Oral History of
DAVID B. ISBELL
EIGHTH SESSION - MARCH 17, 2009

Sinclair: This is the eighth session of the oral history of David Isbell that we're doing for the Historical Society of the District of Columbia Circuit. We are going to pick up today where we left off at our last meeting. We'll cover some of Mr. Isbell's professional activities during the period 1979 to 1995. We've covered the D.C. Bar, so let's talk about the American Bar Association and the House of Delegates in particular. Could you begin by explaining briefly what the ABA and its House of Delegates are?

Isbell: Well, the ABA is the preeminent professional organization of lawyers, whose membership includes more than half of the million or so lawyers in America. Its House of Delegates, with some five hundred members, is its principal policy-making body.

Sinclair: Were you a member of the House of Delegates?

Isbell: Yes, I became a member of the ABA House of Delegates, *ex officio*, when I became President-elect of the D.C. Bar, in 1982. I remained *ex officio* during my year as President, 1983-84 and, I think, my year as Immediate Past President, and then I ran for election as a Representative of the D.C. Bar in the House of Delegates. D.C. had three elected Representatives, in addition to several *ex officio* ones who served for two-year terms but could be reelected any number of times. I kept running and getting reelected to one of those slots until 1996, so I wound being a member of the House of Delegates, either *ex officio* or elected, for thirteen years altogether. When I became the Chair of the ABA Ethics Committee (more formally the Standing Committee on Ethics and Professional Responsibility), it was very helpful for me to still be a member of the House of Delegates because it seemed to me that every year of my committee chairmanship, we had something to propose, or there was a proposal from some

other source on which the committee's views were sought, before the House of Delegates. I would be responsible, as the committee's Chair, for presenting and defending the committee's position on the matter.

Sinclair: What were your responsibilities as a Delegate?

Isbell: To attend meetings, which were held twice a year—a mid-year meeting and an annual meeting—and, if you had something to say, to participate in the discussion, and, of course when the House of Delegates voted on some matter, to cast your vote. Also, various *ad hoc* committees were formed over the course of time. I served on one such committee, which was concerned with "ancillary business"—that is, law firms engaging in related businesses that were not themselves the practice of law.

Sinclair: Would that be a violation of professional conduct rules?

Isbell: The committee was appointed to consider whether a new Rule of Professional Conduct should be adopted that would prohibit or regulate lawyers and law firms engaging either directly or indirectly, through a subsidiary entity, in activities that, although not in themselves constituting the practice of law, were nonetheless related to the law—for example, acting as a realtor.

Sinclair: How long did that committee exist?

Isbell: At least a year. Perhaps a little more.

Sinclair: Were you tasked with a report?

Isbell: Yes. We issued a report and recommendations, which I must say, nobody paid much attention to. But the ABA did wind up adopting a Rule governing ancillary business activities. That's Rule 5.7 of the Model Rules of Professional Conduct, now titled *Responsibilities Regarding Law-Related Services.* There had been a real push on this subject

from the ABA Section on Litigation, whose leaders thought it was a frightful idea for lawyers to have any kind of business connections. They thought it was risky; they seemed to be afraid the practice of law would just be corrupted by lawyers combining practice with commercial activities. My view, and that of the special committee on which I served, was that no prohibition was called for, but that it might be worthwhile to have a Rule that limited such activities in ways that would avoid possible ethical problems, and the Rule that was ultimately adopted by the House of Delegates reflected that general viewpoint. So far as I know, it's no longer a subject of controversy.

Sinclair: So, the Rule that was ultimately adopted was based on your recommendation? Or was at least in harmony with your recommendation?

Isbell: In harmony, yes. The Rule has since been amended in various minor ways, but its general thrust, of regulating rather than prohibiting such activities, has remained the same. I was not in fact deeply interested in the subject. I served on that special committee, and I was a member of the ABA Ethics Committee when the first version of the Rule was adopted, and I'd made up my mind about it, but I wasn't interested enough to follow its subsequent course with close attention after I was no longer on the ABA. I thought there were just a few simple propositions that had to be recognized, and they were, and the rest was uninteresting detail. Anyhow, the battle eventually simmered down.

Sinclair: You were a member and Chair of the ABA's Ethics Committee. Could you begin by explaining the role of that committee?

Isbell: I don't recall any official statement about what the committee's formal role was meant to be (although I'm sure there is one, somewhere), but as a practical matter, it did two principal things. One was to issue Opinions about ethics issues relating to the current ABA

model ethical code, which, when I was on the committee, was (and still is) the Model Rules of Professional Conduct. The Model Rules were first adopted in 1983 (superseding the Model Code of Professional Conduct, which in turn had superseded the original ABA Canons of Professional Ethics in 1969), but they have been substantially amended (and improved) since then. Every American jurisdiction but one now has an ethical code largely based on the ABA Model Rules, and California is slowly edging in that direction. Every jurisdiction also has at least one Ethics Committee that issues its own Opinions about those Rules, so there are a whole lot of Ethics Committee Opinions floating around out there on the internet. On the whole, though, the Opinions of the ABA Committee are considered to be more authoritative, and the committee certainly tries to make them so.

The other important function of the committee concerns proposed amendments to the current ABA Model Rules. Sometimes the committee will be the entity that proposes an amendment; other times, the initiative will be a proposal from another ABA entity (as was the case with the Rule regarding ancillary businesses); or it may be a court decision, as it was in one instance during my time as Chairman of the committee. In that case, a Supreme Court decision holding that a provision of a Nevada rule of professional conduct on trial publicity that was an exact copy of Model Rule 3.6 was constitutionally void for vagueness,[18] which obviously required a revision of that Model Rule. I'll discuss that case a little more fully later in this interview.

Sinclair: Were you a member of the Ethics Committee before you became Chair of the Ethics Committee?

