
Bimonthly Review

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AVE ATQUE VALE

Dear Friends,

As I proceed toward my 80th year, it is time to pass the baton over to Michael Rustad and Brian Flaherty. They will take over the *Bimonthly Review of Law Books*. They have promised me that they will make the main feature of this publication, the listing of reviews in other publications better, larger, and typographically more desirable. I believe that we are the only publication that lists reviews of law books that encompasses both legal and non legal review publications. I understand I will have emeritus status in the new administration, but my role will be minor as I will be devoting my time to writing, reminiscing, and remedying the ills of the planet. I believe the *Bimonthly Review of Law Books* belongs in every library - nay - in every lawyer's most accessible reading place - wherever that may be - and my hopes are that Rustad and Flaherty will convince you of that with their talent and energy.

- Ed Bander

Interview with Keith Schooley, author of: *Merrill Lynch: The Cost Could Be Fatal*. Enid, Oklahoma: Lakepointe Publishing, 2002. 282 p. ISBN 0-9716103-6-3. \$27.95

Professor Michael Rustad: Keith, you are a native of Oklahoma with an MBA from OSU and experience in the oil industry. Your book describes your struggles with Merrill

Lynch, a highly regarded securities firm. Your book is an odyssey of your struggles with Merrill Lynch management that took you on a journey through nearly every regulatory agency, a blue-ribbon arbitration panel, and finally the Tenth Circuit of the U.S. Court of Appeals. Why did you write this case study of your litigation?

Keith Schooley: Dr. Rustad, when I went to work for

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Coming Issues: An Interview with Sara Dillon, author of *International Trade and Economic Law and the European Union*. Also, more on spies, cyberlaw, and criminal law.

Merrill Lynch, I was thrilled to be part of an organization that I truly admired - one that became hugely successful largely because it had the trust of the American people. I was shocked to see that trust abused, time and again. I did everything I could to find remedies within the company, and then within the legal system. The results were disappointing. By writing the book, I'm appealing to the only court that remains open for me - the court of public opinion. I think it's important that investors, clients, shareholders, and the public know about the activities by employees of the company that has successfully cultivated its public image as the broker of Main Street, not Wall Street.

Also, the book is a multi-faceted story that discusses not only my battles with Merrill Lynch but also the failure of the regulatory system, the inherent unfairness of binding arbitration, and a look at how the "powerful and mighty" play the game inside and outside of a court of law. My story, I believe, will resonate with your readers, particularly in light of the recent scandals involving Enron, Arthur Andersen, and, of course, Merrill Lynch. While many may believe that Merrill Lynch's recent settlement with New York Attorney General Eliot Spitzer was a quick fix, my book shows that the problems run deeper - that even ten years ago the corporate culture tolerated dishonesty on the part of its employees.

MR: Tell us about the audience for your book. Is this a book of interest to acquisition law librarians? What other law-related audiences will be interested in your case study?

KS: The primary audience for my book will be investors and anyone employed in the area of securities, insurance, financial services, employment law, or human resources; as well as anyone with an association with Merrill Lynch. My book is a behind-the-scenes look at what goes on behind the facade.

I think the book will definitely be of interest to

acquisition law librarians. In addition to issues involving employment law, my book covers in significant detail five other important legal issues. They are: 1) binding arbitration, 2) regulatory investigations, 3) corporate legal strategies which may suggest that the ends justify the means, 4) internal investigations versus investigations by outside counsel, and 5) the legal and fiduciary role of the board of directors as the ultimate guardians of shareholder value.

For the legal community, the most important role of this book may be as a case study of what is wrong with the arbitration system. As Stephen Jones said in the foreword, my experiences "set forth dramatically everything that is wrong, unwise, and indeed unhealthy and unfair, about the arbitration proceedings." Those are strong words, but I think nobody who reads the book will consider Stephen Jones' comments to be an exaggeration. I hope that legal scholars everywhere will take notice.

MR: Does your book shed light on the ethics of other Wall Street securities firms?

KS: In an indirect fashion, yes. Merrill Lynch has long been considered by many to have the finest legal and compliance system on Wall Street. My book shows a pattern of problems at the firm ranging from the brokers to senior management, and, arguably, the board of directors. Even the experienced NASD investigator in charge of the Merrill Lynch matter told me that his eyes had been opened regarding how large securities firms really work and he was no longer sure his assumption that they were pretty good at policing themselves was correct. So, I would say that if Merrill Lynch has problems, it stands to reason that the rest of Wall Street likely has problems, too.

