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SEPTEMBER 2018

S MAGAZINE

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THE BIG 4 ARE MOVING IN

RISKY PRACTICE

FAMILY LAWYERS FACE MORE VIOLENCE

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and Basha Rubin
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and clients.

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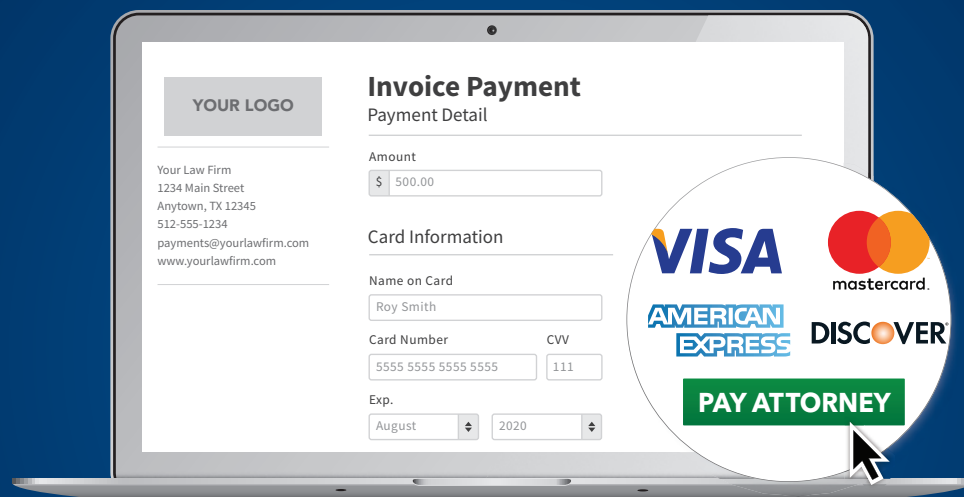
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ABA JOURNAL 321 N. Clark St., Chicago, IL 60654, 312-988-6018, 800-285-2221
FAX: 312-988-6014 EMAIL: ABAJournal@americanbar.org
ABAJOURNAL.COM

ABA Journal September 2018 Volume 104, Number 9 (ISSN 0747-0088) ©2018. ABA Journal is published monthly by the American Bar Association. Editorial, advertising, subscription and circulation offices: 321 North Clark Street, Chicago, IL 60654-7598. Periodicals postage paid at Chicago, Ill., and at additional mailing offices. PUBLICATIONS MAIL AGREEMENT NO. 40032229. RETURN UNDELIVERABLE CANADIAN ADDRESSES TO ABAJOURNAL, PO BOX 875, STN A, WINDSOR ON N9A 6P2. The price of an annual subscription to ABA members (\$5.00) is included in their dues. The price of an annual subscription to members of the Law Student Division of the ABA (\$2.75) is included in their dues. Additional annual subscriptions to members, \$5.50. Domestic annual subscriptions to others: Individual—\$75; Institutional—\$120. International annual subscriptions to others: Individual—\$99; Institutional—\$144. Single copy price, \$7. Write to Service Center, 321 North Clark Street, Chicago, IL 60654. Changes of address must reach the American Bar Association's Member Records Department office 10 weeks in advance of the next issue date. Please include both your old and new addresses. POSTMASTER: Send address changes for the ABA Journal directly to the American Bar Association's Member Records Department, 321 North Clark Street, Chicago, IL 60654.



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A QUIET PLACE

I'm deeply grateful to Philip N. Meyer for "Sounds of Silence," July, page 22, reminding us of President Barack Obama's 2015 eulogy for the Rev. Clementa Pinckney. Obama's speech, including his eloquent use of silence, moved me to tears. Strategic silence definitely has a role in litigation. At a deposition years ago, one of my transit agency's drivers was asked how much time had elapsed between when he first noticed a stalled car in front of his bus and when he skidded into it. He responded "about a minute"—which, if taken literally, meant he'd had plenty of time to avoid the collision. On redirect, his lawyer pulled out a watch and sat silently as 60 seconds slowly ticked by. The driver

Letters to the Editor

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then explained that "a minute" was just a figure of speech. The elapsed time had in fact been only a few seconds.

*Rolf G. Asphaug
Denver*

COURTS BATTLE OPIOID OVERLOAD

With regard to "Opioids, Justice & Mercy," June, page 36, since the biggest contributor to the opioid crisis is Big Pharma, the solution is simple: Have the FDA examine the number of legitimate prescriptions for opioids written in, say, 2017, and limit production to the number of

pills doled out. Anything over that and the producing drug company(ies) get hit with enormous fines.

*James C. Bliwas
Toronto, Canada*

CAREFUL WHEN TESTIFYING

In "Rethinking Woodshedding," June, page 22, I thought Edna Selan Epstein's article was thoughtful and entertaining—but fatally flawed.

The entire premise of the writer's advice to focus and simplify the deposition preparation process was based upon the deposition of her Fortune 500 CEO

client. I am sure her client was a highly intelligent, educated, sophisticated and able witness.

Over the last 40 years, I have represented hundreds of witnesses in connection with their depositions. The overwhelming majority of people who I represented were not Fortune 500 CEOs.

The writer does provide a lot of good, basic advice. Ms. Epstein is right that keeping the deposition preparation process focused and simple is important.

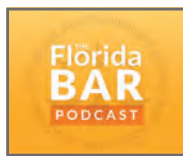
Equally important is first knowing and understanding who the person is and then tailoring the process around that individual's attributes and deficiencies as a witness.

*Daniel D. Swanson
Southfield, Michigan*



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ABAJOURNAL

Working Together to Succeed

ABA pursues team effort to develop new models and enhance existing programs

Serving as president of the American Bar Association is an honor and a privilege. Most of all, it provides an opportunity to deliver a clear, concise and consistent message about the value and importance of the ABA to the legal community and beyond.

As a member since law school, I have witnessed firsthand the positive impact the ABA has on the lives of so many in the legal profession and our justice system. The ABA is really a family, a community of members with shared values. We work together because we recognize the vital role the ABA plays to improve the profession and promote the rule of law. As president, I want to deliver the message that the ABA, as the voice of the legal profession, is essential to all lawyers.

My year as president will be more of a relay than a sprint, building on all the progress and good works of my predecessors.

Like all bar associations today, the ABA is faced with evolving membership needs and technological changes in how we communicate and connect with members. We are responding to those challenges aggressively. We are also committed to working together with state, local and other bar associations to meet these challenges.

Our focus moving forward will be to increase the value of membership in the ABA and offer our members significantly enhanced benefits. As the legal profession evolves, we want to make the ABA an essential partner, working alongside you to help build your practice.

I am guessing you did not know the ABA produces nearly 5,000 articles, blogs and notes each year relating to the concerns of practicing lawyers. We want to make sure you have an opportunity to access more of what you need when you need it.

To accomplish this, we are expanding our library of free CLEs and will provide material to each member based on their specific interests and needs. We are redesigning our website and mobile platform and making it faster and easier for you to get ABA products and register for meetings online. The goal is to improve the



experience of each member.

We are expanding ABA Blueprint for the vast majority of lawyers who practice in solo and small firms. I practice in a small firm and I can tell you, Blueprint is worth exploring. You'll be glad you did.

We also are addressing your bottom line. To eliminate the confusing mix of price points for an ABA membership, we have dramatically streamlined our dues structure.

In addition to our new and improved benefits, we will continue to advance the ABA's leadership in many areas, including:

- Addressing the well-being of lawyers and law students. To be a good lawyer, you must first be a healthy lawyer.
- Making practical changes to legal education and the bar admission process.
- Continuing to move the needle on ensuring access to justice. Far too

many people are not afforded the legal assistance they need, and the consequences can be dire.

- Promoting a strong, independent and impartial judiciary and a fair justice system.
- Furthering pro bono service by lawyers. During Pro Bono Week this October, we are encouraging pro bono efforts that focus on disaster relief legal services.
- Building on the ABA's legacy of advancing diversity within its membership and throughout the legal profession.

This is a "we" undertaking. ABA members need to deliver the message that ABA membership is important and valuable. As famed industrialist Henry Ford said, "Coming together is a beginning; staying together is progress and working together is success."

As I follow outgoing President Hilarie Bass into office, the big tent of the ABA is on full display. What other organization would have a lawyer from a small firm in Butte, Montana, follow a Miami-based co-president of one of the world's largest firms as its leader?

We thank Hilarie for her tireless efforts to improve the ABA and the legal profession. I have big shoes to fill, but with the help of all our wonderful members, I am positive we can all move forward. The power of "we" can be a formidable force. ■



Follow President Carlson on Twitter @ABAPresident or email abapresident@americanbar.org.

Opening Statements

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NEIGHBORHOOD WATCH

FIRMS PROVIDE PRO BONO ASSISTANCE TO KANSAS CITY COMMUNITIES

IN 2011, there were five vacant lots at the corner of Wabash Avenue and East 29th Street in Kansas City, Missouri, that residents considered an eyesore. The intersection in the city's Key Coalition neighborhood had faded in the last few decades as residents with money left. But thanks to Dre Taylor, a local social entrepreneur, those lots were transformed into a thriving urban farm by 2016.

Taylor built an aquaponics system, where fish and plants support each other, with the goal to provide food to the neighborhood and jobs for the boys Taylor mentors through his nonprofit, Males to Men.

By summer 2016, a lot of hard work had made Nile Valley Aquaponics a reality and a neighborhood gathering place. Then Taylor ran into a major problem: a dispute with the owner of the land. Negotiations went poorly, and soon there were locks on the gates. As a leader of a small nonprofit, Taylor couldn't afford to fight it in court.

Luckily, he didn't have to. Through Legal Aid of Western Missouri's Adopt-a-Neighborhood program, the large law firm Polsinelli agreed to represent Key Coalition as a kind of general counsel to

Dre Taylor created Nile Valley Aquaponics, where fish and plants support each other, with the goal to provide food to the neighborhood and jobs for the boys he mentors through his nonprofit, Males to Men.

Opening Statements

Dre Taylor, center, explains aquaponics to people on a 2016 KC Healthy Kids tour at East 29th Street and Wabash Avenue in Kansas City.



"AS LEGAL AID, WE DON'T HAVE ANYONE HERE THAT SPECIALIZES IN PATENT LAW. SO THE FACT THAT POLSINELLI WAS ABLE TO STEP IN AND HELP HIM WITH THAT IS REALLY COOL."

—KAYLA HOGAN

the neighborhood. Two weeks after its attorneys stepped in, the locks were off. The firm later helped Taylor apply for a patent on an innovation in his aquaponics system.

Kayla Hogan, a paralegal and project director at Legal Aid of Western Missouri, says, "As Legal Aid, we don't have anyone here that specializes in patent law. So the fact that Polsinelli was able to step in and help him with that is really cool."

Adopt-a-Neighborhood was conceived as a way to use pro bono work to support economic development in Kansas City's eastside neighborhoods, where homes sit vacant and most residents qualify for Legal Aid's help. Rather than recruiting lawyers piecemeal, Hogan says her group thought it might work better for neighborhoods to develop general counsel-style relationships with their attorneys. That way they could develop long-term relationships.

It's worked out well so far. This

spring, there were seven law firms doing whatever legal work their neighborhood associations or nonprofits needed. Much of this is taking possession of abandoned, blighted homes so they can be rehabilitated and new residents can move in, Hogan says. Brendan McPherson of Polsinelli, who helped represent Taylor, says legal representation is vital in those cases because the titles are generally not clear and banks won't finance the renovation until they are.

"The only way to make it work is to have a law firm step in and do quite a bit of legal work," says McPherson, a shareholder in real estate and

business litigation at Polsinelli.

Other work includes landlord-tenant issues, tax and probate matters for individuals, a public safety program, and setting up business structures and bylaws for neighborhood groups. Hogan says law firms like that the program creates opportunities for transactional attorneys as well as litigators.

And, of course, it's been helpful for Legal Aid of Western Missouri, which isn't able to meet all the needs in its area.

"We're really seeing the private firms, frankly, coming to us and asking to be participants in the program," Hogan says. "And it's been really, really great for Legal Aid because ... to be able to hand off some of those cases has allowed us to take on more."

—Lorelei Laird

"THE ONLY WAY TO MAKE IT WORK IS TO HAVE A LAW FIRM STEP IN AND DO QUITE A BIT OF LEGAL WORK."

—BRENDAN McPHERSON



Yes, He Does

DIVORCE LAWYER'S SIDE JOB IS OFFICIATING AT WEDDINGS

A GROUP OF PEOPLE—bride, groom, wedding party and officiant—stand atop a small, grassy mound tucked between a cow pasture, a county highway and the farmhouse where Amanda, the bride, grew up.

Today, this patch of Wisconsin country doubles as a wedding chapel, with about 50 friends and family seated on hay bales arranged in neat rows. Only 59-year-old Andrew Schmidt, the officiant, does not wear camouflage for the occasion, opting for his usual judgelike garb—charcoal suit, Oxford shirt and a purple paisley tie.