Isbell: Yes. I was appointed to the Ethics Committee (more formally, the Standing Committee on Ethics and Professional Responsibility) by the then-incoming President of the

[18] That case was the *Gentile* case, which is discussed at page 211, below

ABA, Stanley Chauvin, in 1989, and wound up serving on it for six years, three of them, 1991 to 1994, as Chair. What led to my appointment was a conversation with Zona Hostetler, a dear friend who was very active in Bar matters and many other good works. I told her I was getting tired of the House of Delegates, and she asked me whether there wasn't anything I'd like to do in the ABA. After a little thought I realized that there was indeed something I'd be interested in getting involved in—the Ethics Committee. I had spent six years on the D.C. Bar's Ethics Committee, and found that very interesting. Happily my interest came to the attention of Stan Chauvin, and he appointed me to the committee for the standard term of three years.

In my first two years on the committee there were two different Chairs, each in the last year of a three-year term as a member of the committee. The next year I was appointed as Chair by the then-incoming ABA President, Michael McWilliams. He didn't know me, but I think I had strong support from the staff that served the committee, and he yielded to it, I thought, with some reluctance. He phoned me and said he would appoint me as Chair, but only if I promised that I would offer my resignation to his successor after I'd served a year as Chair, so that his successor would not feel bound to keep me on as Chair, or for that matter, as a member of the committee. By then, I wanted very much to be Chair of the committee, and I agreed to the condition he had attached to the appointment.

So after I'd served as Chair for a year, I duly tendered my resignation, as I was promised to do, to McWilliams' successor, William Ide. He evidently thought I had been a good Chair, so he declined to accept my resignation. And then, the following year, I again tendered my resignation to the new President-elect, George Bushnell, whose attitude was that if someone's doing a good job, he should be allowed to continue to do so. So, I wound up having three years as Chair, and then I served one more year, the final year of my second term as a member of the

committee, for a total of six years. They were, altogether, fruitful years, and enormously enjoyable for me.

Sinclair: Why were they fruitful years?

Isbell: Well, a principal manifestation of fruitfulness was that, up through the first two years that I was on the committee, the average production rate of the committee in the form of published Opinions was one or two per year. I had been on the D.C. Bar's Ethics Committee for six years, as I've previously said, and it had been considerably more productive than that in terms of numbers of Opinions issued. A contributing reason for the D.C. Bar Committee's greater productivity was that it met more frequently than the ABA Committee. The D.C. Bar Committee met monthly, whereas the ABA Committee met only four times a year—two times in connection with the mid-year meeting and the annual meeting of the ABA, and the other two times, typically, at a resort of some kind. The practice had been, essentially, to devote the meetings to considering drafts of Opinions, but there was no reason for committee members to give serious attention to other committee members' draft Opinions between meetings, so there was little progress between meetings on any drafts that were in the works.

When I became Chair of the ABA Committee, I got its members to agree, first of all, to have a monthly conference call. Initially the call was for just one hour, but it soon seemed to me that an hour wasn't a long enough time for the conference calls to be really productive, so I got my colleagues to agree to extend it to two hours. The other innovation that I instituted was an expectation that each member would have a draft Opinion in the works at all times. Some members who got appointed to the committee joined it in the expectation that they would simply bring their expertise to enlighten our discussion, but not actually do any work in the way of producing draft Opinions, but it was soon made clear to such members that that was not the way

we were operating. When a draft was ready for consideration, it would be distributed and would be discussed whenever we next got together, which would generally be in one of the monthly phone conferences.

The result of the increased frequency of the committee's meetings and the expectation that every member would have a draft in process was that the rate of production of committee Opinions went up. The first Opinion the committee issued during my time as Chair was Formal Opinion 92-362; the last one was Formal Opinion 94-387—a total of 26 Opinions, or an average of a little more than 8 per year. So I can claim at least part of the credit for that increased productivity of the committee. In fairness, though, I must also say that the major reason for the committee's extraordinary productivity during that period was that I had the good fortune of having several members of the committee who were extraordinarily interested, able, and energetic. Indeed, with only one exception, all of the committee members during my time as Chair were very able.

An interesting thing about the number of Opinions issued during my time as Chair, I think, is that most of them—though not all—were on important points on which there was little or no authority, so that they became important precedents, some of them being reflected later in amendments to the Model Rules or the Comments thereto.

Sinclair: Do you have any examples?

Isbell: One that springs to mind is Formal Opinion 93-374, on Sharing of Court-Awarded Attorneys Fees with Sponsoring *Pro Bono* Organizations. I was personally responsible for that one. It responded to an inquiry that had been made to the ABA, but it was also a subject that I knew was of considerable importance to the ACLU and other cause organizations that engaged in litigation on behalf of persons who had claims under statutes under which attorneys

fees could be awarded to successful plaintiffs. The opinion held that fees so awarded could properly be shared with a sponsoring *pro bono* organization despite Model Rule 5.4(a)'s prohibition on a lawyer sharing a fee with a nonlawyer. I asked Tom Odom, then a relatively new associate at Covington with whom I'd had some other dealings, to draft that opinion, which, after some editing by me, the committee adopted, albeit with one member dissenting. (Tom was inspired by that project to take up legal ethics as a specialty, and wound up teaching the subject in several law schools). The holding of that opinion is now reflected in Model Rule 5(a)(4), as amended in 2002 pursuant to a recommendation of the Ethics 2000 Commission, which provides that "A lawyer may share court-awarded fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter."

Other Opinions issued by the committee when I was Chair that I think were ground-breaking included Formal Opinion 92-364, *Sexual Relations with Clients*, a subject that is now dealt with (somewhat differently than in that opinion) in Model Rule 1.8(g); Formal Opinion 92-367, *Lawyer Examining a Client as an Adverse Witness, or Conducting Third Party Discovery of a Client*, which is reflected in comment [6] to Rule 1.7, as amended, on the recommendation of the Ethics 2000 Commission in 2002; and Formal Opinion 93-377, *Positional Conflicts*, which is similarly reflected in comment [24] to Rule 1.7, also on the recommendation of the Ethics 2000 Commission.