MR: When you say that, arguably, there are problems with the board of directors, could you please elaborate.

KS: Yes. When I sent my 31-page letter to the board of

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directors, I made reference to the fact that the first internal investigation was flawed, either intentionally or because of incompetence. At that point, I had the expectation that the directors, given their fiduciary responsibilities to the shareholders, would surely not allow the same senior management to do a second internal investigation. Common sense tells me that if you have the same people redo the investigation, they're not going to conclude there was a cover-up in the first one. So I felt the board had the responsibility, at that point, to retain outside independent counsel for the second investigation. The directors chose not to do that.

MR: Tell our readers a little about why your case was tried as an NYSE Arbitration as opposed to a case in the courts. What is the logic and limits of arbitration for this kind of dispute?

KS: My case was a wrongful termination case. The employment agreement I executed with Merrill Lynch did not require arbitration of any disputes I might have with the firm. However, the U-4 registration form filed with the securities regulators, which I had to sign, had some language in small print that effectively required arbitration of any dispute. My counsel filed the action in state court, but it was soon removed to federal court. Merrill Lynch filed a motion to compel arbitration, against which we unsuccessfully made a number of legal arguments. As a result, I had no choice but to arbitrate under the auspices of either the NYSE or NASD, both self-regulatory organizations controlled by the securities firms themselves.

The logic for arbitration is that it supposedly is a quicker, less expensive, and more efficient process than the courts, largely because the arbitrators are familiar with the securities industry. The limits, particularly in my NYSE case, were significant. The three arbitrators - who are paid a fee for their services - were selected by the director of arbitration of the NYSE. Each side has the right to challenge an arbitrator for cause as well as exercise one preemptory strike. Once the panel was selected, however, I felt there to be a serious, inherent conflict of interest. The arbitrators were charged with deciding an extraordinarily sensitive matter, particularly in respect to my allegations of a senior management cover-up. This could reach not only the upper echelon of senior management but also the boardroom of Merrill Lynch. The arbitrators were also very much aware of the preemptory challenge that could be wielded against them by Merrill Lynch in any future case involving the firm, but knew they would likely never see me again. Consequently, I felt the very system meant that the arbitrators lacked the objectivity of a jury of one's peers.

MR: What role did regulators play in your case?

KS: A disappointing one. In my book, I cover in great detail the shortcomings of the different regulators. The NASD failed to interview critical parties, and allowed wrongdoing by certain individuals to go unpunished. The SEC and NYSE largely relied on Merrill Lynch's numerous self-serving and inaccurate responses to my allegations. Of course, in my arbitration, Merrill Lynch, in an effort to strengthen its case, downplayed the seriousness of the multitude of wrongdoings I had brought to light, as supported by the lack of any significant regulatory action. Frankly, it is now easy for me to see why Merrill Lynch and other securities firms make it a regular practice to hire enforcement personnel away from the various regulators. The dangling carrot of more lucrative pay in the private sector can be enticing.

MR: Your book is in the form of a personal narrative. Why did you choose that format?

KS: I thought a personal narrative would be the most effective way to tell the story - a way that all readers could relate to. My story has not only legal, business, and ethical dimensions but also a human one. I share in detail the level of hostility and tension I encountered. I also share the concern I had for my family as things unraveled so disastrously. I explain my motives behind my actions, including coming to the realization that I did not want to be part of an organization that I saw as infected with hypocrisy, right up to the highest levels. I wanted my book to be one that could be understood and appreciated not only by legal and academic professionals and sophisticated Wall Street investors, but also by other readers who can relate to simple issues such as right versus wrong, fairness versus unfairness, and decency versus indecency. I've been told by many readers that the narrative form makes for interesting reading, as the story unfolds the way it would in a novel - and the way it did in real life.

MR: Tell us a little about what led you to write this book?

KS: I wrote my book because I have a story that I believe the public needs to hear. As I see it, it is a story of how a large corporation accepted widespread wrongdoing and then how it played a game in which the primary objective was to win, regardless of the merits. The more I learned about Merrill Lynch's modus operandi, the more resolved I became to expose it.

Having seen pervasive problems in a company that people trust with their money, I spent ten years going through all the normal available channels - within the company, before regulators, and in the courts. This was David v. Goliath, and Goliath had the brute strength to prevail.

