Annexure A

A top prosecutor is switching sides

Lawyer: State Solicitor General Gary Bair will team up with a noted defense attorney with whom he has faced off in death penalty cases.

August 12, 2004 | By Julie Bykowicz | Julie Bykowicz,SUN STAFF

In his two decades with the Maryland attorney general's office, Gary E. Bair has played a key role in the legal maneuverings that sent Maryland prisoners from death row to the execution chamber. He even stood before the nation's highest court to oppose an argument meant to save a convicted killer's life.

But Bair is stepping down as solicitor general this month to become partners with Fred Warren Bennett, a well-known capital defense attorney who represented two of the last three Maryland inmates put to death.

"I've never really been a fan of capital punishment," Bair said in his typically measured manner during a recent interview. "Enforcing it was something that went with the job."

The two lawyers were on opposing sides recently. As Bennett filed last-minute appeals from Towson in Richmond, Va., and Washington in an effort to save Steven Howard Oken's life, Bair was advising lawyers on how to ensure the state could carry out its ultimate punishment.

Oken was put to death June 17 for the 1987 rape and murder of a White Marsh woman. A week later, Bennett said, he called Bair to discuss forming a law firm. The two have known each other since 1979, when Bair worked for Bennett in the Prince George's County public defender's office. They both teach law courses at American University.

Their new Greenbelt-based law firm, Bennett and Bair, will go into business next month and include another lawyer from the attorney general's office and a Prince George's County prosecutor. Bennett, 62, said he hopes the 53-year-old Bair will take over the practice when he retires.

Bair began his career with five years of defense work. In 1982, he represented Jack Ronald Jones in a Prince George's County death penalty case. Jones was convicted of killing 22-year-old college student Stephanie Roper after torturing and raping her. He shot her in the head and then mutilated her body and set it on fire.

Prosecutors sought the death penalty, but Jones was instead sentenced to two life terms. In part because of the sentence, Roberta Roper, Stephanie's mother, became an outspoken victims' rights advocate.

A year later, prompted by what he said was a desire to broaden his experience, Bair joined the attorney general's office. He has worked there ever since, beginning in the Medicaid fraud unit and then moving to the criminal appeals division.

Like his boss, Attorney General J. Joseph Curran Jr., who opposes the death penalty, Bair said his personal views have never interfered with his work.

He has worked on hundreds of cases, including final appeals for the last four Maryland death row inmates who were executed: Oken, Tyrone X. Gilliam, Flint Gregory Hunt and John Thanos. Bennett represented Oken and Hunt.

Bennett, a lifelong defense attorney and outspoken death penalty opponent, said he never pressed Bair on his views on capital punishment.

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"My gut judgment - just from vague discussions with him - was that he was not enamored with the death penalty," Bennett said.

He said he wanted Bair to work with him because of his expertise in post-conviction appeals and federal and constitutional law, which have been cornerstones of Bennett's practice in recent years.

Judges think highly of Bair, said Court of Appeals Judge Irma S. Raker. He is married to Court of Special Appeals Judge Mary Ellen Barbera, and the two live in Ellicott City.

"I always looked forward to Gary Bair's cases before the Court of Appeals because I knew they would be well-prepared and argued professionally," Raker said. She called him the "complete lawyer" and said he "brings together brains, experience and confidence."

Bair has twice argued before the nation's highest court. In November, he took a Fourth Amendment case to Washington, saying that police had the right to arrest the passenger in a car pulled over during a routine traffic stop in Reisterstown because a search of the vehicle turned up bags of crack cocaine.

The justices unanimously ruled in his favor. He called that the most fulfilling moment in his legal career. A large painting of Bair presenting oral arguments in the case remained recently in his office, full of boxes packed in preparation for his move.

Bair also presented the state's side in a death penalty case before the Supreme Court. In March 2003, he argued that public defenders did not err in failing to present evidence of an abusive childhood during the original trial of death row inmate Kevin Wiggins. By a 7-2 vote, the justices sided with Wiggins, and he was taken off death row.

Bennett said Bair's experiences as a lawyer for the state will round out the law firm.

"Gary is one of the premier appellate lawyers in the state," Bennett said, "and he'll be equally effective on the defense side."

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Prosecution and Defense — Switching Roles

For years there has been criticism of the way we pay public defenders. Everyone knows that public defenders have way too many cases to give enough time to each. The pay is so bad that the public defenders in New York City recently sued the City of New York, alleging they were paid so little per case that their clients were being denied due process of law. The appellate court agreed they should be paid more, but just a little bit more. So it remains scandalously low there and many other places.

