

Good morning, my name is Susan Kern, and many of you know me as a former deputy attorney general in Hawaii. It is wonderful to see all of your familiar faces, and I look forward to getting to know those of you that I haven't yet had the pleasure of meeting.

Kevan Worley asked me to speak on a topic entitled "On the Barricades in the Courtroom." Of course I asked my friend James Gashel what he meant by that, and Jim sent me right to the NFB website to find out. While listening to Dr. Jernigan, I realized that what he was talking about – the insidious discrimination that underlies the obstacles that blind persons experience – is really at the heart of the reason that there are so many legal impediments to the implementation of the Randolph-Sheppard Act, both at the state and at the federal level.

As I am sure you all know, but it bears repeating, Dr. Jernigan concluded his 1971 address to this Convention as follows:

Since 1969 we have talked a great deal about joining each other on the barricades. If there was ever a time, that time is now. What we in the Federation do during the next decade may well determine the fate of the blind for a hundred years to come. To win through to success will require all that we have in the way of purpose, dedication, loyalty, good sense, and guts. Above all, we need front-line soldiers, who are willing to make sacrifices and work for the cause. Therefore, I ask you again today (as I did last year and the year before): Will you join me on the barricades?

The 1969 address noted:

we have come to recognize these sordid myths and misconceptions for the lies which they are; that we have organized; that we have *mobilized* ourselves into a powerful movement to change the total landscape of the country of the blind; that we have not only won friends and influenced people in our cause but have won battles and influenced the course of public policy.

And concluded with: Will you join me on the barricades?

Today the sordid myths and misconceptions remain. While it is evident that the blatant condescension that Dr. Jernigan exposed in his 1971 speech here in Texas is mostly part of the past, everyone of you in this room knows that there are individuals who make decisions concerning the placement of blind-operated businesses that still see the blind as incapable.

Well, I know that the blind are just as capable of any endeavor as anyone else. As Federationists are wont to say, except for driving a car, but we are working on changing that!

Nevertheless, because of the attitude of some employees of some SLAs, and some hearing officers, arbitration panel members, and state and federal judges, there are barricades in the courtroom that prevent the enforcement of the blind vending laws, both state and federal. I recall a hearing I had before a federal judge where he asked me whether I was really saying that the blind were capable of – I think it was managing a large and complicated enterprise. I was speechless. Then, realizing what he had just said, in front of a room full of successful blind operators of large and complicated enterprises, the judge recovered somewhat and said something along the lines of, well, of course there are many blind individuals who are very accomplished, why I personally know and have a lot of respect for a blind federal judge. I think it's important to remember that the blind federal judge probably would not have secured his position without the organized blind movement.

So, back to barricades in (and to) the courtroom. Those consist of some very unfavorable decisions to blind vendors – those barricades were caused by the attitudes of decision makers that blind people are incapable, or even worse, that the law granting them a priority should not be enforced because it offends their perception of what is equitable.

Now Hawaii's state law grants a priority to the blind to operate vending facilities in state buildings. It's a pretty strong law. Yet, at one time the Director of Health decided that she did not want a blind vending facility in her building, because she wanted the space for a conference room. The vending facility served fresh sandwiches, salads, and the like, was large,

with several tables, and lots of natural light – a very pleasant space. The Director of Health said it was her building and she wanted the space for a conference room. Gee, I thought it was the taxpayers' building!

Thankfully Dave Eveland was the Administrator of the Services for the Blind Branch, and Joe Cordova was, and still is, the administrator of the Division of Vocational Rehabilitation and Services for the Blind. They understood that the state law leaves it up to the SLA to decide where to establish a vending facility. It took quite a bit of convincing, as well as political pressure, for the Director of Health to understand that she did not have the right to put the blind vendor out of a job. Thankfully she was convinced. If she had not been, the blind vendor would have no recourse but to file a grievance.

Unfortunately it is all too often the state of affairs that once a case gets before before a state hearings officer, or an arbitration panel, that the decision-makers have that same attitude as the Director of Health.

Also some SLA staff hold a belief that because they see themselves as more capable than the licensed blind vendors, that they should not earn less than those vendors who have many years of experience as blind vendors and manage very complex facilities. What these SLA staff fail to understand is that they have chosen to accept employment as a public servant, and their role is to serve. If they want to earn a large income, then they have chosen the wrong venue. Rather than feeling resentful, the SLA staff should take pride in the vendor who gets ahead financially and pride in their role in making a successful vending program.

In the courtroom, there is a PHYSICAL barricade that separates the judge, bailiff, clerks, and parties and their attorneys from spectators and witnesses.

