

The Clause

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Fall Issue, September 1998, Vol. VIII, Issue II



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BCABA President-Elect

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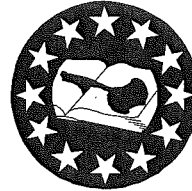
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PRESIDENT'S COLUMN

by the Hon. Cheryl S. Rome

Department of Interior, Board of Contract Appeals



Hon. Cheryl S. Rome

This has been a year for regrouping within the BCA Bar Association. We have taken steps to bring our Membership Directory up-to-date and have contacted those members who have not paid their dues, to see if they wish to continue as members. Most delinquents simply forgot to pay, possibly because we have never supplied a payment envelope, an omission that we are remedying. Please be assured that the \$35 dues (\$30 for Government employees) are so reasonable that there is no lingering pain after payment. Our publication, "The Clause," which includes legal articles and practice tips; our "networking" membership Directory with helpful practice information; and our annual educational program, make membership extremely worthwhile.

See the enclosed registration form for this year's excellent annual program, scheduled for October 14, 1998, co-chaired by Judge Carol Park-Conroy of the Armed Services Board of Contract Appeals and by Steven L. Briggerman, Esq., of Seyfarth Shaw. My most significant work as president was persuading these two fine professionals to chair the program.

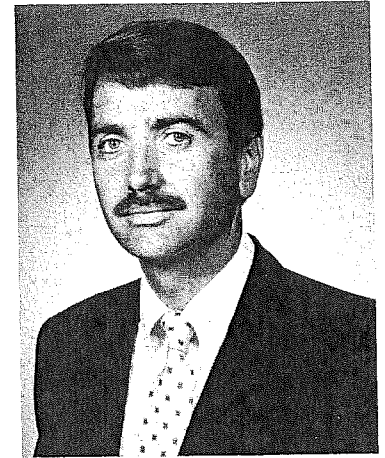
I also have revitalized our Practice and Procedures Committee, which is now co-chaired by Chief Judge E. Barclay Van Doren of the Energy Board of Contract Appeals and by Ross Dembling, Esq. of Holland & Knight. If you have questions or suggestions, or wish to participate, Ross can be reached at (202) 457-5953 and by E-mail at rdemblin@hklaw.com. Judge Van Doren can be reached at (202) 426-9316.

In my waning days as president, I wish to encourage judges to continue to participate actively in the bar association, as they have done. Apart from the continuing education benefits, BCABA is an avid supporter of the boards of contract appeals. Although I was not involved in the process, BCABA was quick to write a strong letter of support for my board, the Interior Board of Contract Appeals, when we were subject to an unwarranted initiative by a political appointee (since gone) to attempt to dissolve the Board, citing budgetary reasons. We had a very full docket at the time, including relatively small appeals (albeit not "small" to the Appellants and agencies involved), and very large ones involving millions of dollars. The initiative, for which there was no cost justification (apart from its lack of substantive merit), was unsuccessful. We "go forth and prosper" and are busier than ever.

Finally, I especially wish to thank the BCABA's vice-president, Dave Metzger, of Holland & Knight, and Professor Andre Long, of the Air Force Institute of Technology, both of whom have kept me and the BCABA on course.

EDITOR'S COLUMN

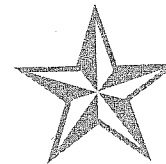
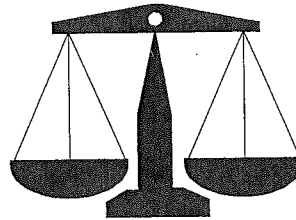
by Professor Andre Long, CPCM
Air Force Institute of Technology



Andre Long

As the editor, I have tried to keep *The Clause* as a useful incentive to belonging to the Boards of Contract Appeals Bar Association. Members, who coincidentally comprise the majority of contributors to the publication, receive an annual subscription, among other benefits. Ideally, *The Clause* works best as a forum for combining the collective thoughts of our diverse membership, which includes Board judges and government, industry and private practice attorneys. Unfortunately, we were only able to produce two issues during the last membership year due to financial constraints. However, hope springs eternal, and I plan to publish at least three issues this coming year. To meet that goal, we need to increase our membership and submit more

articles to yours truly. While I welcome articles on substantive Government contract law matters, I am particularly interested in material that focuses on Board practices and procedures. Practice tips from Board judges have always been well received by our readers as have been substantive articles on frequently litigated Board issues. Whatever your interests, please feel free to e-mail your articles or opinion pieces to andrelong@aol.com. You can also call me at (937) 255-7777 x3146.