Now retired U.S. Supreme Court Justice Sandra Day O'Conner has a suggestion. This month she said if she had a magic wand she would try to make prosecutors and public defenders comparably paid and trained. She said she would like to see states create a staff of public lawyers "who would spend some time on both sides". She says we should try the English model.

In England, public prosecutors and public defenders trade positions every few years. Today's prosecutor is yesterday's public defender and vice versa. This gives the person in each position a deeper understanding of and respect for the other.

My own personal experience confirms this. During the years I was a Assistant District Attorney and as supervisor of other Assistant District Attorneys, I observed that experienced private defense attorneys could always cross examine witnesses better than prosecutors, including me. This is because prosecutors just do not get the experience cross examining witnesses that defense attorneys do. I was a prosecutor for eight years, but I never got a chance to cross examine witnesses on a routine basis, the way defense attorneys do.

Of course, even after practicing as a criminal defense attorney for twenty five years, cross examination continues to be a skill that needs development and sustainment. Every witness must be prepared for extensively with the understanding that no matter how much preparation and anticipation for a witness, the unexpected will arise. However, thorough understanding of the facts and law of the case along with an appreciation of the particular witness will empower a defense lawyer to control the unexpected.

Switching roles, as retired Justice O'Conner suggested, would also give defense attorneys an appreciation of the skills and the role of a prosecutor. That are some things many defense attorneys do not have because they have never served as prosecutors. It really does make a difference, giving a defense attorney an advantage of insight into the process the prosecutor's office follows and the strategic view each prosecutor will have.

Justice O'Conner did not have in mind the superior skills a private defense attorney develops from serving as a prosecutor. She had in mind an improved system of public prosecution and public defense for those who cannot afford to hire their won lawyer, of better understanding and smoother cooperation between the two sides. But those who are accused of a crime who do hire their own

lawyers to defend them should appreciate how the experience of serving as a criminal prosecutor for a number of years prepares a criminal defense attorney in unique ways which enable him to serve his clients.

This entry was posted on Friday, November 23rd, 2007 at 5:10 pm and is filed under Criminal Defense, Prosecution, Public Defense. You can follow any responses to this entry through the RSS 2.0 feed. You can leave a response, or trackback from your own site.

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Legal Transitions
NATIONAL
Vol. 1, No. 4 July/August 2006
NATIONAL Magazine's Legal Careers Supplement

ROBERT KARPA

Crossing the Street

What motivates a lawyer to leave a prosecutor's office and join the criminal defence Bar or a law firm? And is a major adjustment required? Three lawyers tell their stories of going over to the other side.

By Sheldon Gordon

Rishi Gill, criminal lawyer, Vancouver

Lawyers change jobs all the time, and, in increasing numbers, change careers too. The profession is more mobile today than at any time in its history. But old myths die hard in this profession, and among the most prominent has been the idea that the gulf separating Crown attorneys from criminal defence lawyers is just too wide to cross.

Supposedly, this has been because — unlike the opposing sides in, say, commercial litigation — Crown life is just too different from that in the defence bar. The Crown is serving the interests of society and has a broad duty to seek justice, says the theory, while the defence lawyer serves only his or her client in facing off against the full apparatus of the state. Either you prosecute or you defend, the story goes; you make your choice and you stick with it.

But that belief is widely coming to be seen as more myth than reality — crossing this divide has been unremarkable for some time now. Here are three lawyers who left the prosecutions side of the law to join the private bar — two as criminal defence practitioners and one as a litigator.

Rishi Gill, a member of Vancouver's criminal defence bar, doesn't buy the notion that moving from the Crown attorney's office to the defence side involves a huge adjustment. "It's two sides of the same coin," he insists. "We're both making sure the system works properly. Whether you're a Crown or defence, it shouldn't make a difference. A good Crown and a good defence lawyer should be able to switch sides with no problem whatsoever."

Gill should know. He is one of numerous defence lawyers in Canada whose first exposure to the criminal justice system came as a prosecutor. Starting in 2001, he spent two years with a private law firm acting as an agent of the Crown for cases in North Vancouver, West Vancouver and the Sunshine Coast. "I loved it right away," he recalls. "We did all the drug, tax and fisheries prosecutions in that area."