Part of the reason for our producing Opinions that became important precedents was this: at every meeting we would be given a list of topics that had been subjects of inquiries by members of the ABA who had written to ETHICSearch**,** a service that was provided by the staff that also served the Ethics Committee. ABA members could write to that service with an ethical question and the service would respond, not with an answer to the particular problem but with

citations to such authority as the staff was able to find that had a bearing on the question. In other words, it provided research, but not explicit advice. At each meeting of the Ethics Committee, we would be furnished with a list of the questions that had been posed to ETHICSearch on which it had not found substantial authority. All or virtually all of the issues that the Ethics Committee chose to address with a Formal Opinion came from that list of topics. So, we were filling in blanks where there ought to be authority, but there wasn't yet significant authority—filling them in by way of Formal Opinions. I think our procedure for picking the subjects that we'd try to address in a Formal Opinion was essentially the same as was followed by predecessor and successor committees; so I don't count that as another innovation introduced during my chairmanship of the committee.

Sinclair: Now, you've described the committee's role in issuing Opinions, but you also said it had a role with respect to proposed amendments to the Model Rules. Would you expand on that a little?

Isbell: Yes. Monitoring and weighing in on proposed Rule amendments was definitely a responsibility of the committee, and it was also an area in which I felt that the period in which I served as Chair was fruitful. There were two Model Rule amendments during my time as Chair that were particularly memorable. The first of these responded to the Supreme Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), which I have mentioned earlier, effectively holding that Model Rule 3.6, on *Trial Publicity,* addressing the problem of extrajudicial publicity that may affect the fairness of a trial, was unconstitutionally vague, so that amendment of the Rule was needed if it was to survive constitutional challenge. The Gentile in the case was a prominent Nevada criminal lawyer (whose name is pronounced as Genteel, not Gentile or Gentilly) who had held a press conference, some six months before the scheduled trial

of his client, for the purpose of rebutting some of the adverse publicity that he felt might have a prejudicial effect on his client's trial. After the trial, at which his client was acquitted, he was charged with having violated Nevada's counterpart of Model Rule 3.6, which was virtually identical to the Model Rule as it then stood, and disciplined for having held that press conference. He responded by challenging the constitutionality, under the First Amendment, of the Rule he had been found to have violated. He took that challenge to the Nevada Supreme Court and then to the United States Supreme Court, which held that one of the key provisions of the Nevada rule—and, in consequence, the Model Rule—was void for vagueness.

The *Gentile* decision meant that at least the portion of the Rule that the Court had found unconstitutionally vague and therefore void must be amended; but my view, with which the committee was at least willing to go along, was that while we were at it, we should consider whether Model Rule 3.6 could be improved in other ways in addition to curing the problem of vagueness. I identified some nine issues that should be at least considered in connection with the one constitutionally necessary amendment, and drafted and got distributed to various interested parties a memorandum posing those issues and seeking comments on them.

The upshot was that the committee wound up proposing, and the House of Delegates adopting, substantial changes to Rule 3.6. I would have made even more changes than were ultimately adopted, but the new version of Rule was still a great improvement.

There was one other Model Rule amendment in which I played the initiating role: an amendment to Rule 8.5 to add a simple, easily applied formula to govern the resolution of choice of law problems when a lawyer's conduct may be subject to the ethics rules of more than one jurisdiction, and those rules provide for conflicting results. Choice of law problems were becoming increasingly frequent, as lawyers and law firms increasingly dealt with matters

potentially involving the differing ethics rules of multiple jurisdictions. At that time, Model Rule 8.5, which was titled *Disciplinary Authority*, provided no more guidance for dealing with differing ethics rules applicable to the same transaction beyond the general observation that choice of law issues should be resolved by application of the pertinent doctrines of Conflict of Laws. That observation offered no practical guidance at all, and such decisional law as was available on the subject offered conflicting views.

So I asked my partner Arvid Roach, who shared my interest in legal ethics issues and was Vice-Chair of the firm's Professional Responsibility Committee while I was its Chair, to draft an amendment to Rule 8.5 that would provide clear and easily applied rules for resolving at least most conflicts issues that arise in practice, along with Comments to go with those new provisions, and a draft Committee Report in support of the proposed changes to the Rule. Inveterate editor that I am, I probably made some minor changes in Arvid's drafts, but he was a first-rate lawyer and writer, and his product didn't offer much (if any) room for improvement by me. I secured the support of the Ethics Committee, and we then got the House of Delegates' approval of our proposed amendment to Model Rule 8.5. The resulting Model Rule has since been revised somewhat, but I can claim some credit for having got this important subject dealt with in a useful fashion by the Model Rules.

There was a third subject on which the committee also proposed changes while I was Chair, namely, Model Rule 4.2, *Communication with Persons Represented by Counsel,* but nothing much came of that effort.

Sinclair: We've discussed the increased tempo in the issuance of Opinions that came about during your chairmanship of the Ethics Committee. Are there other changes that you made to the committee's work?

Isbell: There were a couple of changes that I got made in matters of form, with the concurrence of the committee, though I'm not sure we took any formal vote on them. One change related to the committee's longstanding practice of issuing two different kinds of Opinions—Formal Opinions and Informal ones. It seemed to me that there was not much point in having two different categories of Opinions. The Informal ones tended to be rather casually thought out and written, as if the authors didn't think they dealt with anything of importance—as in fact was often the case. But if that was so, in a given instance, why should the committee spend any time at all on them?

Sinclair: What was the justification?

Isbell: I'm not sure I ever knew that. Presumably, either the issues dealt with were less important or else less time had been spent on them. But all the Opinions that the committee issued during the six years I was on the committee, were pretty long and substantive Opinions, and I saw no reason to try to make a meaningful distinction among the committee's Opinions depending on whether a particular one was important enough or not important enough, or good enough or not good enough. If it was good enough for us to spend our time reaching a decision on an issue and providing an explanation of our reasoning, and deem it worthy of publication, what useful purpose would be served in labeling it as second-rate?

I don't think the committee ever took a formal vote on the issue, but I do think the committee shared my skepticism about the utility of Informal Opinions, and during my six years on the committee no such Opinions were issued, and none have been issued since; indeed, the last Informal Opinion, number 1530, was issued in 1989.

Sinclair: You said there were a couple of changes in matters of form that you brought about; what was the other one?

