

LAW & HEALTH CARE

N E W S L E T T E R
Volume IX Number 1

Focus on . . .

HEALTH LAW LINKAGES ACROSS THE LAW SCHOOL

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The increasingly complex nature of many health care issues from regulation of the biotechnology industry to finding the correct balance between personal rights and protection of the public health create new opportunities for health law scholars and health law students. Understanding these new issues may require consultation or collaboration with colleagues from other disciplines or in other areas of the law school such as constitutional law or business associations. Such collaboration can result in jointly authored papers, jointly taught courses or partnerships in developing solutions to public policy problems.

For students, these issues create new opportunities for course work, writing, and specialization. Many students are attracted to Maryland's Law & Health Care Program because of its strong reputation, not only in health law but also health policy. Many use their background in health law to take positions in law firms where they represent health care providers in matters from licensing to fraud and abuse. Others take positions with a federal or state agency where they regulate health care providers. However, there is another group of students who are using their foundation in health

care law as a spring board to studying or practicing in even more specialized areas. For example, many students are coming to Maryland with PhDs in the sciences. These students are interested in both health law and intellectual

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From the Director

As it grows more complex and more exciting, the health care law field is extending its reach into more distant areas. As we discuss in our lead article, the establishment of three new Centers at UM Law School, all of which have links to the L&HCP, are creating a wealth of new opportunities for both our faculty and our students. Be sure to read, "Health Law Linkages Across the Law School."

We've also included articles on new genetics legislation, an innovative health care insurance proposal for Maryland, our Fall conference, and more.

Have a great fall semester.

Diane Hoffmann, JD, MS
Director

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**Law & Health Care
Newsletter**

is published by the
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There are a number of law school
faculty who contribute to the diversity of the
Law & Health Care Program through their
teaching and scholarship. We share some of
these faculty's selected publications, presenta-
tions, and appointments in *Faculty Notes*:

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forwarded to the above address.*

In Memoriam Professor Stanley S. Herr

Professor Stanley S. Herr, a lawyer, legal scholar, and beloved teacher, whose thirty-year career focused on ensuring better lives for many of this country's disabled and disadvantaged citizens, died on September 24, 2001 at his home in Baltimore. Herr began teaching at UMLS in 1983 and has been a member of both the clinical and health law faculty.

During his career, Herr argued several landmark cases on the civil rights of the disabled. As a young lawyer working for the National Office of Legal Aid and Defenders Association, he was counsel in a case that led to the Supreme Court decision affirming the principle that a child is entitled to a publicly supported education regardless of impairment. Later Herr was involved in the case against the Willowbrook Developmental Center on Staten Island. The children at Willowbrook had been beaten, abused, and in one instance, injected with hepatitis for medical experimentation. Herr's work on this case ultimately led to its closing and prompted a second look at homes



for the retarded nation-wide. Many below-standard homes were eventually closed.

Herr served as a White House Kennedy fellow during the Clinton administration, and helped develop public policy on disability. His dedication to the advancement of rights for a voiceless group led him to continue to

study the laws that protect the disabled from discrimination. At the time of his death, he was co-authoring a book with Harold Koh of Yale Law School and Larry Gostin of Georgetown University Law Center, entitled *Different but Equal: The Rights of People with Intellectual Disabilities*.

Last year, Herr became a Mary Switzer Distinguished Research Fellow and conducted research on the disability discrimination laws of the U.S., Israel, and other countries. On September 24th, though extremely ill, he was planning to take part in a disability rights symposium initiated by this comparative international study. Sadly, he died just hours before the symposium was to take place. (See article on pg. 9.)

The Journal of Health Care Law & Policy is pleased to announce publication of:

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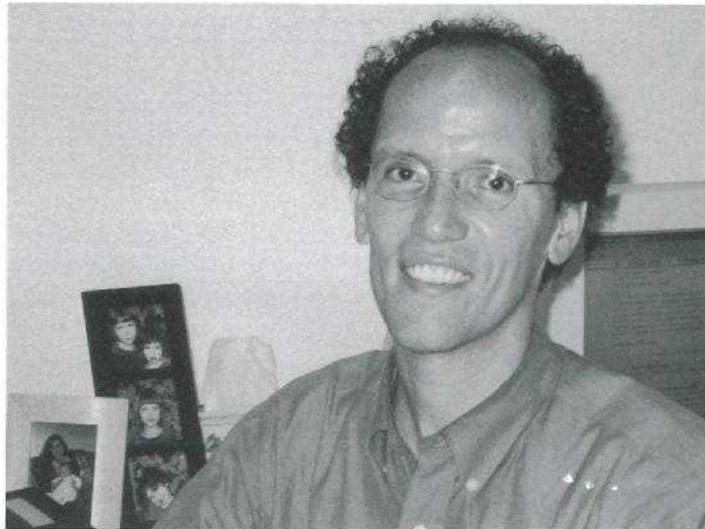
Former HHS Civil Rights Director Joins Law School Faculty

Tom Pérez, the Law School's new Clinical Law Program Director, comes to the Law School with a mission—literally, to change the face of medicine. Pérez, who recently served in the Clinton administration as the Director of the Civil Rights Division within the Department of Health and Human Services, believes strongly in ensuring that the entire law and health care profession is culturally proficient, and reflects the diversity of the communities it serves.

In his quest, he has spoken on the topic at conferences sponsored by the National Medical Association, the Association of American Medical Colleges and the Institute of Medicine, and is an author of a section of the recent Institute of Medicine report *The Right Thing to Do, The Smart Thing to Do, Enhancing Diversity in Health Professions*. The publication was generated by a symposium hosted by the National Academy of Sciences on March 16 and 17, 2001. The symposium faculty—comprised of over forty physicians, attorneys, academics, and policymakers—gathered to discuss the current status of diversity in the health professions and to map the future direction of this movement.

In addition to increasing diversity among health professionals, Pérez's scholarship has addressed such issues as eliminating racial and ethnic disparities in health status through civil-rights enforcement and ensuring access to health care for people with limited English skills.

Pérez came to the Law School with rave reviews from Secretary Donna Shalala and other highly ranked officials in HHS. At HHS, he worked on the Olmstead case, resulting in a Supreme Court decision that challenges



Clinic Director Tom Pérez

Federal, state, and local governments to develop more opportunities for individuals with disabilities through more accessible systems of cost-effective community-based services. Pérez' work at HHS also included the overall Initiative to Eliminate Racial and Ethnic Disparities in Health, a host of initiatives designed to address the unique challenges confronting immigrant populations, including the development of critical policy guidance on the obligations of health and human service providers under Title VI to ensure that people with limited English skills can access critical health and human services. He also played an important leadership role in a Department-wide initiative to expand opportunities for eligible people with disabilities to live in community-based settings.