WANTED - NEW MEMBERS

PRIVILEGES OF MEMBERSHIP INCLUDE:

- Subscription to the *CLAUSE*. A publication unique to Board practice which includes helpful practice tips from judges and experienced practitioners and informative articles on the latest issues in government contract law.
- Inclusion in and a copy of the 1998 annual directory, containing your name, address, phone number and e-mail. Also listed are sample forms used in Board practice along with a listing of Board addresses, judges and phone numbers.
- Participation in various focus groups such as our Practice and Procedures Committee.
- Discounts in attending the BCABA Annual Meeting and Program along with other events offered throughout the year.
- Membership in an established network of Board judges, private practitioners, and government and industry attorneys who are interested in practice proficiency.

Refer to back page for a membership application

BCABA
ANNUAL CONFERENCE
SET FOR OCTOBER 14, 1998

The BCA Bar Association will hold its annual educational program and business meeting on Wednesday, October 14, 1998 at the Hotel Carlton, 16th and K Streets, N.W., Washington, D.C. The Annual Program and Meeting is co-chaired by Steven L. Briggerman, Seyfarth, Shaw, Fairweather & Geraldson and Judge Carol Park-Conroy, Armed Services Board of Contract Appeals. The theme for the conference is "Exploring Current and Emerging Cost Issues" and a strong program has been planned.

The morning sessions will feature a blue-ribbon panel of Government and private sector management, legal and accounting participants who will discuss current and emerging cost issues. Our luncheon speaker is Dierdre A. Lee, Administrator for Procurement, NASA. During the afternoon session, a panel of Judges from the U.S. Court of Appeals for the Federal Circuit and the Boards of Contract Appeals will provide valuable practice tips on how to present these cost and other issues to the Court and Boards. The conference will conclude with the annual business meeting.

Our panel for the morning program has been assembled by co-chairmen Louis L. Rosen, National Director of Government Services, Ernst & Young, and Robert A. Burton, Associate General Counsel, Defense Logistics Agency. Joining the co-chairmen as participants on this panel are Terry A. Albertson, Crowell & Moring, Lynda Tro O'Sullivan, Miller & Chevalier, Carol F. Covey, Deputy Director, Cost, Pricing & Finance, Department of Defense, Pentagon and Michael J. Thibaul, Deputy Director, Defense Contract Audit Agency. The panel moderator will be Steve Briggerman.

The cost issues to be explored during the morning session will include such timely topics as: acquisition of commercial items, disclosure statements for healthcare contracts, treatment of corporate merger and restructuring costs, solutions to the continued confusion in cost accounting practices, recovery of environmental costs and the impact of insurance coverage, resolution of increasingly complex pension cost issues, and recovery of legal costs for alternative disputes resolution (ADR) and settlement of litigation.

The judges panel in the afternoon will be moderated by Gregory A. Smith, Piper & Marbury. We are extremely fortunate to have the participation of Circuit Judges Paul R. Michel and Alvin A. Schall, both at U.S. Court of Appeals for the Federal Circuit, Judges Eunice W. Thomas and Alexander Younger, both at the ASBCA, and Guy H. McMichael, III, Chairman of the VABCA. In what promises to be a lively discussion, the judges will provide concrete suggestions for effective presentation of cost and other contract issues to the Boards and the Court of Appeals.

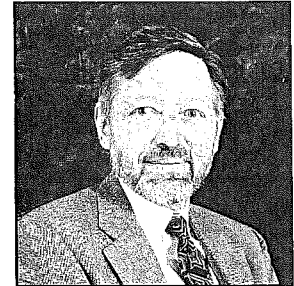
The BCABA annual business meeting and election of Officers and the Board of Governors will follow the educational program. All new and current BCABA members are invited and encouraged to attend.

This is a timely and strong program that you should not miss - so **mark your calendar for October 14, 1998**, now. The cost of the program is \$105 for BCABA members and \$140 for non-members

A formal program invitation will be in the mail to you in the very near future. In the meantime, for further information, please contact Steven L. Briggerman or Megan M. Dunn at (202) 426-2400 or dunnme@dc.seyfarth.com.