To Amanda and the groom, Joe, he's a guy they found on the internet to perform their wedding.

They have no idea the officiant standing with them also is the owner of the oldest law firm in Marathon County, Wisconsin, Schmidt & Schmidt, which he inherited from his father, Peter, who inherited it from his father, Karl. He's spent a decent chunk of his decades-long career practicing family law with an emphasis on divorces, especially those the court deems "high contest."

This wedding, which he calls "not the cheesiest I've done, believe it or not," represents about the 810th marriage he's legally started as opposed to help end. Schmidt swears he does this evenings-and-weekends gig, which he started more than 10 years ago, mostly as a way to pay for his son's education.

But it's clear something more brings him and Suzy, his college sweetheart and wife of 36 years, to wedding after wedding, racing from one to the next in their red F-150.

He knows it's a cliché, and it's cheesy, but he swears



this question tells him whether a couple is made to last: Are you best friends? If there's a pause, or a hedge, or anything but an immediate affirmative "of course," they might be back to see him again.

Marriage is hard, Schmidt says, and you have to be best friends to survive. Officiating weddings, it's not hard to be infected with optimism and idealism while seeing other people at their happiest. "They're so deeply in love," he says of the camo couple, just before the event begins. "That's the neat thing about what we're doing here."

For too long Schmidt only saw the other side: two people who once stood at an altar together and now could barely share the same room. His frustration deepened when he watched lawyers prod their clients to hold out for more and pettiness escalated. "I'd wake up at 2 in the morning thinking about a client's case, and I couldn't get back to sleep," he says.

He realized his law license works both ways—license to start marriages as well as end them—and decided his time would be better spent with the former.

He's made enough from his side gig to carry his son Alex, who eventually might take over the practice, through college and law school. His approach to the day job has changed, too, with a move away from the nasty high-contest cases and a growing specialty in mediation.

And how he thinks about life and work have improved in ways money can't buy. "I started being more compassionate," he says.

—Dan Simmons



10 QUESTIONS

Funny Business

This stand-up comedian and Oregon lawyer stands up against sexual harassment

Who thinks Mitra Shahri is funny? For starters, her colleagues and judges—she's twice earned the coveted title "Funniest Lawyer in Oregon" at the statewide Campaign for Equal Justice's Laf-Off lawyer comedy competition. An amateur humor writer and stand-up comedian, she also extends her funny business to keynote and corporate legal speaking.

Who doesn't think Shahri is funny? Defendants who have lost to her in cases involving sexual harassment and whistleblowing. As a solo practitioner in Los Angeles for many years, Shahri took on the movie industry long before the Me Too movement, and she continues her advocacy as head of the Mitra Law Group, a three-lawyer firm in Portland.

Have you always been funny, or did you develop your sense of humor over time?

In Los Angeles, I was known as the "casting couch lawyer." In no time I developed a loud sense of humor to survive the weight of my clients' pain and the abuse and sexism in the male-dominated and chauvinistic legal profession. Perfecting my stand-up routine on defense lawyers and the court was my clever way of dealing with the problem without affecting my clients.

I later used my talents to cheer up and empower my clients during litigation, most of whom were disappointed when the process ended because they were having so much fun! That's when I realized I'm good with people—I know how to make them laugh during tough situations. To hone my craft, I started doing stand-up. My best moments are when I use comedy to torment sexual harassers during depositions. Payback is a bitch!



I imagine being a litigator is a little like being onstage, right?

Absolutely. I love talking to an audience that can't talk back. I just wish the opposing counsel wouldn't heckle me so much.

When you're competing for Funniest Lawyer in Oregon, do you just go up and riff or do you have a prepared routine?

For the Laf-Off competitions, I usually take off a couple of weeks to write my jokes. I have so much fun crafting my jokes that I consider it a vacation.

What do you talk about? What really slays the crowd?

I talk about everything from racism and sexism to reversing the roles. My stage personality is a strong female attorney who kicks corporate butts with designer shoes. Being Iranian, I also have a whole set about foreigners and national origin discrimination. I love living in Oregon because it's the only state where I brag about being Iranian just to hide the fact that I'm from California.

Do you ever incorporate humor into your law practice?

It really incorporates itself. When you go against rich and powerful offenders, you bring on the wrath of several big law firms. The only

way to survive their legal tag-teaming is to have your wits about you. Early in my practice I learned that my Order of the Coif, law review and moot court certificates did not sway the mentality of opposing counsel who only saw me as a young, weak minority female and an easy target to demean and intimidate. The joke was on them, however, because my strong, kick-ass, take-no-prisoner side slayed their clients' reputations and dipped deep in their coffers.

My first case was against a lawyer I idolized. He called to discuss the case and began with insulting my legal ability and intelligence. He laughed at my client, whom he called average looking, for claiming sexual harassment against his rich client. He then attempted to get me to accept his \$5,000 settlement, which he claimed was enough fees to pay my rent and buy me a nice pair of shoes.

When he finished, all I said was 'OMG, I have to go because I just realized that my toenail polish doesn't match my outfit!' and I hung up. Fast-forward, we settled the case for mid-six figures, and he later told me he often calls young lawyers to intimidate them. But when I hung up on him, I really got under his skin.

I'm sure it didn't hurt that you had a good case. In fact, you're well-known for providing an incredible level of detail in your initial pleadings. Tell me about your process.

I have never subscribed to the theory that a complaint is just a "sneak peek." My complaints are like a movie script. They're 3D. Even though I trust my clients I don't just take their word for it. We talk to witnesses, gather documents and reconstruct the timeline. I don't tone down offensive facts.

It takes us months to prepare the case before filing as if it's ready for trial. I typically first send the employer the draft complaint, exhibits, witness statements and a cover letter, which I call a "love package," inviting them to attend prelitigation mediation. Majority of my clients settle their cases without the stress of litigation. But if the other side is unreasonable, then hell hath no fury like a woman harassed.

Earlier you said you used humor to empower your clients. How so?

For me, it's not just about winning money; it's also about shielding my clients from the horrifying things defense lawyers do to break their spirits. I spend hours and hours making them laugh at the other side. I write them funny poetry about their case and what their harasser's fate may look like after the verdict. They feel so valued that to this day former clients reach out to me just to say they miss me.

Some have even said, "Because of you, I went back to college or started my own business." Others have become lawyers. That makes me feel good.

In 2002, you decided to move from Los Angeles to Portland, Oregon. Did you have to change your practice to adapt to a smaller legal community?

No, perverts are perverts everywhere you go.

In addition to keynote and

motivational speaking you also give presentations to corporate boards. What do you talk about?

Most of them think they understand sexual harassment and retaliation, so they tend to tune out speakers at HR seminars and play Angry Birds instead. My style entertains them enough to look up from their smartphones to learn something. I teach them how to keep their employees happy and productive while keeping me far away from their companies. I also teach executives how to keep it in their pants, which is no easy task.

Have you noticed any improvements in sexual harassment because of the Me Too movement?

Not yet! I've only seen more self-promotion and chest pounding on TV by some famous women who don't deserve the spotlight. If you were a victim but said nothing just to save your career, you are not a hero of the movement. The true heroes are the women who stood up when it was happening and risked their dreams,

many of whom were crushed, black-balled and now live in oblivion. We all stand tall on their shoulders and we owe them a great deal of gratitude, more than just a cropped elbow on the cover of the *Time* magazine.

My former clients are would-be actresses no one knows about because they spoke up. Their names, faces and unrealized dreams still haunt me. Money is entirely inadequate compensation for never being able to pursue your true passion. It can be a cruel and lonely world, so I use humor to help my clients deal with it. We are taught not to get too close to our clients because we can lose our objectivity, but we lose our humanity and sense of justice when we keep our distance.

The finest lawyers feel for their clients, and that passion helps them succeed. That passion is also what will help us stamp out discrimination and sexual harassment for good, at which time I would have to get a real job.

—Jenny B. Davis



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Fighting Hate

Website serves more than 2,000 in first year of reporting incidents



Reporting a hate crime can be a complex process for those who have faced bias-based attacks—one more challenge after a terrifying experience. But a website launched last year by the ABA Center for Innovation has simplified the process for more than 2,000 site users. Launched in partnership with CuroLegal to address an increase in hate crimes across the country, the founders of Hate Crime Help say its mission remains as critical as ever.

“People don’t know where to turn,” says Andrew Perlman, dean at Suffolk University Law School and former chair of the Center for Innovation’s governing council. “We hoped that the website we created would provide a user-friendly digital tool to help hate crime victims.”

The site walks victims—who remain anonymous—through the reporting process, which can entail contacting multiple law enforcement agencies and public and private organizations. The fill-in-the-blanks tool assists victims of harassment, violence and property damage resulting from acts based on religion, race, ethnicity, gender, gender identity, disability or sexual orientation.

It also prompts victims to report the ZIP code of the hate crime and where it happened—at work, school or home, for example—and the nature of the crime. Victims also may report incidents of bias. Based on that information, the site lists a variety of resources.

RIISING FIGURES

Hate crimes are increasing, according to FBI statistics. There were 6,121 incidents recorded in 2016, the last year for which data is available—an increase of 4.6 percent over 2015. The increase in 2015 was 6.8 percent

over the previous year. But experts say these numbers could be much higher because not all hate crimes are reported by victims or law enforcement, leaving data incomplete.

In its first year, more than 2,000 users have accessed hatecrimehelp.com. After filling out the questionnaire, victims are directed to organizations such as state attorney general offices; the FBI; the Anti-Defamation League; the nonprofit newsroom ProPublica; and Communities Against Hate, a national initiative documenting incidents of violence, threats and property damage that are motivated by hate.

The goal has been to facilitate reporting and make

it easier for people to find relevant resources. At the same time, the founders wanted to ensure users felt secure consulting the site. “A key part of this was we weren’t collecting user data,” says CuroLegal CEO Chad Burton. “We didn’t want people feeling they were being tracked.”

Perlman says, “The idea for the website was brought to us by Nicole Bradick.” She was chief strategy officer for CuroLegal and left to found legal services company Theory and Principle.

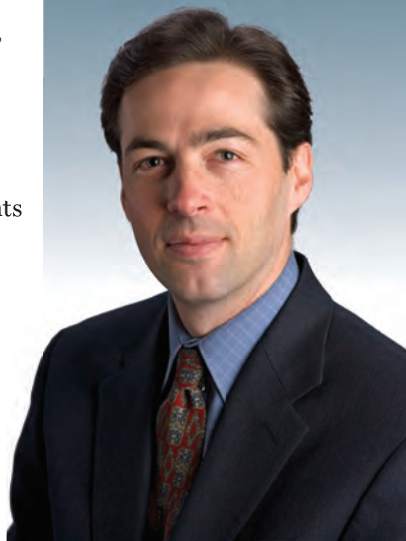
Development of the site was a team effort inspired by a March 2017 design event at Suffolk, where the theme was responding to hate crimes through technology.

CuroLegal developed the idea for Hate Crime Help and brought it to the ABA Center for Innovation. Technology company Cisco Systems provided the initial funding, and Suffolk, Stanford Law School and CuroLegal provided in-kind development.

—Marc Davis

“WE HOPED THAT THE WEBSITE WE CREATED WOULD PROVIDE A USER-FRIENDLY DIGITAL TOOL TO HELP HATE CRIME VICTIMS.”

—Andrew Perlman



Hearsay

Survey Says

The nation's largest firms turned in more than 5 million hours of pro bono work in 2017 in such areas as the Trump administration's travel ban, juvenile justice, veterans' rights, civil rights, and gender equity in athletics, among other issues, according to a new report. Firms topping the pro bono ranks were Covington & Burling; Orrick, Herrington & Sutcliffe; Hughes Hubbard & Reed; Jenner & Block; and Patterson Belknap Webb & Tyler.

Source: law.com.

40% Female

Baker McKenzie elected 67 new partners effective July 1, of which almost 40 percent are women. The global law firm says it now has 1,600 partners worldwide, of which 400, or 25 percent, are women—the most of any law firm.

Source: bakermckenzie.com.

Nearly 25 TONS

... is the weight of the recently unveiled monument dedicated to the pioneering group of black lawyers who founded the National Bar Association in Des Moines, Iowa. The 30-foot sculpture, titled *A Monumental Journey*, is in the shape of two massive African talking drums stacked precariously and is clad in manganese ironspot brick. In 1925, 12 black lawyers established the NBA after facing discrimination from the American Bar Association and other legal organizations on the basis of their race. The NBA is now the oldest and largest legal association to primarily serve black lawyers around the world.

Source: artnet.com.



Did You Know?

The Uniform Bar Exam is now being used in 33 jurisdictions with five states—Maryland, North Carolina, Tennessee, Illinois and Rhode Island—signing on during the past 10 months, and Texas and Ohio considering adoption as well. Lawyers who take the test in a UBE jurisdiction may transfer that score to other states that also use the standard test, meaning they don't have to retake the bar as long as they meet the incoming jurisdiction's cut scores.

Source: law.com.

The Docket

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Fill 'er Up!