Prior to serving as Director of the Office of Civil Rights, Pérez worked at the U.S. Department of Justice for nearly 12 years, including over two years as special counsel to Senator Edward M. Kennedy. Pérez is a

graduate of Harvard Law School and the Harvard University John F. Kennedy School of Government. He received his undergraduate degree from Brown University.

As Director of the Clinical Law Program, Pérez oversees the work of over a dozen faculty members. The

Health Law Clinic, headed by Professor Joan O'Sullivan falls under Pérez' jurisdiction, as does the AIDS Clinic and the Civil Rights of Persons With Disabilities Clinics.

Given his interest in many health related issues, Pérez is spending part of his time his first semester on the job designing a new clinic for the 2002-2003 academic year. He says that the new clinic will be a collaborative effort with the L&HCP's health law clinic and will focus on health related civil rights issues. "Dean Rothenberg and Associate Dean Hoffmann are very supportive of the effort," Pérez says, "which will give students exposure to what is involved in being a civil rights attorney." The new clinic will expose students to the problems of individual clients as well as broader systems issues.

HEALTH LAW LINKAGES ACROSS THE LAW SCHOOL

Centers Link to Health Law

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property law as they hope to advise emerging biotechnology companies. Others wish to use their substantive background in health law and combine it with skills learned in other parts of the law school, such as mediation and negotiation, to create new practice areas. Then, there are other students who come to law school with a background in public health. These students are attracted to health law but are looking for opportunities to combine their public health background with their legal skills.

Recently, the Law School has undertaken a number of new initiatives that will allow students in each of these categories to expand on what they are learning in their health law courses and that will create new experiential opportunities. These new initiatives include an Intellectual Property Legal Resource Center that will provide legal services to start-up biotech companies in Maryland, a Legal Resource Center for Tobacco Regulation, Litigation & Advocacy that will provide legal advice to local governments wishing to adopt ordinances to reduce access to tobacco products, and an Alternative Dispute Resolution Center that will have, as one of its primary components, a specialization in health care. Each of these new initiatives is described in more detail in this issue of the newsletter. With these new programs in place, the Law & Health Care Program will be making new linkages across the Law School that will create new synergies for scholarship, service and learning.

The Intellectual Property Legal Resource Center

Montgomery County, Maryland, home of the National Institutes of Health and the Food and Drug Administration, has become a mecca for the biotechnology industry.

Of the 263 bioscience companies in Maryland, 149 are in Montgomery County. Among these are some of the world's best-known: Human Genome Sciences, Celera, InforMax, and MedImmune, to name a few. But in addition to these well known established businesses, there are numerous biotech start-ups working on the development of new products that will be an outgrowth of the mapping of the human genome.

For example, there is Aptus Genomics which was incorporated in June 2000 and began operation in September 2000. The company was established in anticipation of the mapping of the human genome and its business goal is to discover novel genes for drug discovery and development through collaboration with partners. While Aptus currently does not have a product on the market it has isolated almost 300 genes, 50 of which are novel, and has filed provisional patents on 24 genes.

A second example is Psychiatric Genomics, a first stage start-up that is conducting research with human tissue samples to find the genes that contribute to psychiatric illnesses. The company is mining the Human Genome to decipher the genetic basis of mental illness by using computers to identify the genes that are linked to conditions such as depression, autism, schizophrenia and Alzheimer's. Then, there is GeneDx, Inc. which opened for business in March 2000. GeneDx is a full service genetic testing and diagnostic company dedicated to serving the diagnostic and genetic counseling needs

of individuals and families with rare hereditary disorders. Formed by two scientists who left NIH, GeneDx provides diagnostic services available nowhere else.

While many of these biotech companies are thriving, some are at a nascent stage where they not only need financing but also technical assistance and support to move their products from "lab to market." Recognizing that among the types of services these companies need is legal advice, in an innovative move, the Montgomery County Department of Economic Development approached the University of Maryland School of Law and asked if the School would be interested in establishing a legal resource center in the County to provide legal information and educational programs for biotech and other high tech start up firms. The County also hoped that the Center might be a source of expertise and information on some of the many ethical issues faced by the biotechnology industry, including clinical trials, human tissue research, patenting and licensing issues, genetic privacy and discrimination.

The offer came at a time when the School of Law was planning to expand its Intellectual Property Program and presented the potential to develop synergies between its strong business law program, nationally recognized Law & Health Care Program, and Clinical Law Program. It could also satisfy a demand within the Law School from many students who are coming to the School with PhDs and masters degrees in the sciences and students with strong business backgrounds, many of whom have started their own dot.com companies.

Before committing to establishing the Center, the Law School agreed to conduct a "needs assessment" to determine the perceived need for such

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a Center from members of trade associations, representatives of the biotech and info-tech industry, venture capitalists, and area law firms. A team of faculty and students from the Law School, headed by Associate Dean Diane Hoffmann, conducted the study from late 2000 through July 2001. The central findings of the study were described in a report submitted to the County last month.

The most significant finding was that area start-ups expressed a high degree of enthusiasm for a legal resource center in the County that would provide basic legal and business information to high-tech start-ups. In addition, respondents from research institutions indicated that such a Center could be extremely useful to potential entrepreneurs conducting research and could help to pull innovations and inventions from existing research facilities. Representatives of research institutions and biotech start-ups generally agreed that a focus on ethical and public policy issues would add value to the Center. Such a focus could include a forum for discussion, conferences and workshops, establishment of a community Institutional Review Board (IRB) or advice to IRB members reviewing genetic research.

Based on the needs assessment results, the School of Law proposed that the Resource Center be a joint initiative of the County and the School of Law and include three components: 1) an academic program offering courses for credit for law students, and as appropriate, for local attorneys and high-tech business entrepreneurs, scientists or employees of research institutions; 2) a clinical program where students, under the supervision of faculty members and experienced attorneys, would provide legal information and basic legal advice to high tech start ups; 3) a public policy/ethics program that would serve as a forum for discussion of ethical and public policy issues relevant to the biotechnology industry.