Honorable Carol
Park-Conroy



Steven L.
Briggerman

INTERVIEW OF DAVID P. METZGER PRESIDENT-ELECT OF BCABA

By Andre Long



How do you view the role of the Boards of Contract Appeals?

They're essential. Small firms especially benefit from their informality, flexibility, cost-effectiveness and emphasis on alternative dispute resolution. Aspects such as accelerated procedures and Rule 4 document discovery make them the forum of choice for firms with limited resources. Yet because of their deep, specialized expertise in procurement, their reputation for fairness, and judicial approach to dispute resolution, larger firms benefit from them as well. They are a resource we need to protect and enhance.

What do you see as the role of the BCABA?

In addition to benefitting its membership, the BCABA needs to be a strong, articulate voice for the BCAs. We need to be prepared to provide comments on critical issues. Two years ago, the BCABA was totally unprepared for the board consolidation issue in Congress and failed to mobilize views in response to it. While the BCABA is not organized to lobby, we certainly can provide pertinent information to lawmakers at their request on important issues. Last year we saw an agency encroaching on the independence of the Interior Board. Jim Nagle's articulate letter to the Secretary of Interior is widely credited with providing meaningful assistance to the Interior Board on that issue, and showed that the BCABA can have an impact. There will be many other issues that will need to be addressed as well. For instance, some of the judges who ride the circuit, and presumably government attorneys also, lose money on those trips. That's wrong. No officer of the court should lose money because of excessive travel strictures when they are acting as an officer of the court. On another point, some private sector attorneys would like the boards to get tougher in "encouraging" the parties to consider alternative dispute resolution. In general, the BCABA needs to become a consistent and articulate voice for all issues affecting the boards, either through itself or working through its members.

What are your plans for the BCABA this year?

Our first priority is to increase membership and revenues. We need to publish the Directory, revitalize the Practice and Procedures Committee, and get our specialized training programs up and running. These initiatives build on the work of past presidents. Laura Kennedy established the Practice and Procedures Committee as a standing Committee. The Committee should perform at least three functions: 1) continue its work on alternative dispute resolution; 2) recommend necessary changes in rules and procedures of the boards; and 3) take on new issues the Board of Governors determines should be pursued. We have a real asset in Ross Dembling, whom Judge Rome recruited as Chairman. We also need to drive hard for increased membership and initiation of training programs.

How will you go about increasing membership?

First, by continuing the momentum begun by Judge Rome. She's been the "Sheriff" — she came to town and restored fiscal order. She gave the Secretary the job of maintaining the membership list, vigorously pursued collections and is laying the groundwork for a great year next year. For the first time this year, under her leadership, we are sending out notices to remind our members to send in their annual dues.

Her Annual Program Chairs (Judge Carol Park Conroy and Steve Briggerman) have a terrific Annual Program scheduled later this year (October 14). Devoting the entire program to cost issues is a timely idea and we expect a large turn-out.

We need to approach the major law firms with large government contracts groups and encourage them to have all of the members of their groups join. After all, our annual dues are only \$35 per year — the price of a Washington, D.C. lunch. We also need participation of the Chief Trial Attorneys in the government or the heads of the litigation departments of the agencies that

have them. Their annual dues are only \$30. We are pursuing these two groups with specialized letters that are being funded by a major law firm. We will attempt to recognize appropriately each government contracts group chairman or Chief Trial Attorney if all the members of their group join the BCABA and their organization contributes one article to *The Clause*.

For out-of-town members we need to have one teleconference forum so they can participate and make their views known. We also need to videotape the Annual Program so those who cannot attend in person can still benefit from the high level training it affords. We could apply for CLE credits for them if they certify they viewed the entire program, although we cannot be assured of obtaining it.

What is the training program initiative all about?

Judge Rome has appointed Ty Hughes to initiate several specialized training programs for BCABA members and the general public. The programs would concentrate on board and trial practice, and include Rule 4 discovery, use of computers and other technology before the boards, pre-trial motions, and similar programs. This is an important program, which will lead to a higher level of advocacy before the boards and possibly increase membership as well. I advocate noting in the Directory those who have participated in such training as a sign of their commitment to the boards and expertise. We certainly can apply for CLE credits for these programs as well.

Are we going to see the Directory again?

Yes. The Directory is one of the major advantages of membership and unfortunately was a victim of our financial challenges this past year. Our goal is to publish it later this year, even if we have to beg for funds to do it. It will be back better than ever, hopefully with e-mails addresses, and more addresses of our burgeoning membership.