Candy and snack companies are being sued for selling packages with empty space inside instead of extra product

By Robert Loerzel

National Pulse

“Slack fill” isn’t a phrase you often hear in everyday speech. Most people don’t even know what it means, even though they have experienced it. According to the U.S. government’s definition, “slack fill is the difference between the actual capacity of a container and the volume of product contained therein.” In other words, it’s that empty space you were disappointed to find inside a box of candy you bought at a movie theater—when the box turned out to be only half full. And it’s the air inside a bag of potato chips—all of that space above and around the chips.

“This is one of those issues that gets consumers riled up. They feel cheated,” says Edgar Dworsky, a former Massachusetts assistant attorney general who’s now a consumer advocate in Boston running the Consumer World website.

But does feeling cheated justify suing? Some people clearly think so. According to a 2017 report by the U.S. Chamber Institute for Legal Reform, plaintiffs lawyers filed at least 29 lawsuits in 2015 alleging that companies cheat shoppers with deceptively large packages—followed

by another 37 slack-fill cases in 2016. Those tallies are mostly federal cases, without counting potentially dozens of state lawsuits.

“I think it’s only grown since we wrote that report,” says Cary Silverman, a partner at Shook, Hardy & Bacon in Washington, D.C., who co-authored the U.S. Chamber report with James Muehlberger, a partner in his firm’s Kansas City, Missouri, office. “They’re nuisance lawsuits,” Silverman says. “They are extremely easy to bring. Go over to the supermarket and shake a box. And if it rattles, that’s a lawsuit. ... It makes a mockery of the civil justice system.”

But Ryan J. Clarkson, managing attorney at the Clarkson Law Firm in Los Angeles, says he has a higher purpose in mind when he represents plaintiffs against candy companies. “Slack-fill litigation is important to make sure manufacturers are using packaging that is not false, deceptive or misleading,” he says. “It’s all about corporate accountability.”

Maia Kats, director of litigation for the Washington, D.C.-based Center for Science in the Public Interest, says many slack-fill cases have merit. “Clearly, if you are a chip

manufacturer and you blow up the chip bag three or four times, you are doing so for a reason—that is, to give the impression to consumers that they are receiving more product than they are actually receiving,” says Kats, whose group has not filed any slack-fill lawsuits. “The motivation is to encourage purchases at a higher price point, and that’s classic consumer deception.”

As an example of such deception, Clarkson points to Jujufruits. In a federal lawsuit in San Francisco, Clarkson won preliminary approval on June 26 for a \$2.5 million settlement with Ferrara Candy. Clarkson’s client, Thomas Iglesias, sued after spending \$4 on a box of Jujufruits at a movie theater concession stand in San Francisco and discovered that the box was roughly half full. Illinois-based Ferrara has agreed to pay up to \$7.50 each to shoppers who purchased boxes or bags of Jujufruits, Lemonhead, Jaw Busters and other candies in the past five years. And Ferrara says its packages will have less empty space in the future: Boxes will be 75 percent full of candy, while bags packaged within boxes will be 50 percent full. “We think it’s an excellent result for consumers,” Clarkson says.

MEASURING EMPTY SPACES

Slack-fill lawsuits, which often seek classaction status, hinge on the U.S. Food and Drug Administration’s definition of “nonfunctional slack fill.” FDA rules recognize several reasons why it’s permissible for companies to leave some empty space in packages. For example, food may settle inside a box during shipping. Or some air may be necessary to protect the food.

As Dworsky explains, “The potato chip manufacturers will tell you: ‘We blow up the bag to create this cushion, so when all the bags are packed in a carton, you have this cushion to help protect the chips from breaking.’ My sense is that’s a legitimate reason.” When shoppers file lawsuits complaining about empty space in packages, it’s up to the courts to determine whether there’s a legitimate explanation for that slack fill.

“We’ve been able to prevail in

some cases where we pointed out the weight on the packaging,” says Kenneth K. Lee, a partner at Jenner & Block in Los Angeles. “But other courts have said: ‘That’s not enough. It’s too hard to tell for some consumers to figure out exactly how much is in there.’”

Lee has successfully defended New Jersey-based food conglomerate Mondelez International Inc. against three slack-fill lawsuits that complained about the packaging of Sour Patch candies, Swedish Fish and Go-Paks of Mini Oreos and other cookies. Lee says he often asks judges to use common sense. “What we pointed out a lot of times is that if you just pick up the box of food or candy ... you can feel the product shifting and moving,” he says. “So you know it’s not filled to the absolute brim.”

U.S. District Judge Sara L. Ellis seemed sarcastic in a Feb. 28 ruling in Chicago, when she tossed a lawsuit against Fannie May Confections Brands. She noted that plaintiffs Clarisha Benson and Lorenzo Smith “were saddened to discover upon opening their boxes of Mint Meltaways and Pixies that the boxes were not brimming with delectable goodies.” The judge dismissed these “barebones allegations.”

And she also set up a sort of Catch-22 for shoppers who want to sue: After you’ve purchased one package and discovered that its contents are more meager than expected, that serves as your warning about future purchases. “Already aware of Fannie May’s alleged deceptive practices, plaintiffs cannot claim they will be deceived again in the future,” Ellis wrote.

In Jefferson City, Missouri, U.S. District Judge Nanette K. Laughrey made the same point when she granted a summary judgment for the Hershey Co. on Feb. 16. Robert Bratton was suing the chocolate-maker, complaining about the space in Reese’s Pieces and Whoppers packages. But Bratton testified that

“They’re nuisance lawsuits. They are extremely easy to bring. Go over to the supermarket and shake a box. And if it rattles, that’s a lawsuit. ... It makes a mockery of the civil justice system.”

—Cary Silverman

“Slack-fill litigation is important to make sure manufacturers are using packaging that is not false, deceptive or misleading. It’s all about corporate accountability.”

—Ryan Clarkson

he’d bought these candies hundreds of times over a decade—even though he knew the boxes were 30 to 40 percent empty. “I had a good idea that that’s what I was going to get, yes, ma’am,” he said, pointing out that he didn’t have much choice when he was at a movie theater with his children. “I needed to buy the candy and ... Whoppers and Reese’s is what I generally get for the kids. ... I can’t take outside food into the theater. So I’m kind of stuck with what they have.” This testimony led the judge to conclude that Bratton “cannot demonstrate that he was injured by any purportedly deceptive practice by Hershey.”

JUICY INCENTIVES

Such rulings may discourage slack-fill lawsuits, but settlements like Ferrara Candy’s agreement in the Jujufruits case may offer an incentive for litigants. When that settlement comes up for final approval on Oct. 25, Clarkson’s firm will seek \$750,000 in fees, plus costs and expenses, while asking for Iglesias to get \$5,000. Silverman, the lawyer who co-wrote the U.S. Chamber report, criticizes these fees as exorbitant, pointing to them as an example of how money motivates frivolous lawsuits. But Clarkson says it’s fair payment for his firm’s work, including the hiring of experts. “If we lose

at any stage, we run the risk of getting paid nothing,” he says.

David Greenstein of Los Angeles says he’s filed roughly 75 slack-fill cases over the years. “I’m almost 80 years old, and I remember growing up when you could trust what was in a box,” he says.

A former lawyer who was disbarred after pleading guilty to charges involving insurance fraud, Greenstein usually files his lawsuits without legal representation. “I would describe myself as a prolific plaintiff,” says Greenstein, author of the e-book *Sue and Grow Rich: How to Handle Your Own Personal Injury Claim Without an Attorney*. And he’s won some settlements and court victories.

In 2016, the California company Adams & Brooks was permanently enjoined from selling 4-ounce bags of P-Nuttles Butter Toffee Peanuts in the state after Greenstein sued in Orange County Superior Court, complaining that the company’s bags were 40 percent empty.

Greenstein was not awarded any money. “I get settlements, but they are not a lot of money,” he says, adding that money isn’t his main motivation. “When I see now how companies are just screwing over people with slack fill, ... I figured I can do something.”

Silverman says many slack-fill lawsuits end in private settlements, with their details shrouded in secrecy. Few slack-fill cases have achieved class action status, but even the possibility of that happening is enough to scare companies into paying plaintiffs to go away, he says.

“These suits are just going to continue unless companies are willing to fight them out a little bit,” he adds.

But consumer advocate Dworsky says slack fill is a perfect illustration of why class actions are necessary. “No individual consumer is going to say: ‘I’m going up against Procter & Gamble because of the way they package this product.’ I mean, they have lost a dollar or two. But are they going to spend thousands on hiring a lawyer to make their point? You can only do it if you gather up people. You absolutely need consumer class actions.” ■

Indian Boundaries

How a rural murder case could lead to the return of tribal control for nearly half the state of Oklahoma

By Lorelei Laird

National Pulse

Patrick Murphy doesn’t deny participating in the murder and mutilation of George Jacobs in 1999. On a drunken

afternoon back then, Murphy and two friends waylaid Jacobs and his cousin as they passed each other in cars on a road in rural McIntosh County, Oklahoma. After ordering the cousin away, they cut off Jacobs’ genitals and slit his throat, leaving him to bleed to death in a ditch.

According to court records, Murphy confessed to his girlfriend, and he was convicted and sentenced to death in Oklahoma state court. The Oklahoma Court of Appeals upheld the conviction in 2002.

But it’s possible that his conviction doesn’t count. As Murphy argued in a habeas appeal to the 10th U.S. Circuit Court of Appeals at Denver, he’s a member of the Muscogee (Creek) Nation, as was Jacobs, and the murder took place on land that was part of the tribe’s reservation as defined by an 1866 treaty. In August of 2017, the 10th Circuit ruled that Congress never formally disestablished that reservation. Under the complicated maze of jurisdiction that applies in Indian country, that means Murphy should have been tried in federal court.

And that means Murphy’s hail-Mary death penalty appeal could have an even bigger consequence by significantly altering Oklahoma’s legal landscape. The U.S. Supreme Court will hear the case, *Royal v. Murphy*, in this fall’s term. If it stands, it will shift jurisdiction over 4,600 square miles containing 750,000 people—including most of the city of Tulsa—from Oklahoma state government to, depending on the case, Muscogee (Creek) government or a U.S. attorney’s office. That

largely applies to criminal jurisdiction, but civil jurisdiction may be affected as well.

If that happens, prior convictions could be vulnerable to an attack on their jurisdiction. Subject-matter jurisdiction is never waived in Oklahoma, so the age of the case doesn’t matter. Erik Grayless, first assistant district attorney for Tulsa County, says his office estimates that up to 1,000 of its past cases could be vulnerable to such a challenge.

Among lawyers, “this is one of the biggest things in Tulsa right now,” says Grayless. “We’re closely watching it because we’re going to deal suddenly with a bunch of post-conviction cases.”

HISTORY MATTERS

Before the 10th Circuit’s ruling, few had questioned Oklahoma’s jurisdiction over the area. During the run-up to statehood, the federal government repeatedly passed laws stripping the area’s tribal governments of their powers, as part of pressuring them to Westernize and sell “unused” land to white settlers. By the time Oklahoma became a state in 1907, the land was not being treated as a reservation.

But popular opinion is not the law. To decide whether the reservation had been disestablished, the 10th Circuit used a legal test handed down by the Supreme Court in 1984’s *Solem v. Bartlett*. That test looks first at the language of relevant federal laws, and the appeals court found no “express language of cession” in the turn-of-the-century laws dismantling the Muscogee (Creek) government. Evidence from the less important second and third prongs of the test—contemporary history and current demographics—was “mixed,” the 10th said.

The ruling is stayed until the

Supreme Court speaks. But if the high court upholds it, there's a chance that it could open the door for four other Oklahoma tribes to regain their historic boundaries. The Cherokee, Chickasaw, Seminole and Choctaw—collectively known, with the Muscogee (Creek), as the Five Tribes—are on similar legal footing, thanks to similar histories in their relationships to the federal government. If they regain their reservations, Oklahoma says in its certiorari petition, Indian country would cover a full 43 percent of the state and contain 48 percent of its population. (Currently, the Five Tribes' Indian country covers much less ground—a handful of tribal holdings and lots owned by individual members.)

That's not at all inevitable. Lindsay Dowell, first assistant attorney general for the Muscogee (Creek) Nation, says each of these tribes would have to have a court do a "historical deep dive" into their own pasts and treaties, which are not identical to her tribe's. "If it extends to anyone, it extends to them," says Dowell. "But that would still have to be litigated."

But Dowell says those other tribes were excited by the ruling—and in a less positive way, so are parts of Oklahoma's business community. Organizations representing farmers and oil and gas companies filed amicus briefs before the U.S. Supreme Court, expressing concern that they could be taxed and regulated by tribes as well as states.

Dowell is skeptical about those concerns. For one thing, Oklahoma tribes are forbidden from making environmental laws without the state's permission, thanks to a 2005 law sponsored by Oklahoma Sen. James Inhofe. For another, tribal civil jurisdiction depends on more than where an operation is located. Dowell thinks it would have to be established through litigation or an agreement with the state.