In the courtroom, there are also very subtle metaphorical barricades that inhibit the enforcement of the law. These come from beliefs, which are often unconsciously held, that blind people are incapable.

A 1984 article published in the Army Lawyer, entitled: The Randolph-Sheppard Act: A Trap for the Unwary Judge Advocate, exemplifies the attitudinal barricade. I quote from that article:

The original Randolph-Sheppard Act began as a modest, uncomplicated statute which was designed to promote a worthwhile cause and which made imminent sense in the context of the times. The forces of bureaucracy, attorney scrutiny, and the march of time have transformed the once simple Act into a cobweb of statutory and regulatory requirements.

The writer also claims that the 100 federal employee provision includes only civilian employees. Since when is a member of the military not an employee? Do they not get paid for services rendered? The statute does not contain the word civilian in front of the word employee, yet that is how the military believes the statute should be interpreted.

With respect to vending machine income, the writer's advice is for the military to maximize its earnings by keeping its annual income at \$3000 unless it can generate income greater than \$6000. If normal earnings would fall between \$3000 and \$6000, it is in the agency's best interest to reduce the price of merchandise (thus providing a collateral benefit to its employees) and limit income to \$3000 (thus maximizing profit).

And, oh, by the way, circumventing the law!

And this is only a very small example of a barricade erected. The writer was probably completely unconscious of the prejudice and small minded thinking he was exhibiting.

Given the barricades erected by so many government decision makers, it is incumbent upon the merchants to keep on top of what their SLAs are doing. Every state has an open records law. You must use it! File a request to access records of site surveys, and written communications with federal, state, and municipal agencies. The R-S Act also requires such information be provided to you. Of course, if it is not provided, your arbitration remedy will take two to three years. You don't have to wait that

long – you can seek a resolution through your state’s open records agency or file a lawsuit under your state’s open records laws to get the information. Go to your own state government’s website or sites such as the website of the Reporter’s Committee for Freedom of the Press, where each state’s open records laws are set out.

Another way to stay on top of what your SLA is doing is for your State Committee of Blind Vendors to take the lead in placing matters on the agenda. In other words, it is your committee, and you should control the agenda. The SLA should contribute agenda items as a means to ”ensure the continuing and active participation of the State Committee of Blind Vendors in matters affecting policy and program development and administration,” as required by the regulation, 34 C.F.R. § 395.3(a)(4). That is the SLA’s obligation, to keep you informed!

Besides the need for SLAs to work to ensure the growth of the blind vending program, I see four main issues as barricades TO the courtroom, in other words, as legal obstacles that prevent the growth of the Randolph-Sheppard program. The four are: damages and other remedies, bid protests filed by disappointed non-blind enterprises, insurmountable hurdles to the blind obtaining preliminary injunctions, and delay (and even failure) by the Department of Education to convene arbitration panels.

Before we go into each of these areas, I want to take a minute to summarize the legislative history of the 1974 amendments with respect to those four main obstructions: The committee report makes it clear that the legislation was intended to provide for “adequate administrative and judicial remedies” that it was Congress’s belief that the bill “does create all the important safeguards,” that the arbitration procedures would resolve the issue of of lack of “machinery for prompt and satisfactory disposition of blind licensee and state agency complaints,” and that “if a Federal agency is found in violation of the Act or regulation, its head shall cause such violation to be terminated, and shall take such other action as necessary to carry out the panel’s decision.”

As to the issue of damages, to be paid to blind vendors, we are all familiar with the Premo v. Martin case, where the Blind vendor awarded damages by the arbitration panel, and Ninth Circuit ruling that damages and attorneys fees are permissible in Randolph-Sheppard cases. Nonetheless, the same Ninth Circuit, in Sauer v. U.S. Dept. of Educ., 668 F.3d 644, 652 (9th Cir. 2012), recently ruled that:

the plain language of the statute weighs against interpreting the Act as imposing a duty on state licensing agencies to sue federal agencies, and holding them liable for damages if they fail to do so.

Sauer v. U.S. Dept. of Educ., 668 F.3d 644, 652 (9th Cir. 2012)

As I read these two cases, Premo is still good law. However, the agency's failure to sue to enforce the damage award did not obligate the agency to pay the damages in Sauer. This could have the effect of weakening SLA enforcement of the blind vending laws at the federal level. Nevertheless, It is crucial that blind vendors establish a paper trail (maybe the better term would be "electronic trail") to ensure that agencies move forward whenever there are threats to the blind vendor's livelihood. I know that no one wants to be perceived as being difficult, but there is nothing wrong with being persistent when it concerns your right to earn a living on government property.