Are you contemplating any other initiatives?

I would like to see an "Emeritus Program" in which we honor the stalwarts who have been long-time contributors to the bar association. A lot of names come to mind: Judge Paul Williams, Judge Ron Kienlen, Jim Nagle, Pete McDonald, Judge Barclay Van Doren,

Marshall Doke, yourself (Andre Long), and others. It's important to remember that these are all volunteers who have contributed their valuable time and efforts to the BCABA.

I would like to institute a Practice Tips Corner in *The Clause*, in which members would write in and share practice tips that have increased their effectiveness at the boards.

Because 1998 is the Twenty Year Anniversary of the Contract Disputes Act, I would like to commission someone like Jim Nagle, whose scholarship and depth of understanding of the history of the boards is outstanding, to write a definitive article for *The Clause* on the role of the CDA today and how it's working or not working twenty years later.

I am seriously committed to the training programs Ty Hughes has been working on, and which Judge Rome initiated. We have had a little bit of trouble getting them off the ground because of budget constraints. They are an excellent way of providing training for participants in these specialized forums and at the same time providing a source of revenues for the BCABA.

Not everything we have to do is quite so substantive, though. We still do not have a bulk mail permit. To gain fiscal equilibrium, we need to be able to mail information to our members inexpensively. We cannot continue to pay first-class rates to communicate with our membership. That communication is our lifeblood and we need to be able to afford it. There are other small matters such as that one that we need to address.

What about coordinating with other bar associations?

I think it's essential that we continue to do that. Marcia Madsen, the immediate past Chair of the Public Contract Law Section of the ABA, is a former President of the BCABA. We have always jointly sponsored events with the Federal and Court of Federal Claims Bar Associations. We have many members who are influential in those bar associations, and can assist us in leveraging our valuable resources to the benefit of the bar association as a whole. While those efforts are important, we need to continue to develop our own identity and voice, because the charter and mission of the BCABA -- to protect and enhance the BCA's -- is unique.

THE UCC IN GOVERNMENT CONTRACT DISPUTES

By Dan Petersen, Attorney/advisor¹

As federal agencies, especially the military services, move away from government and defense unique vendors to include the nation's total industrial base, federal acquisition practices are loosened to allow more flexibility using current commercial business practices. This situation presents the ominous question of whether the law of merchants will become the standard under which federal commercial purchases are governed. That is, does Congress' lessening of statutory oversight in federal procurements foster greater reliance on the UCC?

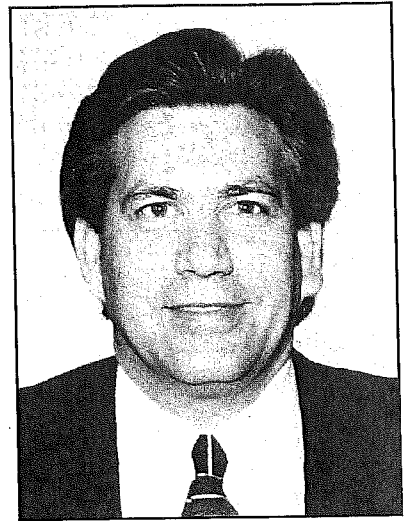
The UCC in Federal Procurement

It is axiomatic that federal procurement law must be consistent throughout the federal jurisdiction. Since the UCC is not uniform and it is not federal law, there is valid concern whether the UCC has any place in federal procurement. For example, in *Thomas Creek Lumber and Log Co. v. U.S.*, No. 94-362C, 94-544C, 94-545C, 36 Fed. Cl. 220 (1996), a contractor argued that Oregon's UCC was applicable in a federal procurement dispute. The Court disagreed. There was no binding authority to direct the court to apply Oregon's version of the UCC, nor was there any indication in the contract that the UCC or the Oregon version should apply. In fact, the court found that, "Federal common law, not state-adopted UCC governs questions of the rights of the United States arising under nationwide federal programs." *Id.* at 247.

However, simply because federal law controls federal procurements, it does not mean the

It is axiomatic that federal procurement law must be consistent throughout the federal jurisdiction. Since the UCC is not uniform and it is not federal law, there is valid concern whether the UCC has any place in federal procurement.