Judith Royster, a professor of Indian law at the University of Tulsa, agrees. "[Tribes] have to make a showing that they have a right to

regulate those activities under federal law," she says. "So there may be some increase in tribal jurisdiction, but it is not going to be the kind of 'the sky is falling' reaction that you sometimes see."

And it's not clear that tribal powers would necessarily be used. In a similar 2016 case, *Nebraska v. Parker*, the Supreme Court ruled that the Omaha Indian Tribe's reservation was never formally disestablished. That tribe had wanted to impose an alcohol tax in the village of Pender, Nebraska, but *Pender Times* publisher Jason Sturek says it hasn't tried since the ruling.

"It was ... clear that if they pursued taxation it could get right back into

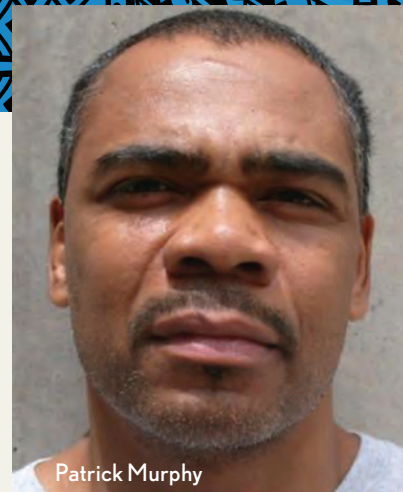
"So there may be some increase in tribal jurisdiction, but it is not going to be the kind of 'the sky is falling' reaction that you sometimes see."

—Judith Royster

litigation again," Sturek says. "And I don't think either side really wants more litigation. It's long, drawn out, it's expensive, and it isn't good for relationships."

JURISDICTIONAL SHIFTS

Criminal jurisdiction is another story. In Indian country—a statutorily defined term that includes reservations—who hears the case depends on who was involved. A crime committed by a member of any federally recognized tribe in Oklahoma's Indian country would go to federal court if serious enough, but would likely go to tribal court otherwise. Crimes committed by non-Indians against Indians fall under federal jurisdiction, and other



Patrick Murphy

crimes committed by non-Indians go to state court.

In practice, this means a lot of criminal cases could move from state court to federal court. According to a 2016 Justice Department report on prosecutions in Indian country, Oklahoma's three U.S. attorneys resolved 88 Indian country cases that year. (That includes 27 cases that were immediately declined.) By contrast, Tulsa County filed 7,851 felonies that year, according to the state court system's annual report—and there are seven smaller counties affected as well.

Ian Heath Gershengorn, co-counsel to Murphy's federal appellate public defender, notes that criminal cases not involving a member of any federally recognized tribe—the vast majority—would stay in state court. He thinks the Justice Department is well-equipped to handle cases that do involve members of tribes.

"If there's one organization that is one we should be skeptical about when they say they lack resources, it's the federal government," says Gershengorn, chair of the appellate and Supreme Court practice at Jenner & Block in Washington, D.C.

Gershengorn and counsel of record Patti Palmer Ghezzi said as much in their brief opposing certiorari. He's on the case pro bono, which he says is a natural outgrowth of his experience with both capital cases and Indian law. (Gershengorn's opposite on the outside legal team for Oklahoma, Lisa Blatt of Arnold & Porter Kaye Scholer, said she could not comment on a pending case.

Oklahoma's solicitor general, Mithun Mansinghani, did the same.)

All of these agencies have been meeting to discuss the potential change. Grayless, the Tulsa County prosecutor, says his office has met with Trent Shores, U.S. attorney for the Northern District of Oklahoma, as well as the governments of all Five Tribes. Those discussions have focused on how to work together, both to prepare and in case the Supreme Court upholds the ruling. Both cross-deputization, in which jurisdictions agree to honor the authority of each other's law enforcement officers, and more hiring have been discussed. In some cases, the collaboration is already happening; a tribal prosecutor in Dowell's office is a special assistant U.S. attorney, and U.S. attorneys' offices are supposed to have tribal liaisons.

A bigger problem for Grayless' office could be jurisdictional challenges to old convictions—just like Murphy's. Because jurisdiction is never waived in Oklahoma, defendants may be able to challenge their convictions in state court even if they've exhausted other appeals. For older cases, this creates evidentiary problems—witnesses may have died, case files thrown away.

And then there's the problem of who is considered an American Indian. Because some tribes make eligibility contingent on ancestry rather than blood quantum, arresting officers may not realize that a crime involved an Indian. Grayless is also concerned about what happens if someone obtains tribal citizenship after the fact.

"Your obvious ones are currently enrolled tribal members who are still in prison, when the case clearly occurred in the historical boundaries of the Creek Nation," he says. "Everything else is going to be litigated."

As with civil jurisdiction, Royster advises calm regardless of how the Supreme Court rules. "It's going to take a period of adjustment," she says. "But the fact is, outside of the Five Tribes in Oklahoma, every other state and every other Indian tribe works this out just fine. Oklahoma can too." ■

Center Court

The chief justice slides into the high court's ideological middle with the retirement

of Justice Kennedy **By Mark Walsh**

Supreme Court Report

Just two days after Justice Anthony M. Kennedy announced his retirement June 27, Chief Justice

John G. Roberts Jr. made his way, as he has done for many years, to the Judicial Conference of the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, for which Roberts is circuit justice.

"There's been some news lately," Circuit Judge J. Harvie Wilkinson III told Roberts in an understated reference to Kennedy's retirement announcement.

The chief justice smiled and then lauded Kennedy as "an extraordinary man" and "extraordinary jurist" who was "deeply committed to collegiality and civil discourse." The amiable conversation between Wilkinson and Roberts continued for about 40 minutes, with Wilkinson asking about an academic study of interruptions on the bench, about which books the chief justice planned to read over the summer, and about how well the justices get along with each other.

"Relations among the justices are very collegial," Roberts said. "We have sharp disagreements on matters that are quite important. ... However direct the disagreements may seem, we do know that we are all in it together."

One matter Wilkinson didn't ask about, and Roberts did not bring up, was the new role the chief justice will assume when the court returns for a new term Oct. 1—median justice. That's the court member at its ideological center, as measured by political scientists who study the court.

"Roberts is going to be in a position of great power on the court," says Lee Epstein, a professor at the Washington University School of Law in St. Louis who specializes in law and political science.

Kennedy has been the median

justice since Justice Sandra Day O'Connor's 2006 retirement. And when they served together, they often traded spots at the court's center.

Although Kennedy did not like the term *swing justice*, he could not escape being referred to by that appellation by many court observers, based on his position as the justice who often joined the court's four conservatives but sometimes cast his vote with the liberal bloc on issues such as LGBTQ rights, abortion rights and affirmative action.

Roberts was in the minority in recent decisions in those areas but has been successful in pushing the court to the right on narrowing the scope of the Voting Rights Act of 1965, sharply limiting when K-12 schools may consider race in assigning students to a particular school, and in considering many criminal matters.

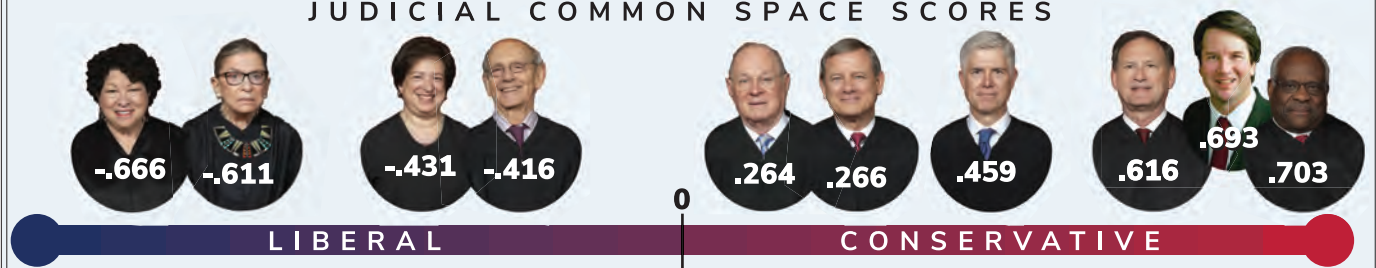
"Roberts is not Kennedy," Epstein says.

MOVING TO THE RIGHT

Epstein was the co-author of a seminal 2005 article in the *North Carolina Law Review*, "The Median Justice on the United States Supreme Court." The median justice "is essential to secure a majority" on the court, Epstein and her co-authors, Andrew D. Martin and Kevin M. Quinn, wrote. The article introduced the "Martin-Quinn score," a method of classifying each justice on an ideological scale that doesn't rely exclusively on past votes.

Epstein and Martin joined two other scholars in a 2007 article, "The Judicial Common Space," discussing another way for classifying judges based on the party of their political patrons. These scores place current court members from left (most liberal) to right (most conservative) in this order: Sonia Sotomayor, Ruth Bader Ginsburg, Elena Kagan,

JUDICIAL COMMON SPACE SCORES



Stephen G. Breyer, Roberts, Neil M. Gorsuch, Samuel A. Alito Jr. and Clarence Thomas.

If Brett M. Kavanaugh, President Donald J. Trump's nominee to succeed Kennedy, is confirmed by the U.S. Senate, he would fall to the right of Alito but just to the left of Thomas on the ideological scale. (All but one of those on Trump's long list of potential nominees would have aligned to the right of Roberts. Only U.S. Circuit Judge Thomas M. Hardiman, considered a finalist for the past two vacancies, would fall to the left of Roberts.)

Epstein says Kennedy has been the median justice continuously since Roberts became chief justice in 2005.

"There is no other justice who has dominated an entire court era," she says. "Kennedy dominated the entire Roberts era."

Of course, the Roberts era continues—now with him at the center.

Epstein says the last time a chief justice was the ideological median on the court was in the 1937 term, with Chief Justice Charles Evans Hughes in that position. But it was only for about half the term, when Justice George Sutherland retired and Justice Louis D. Brandeis became the median.

"We really don't have a good modern-day example of the chief justice being the center of the court," Epstein says, noting that Chief Justices Warren E. Burger and William H. Rehnquist were well to the right of center.

Roberts leans right on many issues, although his crucial vote with the court's liberal bloc in 2012 to uphold the constitutionality of the Affordable Care Act, in *National Federation of Independent Business v. Sebelius*, has long stuck in the craw of American conservatives.

A BALANCE OF CONCERNS

Barry Friedman, a professor at New York University School of Law

who also has studied the ideological impact of judges and justices, says he would not expect Roberts to vote with the liberal bloc as often as Kennedy did in divided cases.

"The dynamics on the court are going to change, and we may get more of a shifting median than we've had," Friedman says.

O'Connor and Kennedy fell naturally into the center on the court, he says, while Roberts, "to the extent he is the median, I think he's going to be median more because of his strategic choosing than because of his own ideological preferences."

Epstein says in the recently completed 2017-18 term, "we got a really good preview of what a Chief Justice Roberts-dominated court is going to look like."

Kennedy did not join the liberal bloc in any of the 19 cases that were decided 5-4 during the term. He instead joined with Roberts and the other conservatives on decisions upholding Trump's entry ban on travelers from several majority-Muslim countries, holding that California may not require pregnancy crisis centers to inform patients about the availability of state-funded services including abortion, and overruling a 1977 precedent that authorized public-employee unions to charge service fees for collective bargaining to employees who decline to join the union.

If Kavanaugh is confirmed, the court's overall ideological balance will shift rightward, with a median justice—Roberts—much less likely to join with liberals than Kennedy was in some key divisive areas.

"That is going to pull the court in an incredibly rightward way," Friedman says.

Cases raising issues about abortion, race consideration in college admissions, school board prayers, the rights of transgender students and

the legitimacy of the ACA are in the pipeline and could reach the Supreme Court soon.

But some observers note that Roberts will face balancing his newfound ideological position of power with his traditional role of chief justice. Most agree this role has invested in him a concern for the long-term legitimacy of the court and raises questions about how willing he would be to overrule established precedents in areas such as abortion and LGBTQ rights.

NOT PICKING FIGHTS

Miguel A. Estrada, a conservative-leaning Supreme Court litigator at Gibson, Dunn & Crutcher, told a Federalist Society gathering in July that because the members of the conservative bloc have long been willing to air their different judicial philosophies in separate writings, even when they are in the majority, he is somewhat dubious that the coming rightward shift will be as dramatic as some predict.

"The conservative justices, which are about to take over the country, cannot agree on lunch," Estrada said. "This whole notion that we're going to have ... the dawn of the right-wing court that is basically going to crush ... the rest of the country is pure fantasy."

At the 4th Circuit Judicial Conference at a West Virginia resort, Wilkinson asked Roberts about the justices' propensity to write separately, which is something the chief justice does not engage in as much as some others.

"As the chief justice, I feel some obligation to be something of ... an honest broker among my colleagues," Roberts said. "I don't necessarily go out of my way to pick fights."

