Reeva had gone to bed, falling asleep hours before the shooting. At around 3:00 a.m. he got up to close his balcony doors. He heard a noise from the bathroom. Fearing a burglar and without his prosthetic legs on, he grabbed a gun from under his bed. On his way to the bathroom he screamed words to the effect, for the intruder to "get out of his house" and for Reeva to "phone the police." It was pitch dark. He fired four times into the toilet chamber. Breaking down the locked door he was shocked to discover Reeva dying. He implies that it was a coincidence that when he got up at 3:00 a.m. to close the balcony doors, Reeva decided to get up at the same time and lock herself in the toilet.

Initial news accounts of the prosecution's case will likely be

modified when witnesses testify and are cross examined. The news media report that a witness heard noises that sounded like a quarrel on the night of the shooting. A neighbor heard a shot, a woman's scream, and then more shots. A neighbor said the lights were on in the Pistorius residence. Prosecutor Gerrie Nel pointed out that the gun's holster was located on Reeva's side of the bed where she was sleeping, and Pistorius would have necessarily seen that she was not there. He had to walk by the bed to get to the bathroom. Investigators say the downward angle of the shots show that Pistorius was already wearing his prosthetics when he fired. Ballistics indicate he fired at close range, about five feet. Nel asserts the couple argued. Pistorius flew into a rage and became violent. Reeva fled, terrified, and locked herself in the toilet chamber, where he shot her several times.

Chief Magistrate Nair found it difficult to understand why, believing there was an intruder, Pistorius didn't make sure he knew where his girlfriend was before opening fire.

On the issue of negligent homicide, a reasonable man would first check on the safety of his loved one before blasting away at a closed toilet. Before he goes into the bathroom, he would tell her to leave the premises and call armed security. Dan Abrams on ABC's "20/20" finds it inexcusable that Pistorius did not ascertain who was in the toilet before firing his weapon. The chief magistrate believed that he should have asked, "Who's in there? Reeva are you in there?" Why a burglar would lock himself in a toilet defies common sense? Being harmlessly trapped and locked in the toilet the burglar posed no imminent threat to Pistorius. He could have called the 24 hour armed security to his residence to take the man into custody. Instead Pistorius made the decision to execute him, firing four times into the toilet.

Pistorius has good character witnesses who believe his account of what happened. However, others tell of Oscar's dark side, which casts doubt on his accident defense. ABC News claims that Pistorius has a real bad temper. A BBC documentary

reports that he once threatened to break the legs of another man over a girlfriend. It is alleged "he kept a black book of people who crossed him, using intimidation and threats against those who might expose his flaws." The Guardian, Feb. 20, 2013. A former longtime girlfriend, Samantha Taylor, told South Africa's City Press that "Oscar is certainly not what people think he is." Behind the image of a devoted boyfriend, he has been linked to numerous other women. Trish Taylor was relieved when her daughter broke up with Pistorius, writing on Facebook, "I am glad that Sammy is safe and out of the clutches of that man." The New York Times reports that the police had been called to Pistorius residence for prior complaints of domestic abuse. In 2012 he made headlines for his outburst after losing in the Paralympics, claiming the winner cheated by using longer prosthetic limbs. Times Live, Sept. 5, 2012. At his bail hearing the chief magistrate noted his "indisputed aggressive behavior." In 2009, the 26-year-old paralympian was arrested and spent a night in jail charged with assault-

ing a teenage girl. It was reported he slammed a door on her leg after she refused to leave his party. He once threatened to "F--- up" South African football player Marc Batchler. The Times Africa, Feb. 25, 2013. The truth of these allegations of prior misconduct and their admissibility in evidence remains to be seen.

A court trial will determine Pistorius' fate. The prosecutor "almost guarantees" a conviction because the Pistorius story is "so full of holes," as if empirical logic always prevails in a criminal trial. In a mystery novel a sleuth can determine guilt by a chain of deductions, but in a criminal trial the prosecution needs weighty forensic and percipient evidence. Much will hinge on the reliability and credibility of the neighbors who reportedly heard the couple loudly quarrel on the night of the shooting. It is hubristic folly to predict the outcome of this case. Pistorius has retained a high-priced legal team to defend him in court.

On the other hand, the investigating officer who resigned in disgrace made blunders. The South African justice system reeks with the stench of corruption. Only 7 percent of rapes and only 11 percent of all murder cases result in a guilty verdict. Because he races on prosthetic limbs, Pistorius had been dubbed "Blade Runner" by the media, given a superhero image. Millions in his nation worship him. Cheers erupted when he was granted bail. Such massive adulation, potentially toxic to a fragile soul, can influence the outcome of a case.