UCC has no place in government contracting. A distinction is drawn between the law of precedence and the art of persuasion. The Court of Appeals for the Federal Circuit has previously recognized "the authority and relevance of the Uniform Commercial Code in the field of government contracts." *Northern Helex Co. v. U.S.*, 455 F.2d 546, 553, 197 Ct.Cl. 118, 130 (1972). Moreover, the Boards of Contract Appeal "have looked to the UCC for guidance in areas unilluminated by the law of government contracts, or where the terms of the contract do not provide a remedy or dispose of an issue." *Golden West Refining Co.*,



Dan Petersen

EBCA Nos. C-9208134 - C9208137, 95-2 BCA ¶ 27,925 at 139,455 (cites omitted). More specifically, the General Accounting Office has held that, in certain cases, the government should follow the UCC "to the maximum extent practicable in the interest of uniformity where not inconsistent with Federal interest, law or court decisions." 51 Comp. Gen. 668, 670 (1972).

In sum, it is proper to use the UCC as an attempt to persuade a Board to resolve an issue in the proponent's favor. It is not proper to use the UCC as precedence in an attempt to dictate the results of a federal procurement problem, or to contravene federal procurement law.

Applying the UCC to Federal Procurement Issues

In government contract cases where the UCC has been cited, the issue often involves application of Article 2. Article 2 sets forth basic legal concepts such as contract formation, warranties, contract terms, contract performance and remedies. It also requires merchants to have a high degree of good faith, to be honest in fact, and observe reasonable standards of fair dealings.

Generally, Article 2 applies only to transactions in goods. For example, in *Ranco Construction, Inc. v. GSA*, GSBCA No. 11923, 94-2 BCA ¶ 26,678, a dispute that involved a federal construction project, the government terminated the contractor for default on the grounds that it repudiated the contract. Before the government terminated the contract, it requested from the contractor reasonable assurance that the contractor would timely complete performance. Since the contractor did not respond, it was defaulted. The Armed Services Board of Contract Appeals found that the "Right to Adequate Assurance of Performance" as a UCC concept. It holds that a buyer may demand adequate assurance of full performance by the seller and may treat the seller's failure to provide it as a repudiation. The ASBCA reasoned however that Article 2 applies only to contracts for the sale of goods and concluded there is very little support to extend the principles to other types of contracts such as construction contracts.

Article 2 does not apply to construction contracts but it may apply to mixed-type contracts. The issue of whether Article 2 applies to a contract for goods and services was heard in *U.S. v. Southern Contracting of Charleston, Inc.*, 862 F.Supp. 107 (D.S.C. 1994). In that case, the Air Force awarded SoCon a contract to replace an existing incinerator, and SoCon subcontracted with Conroy for the incinerator's installation. A dispute ensued where the U.S. with Conroy sued SoCon. A preliminary matter concerned the application of Article 2 of South Carolina's UCC. SoCon claimed Article 2 was not applicable because the transaction involved a mix of goods and services. The court resolved the dispute by employing the "predominant thrust" test. Under this test, the court evaluated the transaction to determine if its predominant thrust is the rendi-

tion of service with goods incidentally involved. The court found it significant that the contract provided for the bulk of the contract price to be paid upon delivery of equipment, and concluded that the transaction was a contract for the sale of goods. The purchase of the incinerator was the predominant thrust of the mixed contract, and Article 2 applied.

Where Article 2 has been applicable, the issue often centers on the measure of damages. The Energy Board of Contract Appeals found Article 2 section 714 applicable to resolve a dispute regarding damage calculation. In *Golden West Refining Company, supra.*, the government unlawfully extended for 30 days a contract for the purchase of crude oil. The Board concluded that the proper measure of damages was the difference in the price for crude paid by the government and the crude's "fair market value." However, the parties could not reach agreement on the proper method to calculate "fair market value." Since there was no federal precedence on the issue and the contract did not provide a remedy, the Board applied the method of calculating fair market value found in Article 2 section 714.

The Armed Services Board of Contract Appeals also used Article 2 to resolve a dispute regarding the calculation of "fair market value." In *International Gunnery Range Services, Inc.*, ASBCA No. 34152, 96-2 BCA ¶ 28,497, the government initially agreed to provide the contractor with 245 salvageable trucks in exchange for gunnery services. The government mistakenly used the trucks for target practice during the contractor's performance, and the contractor sued for monetary damages. The government argued that the proper measure of damages was the value of the trucks before their destruction. Conversely, the contractor alleged it intended to refurbish the trucks and sell them at a profit. It argued that the measure of damages should be the reasonable price of 245 refurbished trucks, less the cost of refurbishing. The Board looked to Article 2 section 715 for guidance. That section requires the claimant to prove the amount of damages with reasonable certainty. Since there was no evidence that the contractor had any prior experience or means to refurbish the trucks, the Board found the government's argument persuasive.