In his new role as median justice, the chief justice won't need to pick any fights. ■

Practice

Storytelling

Just the Ticket

3 storytelling lessons useful to lawyers can be gleaned from *Springsteen on Broadway*

By Philip N. Meyer

There was a nor'easter last March when I drove down from Vermont to see Bruce Springsteen's live show on Broadway. The ticket was outrageously expensive. But I had never seen Springsteen live; this was a once-in-a-lifetime opportunity to see "the Boss" perform in a small venue.

The storm was brutal, and it was a harrowing struggle to make it down to New York City in time for the show. Cars slid off the highway and there were several crashes. The traffic dead-stopped in Massachusetts for an overturned semitrailer. Miraculously, the traffic thinned closer to the city; many drivers were, thankfully, staying off the roads. There was just enough time to check in at my hotel on the east side. The city seemed dead now, and there weren't any cabs. I borrowed an umbrella from the bellman and headed crosstown. As I walked, the crosswind and sleet picked up. My umbrella turned inside out and folded into pieces. I was completely soaked by the time I arrived at the Walter Kerr Theatre on West 48th.

I had a terrific seat just above the stage. It must have been a return or cancellation because of the anticipated arrival of the storm. And now the theater was filling. Certainly, it didn't look like what I had imagined a typical Springsteen audience to be. The patrons seemed well-to-do, meticulously dressed and coiffed. Many were my age, late middle-aged. I'm the same age as Springsteen, both of us born in 1950. At precisely 8 o'clock, Springsteen came out without fanfare. There was only a piano on the bare, sparsely lit stage. Springsteen wore a black T-shirt and tight, black stovepipe jeans and carried a guitar. He seemed so close that I could almost reach out and touch him.

Springsteen's spare set, and his skill in distilling the complexities of his life into simple stories, would define his performance and inspire me to draw my own storytelling lessons—lessons that can be useful to lawyers.

I was struck by Springsteen's physicality and by his strength and self-possession. He had performed the same show for many months by then. Night after night he had said these same words over and over, had sung the identical songs. Yet Springsteen was immersed in the moment. As he put it, "People come to see you be completely present. Anytime you're trying to do that, it takes a lot of energy."

Springsteen sang and played as if his life depended upon

it. Perhaps it did. This was what he had been born to do. His performance was his gift to the audience. And I was riveted.

SPRINGSTEEN'S JOURNEY

Although Springsteen had never written or directed a Broadway show, he knew exactly what he was doing. He played a set list that spanned his career, abetted by commentary adapted from his autobiography, *Born to Run*. While the performance seemed spontaneous, it was not; it was a meticulously scripted composition. Springsteen even had a teleprompter displaying the text of his monologue in soft light at the back of the theater. But I never noticed. It was as if he was speaking directly to me, with nothing between us.

Springsteen had pared down the vast canvas of his 500-page autobiography and the endless repertoire of more than 50 years of songs, retrofitting story pieces and song selection into three movements or acts with a clear narrative arc—beginning, middle and end.

There were only 15 songs on Springsteen's set list. The story was all about his journey. The journey is a common





“SOME OF SPRINGSTEEN’S GENIUS IS TO MAKE THE IMPOSSIBLY COMPLEX SIMPLE, TO MAKE PRESENTATION OF COMPULSIVELY THOUGHT-THROUGH AND OVERDETERMINED MATERIAL APPEAR SPONTANEOUS, EFFORTLESS AND INTUITIVE.” —PHILIP MEYER

metaphoric container—it also captured my memories of coming to see him perform. Of course, Springsteen’s artistic journey spanned a lifetime.

The first movement was autobiographical: Springsteen’s early years in South Jersey (four songs). The second movement was his escape out of Jersey: his Homeric professional odyssey across the musical American landscape (four songs) where he finds a complex and redeeming love with Patti Scialfa (two duets). The third movement is marked by his return, including performance of six classic Springsteen songs (two combined), looking back in time and rediscovered with newfound present-tense meanings.

The show was more than merely a collection of songs or of spoken explanations wedded to songs, something much different than the conventional Broadway show or musical. It was performance poetry. As Springsteen observed, his artistic mantra was that adding one and one together had to make three; the whole had to be much more than merely the sum of the parts.

Springsteen’s advice for aspirational rock stars fits for lawyers too: “You will need to depend upon more than your instincts. You will need to develop some craft and creative intelligence that will lead you farther when things get dicey.”

2 SYMPATHETIC CHARACTERS

For example, the initial movement covers Springsteen’s childhood in four songs from the early albums. He ruthlessly pares down the many family characters and friends depicted in *Born to Run* to two: his mother and father. There is the lightness and dancing spirit of his mother, captured in imagery of her lyrical movement and sounds of her heels clicking down the pavement as she returns from her job as a legal secretary, that somehow became part of Springsteen’s own rock ‘n’ roll onstage performance identity. He sings a seldom-performed song about his mother, “The Wish”: “Well it was me in my Beatle boots, you in pink curlers and matador pants, Pulling me up off the couch to do the twist for my uncles and aunts ...”

Contrasting with the lightness and intimacy of his mother’s spirit, there is the powerful darkness and coldness of the shadow cast by Springsteen’s ever-distant father. The Boss shares with the audience a brief memory of retrieving his father from a bar while his mother stays behind in the

car. He remembers his father bent over the bar in the darkness, specifically the image of the powerful lower half of his father’s torso clad in a working-class outfit recalled from a child’s perspective. Of course, this is precisely the same black costume that Springsteen now wears on stage. The image frames his haunting rendition of “My Father’s House”:

*My father’s house shines hard and bright
It stands like a beacon calling me in the night
Calling and calling so cold and alone
Shining ‘cross this dark highway where our sins
lie unatoned*

As Springsteen explains in his autobiography: “Those whose love we wanted but could not get we emulate. It is dangerous, but it makes us feel closer, gives us an illusion of the intimacy we never had.”

TAKEAWAYS FOR LAWYER-STORYTELLERS

I sat in the box after the show scribbling a list of storytelling ideas for lawyers on the back of my program:

1. Some of Springsteen’s genius is to make the impossibly complex simple, to make presentation of compulsively thought-through and overdetermined material appear spontaneous, effortless and intuitive. Perhaps all storytellers, including lawyers, are in this particular way part Jersey Boardwalk hustlers too.

2. Work to be present, and believe fully in your story. Recognize, capture and employ strategic, emotionally transformative images as Springsteen did. Depict characters sympathetically and economically, and use perspective creatively. Keep the plot simple, if possible—employ clear narrative arcs (e.g., a beginning, a middle and an end) and employ purposeful and familiar narrative designs (e.g., Springsteen’s journey).

3. It is impossible to recapture the past literally. Stories are reinventions—the past transformed by imagination and emotion—and narrative truth turns on verisimilitude (lifelikeness). We reinvent the past to make it come alive, as well as to find truth and meaning in our experiences, whether depicted in story or song. *Springsteen on Broadway* is a reflection on memory and identity—how stories enable us to inhabit the past and relive it through who we are today—whether we are in a theater or a courtroom.

CODA

I didn’t want to go back out into the storm just yet. The ushers kindly left me alone in the box. Perhaps they misbelieved that I knew Springsteen personally or had some connection with him. Perhaps I did. And perhaps you do, too. ■
Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.

Ethics

Lawyers and Cognitive Decline

Diminished capacity may bring ethics problems for sufferers and other attorneys **By David L. Hudson Jr.**

It could be a wildly inappropriate comment, a sudden loss of memory, a pattern of nonresponsiveness, a startling lack of professional judgment, or a gross mistake that an attorney would never make.

Any, or all, of these could be a telltale sign that an attorney is suffering from cognitive decline or even dementia. And cognitive decline in practicing lawyers can raise a host of ethical issues and sometimes lead to lawyers taking disability status.

Cognitive decline can result from a variety of medical or health problems. Perhaps the lawyer had a stroke, changed medication or had auditory loss—or it could be the onset of dementia. Before colleagues and partners determine the proper course of action, or whether intervention is appropriate, the root cause should be identified.

“It is important for colleagues to act when they see a fellow lawyer showing signs of cognitive decline,” says Terry Harrell, executive director of the Indiana Judges and Lawyers Assistance Program. “The good news is that oftentimes there can be a number of things that cause such a decline that can be remedied.”

AGE IS A FACTOR

She relates the story of a judge who contacted her organization expressing concern about an attorney in the judge’s courtroom. The attorney was not responding to the judge’s questions. One of Harrell’s co-workers asked the judge whether the attorney showed the same level of nonresponsiveness outside the courtroom. The judge said no. It turned out the attorney was simply suffering from hearing loss.

Harrell gives another example of an attorney, a great speaker, who suddenly started slurring words in court. Some colleagues thought he might have had a stroke. However,

upon questioning, they learned the problem was caused by a recent change in his medication. These problems can surface in people of all ages, but they most commonly occur with senior lawyers.

The ABA’s Commission on Lawyer Assistance Programs wrote in its 2014 *Working Paper on Cognitive Impairment and Cognitive Decline* that “the most common cognitive disorders of aging, however, are neurodegenerative diseases that involve progressive deterioration of the brain over time.”

The paper notes that the risk of dementia increases dramatically over time. “The age at onset is typically after 65, and the likelihood of developing Alzheimer’s doubles every five years after the age of 65. After age 85, the risk reaches nearly 50 percent.”

“Lawyers suffering cognitive decline is a growing problem, just as dementia in the general population is increasingly an issue,” says ethics expert Peter A. Joy, a professor at the Washington University School of Law in St. Louis.

“People are living longer, and the older one is, the higher the odds are that one will get dementia. This is especially an issue for lawyers in private practice as sole practitioners or small office settings who are practicing law as they advance in age. Many midsize-to-larger firms’ partnership agreements set 65 to 70 as a mandatory retirement age, in part either to avoid or to decrease the odds of having to face this issue,” he adds.

The most common ethical problem of a lawyer with cognitive impairment is violating the first rule of ethics—the duty of competency. In the ABA Model Rules of Professional Conduct, Rule 1.1 says: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Lawyers with cognitive deficiencies might not be able to recognize the strengths and weaknesses of cases,

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— PETER JOY





The most common ethical problem for a lawyer experiencing cognitive decline is violation of the first rule of ethics—the duty of competency.

advance the proper arguments, or even understand the arguments advanced by opposing counsel.

A related rule is 1.3: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Cognitive issues can cause lawyers to run afoul of this rule. “A frequent ethical problem for lawyers suffering from cognitive decline is a lack of diligence,” Harrell says. “They miss deadlines and calendar dates and statutes of limitations.”

Joy says lawyers in solo or small firms often feel the impact more because there aren’t others in the office to pick up the slack.

“For lawyers who are sole practitioners or in office-sharing arrangements, they often have no one else to help them recognize the issues they are facing,” he says. “For those lawyers, they often miss filing deadlines, and sometimes they miss court hearings, both of which trigger issues of competency under Rule 1.1 and diligence under Rule 1.3.”

DUTY OF OTHER LAWYERS

Theresa Gronkiewicz, senior counsel for the ABA’s Center for Professional Responsibility and staff counsel for the Commission on Lawyer Assistance Programs, says, “State lawyer assistance programs are extremely vital in helping to deal with lawyers who may be suffering from

“THE GOOD NEWS IS THAT OFTENTIMES THERE CAN BE A NUMBER OF THINGS THAT CAUSE SUCH A DECLINE THAT CAN BE REMEDIED.”

— TERRY HARRELL



cognitive decline.”

This is particularly true because ethical issues can arise for lawyers witnessing the effect of cognitive impairment on a colleague. Under certain circumstances, this can trigger a lawyer’s obligations under Rule 8.3(a), which provides that attorneys must report the ethical misconduct of their peers.

“If a lawyer in the firm knows that the impaired lawyer committed a violation of the Rules of Professional Conduct that raises a substantial question as to the impaired lawyer’s fitness, pursuant to Rule 8.3(a), a report must be made to the disciplinary authorities,” Gronkiewicz says.