Intellectual Property Courses to Be Offered at Center

The new Intellectual Property Legal Resource Center plans to offer two courses next year in Montgomery County: *The Intellectual Property Law Workshop* and *IP Issues for Entrepreneurs*.

The recently established IP Workshop is comprised of two components: a field placement in which each student works a minimum of 10 hours per week at an intellectual property law placement, and a weekly classroom session.

Placements include NIH's Office of Technology Transfer, the Univer-

sity of Maryland Biotechnology Institute, The Institute for Genomic Research (TIGR), the incubator at the University of Maryland Baltimore County, the U.S. Patent and Trademark Office, and the Johns Hopkins Applied Physics Lab.

The Center also plans to offer a new course for law students, as well as interested entrepreneurs, that will address legal issues of high-tech start-up companies using one or two start-ups in the County as models for case discussion.

In response to this proposal, the Montgomery County Department of Economic Development agreed to provide funding for the first phase of the Center. During this phase the School of Law will: (1) begin to develop the infrastructure for each of the proposed components of the Center, (2) offer an intellectual property law workshop and a course on legal issues for high tech start ups (see insert above), (3) host a day long workshop on ethical and policy issues relevant to the biotech industry, and (4) provide legal information and educational programs to start up companies located in the Montgomery County Technology Incubator.

Lawrence Sung, a new faculty member at the School of Law, heading up the School's Intellectual Property Law Program, sees the initiative as a way in which law students can begin to understand the variety of legal issues that confront biotech start-ups. Sung, who has both a JD and a PhD in microbiology, says that lawyers who understand both the legal and scientific issues faced by biotech companies are

in very high demand. Increasing the pool of lawyers who have experience in this area will be a boon to the region.

Lawrence Sung received his PhD from the U.S. Department of Defense-Uniformed Services University of the Health Sciences, and his JD from American University, Washington College of Law. Prior to joining the law school in 2001, he was a registered patent attorney. He entered private practice specializing in biotechnology patent litigation as an associate with Foley & Lardner, and then as Of Counsel to Arter & Hadden, LLP, and later McKenna & Cuneo, LLP.

Sung taught at the George Washington University Law School, the American University, Washington College of Law, and the Northwestern School of Law of Lewis & Clark College. He has published extensively in the area of intellectual property law on issues including those concerning biotechnology and technology transfer.

The Center for Tobacco Regulation, Litigation & Advocacy

Background—The Multistate Master Settlement Agreement

In 1994 and 1995, Mississippi, Minnesota, West Virginia and Florida filed lawsuits in state court against the tobacco industry to secure reimbursement for health care expenditures for ailments arising from tobacco use. Joined by 41 other states and two jurisdictions, a group of state attorneys general presented a tobacco settlement proposal to the American public on June 20, 1997. This proposal purported to settle all pending class action lawsuits against the tobacco industry and all pending actions against the industry brought by states and other governmental entities.

To bind all 50 states, the proposal had to be drafted and enacted in the form of Congressional legislation. A series of bills were introduced for the purpose of converting the \$368.5-billion national tobacco settlement into legislation.

The "tobacco wars" continued to rage over the next several years as the states battled with the industry while they tried to craft the legislation.

Finally, in 1998, an eight-state negotiating team and two of the nation's leading tobacco companies succeeded in fashioning a multibillion-dollar settlement of dozens of lawsuits against the tobacco industry. The Multistate Master Settlement Agreement of November 23, 1998 settled all 37 pending state cases (including Maryland's) and quieted potential claims in the remaining states.

Maryland's Use of Its Tobacco Settlement Funds

In Maryland, a state Task Force, appointed by the Governor, recom-

mended that part of the Master Settlement Funds go to support the establishment of a legal resource center that would provide advice to local governments regarding the establishment of ordinances and enforcement strategies that would withstand legal challenge. In line with this recommendation, the State Office of Health Promotion, Education and Tobacco Use Prevention within the Department of Health & Mental Hygiene contracted with the University of Maryland School of Law to establish a Legal Resource Center for Tobacco Regulation, Litigation & Advocacy. The Center is the first of its kind to be funded by Tobacco Settlement Funds. For the Law School, it provides a unique opportunity for collaboration between the Law & Health Care Program and the Environmental Law Program.

The purpose of the Center is to reduce access to tobacco products and reduce smoking and the impact of second-hand smoke.

Some of the activities in which the Center may engage to accomplish its goals include:

- conceptualizing and drafting model ordinances to reduce smoking and smoking related injuries;
- providing technical advice to community groups in advocating for ordinances before local government bodies;
- evaluating alternative strategies for reducing tobacco use based on study of the experience of other states and localities;
- representing citizen groups or providing advice to such groups about how to obtain representation in cases involving passive smoke or other injury from smoking;

- providing resources and advice to local governments when an ordinance is challenged;

- providing legal assistance to lawyers representing local governments;

- providing lawyers training in statistics and epidemiology essential to making persuasive arguments of causation of illness or injury from tobacco products;

- mooted oral arguments for attorneys preparing to argue tobacco cases; and

- drafting briefs or arranging for amicus briefs for attorneys representing local governments or citizen groups.

Specific services that the Center will provide include educational assistance such as development of a resource guide analyzing the legal aspects of efforts to regulate smoking and the sale of tobacco products, especially to children, and preparation of information packets on ordinances and legal challenges to ordinances in Maryland and other states.

Additionally, the Center will publish a newsletter directed to community groups and local governments on regulatory issues, provide student externs to work with local governments or nonprofits advocating reduction in the use of tobacco products, and establish a website with background materials and links to other relevant resources for lawyers and citizen groups.

The Tobacco Center is currently in its start-up phase. Paula A. Monopoli, Visiting Professor of Law on leave from Southwestern University School of Law, is serving as the Acting Director during this phase, and the

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Center recently hired a Managing Attorney and Administrative Assistant.

During this phase, the Center is:

- performing outreach to local tobacco control community coalitions and health officials in Maryland;
- compiling a database of tobacco control statutes—including those that passed and failed to pass in Maryland and model statutes from other states;
- interfacing with the Maryland Office of the Attorney General to determine how the Center can best assist the AG's efforts in the legislative arena; and
- beginning to draft guidelines addressing client selection and the kinds of legal advice the Center will give when it is fully operational.