Isbell: The other thing I got changed concerned the format of the Comments that followed each Model Rule. Originally, the Comment following a Rule would generally consist of several paragraphs—indeed, sometimes twenty or more paragraphs—each dealing with some aspect of the Black Letter Rule to which it pertained, but none of which was separately labeled by either a number or a letter. If you wanted to refer to a particular paragraph in the Comment following a Rule, there was no more convenient means of designating it than saying, "Rule __ Comment, sixth [or twentieth] paragraph." My proposal, to which I've never heard any objection, was that the individual paragraphs under the title Comment after each Model Rule should be separately designated by a number, in brackets, so as to be conveniently cited as "Rule __, Comment [_]." The effect of that suggestion was that the next annual edition of the Model Rules showed bracketed numbers for each separate paragraph of a Comment. Similarly, we started referring to them in Committee Opinions as Comment [2] or [8] or whatever—or in abbreviated form as "cmt [2]," and so forth. This mode of reference was subsequently given the ultimate stamp of approval by being applied in the ALI's *Restatement (Third) of the Law Governing Lawyers*.

Sinclair: It sounds as though you were more active with the Ethics Committee than with the House of Delegates. Is that correct?

Isbell: Absolutely. It was possible to do more as a member of that committee, and especially as Chair of that committee, than as an otherwise untitled member of the House of Delegates. It's a very large body—more than five hundred delegates.

Sinclair: Did you vote? Was there a voting portion of being a Delegate?

Isbell: Yes indeed. In addition to addressing Rule changes, which we have discussed, the House of Delegates had the important function of deciding what the ABA's policies should

be, particularly positions on issues of public policy that the ABA would lobby about. And decisions by a deliberative body, of course, require votes by the members of that body, preferably after appropriate debate. A major portion of the time at every meeting of the House of Delegates, at least during the period I was in the House, was devoted to debating and voting on the various Proposed Statements of ABA Policy. The ABA takes lots of positions on public policy issues. It has a major lobbying operation in Washington.

A good many of the issues that it takes positions on are matters of national policy. For instance, when I joined the House of Delegates, the ABA had long since adopted the position that discrimination on various conventional grounds like race, creed, sex and national origin should be prohibited, which is to say that it supported Civil Rights legislation.

There came a time, early in my tenure in the House of Delegates, when it was proposed that the ABA's policy favoring legislation prohibiting discrimination on the basis of race, religion, sex, national origin and the like be amended to include sexual orientation among the grounds on which discrimination should be prohibited. That subject came up two more times during my sixteen years in the House of Delegates. The first time, we were meeting in Nevada, in Las Vegas, and I remember one of the speakers made the argument that we should not, in this sinful State of Nevada, be giving our blessing to sodomy. I think that was the low point of my time in the House of Delegates, although that speaker could be counted on for some pretty awful statements whenever he spoke. The principal speaker in favor of the proposal, as I recall that meeting, was Dan Bradley, who had been (and perhaps still was at that time) the first President of the Legal Services Corporation, established during President Johnson's War on Poverty, to provide federal funding to organizations that provide legal representation to people who can't afford to hire a lawyer. If memory serves, Bradley was one of those men who had not

recognized their sexual orientation until relatively late in life. When he spoke to the House of Delegates, he knew, and told us, that he had contracted AIDS, and, since AIDS at that time was invariably a fatal disease, he would soon die of it. He made a moving address, but the proposal was overwhelmingly defeated.

A couple of years later, the proposal came up again before the House of Delegates. This time it failed of adoption again, but by a narrow margin. Then a few years after that, it came up a third time, while I was still in the House of Delegates, and this time it was adopted by an overwhelming margin. There had been an extraordinary change in the degree of enlightenment of essentially the same deliberative body. A fair number of people, of course, were on that body throughout that period, so my guess is that a good many of them changed their minds, reflecting a comparable change in the general population.

Sinclair: Were you an active participant in House of Delegates debates?

Isbell: I was certainly an active participant on anything having to do with the Model Rules, and particularly when I was Chair of the committee. And where proposed amendments to the Model Rules were to be voted on, I served in the debate in the House as spokesman for the Ethics Committee. I participated occasionally in debates on proposed ABA public policy positions, though I don't recall any particular ones. I know I didn't participate in the first debate on the question of discrimination on grounds of sexual orientation, because I hadn't prepared my thoughts on the subject beforehand and the debate concluded and the vote was taken before I managed to put some together. I regretted that I hadn't, but I think I did participate the two subsequent times the issue came up.

Sinclair: Good, well, that's quite a bit about the ABA. Is there anything else missing?

Isbell: No. Shall we go on to the time when I was induced to become a member of the board of the new organization established by the Washington Lawyers' Committee—the Disability Rights Council of Greater Washington? Or perhaps the Veterans Consortium Pro Bono Program, which came into being at about the same time, but in which my role was more significant?

Sinclair: Sure, let's turn first to the Veterans Consortium Pro Bono Program. Please explain a little bit about what the Veterans Consortium Pro Bono Program is.

Isbell: Let me first recount some of the historical background of the Veterans Administration's processing of claims by veterans or their survivors for benefits for service-connected disabilities. (Incidentally, the formal name of that agency is the Department of Veterans Affairs, but everyone still refers to it as the Veterans Administration, or the VA, as I will also do.) There were two longstanding statutes restricting the rights of veterans with respect to the VA's handling of such claims, both of which were finally repealed and replaced in 1988. One of those had prohibited judicial review on the merits of decisions by the Veterans Administration about individual veterans' disability benefits. The other was a provision that had been in effect in slightly varying forms since the Civil War, which prohibited, under criminal penalty, any person from charging more than ten dollars to represent a veteran in dealing with the Veterans Administration. I had encountered, and been astonished by, that remarkable statute when, as a young lawyer, I had represented a young man who had just been commissioned a second lieutenant in the Army, but who had had a psychotic episode. I represented him in a hearing before an Army discharge board, and in the course of that representation learned that there was that extraordinary statute that effectively barred me from helping that client to assert his possible benefits from the VA, though I could help him get benefits from the Army. A

Supreme Court decision in 1985, although recognizing that that ten dollar fee limitation effectively prevented any lawyer from representing a veteran before the VA other than on a *pro bono* basis, nonetheless upheld the statute against a constitutional challenge, on the ground that the VA's paternalistic procedures sufficiently protected veterans' rights without the need of any privately retained lawyers.[19]

In addition, there was a VA Rule that prohibited anyone from taking *any* money for assisting a veteran before the Veterans Administration. In sum, lawyers simply weren't available to provide such assistance, except for lawyers who were employed by one another of the veterans service organizations like the American Legion, who would provide free representation and get paid by the service organization.