The Vuma Reputation Management Company, the PR firm retained by the sports star to protect his brand, made it known that Oscar held a memorial service for Reeva on his uncle's estate. Staying at a three story mansion with a large swimming pool, Pistorius seeks to have bail restrictions lifted and is eager to get back in training.

Joseph Sorrentino served as a prosecutor with the Los Angeles District Attorney and Riverside District Attorney. He was part time faculty as a "Distinguished Practitioner" at the University of Southern California, Adjunct Professor at Pepperdine University, and Director of Lecture Series at the University of California, Santa Barbara.

Firm failures: Our own worst enemy is us

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leader, but from a broad recognition of the partners that they are confronted with a complete and total lack of alternative options. This realization can motivate the partners to make the commitment to pull together for survival. Whether that action is undertaken under the current leadership, a new leadership, or from the rank and file themselves is not as important as just getting it done. While we should not confuse actions sparked from a lack of alternatives as being on the same plane as those voluntarily taken through courage and vision, if it gets the firm and the great majority of its partners, associates and staff to the safety of a sustained and profitable enterprise, and away from the terrible consequences of a major failure or bankruptcy, we shouldn't quibble. "Anyone who doesn't take truth seriously in small matters cannot be trusted in large ones either."

Indeed, our level of capability probably not only drops more than a few rungs on the ladder from Einstein, but is perhaps closer to that of the little possum character Pogo from the Okefenokee Swamp: "We have met the enemy, and he is us."

A third path one might say derives from the J. Alfred Prufrock school of management. That approach carefully avoids either of the first two paths, and instead resorts to concocted fantasy scenarios, spin stories, engineered financials, eventually leading to an implosion from having accepted the futility of fighting an outcome that is accepted as inevitable by the leaders and even large numbers of partners. "Human beings must have action; and they will make it if they cannot find it."

Does it matter which path is chosen? Of course it does, as the extent of damage to the organization, and to its people, will be significantly

reduced if the first of the above options is followed. "If you can't explain it simply, you don't understand it well enough."

For five straight years of financial and operating challenges, the first option has been largely shunned by many large firms, as they have taken a seriously bent, if not broken, business model and done the same old wrong things "better," deferring (but not avoiding and possibly ensuring) a painful day of reckoning, while hoping things would return to "normal" and everything would somehow just get "better." The recovery to the legal industry has not happened, law firm leaders and consultants keep advising that it will not happen, and still law firm leadership in too many firms often exemplify a popular definition of insanity: "Doing the same thing over and over again, and expecting different results."

The second of the options does involve pain and suffering to the law firm and its people, in some instances severely. But it may still result in survival of the entity and another chance for many to keep their jobs/careers and ultimately prosper. Unfortunately it will come too late for those ejected or de-equitized, but lessons learned in time to save the firm are not a complete waste, just an expensive one. The outcome for many is still superior to the alternative of failure of the firm. "People love chopping wood. In this activity one immediately sees results."

Looking at the path of many law firms over the past five years, very few if any appear to have taken the first path, and very many appear to be on the second path. "If you are out to describe the truth, leave elegance to the tailor."

Some firms have already reached the decision point of either taking resurrective action, or descending into the third option. Unfortunately, over the course of the last decade all large law firms that have reached that decision point have failed. (The failure of Dewey & LeBoeuf LLP is not the only example of this third option outcome, but it is the most recent and stark example.) "In order

to be an immaculate member of a flock of sheep, one must above all be a sheep oneself."

The quotes in the commentary are of course all from Albert Einstein. We claim to have many intellectuals in our leaderships, but we don't seem to have much genius ("Intellectuals solve problems, geniuses prevent them"), so perhaps we could borrow a little insight from one of history's greatest minds. Particularly since we lawyers as "intellectuals" do not seem to be doing all that great a job at solving these particular problems, let alone preventing them.

Indeed, our level of capability probably not only drops more than a few rungs on the ladder from Einstein, but is perhaps closer to that of the little possum character Pogo from the Okefenokee Swamp: "We have met the enemy, and he is us." But if that is still a true and correct realization, it could work just as well for us, and none of us has to be a genius, let alone an Einstein, or even an intellectual as we self-proclaim ourselves to be. To work our way out of the challenge all we have to do is recognize and embrace our true situation for what it is, and set to work. Surely we must be able to just find a Pogo amongst our leaders here and there? The clients have told us clearly what it is that they want, and so did Einstein: "Strive not to be a success, but rather to be of value."