The Center for Alternative Dispute Resolution

Over the past decade, the School of Law has been a leader in applying and evaluating the use of ADR in new settings. In 1992, the Clinical Law Program initiated a pilot project using law students and social work students to assist parents, children and the Baltimore City Department of Social Services in resolving Child in Need of Assistance (CINA) cases through mediation rather than litigation. Associate Dean Diane Hoffmann and Professor Roger Wolf were actively involved in a pilot project sponsored by the American Bar Association's Section on Legal Problems of the Elderly mediating patient and resident disputes in nursing homes in Maryland and the District of Columbia. Dean Hoffmann, an expert on hospital and nursing home ethics committees, has, in her research, explored the use of mediation to resolve end-of-life issues.

Dean Karen Rothenberg (former director of the Law & Health Care Program) created, with Professor

Wolf, the *ADR in Health Care Seminar and Workshop* described on page 8. *ADR in Health Care* is currently being taught by Professor Wolf and a professor from UM's medical school.

In light of the Law School's many links to dispute resolution, the clinical law program recently announced its plans to establish an interdisciplinary Dispute Resolution Center at UMLS to be directed by Professor Roger Wolf. The mission of the Center is to encourage the use of ADR processes throughout the State of Maryland and to meet the growing demand for skilled practitioners.

Professor Wolf has been a pioneer in ADR for over a decade. He is a past president of the Maryland State Bar Association's Section on Dispute Resolution, teaches the mediation clinic, and is one of Maryland's leaders in ADR.

The proposed goals of the Center are to:

- develop a Certificate program in Conflict Resolution;

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Environmental Law/Health Care Law Seminar: Tobacco Control and the Law

During the fall semester 2001 Professor Bob Percival, Director of the Environmental Law Program, is teaching a new seminar on Tobacco Control and the Law. The seminar is being co-taught with Linda Bailey, who is the associate director of the Office of Smoking and Health at the Centers for Disease Control.

In this seminar, the first joint offering by the Environmental Law and Health Care Law Programs, students are reviewing the history of how science and law have responded

to evidence of the enormous health risks inflicted by tobacco use. By focusing on a set of products that pose high risks to human health from a common source, students are developing a thorough understanding of the science behind regulatory policy and how well the legal system has used scientific information. Credits earned through this seminar can be used to satisfy the requirements for both the Certificate in Health Law and the Certificate in Environmental Law.

Because efforts to protect public health from the risks of tobacco use

have raised a variety of legal issues, this seminar is exposing students to many important areas of law—how doctrines of tort law, civil procedure, administrative law, constitutional law, and the law of international trade have been applied in responding to a major public health problem. The seminar is also providing students with a rich understanding of some of the most challenging issues of regulatory policy including the advantages and drawbacks of alternative approaches to discouraging behavior that harms health.

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Health Law Linkages

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- provide seminars and training to practitioners across Maryland;
- convene conferences and other events addressing conflict resolution issues. (See the article on page 9 on MEDispute: Resolving Health Care Conflicts.)
- develop partnerships with other institutions interested in conflict resolution across the health professions campus of the University of Maryland;
- assist courts and state agencies in implementing dispute resolution systems;
- conduct research on dispute resolution processes and issues relating to ADR;
- assist in developing conflict resolution programs on the University of Maryland Baltimore campus that would serve as a model for college and graduate school campuses throughout the state; and
- on a cooperative or contractual basis, assist court systems, executive branch agencies and private businesses institutions and communities in providing conflict resolution training and developing and implementing conflict resolution systems.

The Center will be housed in the clinical law office and will include a specialization in health care. The Law School provides a strong foundation for the Center, particularly in its health care mediation initiatives, its connections with the Health Advocacy Unit within the Attorney General's Office, and the work of its faculty in mediating health care ethics disputes.

Health care has also become ripe for the application of mediation and other forms of ADR. In addition to the traditional disputes between patients and physicians, physicians and nurses, hospitals and physicians, and hospitals and health care providers, the rise of managed care has created new forms of disputes between patients and payers and providers and managed care plans.

Alternative Methods of Dispute Resolution (ADR) in Health Care Seminar/Workshop

The move away from litigation and toward alternative methods of dispute resolution is a defining trend in the legal profession. ADR in Health Care explores the application of dispute resolution to a variety of health care contexts such as medical malpractice, credentialing, bioethical issues, and insurance disputes, among others.

Dispute resolution can take many forms, including negotiation, conciliation, mediation, fact-finding, mini-trials and arbitration. Professor

Roger Wolf has structured the seminar so that students are given hands-on experience with these various dispute resolution processes through simulation and the handling of actual disputes in the health care field. Co-taught by a Professor from the medical school and open to medical, as well as law students, enrollees spend five hours per week outside of class mediating disputes for the Health Care Advocacy Unit of the Attorney General's Consumer Protection Division in Baltimore.

In August 1997, leaders of the American Arbitration Association (AAA), American Bar Association (ABA), and American Medical Association (AMA) met in Chicago with the purpose of forming a commission to study and make recommendations on the appropriate use of alternative dispute resolution in the privately managed health care environment. The effort was a logical move in view of a growing trend in the legal industry—a trend away from court battles and toward more amicable third-party arbitration.

Recognizing the need in the health care sector for a fast, just and efficient system of resolving disputes without resorting to costly and time consuming court litigation, Professor Wolf hopes to focus at least initially on bringing the benefits of mediation and dispute prevention to the state's health care industry. In collaboration with the Law & Health Care Program, Wolf planned the Center's first event—a conference on the application of ADR to health care—to introduce the medical profes-

sion to the concepts of ADR and to introduce mediators to the disputes that arise in the health care system.

At the conference, entitled MEDispute, speakers and attenders made many favorable comments about the potential for mediation in resolving health care conflicts. Conference participant, Michael Preston who is the Executive Director of the Maryland State Medical Society (MedChi) said, "I was so impressed at the Law School's leadership in seeking to address conflict in new and creative ways, particularly in health care. Speaking as a lawyer, I know that we are too often associated with fomenting conflict, rather than avoiding or resolving it."

The ADR Center is part of a broader effort to provide viable alternatives to litigation. "Lawyers are problem solvers," said Professor Wolf, and "effective problem solvers must have many tools at their disposal. The Dispute Resolution Center will ensure that we continue to focus heavily on alternative methods of problem solving."

FALL CONFERENCE
MEDispute
Resolving Health Care Conflicts

The \$450 billion health care industry is rife with disagreement. Patients conflict with providers, providers with payers, hospitals with physicians and patients. The opportunities for dispute are seemingly endless. Two additional ingredients, Medicare and managed care, have thickened the contentious mix. In many cases, discord leads directly to litigation.