Sinclair: Unbelievable!

Isbell: Indeed! Happily, those two extraordinary laws were repealed in 1988 and replaced by the Veterans Judicial Review Act,[20] which not only allowed judicial review of the VA's benefits decisions but established a special Article One court, now called the U.S. Court of Appeals for Veterans Claims (or, less formally, the Veterans Court), to which appeals could be taken. That statute also narrowed the prohibition on a lawyer being paid for representing someone before the VA to the period before the VA's Board of Veterans Appeals had made a tentative final decision on the merits of the claim. Thus, it allowed veterans to hire lawyers to handle appeals to the Veterans Court.

That new Court was quickly staffed and went into operation, but it soon found that something close to eighty percent of the appellants before it were *pro se*; that is, unrepresented by counsel. That, of course, presented a terrible problem for the court in figuring out what a case

[19] *Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305 (1985).
[20] Pub. L. 100-687, 102 Stat. 4105 (1988).

was about, and a terrible problem for appellants who had a good claim, but didn't know how to present it. However, one of the judges on the Court had the good idea of asking Congress for permission to pass on some of the court's appropriated funds to the Legal Services Corporation (LSC) for the purpose of having LSC issue a request for proposals (RFP) to establish a program that would train lawyers in veterans law, evaluate the cases of *pro se* appellants, and, with cases that presented an issue worth arguing, to assign such lawyers to represent those appellants without charge. In 1992 Congress agreed to the Court's request and authorized some of the court's appropriation to be transferred to LSC for that purpose.

LSC issued the RFP and got several responses, one of which was put together by four veterans' services organizations (VSOs). The American Legion is probably the best-known of the four; the other three were Paralyzed Veterans of America, Disabled American Veterans and a public interest law firm called the National Veterans Legal Service Program. They put together a proposal that was awarded a grant from LSC. There was another organization, on the West Coast, that also got a grant at that time, but that organization's grant was not renewed after the first year, so the project these four VSOs had put together, which was given the name Veterans Consortium Pro Bono Program (hereinafter the Program), wound up as the sole recipient of the funds that were channeled by the Court to LSC. So the Program started training volunteer lawyers in veterans law, evaluating the claims of *pro se* appellants and assigning trained volunteer lawyers to represent those appellants whose claims were deemed worth arguing before the Court. The set-up of the Program had an *ad hoc*, improvised quality to it. It was not, technically, even a legal entity. It was staffed by personnel who were actually employees of one or another of the constituent VSOs, which were in turn reimbursed for the employees' time out

of the Program's funds. Despite the jerry-built structure of the Program, it worked, and very effectively.

The four constituent VSOs were all rivals in various respects, and often disagreed with each other about matters of public policy affecting veterans. So, while they were all supporting this new Program, they did not want decisions made about the Program that they could not veto. They recognized that there would have to be some entity to make decisions for the Program, but they were hesitant to call it a board of directors, and instead named it the Advisory Committee. That committee was to consist of a representative from each of the four constituent VSOs, and a fifth member who was not connected to any of the constituents, and who they decided should be a representative of the private bar. I was asked if I would be willing to be that fifth member of the Advisory Committee. Since I was myself a veteran, I had a certain sense of identification with the Program. Moreover, I had just resigned from the National Board of Directors of the National ACLU, and was receptive to the idea of getting into some other sort of good works. So I agreed to join the Advisory Committee, without even thinking about the fact what when that committee had its first meeting, it would have to elect a chair, and I would inevitably be elected as such, since I had no connection with any of the four constituent organizations.

Sinclair: How did you get involved?

Isbell: Two of the people involved in designing the program and preparing the proposal that won the grant had known me in other good works connections; one of them through the ACLU, and the other through the Civil Rights Commission. I'd also been President of the D.C. Bar, and I've since been told that that was an important factor in their choosing me, I presume because it gave me some credentials as an appropriate representative of the private bar.

Sinclair: This was around 1995?

Isbell: No, it was in 1992.

At the first meeting of the Advisory Committee, I was, for the reason I've mentioned, elected as Chair. I found it quite easy to get the organization running smoothly. When I'm the chairman of a board or other organization—or just a member of such a board—I tend to be an active leader or participant. That is the way I played my role on the Consortium's Advisory Committee, and one of the things I insisted on right from the start was that absent a compelling consideration to the contrary, the committee should meet every month. I don't remember any other particular thing I did as Chair, but some outside observers, including at least the Chief Judge of the new Veterans Court, seemed to have been doubtful that the four constituent VSOs would be able to get along well enough for the Program to operate effectively, and in consequence were impressed by the fact that it was operating very well. As a result, after the Program had been operating for a mere two years, the Court presented me with an impressive plaque designated as a Distinguished Service Award, "In recognition of exemplary service to the veterans who served the country and to the United States Court of Veterans Appeals through his work as Chairman of the Advisory Committee to the Veterans Consortium Pro Bono Program."

I was astonished by that award, though, of course, very pleased as well, for I didn't feel—and, indeed, still don't—that I'd done anything that remarkable in that short time. I did manage to get the Advisory Committee working smoothly together, but that wasn't difficult at all. And, most importantly, the Program had a superb staff, which I had no role at all in choosing.

Anyhow, the Program was very successful; that is, we provided a lot of free representation to a lot of people who needed it. By the time I stepped down as Chair of what had

been renamed as the Program's executive board, thirteen years later, we had trained more than 1,900 lawyers and provided free legal representation before the Veterans Court to some 2,400 veterans or their survivors, who would otherwise have been without representation.

Sinclair: You served as a member of the board for thirteen years?