As a Crown agent, he says, "you're not just on the Crown's side. You have a more even-handed perspective. Our job as Crown was not to get convictions, but to

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present the evidence in an impartial way. I came into contact with some of the top criminal lawyers, who had been hired by high-end clients, and they were impressed with me because I was impartial and fair. They persuaded me to come over to the defence side."

Gill was motivated to move less by financial reward than by the opportunity for more personal freedom. "Defence lawyers are kind of mavericks," he says. "I like to do things when I want to do them. I like to have control over my life. Most defence lawyers have that streak in them. That's what appealed to me.

"One of the big problems in Crown offices is the bureaucracy and the administrative hassle," he adds. As a defence lawyer, "I'm no longer under someone's thumb."

In fact, starting off as a Crown is great training for anyone who wants to practise as a criminal defence lawyer. "It's very difficult to get trained properly on the defence side," he notes. "The flip side of their independence is that these maverick defence lawyers are not always able to take somebody under their wing and mentor them. I would advise anyone planning to practise criminal law to work as a Crown for a few years first."

The biggest potential problem in making the transition, he says, is going from a salaried position to one with financial insecurity. "You've got to hustle your own clients," he points out. "There are very few criminal law firms where you go there as an employee. The biggest issue for someone switching sides is: What about my three weeks of vacation? What about my maternity leave? Who's going to pay my bar fees?"

Gill has never had a problem acquiring clients, but he has had to develop a comfort level with keeping records and billing clients, the bane of many private lawyers' existences. "I'm not only a lawyer, I'm also a businessperson, which I hate," he says. "You do have to develop a side of yourself that you wouldn't otherwise."

The best part of working both sides of the street is the added perspective, he concludes. "It doesn't make plea bargain negotiations easier, in the sense that they're going to give you a break because you've been a Crown," he says. "But you're able to approach a Crown knowing what their perspective is. That involves looking at a file and not coming to them with a completely ridiculous position but, instead, seeing their side of it."

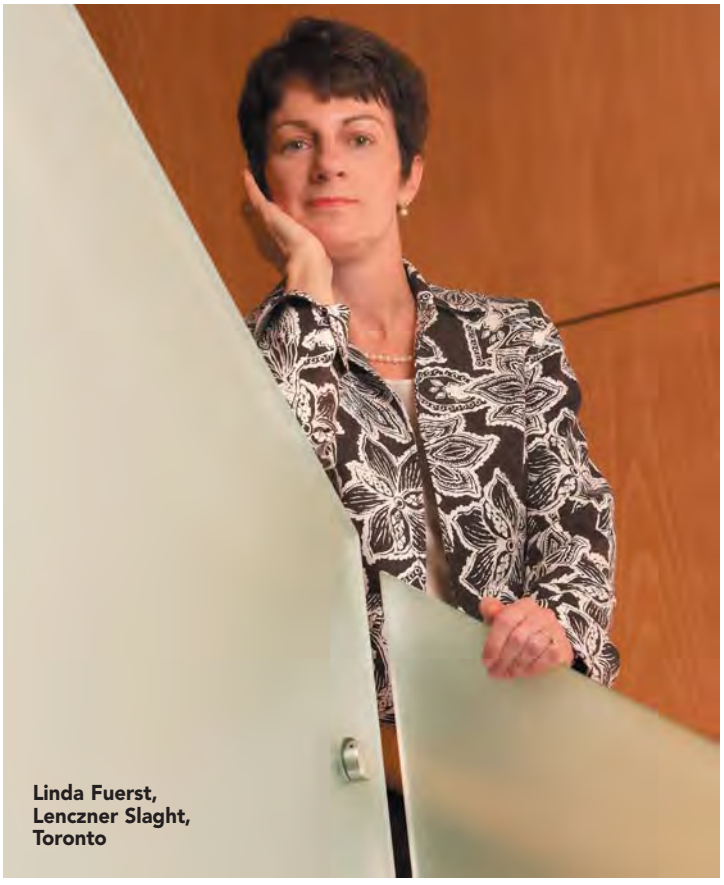
Howard Rubin, another Vancouver criminal defence lawyer, also draws upon a prosecutorial past. He started his law career as a Crown in Edmonton in 1968 before entering private practice later that year. In the early 1970s, he prosecuted less serious *Criminal Code* offences as an agent of the Crown, while also conducting criminal law defences. In late 1977, he moved to Vancouver, joining the federal Justice Department to prosecute drug cases before shifting permanently into the private sector in 1979.