On September 25, 2001 about 150 people gathered at the Sheppard Pratt Conference Center to participate in a conference sponsored jointly by the Law & Health Care Program and the law school's new Center for Alternative Dispute Resolution (see article on page 7.) *MEDispute: Resolving Health Care Conflicts* brought together ADR practitioners, physicians, nurses, health care attorneys, policymakers, health care administrators, and insurance and managed care organization personnel to discuss the nature of health care conflicts and a means for their resolution that avoids costly and time-consuming litigation.

In other areas of the law, dispute resolution has been used increasingly as an alternative to the courts. Following a burgeoning trend in the areas of family, labor, and international law, the MEDispute conference was planned to apply the lessons learned in those areas to the privately managed and government health care systems.

The three keynote speakers at the conference are nationally recognized experts in the health care dispute resolution field. Leonard Marcus is founding Director of the Program for Health Care Negotiation and Conflict Resolution at the Harvard School of Public Health. The Center, founded in 1991, is a non-profit mediation service that specializes in resolving health care disputes. The title of his presentation was *A Culture of Conflict: Lessons*

from *Renegotiating Healthcare*, also the title of his latest book.

Karl A. Slaikeu is president of Chorda Conflict Management, Inc., a consulting and training company that specializes in conflict management systems. He has written two books on the topic, *When Push Comes to Shove: A Practical Guide to Mediating Disputes* and *Controlling the Costs of Conflict*, published in 1996 and 1998. Slaikeu's presentation focused on the best practices in workplace dispute resolution from corporate America.

The third keynote speaker, Nancy Neveloff Dubler, is the Director of the Division of Bioethics, Department of Epidemiology and Social Medicine, Montefiore Medical Center and Professor of Bioethics at the Albert Einstein College of Medicine. She is the author of *Mediating Bioethical Disputes*, published in 1994 and spoke on dispute resolution in the managed care arena.

A symposium issue of the *Journal of Health Care Law & Policy* based on presentations made at the MEDispute conference will be published in 2002.

A Roundtable on Reforming Disability Non-Discrimination Laws

On September 24, 2001, the Law School held an international disability roundtable with invited participants from academia, the public sector and non-profit agencies concerned with the rights of the disabled. Associate Dean and Law & Health Care Program Director, Diane Hoffmann organized the event, working with clinical law professor, Stan Herr. (See In Memoriam: Professor Stanley S. Herr, page 2.)

Herr's thought-provoking article, "Reforming Disability Nondiscrimination Laws: A Comparative Study," was the motivation and focus of the Roundtable. In the article, Herr looks at the experiences in the U.S., Israel and the United Kingdom as a way for the U.S. to find ways to strengthen disability rights and heighten compliance with nondiscrimination laws. The study is a culmination of more than two years of research and includes a table of more than forty-one countries that have various forms of disability non-discrimination laws.

Speakers addressing international issues and proposals for reform included Eric Rosenthal, Executive

Director of Mental Disability Rights International and Arlene Kanter, Professor and Director of Clinical Programs at Syracuse University College of Law (who participated by speakerphone.)

Madeline Will, vice-president for Strategic Planning and Advocacy at Community Options, Inc., and The Honorable Judith Heumann of Heumann and Associates, both former U.S. Assistant Secretaries for Special Education and Rehabilitative Services in the Department of Education, covered the domestic agenda, specifically the role the White House should play in such issues. Other speakers included Equal Employment Opportunity Commissioner Paul Miller, Ira Burnham, Legal Director of the Bazelon Center for Mental Health Law, UMLS Visiting Professor Andy Levy, and Professor and Director of the Clinical Law Program, Thomas Pérez. Robert Dinerstein, Professor and Associate Dean at American University, Washington College of Law, wrapped up the event summarizing comments made throughout the day.

Genetics Legislation Takes Effect October 1st

by Kelly M. Fitzpatrick '02

During the last session of the Maryland Legislature, Senate Bill 2, "Genetic Information-Nondiscrimination in Employment," sponsored by Senator Jenny Forehand, was enacted. UMLS Dean Karen Rothenberg provided guidance and technical assistance in drafting the bill, and submitted written testimony for the Judiciary Committee hearing on March 14, 2001. The legislation went into effect on October 1, 2001.

SB 2

Specifically, SB 2 restricts both acquisition and use of genetic information in the employment context. Under the new law, employers are prohibited from requesting or requiring genetic tests or genetic information as a condition of hiring or determination of benefits. Employers are prohibited from making unfavorable employment decisions based on the individual's genetic information. Adverse employment actions based on an individual's refusal to submit to a genetic test or make available the results of a genetic test are also prohibited.

The bill amended Article 49B-Human Relations Commission, which prohibits discrimination based on race, color, religion, gender, age, national origin, marital status, or disability.

Rothenberg's Role

Rothenberg has devoted much of her time and expertise to advocacy on genetics discrimination—it is one of her primary research interests. She was instrumental in the passage of the Genetic Information Nondiscrimination in Health Insurance Act, introduced by Delegate Michael Finifter and Senator Forehand. The Maryland Legislature passed the Genetic Information Nondiscrimination in Health Insurance Act in 1999. In fact, SB2 defined the



Maryland Governor Parris Glendening (center of photo) signs SB 2 into law. Dean Karen Rothenberg stands in back of the Governor to his left, with Kelly Fitzpatrick '02 on Dean Rothenberg's left.

terms "genetic information" and "genetic test" using the same definitions that already appear in Maryland's Insurance Article prohibiting genetic discrimination in the insurance context.

"Senate Bill 2 is significant because until its passage, Maryland had nothing in place to protect people from genetic discrimination in the workplace," Rothenberg said.

In her testimony for the General Assembly, Rothenberg offered statistics that document the public's fears of workplace testing and discrimination based on genetic information. Citing a 1998 survey commissioned by the National Center for Genome Resources (NCGR), Rothenberg said, "Eighty-five percent of those surveyed think employers should be prohibited from obtaining information about an individual's genetic conditions, risks, and predispositions." The survey also found that 36 percent of those surveyed would probably not take genetic tests, and 27 percent definitely would not

take such tests if health insurers or employers could get test results.

"We must ensure that the state of Maryland protects the workplace so that people who might benefit from genetic tests do not refuse to have them because of fear of discrimination or stigmatization," Rothenberg said in her testimony.