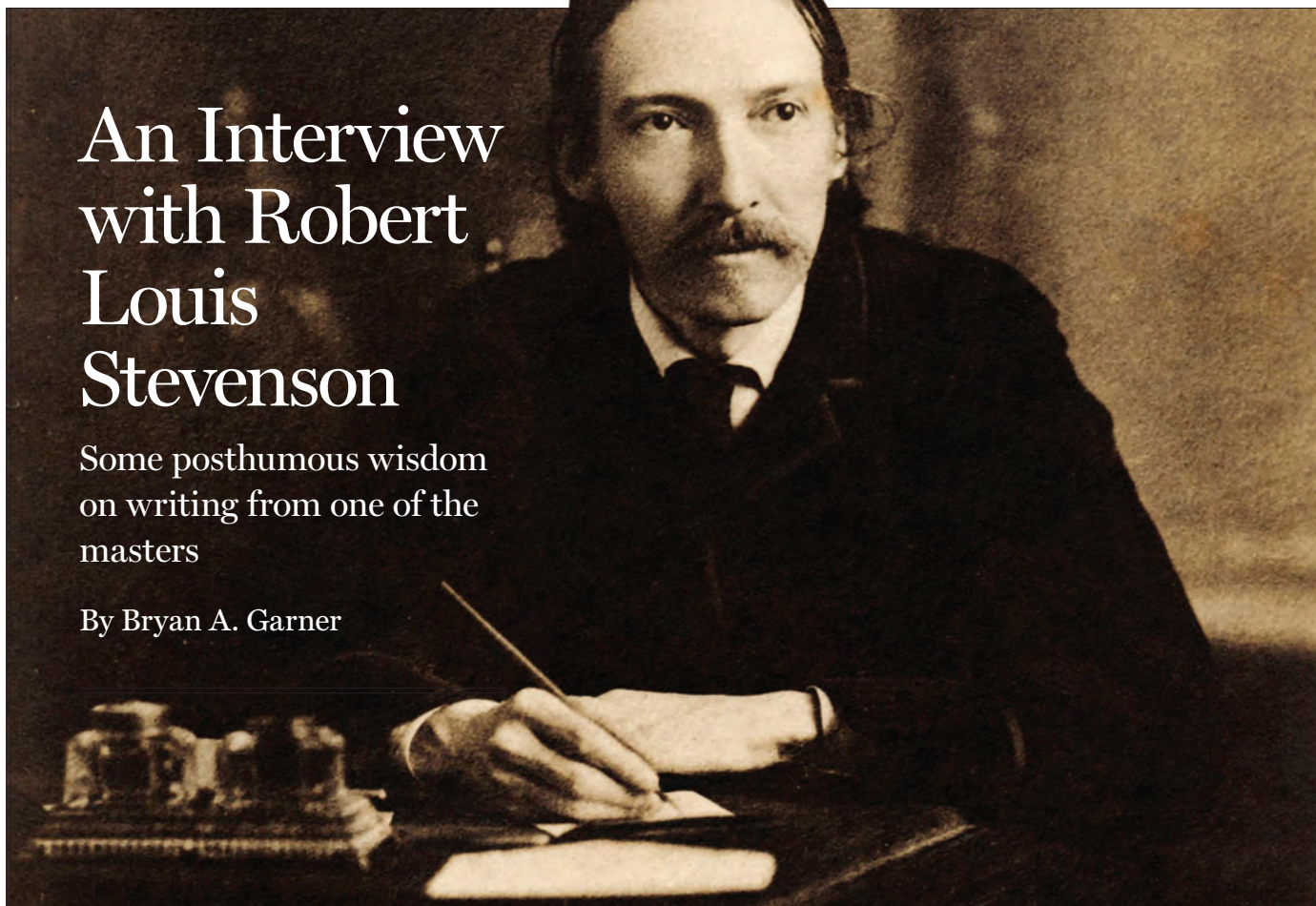
In Formal Opinion 03-431, “the ABA Standing Committee on Ethics and Professional Responsibility explained that if a lawyer suffers from a condition materially impairing the ability to practice, failure to withdraw ‘ordinarily would raise a substantial question requiring reporting under Rule 8.3,’” Gronkiewicz says.

Experts say lawyer assistance programs can be a vital cog in helping attorneys who are having cognitive and competency issues. Such programs can also assist in determining the proper course of action, which usually involves a one-on-one conversation with the lawyer as a first step. ■

An Interview with Robert Louis Stevenson

Some posthumous wisdom on writing from one of the masters

By Bryan A. Garner



Readers of this column know that I occasionally sit down to interview long-dead authors. I do it not by time traveling but by consulting their works published long ago and asking questions as I read.

This month's interviewee is the esteemed Robert Louis Stevenson (1850–1894), the Scottish writer famous mainly for his novels *Treasure Island* and *The Strange Case of Dr. Jekyll and Mr. Hyde*. Stevenson traveled the world and spent a great deal of time in the United States. At the age of 30, he spent a summer honeymooning at an abandoned mining camp at Mount Saint Helena in California. He was obviously a romantic. The place he stayed is now called Robert Louis Stevenson State Park.

On a Thursday in mid-July, we sat down for an agreeable chat. I was astonished, frankly, at his candor and amiability. The words in his answers are drawn from a posthumous collection of his essays titled *Learning to Write* (1920).

Garner: How did you become a writer?

Stevenson: All through my boyhood and youth, I was always busy trying to learn to write. I had vowed that I would learn to write. That was a proficiency that tempted me; and I practiced to acquire it, as men learn to whittle, in a wager with myself.

Garner: How did you start?



Stevenson: Description was the principal field of my exercise; for to anyone with senses there is always something worth describing, and town and country are but one continuous subject. But I worked in other ways also. I often accompanied my walks with dramatic dialogues in which I played many parts and often exercised myself in writing down conversations from memory.

Garner: That's how you learned?

Stevenson: No, that wasn't the most efficient part of my training. Good though it was, it only taught me, so far as I have learned them at all, the lower and less intellectual elements of the art—the choice of the essential note and the right word. It set me no standard of achievement. So there was perhaps more profit, as there was certainly more effort, in my secret labors at home.

Garner: Secret labors? Sounds mysterious.

Stevenson: Whenever I read a book or a passage that particularly pleased me, in which a thing was said or an effect rendered with propriety, in which there was either some conspicuous force or some happy distinction in style, I must sit down at once and set myself to ape that quality. I was unsuccessful and I knew it, and tried again, and was again unsuccessful and always unsuccessful; but at least in these vain bouts, I got some practice in rhythm, in harmony, in construction and the coordination of parts. I played the sedulous ape.

**Familiarity
has a cunning
disenchantment. ...
Our attention
must be
surprised.**

—Robert Louis Stevenson

Garner: That's how David Foster Wallace taught himself to write.

Stevenson: That, like it or not, is the way to learn to write; whether I have profited or not, that is the way. It was the way Keats learned, and there was never a finer temperament for literature than Keats'; it was so, if we could trace it out, that all people have learned; and that is why a revival of letters is always accompanied or heralded by a cast back to earlier and fresher models.

Garner: Doesn't sound very original.

Stevenson: It is not the way to be original! It isn't. Nor is there any way but to be born so. Nor yet, if you are born original, is there anything in this training that shall clip the wings of your originality. There can be none more original than Montaigne; neither could any be more unlike Cicero. Yet no craftsman can fail to see how much the one must have tried in his time to imitate the other. It is only from a school that we can expect to have good writers; it is almost invariably from a school that great writers, these lawless exceptions, come. Nor is there anything here that should astonish the considerate. Before he can tell what cadences he truly prefers, the student should have tried all that are possible. Before he can choose and preserve a fitting key of words, he should long have practiced the literary scales; and it is only after years of such gymnastics that he can sit down at last, legions of words swarming to his call, dozens of turns of phrase simultaneously bidding for his choice, and he himself knowing what he wants to do and—within the narrow limit of a man's ability—able to do it.

Garner: What's the point of these imitations?

Stevenson: It's this: There always shines beyond the student's reach his inimitable model. Let him try as he please, he is still sure of failure; and it is a very old and a very true saying that failure is the only high road of success. I must have had some disposition to learn; for I clear-sightedly condemned my own performances. I liked doing them, indeed; but when they were done, I could see they were rubbish.

Garner: Rubbish? What's your standard for style, then?

Stevenson: We talk of bad and good. Everything is good that is conceived with honesty and executed with communicative ardor. See the good in other people's work; it will never be yours. See the bad in your own, and don't cry about it; it will be there always. Try to use your faults; at any rate use your knowledge of them, and don't run your head against stone walls.

Garner: How much do you think about technique?

Stevenson: Bow your head to technique. Think of technique when you rise and when you go to bed. Forget purposes in the meanwhile. Get to love technical processes, to glory in technical successes; get to see the world entirely through technical spectacles, to see it entirely in terms of what you can do. Then when you have anything to say, the language will be apt and copious.

Garner: Why do you care so much about technique?

Stevenson: There is only one merit in a writer—that he should write well. And only one damning fault—that he should write ill.

Garner: How do you prepare to write something?

Stevenson: When truth flows from a writer, fittingly clothed in style and without conscious effort, it is because the effort has been made and the work practically completed before he sat down to write. It is only out of fullness of thinking that expression drops perfect like a ripe fruit. And when Thoreau wrote so nonchalantly at his desk, it was because he had been vigorously active during his walk. For clearness, compression and beauty of language cannot come to any living creature till after a busy and prolonged acquaintance with the subject at hand.

Garner: Do you compose quickly?

Stevenson: I used to write as slow as judgment. Now I write rather fast. But I'm still a slow study, and I sit a long while silent on my eggs. Unconscious thought is the only method: Macerate your subject, let it boil slow; then take the lid off and look in—and there your stuff is, good or bad.

Garner: Many lawyers just ape each other, using bad old forms and thinking they must use the legalese that judges are accustomed to. Does that seem wise?

Stevenson: Familiarity has a cunning disenchantment. In a day or two it can steal all beauty from the mountain-tops, and the most startling words begin to fall dead upon the ear after several repetitions. If you see a thing too often, you no longer see it; if you hear a thing too often, you no longer hear it. Our attention must be surprised. To carry a fort by assault and to gain a thoughtful hearing from the ruck of mankind are feats of about equal difficulty and must be tried by not dissimilar means.

Garner: One last thing, if I may: How important is word choice?

Stevenson: The first merit that attracts in the pages of a good writer, or the talk of a brilliant conversationalist, is the apt choice and contrast of the words employed. It is a strange art to take these blocks, rudely conceived for the purpose of the market or the bar, and by tact of application touch them to the finest meanings and distinctions, restore to them their primal energy, wittily shift them to another issue, or make of them a drum to rouse the passions.

Garner: I wish we had longer. Thank you for your time, Mr. Stevenson.

Stevenson: A pleasure, Mr. Garner. ■

Bryan A. Garner, editor-in-chief of Black's Law Dictionary and author of many books on advocacy and legal drafting, is the distinguished research professor of law at Southern Methodist University. His most recent book is Nino and Me: My Unusual Friendship with Justice Antonin Scalia.

On
Well-
Being

Find Your Ease

Relaxing the anxious lawyer brain takes practice

By Jeena Cho

I think about getting into a car accident or catch myself checking the weather, hoping for a really bad storm so I won't have to go to the hearing: This is what a lawyer shared with me during a coaching call. It's a feeling that's also familiar to me—one that I never shared with other lawyers until I realized that keeping a stiff upper lip only perpetuates the problem.

According to a 2016 study by the Hazelden Betty Ford Foundation and the ABA Commission on Lawyer Assistance Programs, 19 percent of lawyers experience anxiety and 23 percent experience chronic stress.

I, too, fell into the category of lawyers experiencing overwhelming stress and anxiety. But, like most lawyers, I didn't give much thought to being proactive and looking for tools to let go of the stress and anxiety.

I lived for years in a constant cycle of exhaustion and tension. I assumed if I could just work harder, get through my cases faster, do more with less time, these issues would resolve themselves. It didn't seem abnormal that I'd fantasize about catastrophic events happening so that I wouldn't have to go to the mediation, court hearing, client meeting or other work-related, anxiety-provoking events.

OPTIMAL CONDITIONS

Recently I led a mindfulness retreat for 25 lawyers from across the country. The theme was "Find Your Ease." The word *ease* means to relax one's efforts.

A retreat is a wonderful opportunity to disrupt everyday habits in a new environment. It's a chance to learn and practice how to relax the constant efforts we tend to engage in. It's a chance to create new habits and try different tools to see which ones work to lessen feelings of stress and anxiety.

It's common to get to a retreat only to find yourself full of anxiety or stress-inducing thoughts. The mind doesn't have an off button, and just because you're sitting at the beach overlooking the endless blue ocean doesn't mean your mind

can't be back at the office frantically working away.

I like to approach relaxing the mind the same way I approach gardening. I can make sure to tend to the plant with just the right amount of water, enrich the soil just so, space it properly, keep an eye out for signs of disease—but ultimately, how well the plant does or how much fruit it produces isn't up to me. Similarly, I can regularly engage in activities that create the optimal conditions so the mind can relax but still recognize that might not happen.

Getting to know your own mind and figuring out what helps it to relax takes a willingness to get to know yourself—a willingness to try different things and see what works.

One of the many benefits of having a regular mindfulness and meditation practice is experiencing less stress and anxiety. However, these practices won't give you instant results. Similar to exercising the physical body, meditation practice will train the mind over time. One of the most common challenges beginning meditators have is that they notice more stress and anxiety during the session.

It's a frustrating experience when the mind doesn't cooperate and continues to work overtime when you're trying to relax. You sit down, eyes closed, paying attention to your breath, and you realize the mind feels like there's a tornado going through it.

What does happen over time is that we can learn not to allow these thoughts to pull us away. We can learn to catch ourselves when we're engaged in these destructive thoughts and return back to this moment. We can learn to see the thoughts for what they are—a habit of the mind. Over time, we can replace the broken record with a more pleasant tune.

INCREASED RESILIENCE

Resilience refers to one's ability to survive and thrive when faced with life's many stressors. We can learn to be more resilient through deliberate practices, including fostering deep, meaningful relationships with others; changing how we think about life's obstacles; accepting that changes are a natural part

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— JEENA CHO



of life; and taking good care of ourselves.