"I enjoyed prosecutions," he recalls. "The cases were interesting, and I got choices as to which ones I prosecuted because I was fairly senior. But I enjoyed it so much that I used to work very long hours. I was working seven days a week, leaving the house at 6:30 a.m. and coming home at 11:30 p.m. We didn't get paid overtime.

"Finally," he recalls, "my wife said, 'If you're going to work those long hours, you should at least be in private practice.' It was more her pushing me than anything else" that drove his decision.

The transition wasn't very hard, he says. "As soon as I left the Department of Justice, I was hired to do a civil case where I billed by the hour, and that case went on for the next 19 years. Then, when I did legal aid cases, that established me in the defence bar and led to other [criminal] cases.

"I look upon these cases as being all extremely interesting, and in that sense they're all serving the public," says Rubin. "I don't think I'm any more or less serving the public when on this side than on the other side. From time to time, you defend someone you don't particularly like, but even then, someone has got to do that."



Linda Fuerst, Lenczner Slaght, Toronto

Rubin's biggest adjustment was dealing with the arrival of the *Charter of Rights and Freedoms* in 1982. "That established a new mindset for both sides," he says. In particular, it required a much higher level of pre-trial disclosure of evidence than had been necessary under common law.

But Rubin had a head start — he had begun making full disclosure four years prior to the *Charter* as a prosecutor. Later, he made the most of it as a defence counsel. "When you're defending a complicated drug case, you want to take the disclosure and get a mindset where you're

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thinking like a prosecutor. That allows you to better understand the case they're putting forward."

Linda Fuerst is proof that crossing the street does not always involve going from the Crown attorney's office to the defence bar. Fuerst spent six years at the Enforcement Branch of the Ontario Securities Commission (the last four as senior investigation counsel) before becoming a securities lawyer at the Toronto litigation boutique Lenczner Slaght, where she has worked for the past 11 years.

Fuerst didn't enter government service with the idea that she would "be there forever," she says. The time came when "I felt I had gotten as much out of the experience as I was going to get. I had learned a lot, but I wanted some new challenges and wanted to broaden my horizons." Before joining the OSC, Fuerst had been in private practice, doing primarily criminal defence law. "I really felt I wanted to be back working with clients."

How was the move consummated? She had faced off against Alan Lenczner when she was prosecuting a case at the OSC and he was on the respondent's side. "He called me a few months later and asked if I had ever considered coming into private practice. And I told him I had been thinking about it for the past few months."

Fuerst didn't have the level of resource support at the OSC that she enjoys now at Lenczner Slaght — a shortfall that was "periodically a source of frustration. It limited what we could do" in the Enforcement Branch, she says.

While only about 20 percent of her caseload involves tangling with the commission she left, the experience of having worked there has been extremely valuable. "It helps to have some credibility with the people there," she says.

Working at the commission has also enabled her to understand the regulatory mindset. "You acquire a good sense of how they will view certain types of fact situations," Fuerst says, "what factors they will agree are mitigating in certain circumstances. Understanding the kinds of evidence they are going to be looking for in the course of an investigation [helps me] advise my client what they're up against and how to respond."

In a refrain common to the profession's crossover counsel, Fuerst adds: "I liked seeing both sides of the street. It helps you do your job better, whether you're doing prosecutions or defence work, either in the civil or regulatory context, to understand the other side's perspective."

Sheldon Gordon *is a freelance writer in Toronto specializing in legal and business affairs.*

The *perfect* candidate

It's almost impossible to resemble the ideal employee set out in the average job description, but that doesn't mean you can't try. Here are winning strategies for overcoming imperfection.

By Wendy L. Werner

Whenever an employer decides to hire a new lawyer, somewhere in the back of his or her mind is a picture of the perfect employee. The job description usually tells you this. It's usually a compendium of all of the characteristics of the ideal candidate.

Sometimes job descriptions are developed as an antidote to a gap in the previous job-holder's background. Sometimes, they're developed as a stopgap measure for all the holes this ideal lawyer would fill in the office. Sometimes the description is written by one person, and sometimes it's written by a committee.

Your question is this: How can I make myself the ideal candidate? What do I do about those things about myself that I know are less than ideal in the employer's mind, or simply factors that I cannot change? This article will discuss issues related to experience (too little and too much) as well as immutable characteristics like age and gender.