She noted that these fears were realized in light of allegations made earlier in the year that the Burlington Northern Santa Fe Railway had performed genetic tests on several employees without the employees' knowledge or consent.

Maryland is now one of 28 states that prohibit genetic discrimination in the workplace. Arkansas, Louisiana, Minnesota, Nebraska, and South Dakota also enacted similar measures in 2001.

Today Rothenberg notes, "State laws are a step in the right direction.

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Health Care For All

On September 8, 2001, the Maryland Citizens' Health Initiative (Health Care For All) released a proposal for a plan to provide quality, affordable health care to every Maryland citizen. The Initiative was spearheaded by Dr. Peter Beilenson, Health Commissioner of the City of Baltimore. Associate Dean and L&HCP Director Diane Hoffmann is a member of the Technical Advisory Group (TAG) that drafted the plan, which included some of the country's top health policy, economic and law experts. In addition to Hoffmann, representatives from the Johns Hopkins Bloomberg School of Public Health and the Georgetown University Institute for Health Care Research and Policy participated on the TAG.

The Initiative began as a small group of people interested in health care reform in Maryland. Today, over 2,175 religious, community healthcare, labor and business groups from across Maryland support the goal of health insurance coverage for all Marylanders and have committed their organizations to provide input on draft proposals. The Initiative's plan is to provide people with the right to choose their own doctor; a benefit package appropriate for their age, gender, and health condition; and care decisions based on medical need and not cost.

Health Care For All has conducted a number of polls querying Maryland citizens on how they feel about state-supported health care. A 1999 poll conducted by the Abell Foundation found that 78 percent of Marylanders agreed that all residents are entitled to comprehensive health insurance coverage, and 90 percent agreed that all Maryland workers were entitled to the same benefit.

The polls also found that hundreds of thousands of Marylanders have no health insurance, including tens of

thousands of children. Additionally, hundreds of thousands have inadequate coverage, such as seniors on Medicare who cannot afford prescriptions.

Hoffmann attended a series of drafting meetings lasting through the spring and summer of 2001. To inform the drafting process, the Initiative conducted over a dozen town meetings soliciting input from the general public and from its own endorsers on what was needed in a Health Care For All system. The Initiative also held stakeholder meetings with key interest groups in the State—advocates for mental health, children, community health centers, the poor, substance abuse treatment and prevention, alternative medicine and those advocating for a single-payer system—and with health care system groups—hospitals, physicians, nursing, social work, labor, representatives of the private insurance industry, and employers in the State. Last, the organization received input from government officials that direct and monitor health care programs in Maryland.

In the preface to its proposal, Health Care For All, acknowledges that over the past decade, Maryland has expanded access to health care and that it hopes to build on that success. As of July 1, 2001, the State became one of only a handful of states to guarantee health care coverage for all children living in families earning up to 300 percent of the federal poverty level. Additionally, Maryland's small group insurance plan has enabled small businesses to provide health care coverage to thousands.

The proposed plan is two-phase, and after implementation of the final phase, all Marylanders will have health care coverage through either private insurance, an existing governmental insurance program, or through a new, quasi-public entity to be known as "The Maryland Healthcare Trust."

The complete plan, along with town meeting reports and other information can be found at the Health Care For All website: www.healthcareforall.com.

Student Health Law Organization Update

Fall 2001 Events

September 30th, October 1st & 2nd—the AHLA (American Health Lawyers Association) Fraud & Abuse Conference in Washington, DC

October 22nd, 5:30 p.m.—Annual Alumni Mixer and hosting of the Health Law Section of the Maryland Bar Association Meeting at Westminster Hall

September 26th, October 17th and November 7th—Speaker Series: A lunchtime event (co-sponsored by the Law & Health

Care Program) that spotlights a guest speaker on a current health law topic.

2001-2002 Officers

President - Nisha Wagle
Vice-President - Tracee Orlove
Secretary: Alison Beyer
Treasurer: Valerie Webb
Liaison to AHLA: Jason Caron
Co-Publicity: Shannon Chilcoate
Co-Publicity: Chrissy Dabkowski
Co-Events: Yakov Bashyrov
Co-Events: Lisa Dailey

L&HCP Faculty Notes . .

ASSOCIATE DEAN DIANE HOFFMANN

Selected Presentations:

"Gender Differences in the Treatment of Pain," Press Briefing sponsored by the American Society of Law, Medicine & Ethics and the Mayday Foundation, Washington, DC (2001)

"The Impact of OIG Fraud Alerts on End of Life Care," Annual Health Law Teacher's Conference, Boston University School of Law, Boston, MA (2001)

"Laws Regarding Genetic Testing: Who has a Right to Know?" 3rd International Scientific Conference on Alpha-1: The Challenge of A Genetic Condition, Airlie Conference Center, Warrenton, VA (2001)

Award:

Grant from the Mayday Scholars fund to conduct an empirical study of changes in attitudes and practices of State Medical Boards regarding disciplinary actions of physicians prescribing opioids (2001)

PROFESSOR STANLEY S. HERR

Awards:

Paul Hearne Disability Rights Award, American Bar Association, Chicago, IL (2001)

Herbert S. Garten Pro Bono Special Projects Award, Maryland Pro Bono Resource Center, Maryland State Bar Association Business Meeting, Ocean City, MD (2001)

PROFESSOR DAVID A. HYMAN

Publications:

"Just What the Patient Ordered: The Case For Result-Based Compensation in Health Care," 29 *J. L. Med. & Ethics* 170-173 (2001) (with Charles Silver) (with response by Prof. E. Haavi Morreim, 29 *J. L. Med. & Ethics* 174-181 (2001)

"Health Care Fraud and HIPAA: Where's The Beef?," Making a Federal Case out of Health Care: Five Years of HIPAA, Cato Institute (2001)

Selected Presentations:

"Two Cheers for Employment-Based Health Insurance," (with Mark Hall), Testimony before the Department of Labor, Advisory Committee on Employee Welfare and Pension Benefit Plans, (2001)

PROFESSOR SUSAN P. LEVITON

Publication:

"Court Ruling Is Slowing Research That Could Help Sick Children," *The Sun Newspaper* (Perspective Section) (2001)

ASSISTANT PROFESSOR THOMAS E. PÉREZ

Publication:

"The Current Legal Status of Affirmative Action Programs in Higher Education," in *The Right Thing to Do, The Smart Thing to Do, Enhancing Diversity in Health Professions*, Institute of Medicine (2001)