With the constant demand and stress of billable hours, there can be a natural tension between carving out “me time” versus time we dedicate to work. Finding balance doesn’t happen magically. We can falsely believe that there will be some magical moment where every item on the to-do list has been completed, and then there will be time for self-care. What we often fail to see is that self-care practices help us to be more resilient and effective, and better at keeping overwhelming stress and anxiety at bay.

Each person has different needs in terms of how much self-care they need to feel whole and balanced. Also, over time, what we do for self-care will likely shift. In my 20s, I used to enjoy rock climbing; now I prefer low-impact activities such as hiking and yoga.

Sometimes lawyers express that they feel guilty when they take time for themselves. The feeling of guilt is also just another thought, a habit of the mind. Caring for your well-being isn’t a selfish act. It’s the foundation for ensuring that you can be the best lawyer possible. ■

Jeena Cho consults with Am Law 200 firms, focusing on strategies for stress management, resiliency training, mindfulness and meditation. She is the co-author of

The Anxious Lawyer and practices bankruptcy law with her husband at the JC Law Group in San Francisco.

MEDITATION FOR WORKING WITH ANXIETY

Adapted from
The Anxious Lawyer

1. Sit in a comfortable position, or practice lying down. Allow the eyes to close.
2. Begin to notice the breath as the air moves in and out of the body.
3. Notice whether you’re holding tension anywhere in the body.
4. Deepen the breath and see if you can lessen the tension.
5. Invite the body to relax. You can silently think “Relax.”
6. If you notice anxiety rising in the body or mind, label the experience. For example, “I am experiencing anxiety.”
7. Just like clouds in the sky, feelings of anxiety will come and go.
8. You might imagine the anxiety is like the clouds in the sky. Sometimes there may be a thunderstorm going through the mind with lots of dark clouds. Other times there will be no clouds, as on a beautiful spring day.
9. Notice when the mind adds extra thoughts, judgments or narratives about the anxiety.
10. Gently return the mind back to the breath.

Listen to an audio version of this meditation at jeenacho.com/wellbeing.

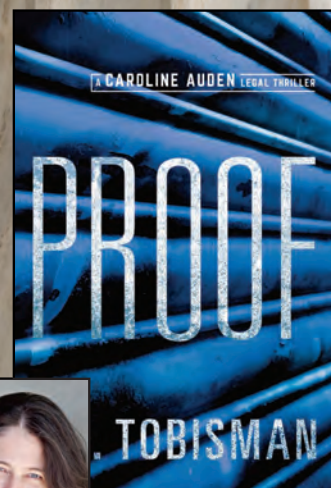
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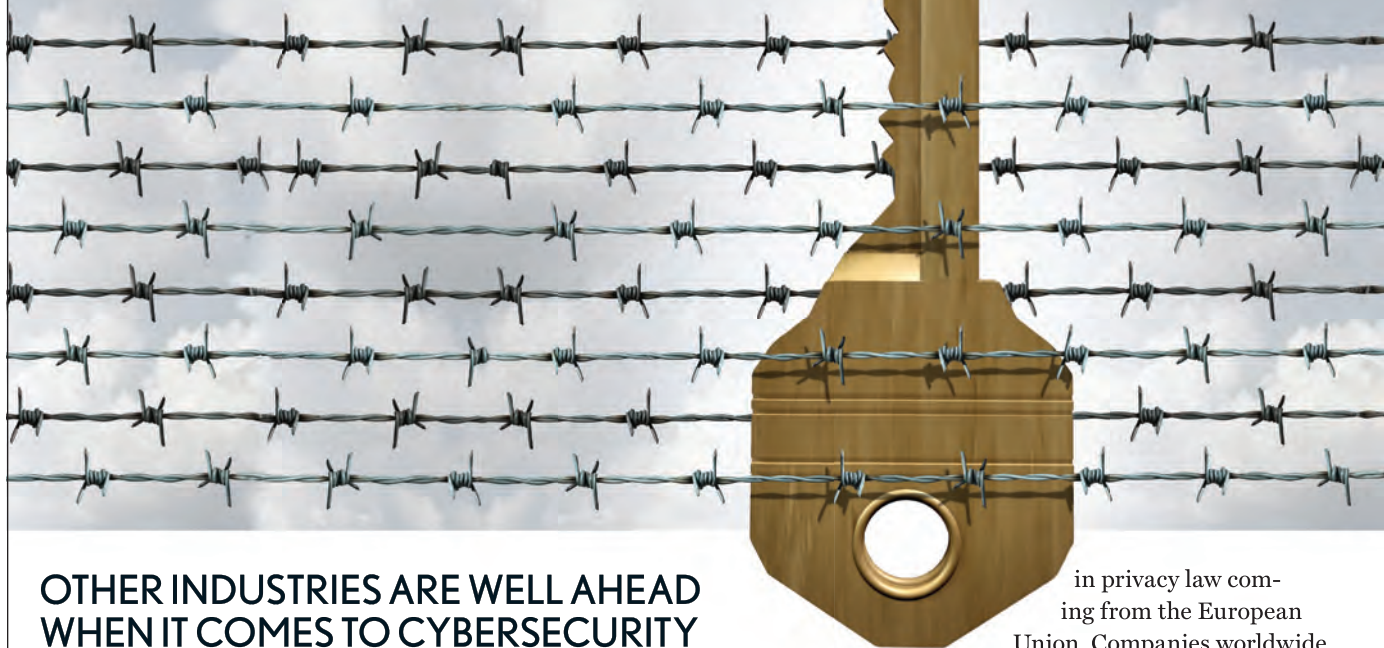


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OUTSIDE HELP



OTHER INDUSTRIES ARE WELL AHEAD WHEN IT COMES TO CYBERSECURITY AWARENESS AND PREVENTION. WHAT CAN THE LEGAL INDUSTRY LEARN FROM THEM? BY ANNA STOLLEY PERSKY

Equifax. Yahoo. Anthem. Sony.

In the past few years, these companies experienced some of the most significant data breaches to date. And all of these companies found themselves subject to intense worldwide media coverage over their failure to secure their information.

The industries affected—from health care to entertainment—know all too well that the struggle to secure data in the digital age never ends. While individual businesses within these industries will continue to find themselves vulnerable to breaches, they have an advantage over law firms. They have been fighting this battle for a long time.

The legal industry is lagging well behind when it comes to data security, says Rich Santalesa, a member of the boutique cybersecurity firm SmartEdgeLaw Group and of counsel to the New York City-based Bortstein Legal Group.

“Law firms as a whole can learn a lot about cybersecurity by looking at other industries,” says Santalesa. “Unfortunately, other industries have had to learn their lessons the hard way—by having breaches that have received media attention.”

Santalesa says data security involves three different, simultaneous focuses: “the technology, the people you have, and needs of the industry in which you work.”

In addition, data security can’t be a one-size-fits-all situation. The cybersecurity needs of a small law firm will be different than the needs of an international firm, just like the needs of Target are different from the needs of a small retail website. However, all law firms, just like all businesses, must pay close attention to the applicable privacy laws, Santalesa says.

The legal industry needs to pay special attention to the changes

in privacy law coming from the European Union. Companies worldwide are responding to the General Data Protection Regulation, which sets guidelines for the collection and processing of personal information of individuals within the European Union.

The GDPR is “scaring everyone because the penalties for failing to protect personal data are high,” says Charles Gold, chief marketing officer for Virtru, an encryption and data protection company.

“If you are doing business with Europeans, you need to be very conscious about GDPR and the requirements for protecting personal data,” he says.

Gold points out that Europe tends to blaze the trail when it comes to privacy laws, so “even if you aren’t doing business in Europe, you need to know that the same kind of regulation as GDPR is coming soon to a country near you.

“Giddyup and get ready,” Gold says.

ENCRYPTION IS KEY

Law firms of all sizes have failed to properly invest in the technology needed for data security, according to cybersecurity experts.



Cybersecurity & the law:
A joint production of the
ABA Journal and the
ABA Cybersecurity
Legal Task Force

“Your law firm’s data, just like other organizations’ information, is no longer sitting in one place,” Gold notes. “It’s moved to the cloud. It’s on multiple servers, client devices, third-party devices. It’s out there in the world, so how do you protect it?”

Law firms can look to financial institutions, which have long struggled with protecting data as required under the Gramm-Leach-Bliley Act, says cybersecurity expert Yong-Gon Chon.

Both Chon and Gold say the lesson learned from other industries is that encryption is a good investment to help secure end-to-end protection. Chon says industries such as financial services and casino gaming have long used encryption to protect data.

While encryption can’t prevent all cyberattacks, it makes stealing information a lot harder, says Chon, who’s a board adviser for RiskRecon.

“When you have pervasive use of encryption, even if someone does get access to a server or a cloud archive, they then have to break the encryption,” says Chon.

Gold emphasizes that encryption helps protect not only consumer information but also other precious data that law firms don’t want leaked, such as intellectual property. Media companies like Home Box Office use the encryption software available from Virtru, he says.

“HBO encrypts scripts that are sent via email,” says Gold. “If you think about it, if a script was leaked, that would be a big deal for any media company.”

DOCTORS AND LAWYERS

Unfortunately, the biggest cybersecurity transgressors are often the people who think they have more important matters to concern themselves with than the protection of information, Chon says.

In the health care industry, he says,

it is the doctors, not the administrative staff, who can be most resistant to cybersecurity awareness. The problem, he says, is that doctors often operate in a “VIP mode.”

To put it bluntly, says Chon, “doctors often put the convenience and speed of accessing patient records above the safety of patient information, and nobody wants to correct them.”

“Think of the last time you went to an emergency room. What did the doctor do? The doctor pulled up your medical records while seeing you,” Chon says. “Your personally identifiable information was probably in plain sight of everybody else—and anybody could have just walked up to the terminal and gotten access.”

Hospitals and medical offices have had to focus on training doctors on the importance of ensuring the safety of medical information. And senior partners, he adds, aren’t much different than doctors.

“They tend to operate with a sense of privilege, the same way doctors can,” says Chon. Therefore, when law firms are establishing and reinforcing their cybersecurity protocols, partners need to be leaders, not rule breakers, by following the same procedures that apply to associates and administrative staff.

NO SILVER BULLET

According to Verizon’s *2018 Data Breach Investigations Report*, businesses need to be especially alert for ransomware attacks, which are often disguised as a file an employee is tricked into downloading. Businesses such as banks have been specifically targeted for ransomware attacks.

Employees need to be trained in proper data security protocol and must understand that cybersecurity should always be a top priority, says Michael Mason, chief security officer at Verizon Communications.

“It is important to develop a culture of security,” Mason says. “Bake it in on the front end as you grow your firm.”

That culture extends to third-party vendors. Law firms also must make sure that the companies they do

business with have adequate cybersecurity safeguards in place, as well as a culture of security.

For instance, in 2013, Target found itself in a public relations tailspin when hackers stole massive amounts of sensitive payment card data. In the end, it turned out that the attackers gained access to Target’s network with a username and password stolen from an HVAC company that had serviced Target.

“When you hire a baby sitter for your child, what sort of background check do you use? Hopefully, something so precious is not put into the hands of strangers without a background check,” Chon says. “Your firm’s data is also precious.”

There is, according to cybersecurity experts, a plethora of experienced outside consultants to help law firms with risk assessments. Once a third-party vendor has been vetted and hired, says Chon, it’s not over. Every year, a law firm should still conduct risk assessments to ensure that the vendor is maintaining its data security protocols.

Michelle Dennedy, vice president and chief privacy officer at Cisco Systems Inc., says law firms should be examining the vulnerability of information from every case that has been closed but is still kept in storage.

“How are we managing the storage and deletion of data so we are not exposing information at the end of its life cycle?” Dennedy asks. “There’s technology to help delete information that is left exposed long after you are done utilizing it.”

To Mason, the most important lesson for lawyers is the same one businesses have had to learn through their mistakes: Cybersecurity must be a way of life. Never stop paying attention.

“At the end of the day, you can never put your silver bullet on the table and say, ‘My work is done’ and go riding off into the sunset,” he says.

“You need people who are being constantly trained and updated. You need to be constantly aware of what tools and services are coming into the marketplace.” ■

Good Data, Bad Data

When it comes to predicting outcomes in litigation, algorithms are only as good as their underlying information

By Jason Tashea

Technology

There is a small law firm in Annapolis, Maryland, harnessing big data.

Emanwel Turnbull, one of two attorneys at the Holland Law Firm, uses a unique, statewide database to gain early insight into his cases.

The database, which has over 23 million civil and criminal cases from Case Search, the state judiciary's document portal, allows Turnbull to analyze the behavior of an opponent, check a process server's history or learn whether an opposing attorney has an unscrupulous track record.

"Back in the old days, they'd have an intern or secretary manually go through judiciary Case Search to try and find these things out," says Turnbull.

Now, it takes seconds.