But I'm an optimist. I am hopeful that the truth will prevail, and that an effective verdict will come from the court of public opinion.

MR: What relevance does your book have for employment law and securities law?

KS: A great deal of relevance, I hope. I tried to blow the whistle on a corporate climate that violated the trust the public had invested in a huge corporation. As a result, I lost my job. Also, the regulators, for the most part, and the judicial system sided with the company. Something is wrong with that picture.

MR: What is your take on recent revelations concerning brokers?

KS: I'm certainly not surprised. The corporate culture ten years ago was to downplay the interests of clients, in favor of the company's financial bottom line and maximizing remuneration of individual employees. That's consistent with all of the current and recent allegations.

I was disappointed with the outcome of Attorney General Spitzer's case against Merrill Lynch concerning the conflicts with investment analysts' research opinions. If Spitzer had the case he claimed to have, I think he should have gone much further since so many Merrill Lynch investors apparently suffered significant losses as a result of less-than-honest research reports. Instead, Spitzer allowed the firm to do what it is so good at doing - that is, to buy its way out of a problem. A firm with \$38 billion in revenue paying a fine of \$100 million would be the same as an individual with annual income of \$100,000 paying a fine of \$263 to avoid testifying in public hearings and possible criminal indictments. While some beneficial changes will be made as a result of the settlement, Merrill Lynch, of course, did not have to admit to any wrongdoing. I'm confident that Merrill Lynch is celebrating behind closed doors, as they have once again "prevailed."

MR: What reforms would you recommend to prevent future wrongdoing in brokerage houses?

KS: I would abolish the self-regulatory system, that is, the NYSE, NASD, and others, because of the inherent conflicts of interest, and expend those funds to strengthen the SEC. I also think, in an effort to restore integrity to the system, there should be a prohibition of SEC enforcement personnel going to work for securities firms for a reasonable length of time after their service with the SEC.

Also, I recommend making binding arbitration available only if it is agreed to by both parties to a dispute, on a dispute-by-dispute basis. Unknown to many, and in most cases, whenever one becomes either an employee or client of a securities firm, the requirement of binding arbitration of disputes is part of the contractual agreements. Furthermore, arbitration essentially takes place behind closed doors and makes it more difficult for the public to be aware of brokerage firm wrongdoing. I think open hearings in a court of law would allow investors to obtain better information about

the markets and serve as an incentive to Wall Street firms to clean up their act.

MR: Do you have any final thoughts on your case and its social impact?

KS: We've heard from a lot of commentators that investors today - particularly the small investors who are trying to save funds for college and retirement - are feeling that they can no longer trust the advice of professionals. They don't know where to turn. This damages investor confidence, a key factor in the nation's economic health.

I hope that my case will help to pinpoint some of the problems and to generate solutions. I also hope that actions will be taken to better protect the interests of whistle-blowers and to create a climate in which the main incentive of Wall Street firms and financial advisors is to give the best possible advice to their clients.

This has been a difficult chapter in my life. If making it public will help to spare others similar fates and reform the system, it will have all been worthwhile.

THE ROSENBERG, WEN HO LEE and HANSEN SPY CASES

Ethel: The Fictional Autobiography. Tema Nason. Syracuse, New York: Syracuse University Press edition 2002. 306 p. ISBN 0-8156-0745-8. \$24.95 paper

Reviewed by Thomas Koenig, Professor, Northeastern University

Syracuse University Press has picked an excellent time to reissue Tema Nason's 1990 fictional autobiography of Ethel Rosenberg, the only woman ever electrocuted by the federal government. The highly publicized 1951 trial of the Rosenbergs for conspiracy to commit espionage has many interesting parallels to the upcoming trial of Zacarias Moussaoui who stands accused of conspiring with the September 11th hijackers. As Supreme Court Justice Mahlon Pitney wrote in the 1915 case of *United States v. Rabinowich*, conspiracy "is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." Because of these factors, convictions in politically tainted trials can be very controversial. The tactics of the 1927 executions of Boston anarchists Nicola Sacco and Bartolomeo Vanzetti, for example, is still being debated.

Balancing the defendants' rights with the need for national security is particularly difficult when the accused may be agents of a hostile foreign power. Prosecutors are hampered by their desire to avoid exposing secret sources of information to the enemy. The government never introduced their strongest evidence against the Rosenbergs, the intercepted "Venona" documents, in order to conceal the fact that