Selected Presentations:

"Preventing Discrimination Against Physicians of Color," Annual Conference of the National Medical Association (2001)

"The Current Status of Affirmative Action in Higher Education," Annual Nickens Symposium on Diversity in the Health Professions sponsored by the Association of American Medical Colleges and the Institute of Medicine (2001)

DEAN KAREN ROTHENBERG

Testimony:

"The Potential for Discrimination in Health Insurance Based on Predictive Genetic Testing," before the House subcommittee on Commerce, Trade and Consumer Protection, Washington, DC (2001)

PROFESSOR LAWRENCE M. SUNG

Publications:

"Stranger in a Strange Land: Biotechnology and the Federal Circuit," 2 *Washington University Journal of Law and Policy* 167 (2000)

"IP Horizons in the Protection of Genetic Knowledge," *AAPS Newsmagazine* (2001)

IN THE HEALTH AND ELDER LAW

CLINIC

The law school offers, as part of its regular curriculum, a clinical law program in which faculty members who are practicing attorneys supervise law students in the representation of actual clients. For those students with a general interest in health law, the clinic represents clients in cases involving health care for children, legal issues of the handicapped, mental illness, AIDS and the elderly. This issue's article is written by the Director of the Health and Elder Law Clinic.

Students in the Health and Elder Law Clinic have been reviewing the medical records of residents at a New York nursing home for evidence of transfer trauma. AARP, the New York Legal Aid Society and a private law firm, Kaye, Sholer, Fierman, Hays & Handler, LLP, have sued the mayor of New York, Rudolph Giuliani, in a class action lawsuit. The lawsuit alleges that the expedited transfer of some 282 residents at the Neponsit Health Care Center in Rockaway, Queens, violated the federal rules for transfers from nursing homes. The agencies have sued the mayor, the Chair of the Health and Hospitals Corporation, and the Commissioner of the New York State Department of Health in the United States District Court for the Southern District of New York.

The class consists of all persons who resided at the Neponsit Health Care Center on September 9, 1998, and who were transferred to area hospitals, facilities, and nursing homes from September 10 to 12, 1998. The residents were given no warning of the transfer, after a housing inspector said that the 85 year old facility was "structurally unsound, after damage

by Joan L. O'Sullivan, JD

caused by a storm on Labor Day." The Health Care Center is located on six oceanfront acres on Rockaway Beach Boulevard. The mayor had promised a park on the oceanfront to the residents of Queens, but lawyers have obtained an injunction in federal court to prevent the destruction of the nursing center. The Health Care Financing Administration fined the City of New York \$3,050 a day until all of the former residents were placed in nursing homes.

The residents were given only a few hours to pack their belongings in plastic bags and to move from the center. Many have not seen their former possessions again. Most residents described other residents of the facility as "family." They met to discuss how the laundry should be done and what to have for meals. They had a book club and went for walks on the boardwalk for exercise. Like the other city-owned nursing centers, the facility was a refuge for the poor and the sick; many residents were in their fifties, with chronic diseases like cancer or other disabling diseases.

Two patients died in the weeks after the transfer, and one patient walked away from the facility in which she was staying. One named plaintiff, Jackie Brown, said that the day was a disaster. "The staff were crying, it was a mess. We kept asking where we were going and nobody knew. Victoria, she was a lady who never went outside. She had diarrhea all the way and had to be bathed as soon as she walked into the new place. Henrietta vomited on the bus. I believe she was scared. Anna went to bed for two

weeks after. It was a terrible day. I'll never forget it."¹

Students in the Health and Elder Law clinic are looking for signs of "transfer trauma," such as loss of weight; decrease in daily living activities, such as dressing, toileting, and hygiene; intensified confusion; a new illness; increase in anti-anxiety medications; incontinence of bowel and bladder; sleep disorders; limited range of motion; change in activity level, such as no longer leaving a room or unit; or notations of verbally abusive behavior. Many student attorneys are seeing medical records for the first time, and are learning to discover from the physician's notes and nursing notes how the patient fared after the transfer. AARP is responsible for reviewing the medical records and sending them to the geriatric medical experts in the case.

Transfer trauma has been written about by geriatricians and scholars. Experts believe that when an elderly person or one who is sick and disabled is moved suddenly against his or her will, that transfer trauma will result.

The Code of Federal Regulations, at 42 CFR 483.12(a) defines transfer, which includes the movement of a resident to a bed outside the facility. The CFR goes on to say that the facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless:

- the transfer is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
- the transfer is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

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2001 Student Award for Excellence in Clinical Service

In her letter nominating Carla Williams for the Geriatrics and Gerontology Education and Research award for outstanding clinical practice, Health and Elder Law Clinic Director Joan O'Sullivan says of Williams, "She is a tenacious advocate for her clients and has won cases based on her research, investigations and clear ability to write what a judge wants to hear."

Williams, a May 2001 graduate and recipient of the Certificate in Health Law, receives glowing recommendations not only from her professors, but also from her clients. In a case that lasted two years, Williams represented a woman whose husband had Alzheimer's Disease and who one day, drove off and never returned. Williams accumulated information about the husband and was able to convince the court that the man's wife should be appointed his guardian of property. His Social Security and pension checks had been stopped during the time he was missing, and his wife had had to live on her savings until the Health Law Clinic obtained the guardianship. The pension



Carla Williams '01 and Professor Joan O'Sullivan

fund sent the wife a check for \$25,000 after she was appointed.

In another case, Williams convinced the attorney for a hospital that the Clinic's client was not responsible for a bill for mental health treatment. She made numerous telephone calls to all the insurance agencies involved, and finally, two days before the trial, found someone who admitted that his company had made a mistake. Williams' client was found not responsible for the

\$900 for which the company was suing her. Because the client was disabled, she did not have the money to pay this bill and the outstanding amount would have been noted on her credit rating.

O'Sullivan says, "Carla has had great success in the Health and Elder Law Clinic. I have no doubt that she will go on to become a determined and persistent advocate in the field of health law."

In The Clinic

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- the safety of individuals in the facility is endangered;
- the health of individuals in the facility would otherwise be endangered;
- the resident has failed, after reasonable and appropriate notice, to pay the facility (or have Medicare or Medicaid pay) for a stay at the facility. For those who qualify for Medicaid after the admission of the resident to the facility, the facility may charge a resident only allowable charges under Medicaid; or
- the facility ceases to operate.