A safeguard that is missing is that of a preliminary injunction. As I will discuss, incumbent nonblind enterprises have an immediate remedy, they can file a protest with the Government Accountability Office, which prevents the award to a blind vendor. Yet, incumbent blind enterprises are denied that GAO protest right. An incumbent blind enterprise was recently denied a preliminary injunction by a Colorado court to prevent a cafeteria contract from being awarded to a non-blind enterprise, stating that "there must be a virtual certainty of irreparable harm" and that economic losses do not constitute irreparable harm. The court stated that "a contrary finding would result in a windfall to any incumbent R-SA contractor who bids unsuccessfully on a contract's renewal." What about the windfall to the non-blind incumbent? There is a case in Hawaii where the SLA won the

bid to operate a military dining facility, yet the incumbent non-blind enterprise is still operating that facility, having filed a series of GAO protests. What about the windfall to that incumbent non-blind enterprise? The blind vendor is scheduled to start August 1, but only because the SLA has vigorously pursued the opportunity.

Still, the best course would appear to be to make sure that bids are very carefully crafted to stay within the competitive range.

The military has stated that it wants to “reduce the costs associated with contracting with R-S Act vendors.” I find that kind of a statement to be dismissive of the priority, and contrary to the language in the regulations imposing the priority that the priority applies when “the operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees.”

If there is language in the solicitation establishing a competitive range based on lowest price, I would recommend filing both an arbitration and a protest with the Government Accountability Office. While protests filed with the GAO are routinely dismissed, an arbitration panel is likely to rule that the protest should have been filed and this would likely be upheld on appeal.

So, the only avenue remaining is the federal arbitration path. All would agree that the right to arbitration is an improvement over the state of affairs that existed prior to R-S Act’s 1974 amendments, to get through the process involves, at a minimum, a good share of tenacity, that very same tenacity that Congress mentioned in 1974 as forming the basis for the success of the blind vending program.

Personally, one of my pet peeves the length of time it takes the Department of Education to convene an arbitration panel. I have seen the Department of Education ignore repeated requests to appoint a panel member when the federal agency refused to do so. I have seen the Department of Education, when panel members did not agree on a third panel member, appoint a panel member who refused to set a hearing date, saying he was very good at mediating cases! I found it to be reprehensible that a panel

chair would refuse to convene a panel, when the law plainly requires convening of a panel.

Another issue that I would like to see this group take up is the selection of the third member of the panel. This panel member is generally based on a list provided by the Department of Education.

That list is very outdated. Individuals who are neutral should be on the list. I think to be neutral in this context an individual would need to have an understanding that blind people are capable of all that they are capable of. I don't see how a panel chair could be neutral without that understanding. I would urge you to think about finding a way to address this issue with the Department of Education.

Getting back to your active participation role, and your duty to be articulate and well informed in your dealings with the SLA, there remains the issue of the failure of many SLAs to work to ensure the growth of the blind vending program.

You are all aware of the Enzi Committee Report's statement that "Although the program is specifically directed at a population with very high unemployment numbers, only a relative handful are reaping the benefits and receiving the support this program provides." What the report fails to take into account is that some state agencies are not taking the initiative to contact federal, state and municipal authorities to assert the priority. This is a task, that in my opinion and experience, takes a great deal of time and effort on the part of the SLA, the attorney assigned to the SLA, and the blind vendors. Where a SLA does an exemplary job to grow the program, consider an award – such as the Jacob Bolotin award.

Meanwhile, The chair of the elected committee has to devote many, many hours to countless meetings, and require accountability from the SLA. It can be a thankless task, and it is an unpaid task. We all know how easy it is criticize. Nevertheless, you should insist on more specific site surveys, and obtain a copy of site surveys. Those past, and future, elected Committee chairs deserve our respect and gratitude.

Every successful and every blind vendor on the road to financial excellence, acting in the best interests of all blind vendors, must continually urge that the SLA recruit more individuals to the vending program, and establish more sites. This group could work to create standards for successful vending facilities, and urge the adoption of these standards on a state by state basis.

So I urge you, in the words of Dr. Jernigan, to man AND WOMAN the barricades. Push your state agencies to obtain more locations, to provide quality mentoring and training programs, to support the merchants. The issues that I have identified will persist. They may never go away. That does not mean that you cannot create more opportunities and improve the lives of blind merchants. You must be the catalyst.

Aloha and mahalo. It is a honor to be asked to speak to this group.