Isbell: Yes, from 1992 to 2005, and all of that time as Chair of what I eventually got renamed the Executive Board (since it really functioned as a board, not just an advisory committee). I would gladly have continued in that position indefinitely, but my ever-worsening deafness got to a point where I was chairing meetings (typically attended by eight or ten people, including not merely the board members but key staff and observers from both the Court and LSC), and not hearing everything that was being said. I'd know what major decisions were made, but in order to get the details I'd have to wait to see the minutes of the meeting.

When I became Chair of the Advisory Committee, there was nothing written or even understood as to how long a term I was to serve, and no one ever suggested that there should be such a term, or even that there should be a periodic election of a Chair. After three or four years, however, I started thinking that there ought at least to be such a periodic election (only of the Chair, since the other members were selected by their respective constituent organizations), so I suggested, and it was agreed, that we'd have one every couple of years. Those elections came to have a certain hollow routine to them. I'd have announced in advance that we'd have an election at a particular meeting, and that I was willing to stand for re-election. At the end of that designated meeting, I would leave the room; in a couple of minutes someone would come to tell me that there'd been no other candidates and I'd been unanimously re-elected.

At a board meeting in 2004, however, I announced that, because of my ever-worsening hearing problem, there would be an election in 2005 at which I would not be a candidate. The

other board members didn't welcome this news, so far as I could tell, but neither did they protest. They did, however, make clear that they looked to me to find a successor—which I told them I took to mean that I should find two or more suitable candidates, so that the board and not I would be choosing my successor. So I spent quite a lot of time thinking about and looking for a successor. I needed somebody who was a veteran himself or herself, and somebody who would have some degree of prominence, and who could spend the necessary time to do the job properly. (I estimated that I spent 5 to 10 hours a week on Program matters.)

I interviewed quite a few people who would have been very good, most of whom just told me they didn't have the time. One of them would have been ideal—a practicing lawyer who had also been a major-general and the chief of the Army Judge Advocate Corps. He let me take him to lunch and I told him all about it. He was interested, but he had a very busy practice of law, and he concluded that he couldn't add it to his schedule.

I ultimately wound up with two well-qualified candidates. One of these two candidates was Stuart Land, a former Marine JAG officer and an almost-retired partner at Arnold & Porter; the other was a somewhat younger guy, Jeff Stonerock, a partner in Baker Botts and a graduate of West Point who had been very active at getting lawyers at Baker Botts to volunteer for the program. I had each of these candidates, and one or two others who withdrew from consideration, to sit in on a meeting of the Program board, to get a sense of how we operated, and then had each of them come to a special meeting devoted to nothing but the opportunity for board members and staff to ask them questions, and for them to ask questions as well. The one the board ultimately chose was Stonerock.

Sinclair: Quickly, what were your responsibilities on the board? Was it to oversee where funds went? Was it to oversee training? Was it those plus other things?

Isbell: My responsibilities as Chair were really never specified. Since I was the first to hold that position, I improvised as I went.

Sinclair: And what were the board's responsibilities? Simply overseeing the Program?

Isbell: Yes, the board did oversee the Program. At each meeting there would be a report from each of the staff persons who were in charge of one of the Program components; we discussed everything that the Program did. We set organizational policy on various subjects—recorded in a series of documents that we called Policy Papers. Every few years we were required to submit to LSC an elaborate justification for our continuing to receive the grants that LSC was distributing to us. We also underwent every few years an LSC-sponsored Peer Evaluation and provided a response to any suggestions made by the evaluators. And finally, we spent a lot of time on the preparation of budgets to support our annual requests for appropriated funds.

The budget process was one area in which I was able to make a substantial contribution, in the form of lobbying. We had to submit by February of each year a budget for the federal fiscal year that would start the following October. Initially, we submitted our budget to the Veterans Court and the Court would approve it and incorporate it in the Court's proposed budget. There came a time, however, when the Court said it wasn't going to take responsibility for approving our budget—it would simply pass on whatever we proposed to the Congressional committees that had to decide on appropriation matters, without comment or endorsement, and leave to us the burden of justifying our own budget.

The Court stopped taking responsibility for our budget in the mid-'90s, during the Clinton administration, when the Republicans got control of Congress with a view to implementing the so-called Contract with America. There was a confrontation between

Congress and the Administration about the budget, and the government operated for quite a while on eighty percent of the money it needed. Everything was cut, including the Court's appropriations for its operations.

The Chief Judge of the Court told me at that time that the Court was going to take that cut out of the money that would normally have gone to the Veterans Consortium Pro Bono Program. It also decided that it had a conflict of interest in having anything to do with providing funds for the Program; indeed, there was an effort by the Court to have the Program's appropriation made part of LSC's appropriation rather than the Court's. I knew that the Program could not continue to exist if we didn't have federal funding; and I knew that only those congressional subcommittees dealing with veterans affairs—not those dealing with LSC—would be interested in supporting appropriations for the Program's operations. Had the Court succeeded in transferring responsibility for our funding to the subcommittees that oversaw LSC, I don't think that we would have survived. As it happened, though, the cavalry arrived at the very last minute to rescue our stagecoach: somebody up on the Hill inserted language in the appropriation bill that funded the Court saying, in substance, that the cut in the Court's appropriation was not going to be taken out of the Program's funding. I can't honestly claim that I engineered this outcome, and to this day I don't know who our benefactor was.

Anyhow, the Court did not try after that to cut our funding, but they left it to us to justify it to Congress. So I learned to lobby, something that I'd never done before. Every year I'd go and talk to the key people on the Hill, which meant principally the key staff person of each of the Appropriations Subcommittees that dealt with funding for the VA and the Court.

Sinclair: So you were the pitchman?

Isbell: I hadn't thought about it in just that way, but I guess I was the pitchman, yes; anyhow, certainly the spokesman. Lobbying was an activity I'd never before engaged in; it was a new and interesting experience.

Sinclair: Were there any other respects in which, during your Chairmanship, you helped the Program to become established?

Isbell: Toward the end of my time as Chair, we had to rent new office space for the heart of the Program, which was the staff that were evaluating cases involving *pro se* appellants and placing with them lawyers who'd been trained in veterans law. And at that time the Program was still not a legal entity—not a corporation, not a partnership, not a business trust—so it lacked the capacity to execute a lease. That meant that one of the constituent entities had to sign the lease, and be legally responsible as the lessee. NVLSP, one of the four VSO constituents of the Program, undertook to do that, but in return required veto power over the Program's expenditures.