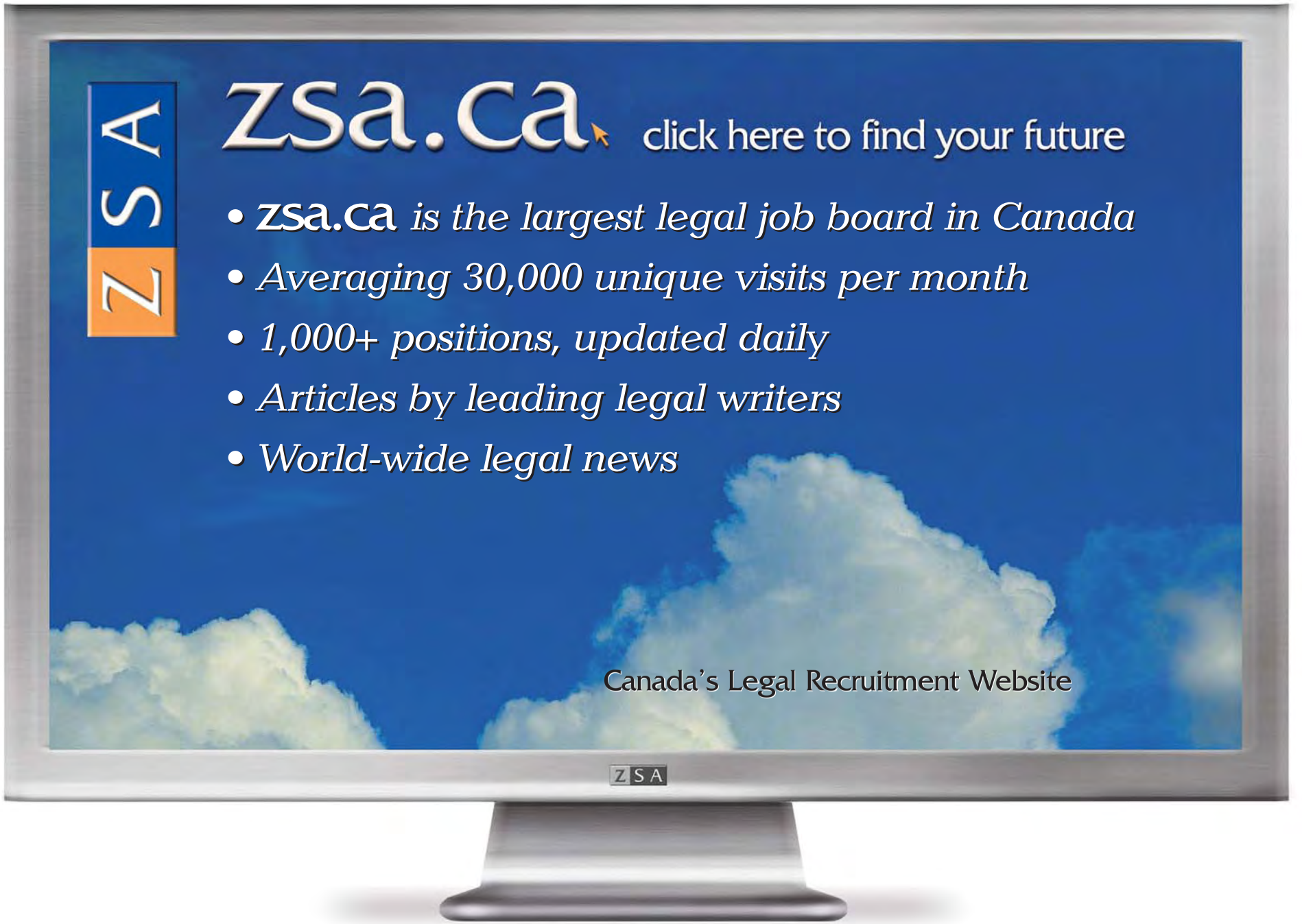
Experience: not enough, too much

Finding your first professional job after articling (assuming you're not asked back) is certainly the most difficult job to land. Most job descriptions ask for some kind of experience, and it is often fruitless to apply for positions when you don't meet the hiring criteria. If the employer wants multiple bar calls or three years of experience, it's not something you can finesse.

The fact is, however, that many positions aren't posted and are filled by word of mouth. Accordingly, you'll need to take advantage of networking opportunities in order to learn about these openings. Your former classmates and articling colleagues are often a good source of information about possible openings, as are your former articling principals.