CFR regulations for nursing homes require patients be given 30 days notice

of the need to move from a facility. Patients have the right to a hearing, and the right to be represented by an attorney.

The Neponsit Health Care Center case is a valuable learning experience for our clinic students. Knowing how to review a medical record is essential in many areas of health law. In cases of malpractice, experience in reviewing a medical record is a fundamental ingredient when deciding whether to settle a case, or take it to trial.

Additionally, those who are interested in learning elder law and how to represent the elderly residents of nursing homes need to know that transfer trauma exists. As cases

proliferate against nursing homes, some states, such as Florida, have put a cap on punitive damages. In Florida, the cap is \$3 million dollars.

Reviewing the Neponsit Health Care Center medical records contributes to the case brought by AARP, the New York Legal Aid Society, and the private law firm. Our student attorneys are playing a vital role in this case and are representing poor people who may, with their help, win a large settlement against the City of New York.

I Jennifer Steinhauer, The New York Times, section 1, page 37, (November 1, 1998).

Spotlight on . . .

HEALTH LAW PRACTICUMS AND EXTERNSHIPS: The Equal Employment Opportunity Commission

by Lisa Ohrin, Director of Practicum and Externships

What does equal employment opportunity have to do with health care? Plenty. Just ask third-year UM Law students Kelly Fitzpatrick and Thanh Ly. This Fall, Fitzpatrick and Ly are working in the office of EEOC Commissioner Paul Miller on issues related to genetic discrimination in the workplace. Both students are tackling challenging, cutting edge issues at the intersection between health law and employment discrimination law.

Kelly Fitzpatrick

Fitzpatrick is researching and drafting a paper for Commissioner Miller that will address whether it is ever appropriate to conduct genetic testing in the workplace. Over this past summer, she worked with the National Institutes of Health's National Human Genome Research Institute (NIH-NHGRI) on issues related to genetic testing and assisted in an ongoing project of the Law School, NIH-NHGRI and the EEOC to examine why there has been no enforcement of state laws regulating genetic testing in the workplace. Her current project with the EEOC allows Fitzpatrick to continue the work she began at NIH-NHGRI and further explore her interests in genetics and employment law. Prior to coming to law school, Fitzpatrick worked in the human resources field.

In addition to her research at the EEOC placement, Fitzpatrick has been able to attend Congressional hearings and was slated to attend a workshop to educate labor unions on genetics issues. In fact, two of the things

Fitzpatrick loves most about her placement is the unlimited access to Commissioner Miller (he has an open door policy) and her ability to attend any meeting or hearing that interests her and is related to her work at the EEOC. Being "just a law student," Fitzpatrick finds this to be an unusual and pleasant surprise.



Kelly Fitzpatrick '02 and Thanh Ly '02

Thanh Ly

Thanh Ly is researching and drafting a paper for Commissioner Miller on the Title VII implications of genetic testing. Specifically, Ly is exploring the intersection of race and genetics and whether eugenics is a possible result of our expanding genetic testing capabilities. The work is the first of its kind at the EEOC and focuses on tests for genetic markers that are prevalent in persons of particular races and national origins.

For Ly, this is not only exciting work, but work that allows her to use her educational background—she has a Master's degree in physiology—and incorporate her interest in Asian-American issues. In the past, Ly has been active in the Vietnamese community, teaching post-high school youths career skills, and serving as a mentor

The Law & Health Care Program's Health Law Practicums provide an opportunity for students interested in health law to obtain credit by working for organizations and government agencies dealing with health care issues. Students spend 10 to 20 hours at their placement and additional hours throughout the semester in the classroom participating in the Health Law Practice Workshop. Placements have included the American Nurses Association; the Equal Employment Opportunity Commission; Johns Hopkins Health System Corporation; Legal Services to the Elderly; Med-Chi of Maryland; Maryland Board of Physician Quality Assurance; the National Health Law Program; NIH; U.S. Senate Subcommittee on Aging; University of Maryland Medical System, Office of the General Counsel; and the Office of the Attorney General, General Litigation Unit and Medicaid Fraud Unit.

The Program also offers several full semester externships—The National Health Law Program externship in Washington, D.C.; The University of Maryland Medical System externship, located in University Hospital's General Counsel's office; Blue Cross/Blue Shield of Maryland (BCBSM), The Federal Trade Commission, The Maryland Health Care Commission; and the NIH General Counsel's Office.

and tutor for Asian children. She feels lucky to have a chance to connect her interests in civil rights and discrimination with her interests in health law.

According to Commissioner Miller, the EEOC is "thrilled" to have the opportunity to work with Fitzpatrick and Ly. The unique combination of skills that they possess is highly relevant to topics on which Commissioner Miller and the Commission have been focused. Fitzpatrick and Ly are engaged in cutting edge research and analysis that will serve as the basis for future significant work of the EEOC and Commissioner Miller—in short, the EEOC says they are "incredibly fortunate to have them."

Genetics Legislation

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However, many states still have no protections against genetic discrimination in the workplace. The scope and function of such laws vary widely in the states that do have genetic nondiscrimination laws. It's a real patchwork. We need legal protection at the Federal level."

At the federal level, Rothenberg has provided technical assistance to Rep. Louise Slaughter, sponsor of HR 602, the Genetic Nondiscrimination in Health Insurance and Employment Act. The Senate version is S 318, sponsored by Sen. Tom Daschle. Both bills have garnered bipartisan support.

A Law Student's Perspective

Then-second-year law student Kelly Fitzpatrick also submitted written testimony and testified in person in support of SB 2 the day of the committee hearing.

"Dean Rothenberg knew about my research interest in this subject, and

she encouraged me to consider testifying," Fitzpatrick said. "Participating in the process and observing our state legislature was an incredible experience."

The day of the hearing, SB 2 was scheduled to be heard first. However, SB 205, the bill prohibiting discrimination based on sexual orientation also was scheduled for that day. So many people and television cameras had packed into the hearing room, it was standing room only. SB 205 ended up being moved to the top of the list. The large number of people who wanted to comment on the sexual orientation anti-discrimination bill meant that SB 2 was not addressed until nearly 6:00 p.m.

"I ended up missing a class that evening, but it was well worth it," Fitzpatrick said. "I learned so much by interacting with Senator Forehand's office and testifying. It's the sort of opportunity I hoped that I would get by attending the University of Maryland. I haven't been disappointed."

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