That was a necessary arrangement, but obviously not a desirable one, so I recommended and it was agreed that we should incorporate the Program, so that it would have its legal own identity and be able to sign things like leases in its own name. With the considerable assistance of Kevin Shortill, a colleague here at Covington who had the appropriate expertise for such a matter, I drafted the necessary documents to establish the Program as a nonprofit membership organization and get it recognized by the IRS as a §501(c)(3) organization. That was my parting contribution to the Program.

Sinclair: Okay, we're going to switch gears here, then, to the Disability Rights Council. In particular we're going to discuss the Cineplex Odeon lawsuit. First of all, what is the DisabilityRights Council?

Isbell: All right. In 1992, the Washington Lawyers' Committee for Civil Rights and Urban Affairs, which had previously spun off a couple of other organizations to concentrate on particular areas of discrimination, such as in housing, established another organization, the Disability Rights Council (DRC), to combat discrimination against persons with disabilities. That meant enforcing the then-recently enacted Americans with Disabilities Act, as well as several other laws forbidding such discrimination. Rod Boggs, the able Director of the Washington Lawyers' Committee, whose idea the DRC was, recruited a Board of Directors of a dozen or so members, most of whom had some sort of physical disability.

I was obviously chosen to be a representative of the deaf community, although I'd resisted thinking of myself as disabled—or, indeed, as deaf; just as increasingly hard-of-hearing. Rod had previously tried to get me involved with the Washington Lawyers' Committee, and I had resisted those efforts because I found civil liberties and the ACLU more interesting than civil rights and the activities of the WLC (although my wife Florence had been a staff member of both organizations). So I was reluctant to join the board of the Disability Rights Council. However, Rod had a special inducement to tempt me: he had dreamed up a lawsuit in which Florence and I could be the plaintiffs, and had gotten a volunteer law firm, Cleary Gottlieb, to handle the lawsuit, against Cineplex Odeon, which at that time owned something like fourteen of the sixteen movie screens in the District of Columbia, and had not provided for persons with impaired hearing assistive listening devices, such as headphones that received sound by FM radio or infrared light. Cineplex Odeon, like most movie houses and chains of that time, seemed never to have heard of the Americans with Disabilities Act, and never to have thought of making assistive listening devices available to their customers, despite the fact that most legitimate

theatres (that is, live theatres) had been providing such devices to their patrons for many years, and obviously did so in order to attract older patrons, as in fact they did.

Rod proposed to have Florence (who's also somewhat deaf) and me be plaintiffs in this suit. The Disability Rights Council was also to be a plaintiff, but we would be the lead plaintiffs. Both of us had pretty much given up going to movies by that time, and taken up renting movies (almost all of which had closed captioning) and viewing them at home instead. But we sufficiently missed the experience of seeing movies on a large screen in a darkened room where all one's senses were focused on the drama before us, to be willing to lend our names to what seemed to be a meritorious and quite appealing case—and in my case, not only to be a plaintiff in the suit but also to join the board of the DRC.

Sinclair: Why do you say that?

Isbell: It was a suit that really ought to be brought and could become an important precedent, and it would be nice to lend our names to it, even though we weren't going to do any of the legal work involved—a nice sort of free ride.

Sinclair: It interested you to be a plaintiff?

Isbell: Yes, and not only because it was a worthwhile suit, but also because it was seeking relief that might be advantageous to us personally.

Sinclair: So a lawsuit was actually filed?

Isbell: Yes indeed. Initially, our volunteer counsel, Matt Slater of the Cleary Gottlieb firm, contacted Cineplex Odeon and told them what he was prepared to sue about. Cineplex Odeon's initial response was that the company was losing money—oh, yeah—and couldn't afford to install the devices in their theatres, although the devices only cost around $150 per screen. Matt then went ahead and filed the complaint. The company's response to that was to

request an extension of time to respond, which Matt, of course, routinely granted. When the extended time arrived for Cineplex Odeon's response, it was a motion to dismiss on grounds of mootness, because the devices had been installed in all the company's local theatres. Our lawyer replied, in substance, "Not so fast," and pointed out that the complaint asked for an injunction, for appointment of a monitor to check on compliance with the injunction, and for an award of attorney's fees (available, not under the Americans with Disabilities Act but under the D.C. Human Rights Law). No good answer to this was available to Cineplex Odeon; we simply had a lay-down case. So Cineplex Odeon yielded, and our respective lawyers had a wrap-up settlement conference in the chambers of the federal judge to whom this matter had been assigned.

Sinclair: That was Judge Sporkin?

Isbell: Yes, Stanley Sporkin. If you had an interesting or an oddball case, he was a judge you'd like to have on the bench for it. So, in this settlement conference in the judge's chambers, after all the obvious terms had been disposed of, our counsel said, "And now the Isbells also have a damage claim," and Judge Sporkin responded, "Oh, I know the Isbells. They don't need any money."

Sinclair: And you knew him?

Isbell: I knew Judge Sporkin because we'd overlapped at Yale Law School, and I had also had some dealings with him when he was the head of the Enforcement Division of the SEC. He and Florence knew each other for a different reason. As I've mentioned, she had worked for the Washington Lawyers' Committee—indeed, she'd done that at two different times, during one of which she had participated in a mock housing discrimination trial before an audience of law school students for the purpose of interesting them in doing civil rights work. The trial was

held on a Saturday, and it was presided over by Judge Sporkin—a very nice thing for a sitting federal judge to do—and that's how he and Florence had met. Florence's role in that mock trial was to play the villainess—the rental agent who showed the available rental property differently to a black couple and to a white couple (both couples being testers). Do you know what I mean by testers in those circumstances?

Sinclair: I recently litigated a Fair Housing discrimination suit, so yes, I do.