In addition to Article 2, other UCC Articles have been used to influence procurement decisions. In *Nielsen Dillingham Builders, Inc.*, VABCA-5255, 97-2 BCA ¶ 29,005, the Veterans Affairs Board of Contract Appeals relied upon Article 1 section 201 of the UCC. In that case, the Contracting Officer (CO) sent a Final Decision to the contractor's last known address, certified mail, return receipt requested. The contractor relocated before the mailing of the Decision, and another company accepted delivery. Although it eventually received the letter, the contractor alleged it should not be charged with notice until one of its authorized employees had actual possession of the CO's decision. The Board disagreed. It found that according to the Article 1 section 203, a contractor receives notice when a document is duly delivered to the place of business through which the contract was made. Since the government met the test found in Article 1 section 203, the Board resolved the dispute in the government's favor.

Any of the UCC's nine Articles may be applicable in a government contract case. Article 5 section 103 helped the Agricultural Board of Contract Appeals discern the meaning of the phrase "letter of credit." 97-1 BCA ¶ 28,809.

Moreover, the U.S. Claims Court cited Article 7 section 303 to decide whether a commercial carrier may properly complete delivery to an individual or destination different from that set forth on the face of the bill of lading. *National Trailer Convoy, Inc. v. U.S.*, No 311-76, September 26, 1979, (Ct.Cl. 1979). These examples are not unique. In many instances, both government and contractor have used various Articles of the UCC as a guide when faced with a situation where federal law does not control.

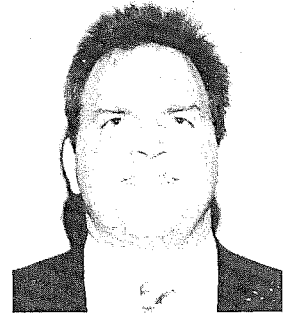
Conclusion

State law looms over federal government contracts. The lessening of federal oversight in commercial-item procurements fosters greater reliance on the Uniform Commercial Code. For Board practitioners, it is no longer sufficient to be an expert solely in the field of federal procurement regulations.

¹ The opinions expressed within this article are those of the author and should not be construed as those of the U.S. Air Force or the Department of Defense.

TREASURER'S REPORT

by James McAleese
McAleese & Associates, P.C.



James McAleese

August 31, 1998

**BCA Bar Association
Statement of Financial Condition
For the Period Ending August 31, 1998**

Beginning Balance from April 30, 1998	\$ 1,183.23	
Fund Income:		
Dues & Annual Meeting checks:	<u>\$ 1,034.43</u>	
Subtotal		\$2,217.66
Fund Disbursements:		
Bank fees for checks	<u>\$ 26.00</u>	
Total Fund Disbursements		(\$26.00)
Ending Cash Balance		<u>\$2,191.66</u>

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION

Application for Membership

Annual Membership Dues: \$35.00 (\$30.00 for Government Employees) [Note: The information you provide in this section will be used for your listing in the BCA Bar Directory. Accordingly, neatness and accuracy count.]

SECTION I

Name: _____

Firm/Organization: _____

Dept./Suite/Apt. Street Address: - _____

City/State/Zip: _____

Work Phone: _____ Fax: _____

email address: _____

SECTION II (THIS SECTION FOR COMPLETION BY NEW MEMBERS ONLY.)

I am applying for associate membership (for non-attorneys only)

I am admitted to the practice of law and am in good standing before the highest court of the:

District of Columbia: _____ State (s) of: _____

Employment: Firm _____ Corp _____ Govt _____ Judge _____ Other _____

SECTION III

Date: _____ Signature: _____

FORWARD THIS APPLICATION WITH A CHECK PAYABLE TO THE BCA BAR ASSOCIATION TO THE TREASURER AT THE FOLLOWING ADDRESS:

Barbara Wixon-Bonfiglio
Williams & Jensen, Suite 300
1155 21st Street, NW
Washington, DC 20036