If we can't, or won't do what the wisdom of clients and the genius of Einstein concur we must, then it must be because we don't care enough to embrace the changes required to solve the problem. The problem won't go away, but we in our fast evolving irrelevance will. Problem solved.

Edwin B. Reeser is a business lawyer in Pasadena specializing in structuring, negotiating and documenting complex real estate and business transactions for international and domestic corporations and individuals. He has served on the executive committees and as an office managing partner of firms ranging from 25 to over 800 lawyers in size.

American exceptionalism and leaders subject to laws

By Kenneth G. Petrulis

The U.S., in 1803, was a young, struggling country. Other countries had greater or equivalent human, monetary and natural resources. They had more advanced technologies. They had a greater history than we did of dealing with law and rights. What we had was a unique concept: *no one* is above the law. Our constitutional rights would be enforced by an independent judiciary to create a fair playing field. No one, not the king, or in our case the president, could deny an individual rights under the law. This was a revolutionary concept. It would allow the growth of ideas and industries that, 200 years later, would become and still are the envy of the entire world.

The concept of the independent judiciary had its roots in English law and tradition. Our Constitution borrows heavily from the English common law. The Magna Carta, in 1215, established the rights of noblemen and free men in return for an agreement of loyalty to the king. Later, the English Acts of Settlement in 1629 established rights for most Englishmen. It closely reflects our Bill of Rights. At about the same time, Lord Coke, addressing parliament, voiced the statement that no one, even the king, is above the law. This statement, however, was *not* put into practice in England. It was not until John Adams, helping to draft the Constitution, established the judiciary as an independent branch of government. Adams concept was that the president was to be subject to the checks and balances not only of a Legislature but also an independent judiciary.

Thomas Jefferson, John Adams' good friend and cohort in Virginia, was, in 1803, attempting to enforce an act passed by Congress. The Supreme Court, led by Chief Justice John Marshall, in *Marbury v. Madison*, declared the

act unconstitutional. That decision put into effect the promise of the Constitution that all, including the president, would be subject to the law. It was Jefferson, the founding father and a drafter of the Constitution, who acknowledged the right of an independent judiciary to act as a separate and co-equal branch of government. Thus was set into place the keystone of American Exceptionalism.

The establishment of the independent judiciary began our tradition of being a nation of laws, ruled by leaders subject to laws.

The establishment of the independent judiciary began our tradition of being a nation of laws, ruled by leaders subject to laws. When a young inventor fought for his invention against the might of Western Union, the law protected his rights though he was up against a foe with a thousand times the resources. Without the law, the telephone, Alexander Bell's invention, might never have spread the way it did in the Bell's innovative and dedicated hands. It surely inspired other inventors and entrepreneurs, knowing that they could reap and retain the fruits of their inspiration and labor.

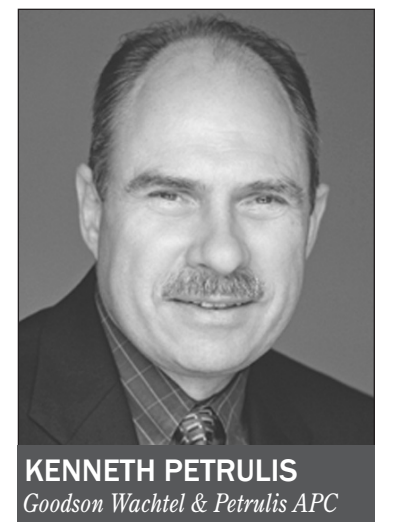
No less important to our traditions of rule by law are the human rights aspects of the establishment of an independent judiciary. Personal and civil rights are the "canary" by which the strength and integrity of a legal system may be judged. As we do unto the least of us, so we do as to all of us, to analogize to another well respected rule.

Our struggle with these personal

rights largely parallels the emergence of our country on the world stage. Though our courts have an early history of overlooking the personal rights of women and minorities, significant advances were grudgingly, but inevitably supported by the courts following the Civil War, the labor movement of the late 19th century and the women's suffrage movement's of the early 20th century.

Without an independent judiciary the U.S. would be just another country and the world would be the poorer for it. As Shakespeare said of how to become a tyrant "first take the attorneys." Examples of tyrants first attacking the courts abound. From the Nazis, to Pakistan, to just recently Egypt, courts and attorneys are the key element to be eliminated first when destroying or denying a democracy. With a truly independent judiciary come the freedoms, innovation and economic success that are the hallmark of American Exceptionalism.

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