Put yourself in places where lawyers gather (the courthouse, for one), as well as bar association functions, and inform as many people as possible that you are looking. Even gaining volunteer experience, while you're searching for your first position, tells a prospective employer that you are committed to a job in the law.

Some candidates have the opposite problem. You'd like to find another position, but everything you see advertised is



for someone with two to four years' experience. You have ten or more years. An employer, seeing your résumé in response to a posted vacancy, will immediately wonder why you are applying, and will often see your application as outside their acceptable range.

Other candidates run into trouble trying to change specialties or career paths. The people who screen applications are guided by their personal experiences, expectations and biases. If they've had straight-trajectory careers, they may not understand someone wanting to take a position requiring less experience than they had or a desire to change practice areas.

Equally, if the application screener has been a hard-driving lawyer, seeking to move to the next level at all times, he or she may not understand your desire to back off the intensity of your career and balance work with other demands. The reader of your application may also not be aware of the various increases or decreases in demand for your practice expertise.

In these and similar circumstances, a very well crafted cover letter can help explain your circumstances and interest. Better yet, a call from a referral source can help create a more welcome response to your expressed interest.

Immutable characteristics

In this day and age, it's hard to believe that people find themselves shut out of job options because of age, gender, race, ethnicity, religion, sexual orientation or a host of other immutable factors. But the fact remains that job candidates often feel they're not considered for one of these reasons.

If this happens, there are several questions that you should ask yourself. First, would you like to work for an organization that would not want to hire you because of your "factors"? Secondly, how do you want to present yourself to employers in relation to these unchangeable aspects of your makeup?

Every employer carries bias into the candidate search. The bias may simply be the picture in his or her head that exists regarding the ideal candidate, or as complex as the person's own life experience, and ideas about candidates in the job market, or that person's personal perspective on what gender, age, race or other characteristics really mean. There is only one part of this equation that you control, and that's your side.

For many years, when I was working with law students, I observed that women completing law school over the age of 40 seemed to have difficulty accessing their first job. This is not a scientific study or a generality, but rather something that I simply observed in a number of cases. It is also not a statement regarding their long-term career prospects or success rates, both of which I observed to be excellent over time.

What was most interesting was how different candidates responded to this phenomenon. Those who ranted about this obvious slight had more difficulty accessing opportunities than those who simply shook off the rejection and moved on, with a positive face turned in the direction of the next available opportunity.

When interviewing for a job, it's critical to revert to the most traditional picture of a lawyer.

I am not for a moment endorsing the various biases that can exist in the hiring process. I am simply saying that there is only one side of the hiring process for which a candidate can be responsible, and that is: how we react to this rejection or bias and the impact that it has on our subsequent attempts to find work.

If your anger about unfairness in the hiring process is eating you up, you'll probably take that attitude with you to your next job interview. It won't help, and it may unfairly cause you to paint all employers with the same brush as the last one.

Looking the part

Each of us comes to an interview presenting a visual image. Studies indicate that a significant part of the first impression that we give is based upon not what we say, but how we appear. If the employer has something in his or her mind about what the ideal candidate looks like, then we either fit that picture or we deviate from it in some way. We won't know what that picture is, but we can create a positive picture of who we are.

Years ago, when law was practised almost solely by men, the interview dress code was a dark suit, white shirt, tie, and dark shoes and socks. Much has changed since then, and the advent of "casual attire" has become something of a minefield for professionals trying to fit into an environment.

When interviewing for a job, it's critical to revert to the most traditional picture of a lawyer. At an interview, you must pass the appearance test and then ensure that the people interviewing you focus on what you are saying, rather than how you look. I am amazed at how frequently job candidates come to interviews too informally dressed, or not at their most well groomed.

No matter if you are short or tall, slender or not, young or older, you can dress the part of a person committed to success and someone the employer would be proud to have represent their interests. If you're not sure you project this image, look around you at those you believe do present themselves well, or ask a trusted friend who will be totally honest with you.

Richard Bolles, the author of the best selling career book *What Colour is Your Parachute*, wrote a small book with Dale Susan Brown called *Job-Hunting for the So-Called Handicapped*, which outlines ways that people with disabilities can more effectively look for a job. But the real moral of the book is that we are all disabled in some way, and to that extent, the book is a great resource for anyone looking for a job.

The better we know ourselves, and the more effectively we deal with the potential shortcomings and strengths we bring to the table when placed against the imaginary "ideal candidate," the greater the likelihood that we will be successful in the job search.

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