Isbell: Well, the testimony of the testers was to the effect that Florence had showed the white tester couple different and better facilities of the properties that were being offered for rent, and Florence was challenged to explain why she had done this. Her testimony, to the effect that she had shown the two couples different aspects of the property because she thought they had different interests, was so persuasive that when, at the conclusion of the mock trial, the student audience were asked for their verdict on the case, to everyone's surprise, and to the WCL staff's dismay, their verdict was for the defendant. Indeed, Florence had been so persuasive as a witness that one of the students asked her how long she'd been in the real estate business.

Sinclair: So, did you ever collect damages in your case against Cineplex Odeon?

Isbell: No. Indeed, I was relieved to learn that we wouldn't have to testify about our damages because we really hadn't gone out to the movies for a long time and instead had watched whatever movies we wanted to see at home. And as it turned out, the assistive listening devices that our suit had gotten installed were not, in fact, good enough for us. So we couldn't make out much of a case for our being deprived of the pleasure of watching movies because of the lack of assisted hearing devices.

Sinclair: They were, or were not, good enough?

Isbell: *Not* good enough—At least not good enough for me because my hearing loss was already pretty marked.

Sinclair: Now did you have any further involvement with the Disability Rights Council?

Isbell: Well, having agreed to join the board of the DRC, I volunteered to become its treasurer, and I also insisted that the board meet monthly, so that it would really be involved in making the organization work. And I stuck with it for some 13 years, during which the board became narrowed down to a relatively small working group of four or five faithful board members and one staff member, plus a staff lawyer of the Washington Lawyers Committee, Elaine Gardner, a very able lawyer who also had considerable expertise in the area. However, in 2004, at the same time as I told the board of the Veterans Consortium that I was going to have to step down as Chair, I told my colleagues on the Disability Rights Council that I was going to have to resign because my hearing was becoming so poor that I could not keep up with the discussions at our monthly meetings.

Sinclair: So you actually were a member of the Disability Rights Council as well?

Isbell: Yes, I was, and by coincidence, for the same period of thirteen years as with the board of the Veterans Consortium. So I tendered my resignation, but my DRC colleagues resisted accepting it. They recognized that they couldn't very well allow a board member of the Disability Rights Council to resign because of a disability without making a "reasonable accommodation" for the disability, since that—a reasonable accommodation—is the standard enforced by the Americans with Disabilities Act, the principal legislation that the DRC was involved in enforcing. So they decided to have a simultaneous stenographer attend our board meetings. The simultaneous stenographer is technically termed a computer-assisted real-time (or CART) interpreter—a fancy name for what amounts to a stenographer who types out the words

that are being spoken so that they appear almost simultaneously on a little monitor where the person who's hard of hearing can read them.

So I withdrew my resignation and went on with the DRC for a year. At the end of that year, however, I told my colleagues that I still was not really able to participate in the group's discussions. I would know what had just been said, but I didn't know it quickly enough to participate effectively in the discussion, because by the time I'd read what had just been said, the discussion would have gone on. This time, my colleagues couldn't really give me a good answer to why I should stay on, when I wasn't able to contribute meaningfully to their deliberations, so they finally let me resign.

Sinclair: What was the function of the Council?

Isbell: What we were doing as board members of the DRC, with the help of a salaried director for most of the DRC's existence and the help of a staff lawyer of the Washington Lawyers Committee, was deciding what lawsuits to bring—generally to compel a business of some kind to conform to the legal standards of the Americans with Disabilities Act with respect to their treatment of persons with disabilities—and finding volunteer lawyers to handle them. I should add that before I finally quit, the DRC had merged into another spin-off of the Washington Lawyers' Committee, the Equal Rights Center, so that we had been reduced to being an advisory committee of the Equal Rights Center.

Sinclair: Okay, let's switch gears a little bit from good works to a possible inquiry—or an inquiry about a possible appointment, to the federal bench.

Isbell: All right. As I mentioned in an earlier session, when Carter became President in 1976, I briefly considered going back into government for another stint of public service. What prompted that was that one of the innovations Carter instituted was setting up a commission in

each jurisdiction—in each state, plus the District of Columbia—to recommend candidates for federal judicial appointments to the senator or senators for that state. The District didn't have a senator, but Joseph Tydings, one of the senators from Maryland, served as the channel for suggested federal judicial candidates for the District of Columbia. The District of Columbia Committee sent out a mailing to hundreds, maybe thousands, of D.C. lawyers, asking if they would be interested in being considered for a federal judicial appointment, and I was one of the many who got one of those letters.

I suppose every lawyer at some point in his or her career thinks about the possibility of becoming a judge, since judges sit at the top of the legal pyramid. In my own case, I had first thought about being a judge when I was serving on the Legal Ethics Committee of the D.C. Bar and was writing a lot of the committee's Opinions and came to the realization that resolving contested legal questions is even more enjoyable and fulfilling than contesting them. Moreover, I still had something of a yen to return to government service of some kind. So, when I got that letter asking if I was interested in being considered for a federal judgeship, I took the time to think about it. Before long, though, I considered the financial aspect of a judgeship, and realized that my fixed family financial commitments—having three children either in higher education or about to be; paying a modest alimony to my former wife; and, together with my sister, supporting our retired father—made it ridiculous even to consider getting by on the salary of a federal judge. And, of course, if I couldn't afford to be a federal judge, I couldn't afford to do anything else in the federal government, either.

Sinclair: Do you have any regret about not pursuing an appointment to the bench?

Isbell: I do have some regret about not getting another chance to serve in the federal government. As I've already recounted, when I last left government employment, with the Civil

Rights Commission, I was greatly tempted to stay in government rather than return to the private sector, because so many interesting things were happening in government in those early days of the Kennedy Administration; but I'd figured that a better course of action from a long-term point of view would be to first get a base in private practice to which I could return after a stint in government. Having such a base seemed important because I'd already gotten to a level in government where the next step would be to a policy- and politically-sensitive position that would be subject to change with a change of Presidents. But then, after Kennedy and Johnson, the Democrats didn't get back in until Carter, and I couldn't do it then because of my financial responsibilities, so as it turned out I never did get back into government service. I'm a little sorry I didn't, but I must say that I've been pleased with the amount of public service work that I've managed to do as a lawyer in the private sector. There have been a lot of opportunities and I've taken a lot of them. Moreover, I've also always enjoyed what I was doing in the revenue-producing practice of law.