While saving time, the database does not provide dispositive evidence because the information reflects input and clerical errors. Even with this shortcoming, Turnbull says the database points him "in the direction of further research," which he uses in aid of his clients.

Turnbull's work reflects data's growing role in law. With increased computing power and more material, law firms and companies are evolving the practice and business of litigation. However, experts say these projects can be hindered by the quality of data and lack of oversight.

Many data-driven projects promise efficiency and lower legal costs for firms and clients.

Littler Mendelson developed CaseSmart, launched in 2010, "to provide better value" to clients with

leaner legal budgets after the recession. The project is a repository for data created by a client's legal issues, explains Scott Forman, a shareholder in Miami.

Through an intake team in Kansas City, Missouri, employment law firm Littler can capture data that, on aggregate, points to specific company policies or employees that create legal problems. Clients can take these outputs and decide to increase training or change a policy to reduce the risk of future litigation, for example.

While the data is good for trend-spotting, it is not used to build predictive algorithms. Forman wants to include that capacity at some point; however, he says there is not enough "clean data" to train an algorithm.

Algorithms are built on structured data, which means data quality impacts accuracy. If your data is of low quality, then it's as the saying goes: "garbage in, garbage out."

Travis Lenkner, managing partner

"Back in the old days, they'd have an intern or secretary manually go through judiciary Case Search to try and find these things out." —Emanwel Turnbull

at Keller Lenkner in Chicago and senior adviser at Burford Capital, a litigation finance firm, says the use of algorithms and data in litigation finance "will be measured and limited by the availability of data."

While Burford's work is informed by data, Lenkner is skeptical that current court data quality allows for good predictions. "Imagine your county courthouse," he says, and think about its data situation. You realize "there's a lot of work to do."

One way to put a check on data and algorithmic systems is through auditing, explains Christian Sandvig, a professor at the University of Michigan.

Like a financial audit, this process can determine, among other things, whether there are data quality issues, an algorithm meets legal standards, or the tool is creating unintended or biased consequences. Sandvig says that audits are not "just investigative or punitive," but they should be used by companies to monitor their own operations. Currently there are no industry standards regarding what or who should be audited and how, he says.

CALL AN AUDITOR

Whether or not this call for oversight is heeded, companies in the legal market see growing demand for better analytics. Justly, a litigation analytics startup founded in New York City in 2015, is one.

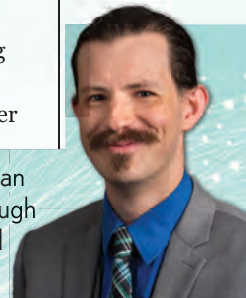
CEO Laurent Wiesel explains that Justly aggregates litigation data to "forecast time and cost" in business cases. Subscriptions start at \$1,500 a month. Beyond forecasting, Justly provides reports on clients and opposing counsels. The predictions are derived from a data set of 17.5 million state and federal cases going back to 2003.

Informed by his work as an attorney, Wiesel says Justly improves on the traditional,

"labor intensive" law firm approach to estimate the needs of litigation. When asked, he says that Justly has not undertaken third-party auditing, but that he was open to the idea.

The co-founders of Legalist take a different approach with their data, which is used to inform litigation financing.

Eva Shang, CEO and co-founder of Legalist, says her company's data allows it to look "at the likelihood" a case will win at trial. The data-driven



infusion, Shang says, helps close the justice gap for small businesses.

With a data set of 15 million state and federal cases, Shang says they have not engaged with auditors. She says investors do their due diligence when deciding to invest, which includes the fact that they have not suffered a loss yet.

Since no one would ask a large insurance company to open its underwriting models, she argues, the auditing issue was irrelevant to Legalist.

While aware of startups in his field such as Legalist, Lenkner, who maintains a senior adviser role at Burford, is comfortable with the company's data and algorithm use. He has an appetite for more robust analytics, he says, but only when the data is more trustworthy.

"We are stewards of our investors' and our shareholders' capital, and they invest with us precisely because of our expertise and judgment and experience, not in spite of it," Lenkner says. ■

Is Culture Overrated?

Law firms place great importance on hiring lawyers who fit their culture, but are they merely perpetuating the status quo?

By Danielle Braff

Hiring

If you're a prospective employee at Culhane Meadows, you can expect to go on up to nine interviews before getting an offer.

It takes that many conversations to figure out if you're really, truly a fit with the culture there.

"It's the single most important factor," says Grant Walsh, managing partner and national hiring coordinator for the firm, which has seven offices. "We've turned down candidates that might have very good books and very good financial data, but

during the interview they didn't talk about being part of a team, and they always said 'I, I, I.' We want them to be part of a team."

The idea of "cultural fit," which refers to how well employees' personalities, work styles and values mesh, has long been an important factor for law firms. Indeed, at many firms, it has become more important than grades, previous job records and even money. Major, Lindsey & Africa found in 2016 that law firm culture was the primary reason partners switch firms, and that 62 percent of lateral partners were attracted by a firm's

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culture compared to 15 percent who were motivated by money. Culture can also affect whether law firms can retain associates. According to a 2016 survey published online in



"When there's no specific way on how to judge an answer, people just gravitate toward the people they like."

—LAUREN RIVERA

the ABA's Law Practice Today, negative culture was one of the main reasons associates chose to leave a firm, with 19 percent of respondents citing it as the main reason.

But putting so much emphasis on cultural fit may not be the best decision, especially with regard to law firms, one recent study finds.

The study, published last year in the *Georgetown Journal of Legal Ethics*, covers interviews with lawyers over a 15-year period. The main finding was that the idea of cultural fit at elite law firms favors white men and reflects racial, gender and ethnic inequality.

"Fit is a way for embedded histories and power relationships to make it more difficult for minorities, women and people who do not possess the cultural capital represented by golf, for example, to succeed in particular settings—including the corporate law firm," the study finds.

ASKING THE RIGHT QUESTIONS

Recent studies have found that diverse law firms actually work better than those that are culturally homogenous.

In a study published in the American Psychological Association's *Journal of Personality and Social Psychology*, 200 people were split up into six-person mock jury panels. The panels were either all white or had four white people and two black people. The diverse panels raised more facts and made fewer factual errors. When issues came up, they were more likely to correct them during deliberation, compared with the all-white juries.

That's because when it comes to law firms—or businesses in general—the term *cultural fit* looks at personalities rather than skills, says Lauren Rivera, associate professor at the Kellogg School of Management at Northwestern University, who studies this topic.

And while it's natural that law firms lean toward choosing a candidate who seems to have a personality that matches the rest of the team, since the hours tend to be long, and you want a partner who will get along with everyone, this isn't the right question to be asking during an interview.

"They should be looking for skills," Rivera says. "They should crunch the numbers internally to figure out what predicts good performance: You have to figure out what's driving your organization, and then you can make sure that's what you're testing to hire."

The more you can test the skills and simulate them during the interview process, the better, Rivera says. "The answers to the open-ended personality questions tell you whether or not you like talking to that person, but that's it," she says.

Eric Stevenson, a partner at Stevenson Klotz in Pensacola, Florida, disagrees.

Stevenson, who has been practicing law for 19 years, says his three-lawyer firm works hard to find someone who fits into the workplace culture—even when hiring staffers. He sees this as its own skill that can benefit, rather than hurt, clients.

"We are very customer service-oriented and work hard to make sure the candidate fits into our firm culture of putting the client first," Stevenson says. "I think our approach is important because a candidate's personality and fit likely will not change much, and if they may lack some skills or knowledge in a position, we can provide that training to them."

During the interview, Stevenson says, he'll ask questions along the lines of: "Tell me about a time when you had to go out of your way to assist a customer," or "Describe a time when you could establish a rapport with a person that others referred to as difficult?"

In the United States, the preferred way of interviewing candidates is through open-ended, unstructured questions like these, Rivera says.

"You don't really have a database perspective on why you're asking certain questions, and the firm hasn't crunched the numbers on what questions make good associates," she says. "When there's no specific way on how to judge an answer, people just gravitate toward the people they like."

And while that may create a friendly law office, it doesn't necessarily create a skilled one, she says.

Nevertheless, Walsh of Culhane Meadows says his law firm has reaped the benefits of cultural fit, growing from a firm of four lawyers in 2013 to more than 50 today.

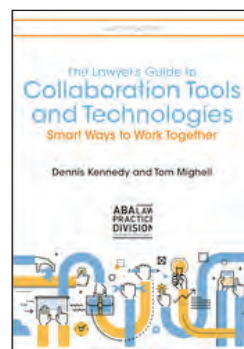
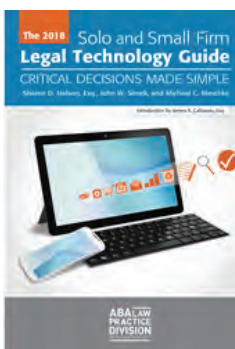
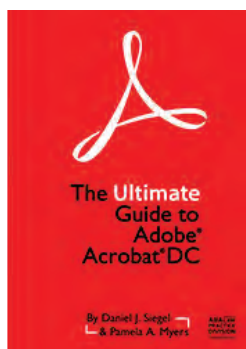
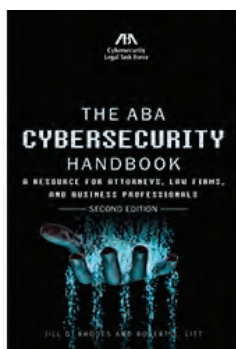
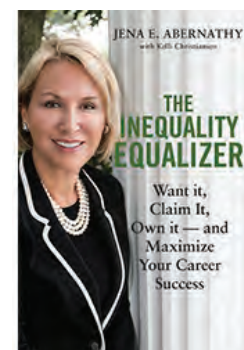
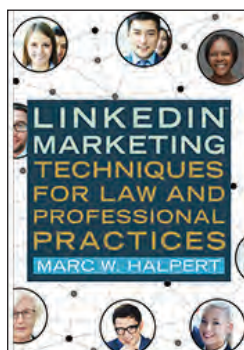
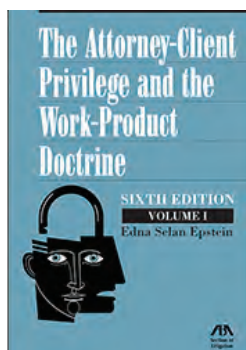
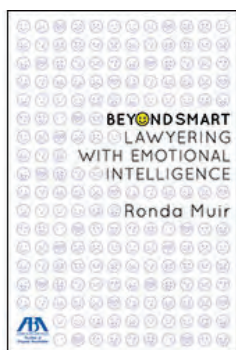
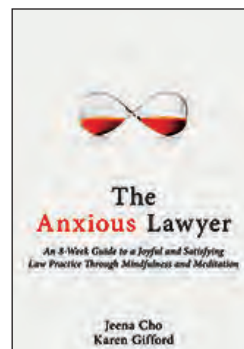
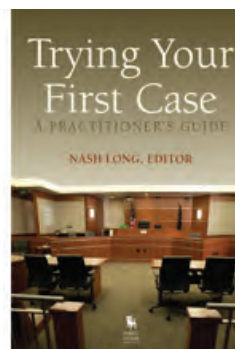
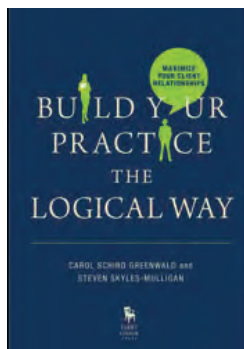
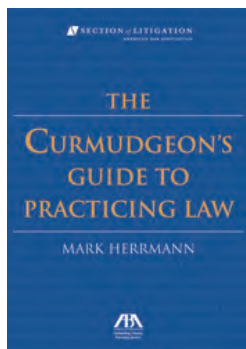
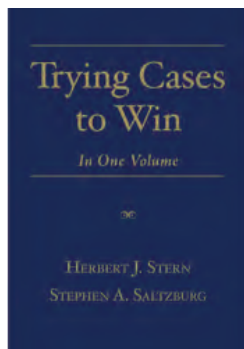
"We're doing something right," he says. ■



"A candidate's personality and fit likely will not change much, and if they may lack some skills or knowledge in a position, we can provide that training to them."

—ERIC STEVENSON

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Today's law practice is a construction zone. With so many new ideas, approaches, tasks and services, the profession can seem like a Chicago summer. (That's when the city crews are out fixing all the streets devastated by Chicago winters.)

All that activity can seem like chaos, but these legal services projects promise more effective, more efficient and more amenable paths to helping clients and building a practice.

So it's only right that this 10th edition of the *ABA Journal* Legal Rebels celebration adopts a hard-hat theme. This year's 11 innovators are building roads to justice, efficiency, technology and knowledge. Their efforts include bringing legal services to outback Alaska, ranking law firms and law schools for their work with legal technology, setting the rules for blockchain, using a law firm as a lab for change, giving performance reviews to corporate law firms, using data to link clients to experienced attorneys, developing best practices for immigration law, using a privately funded nonprofit to keep legal aid costs down, training law students in a business mindset, and offering a *Star Wars*-style shortcut to competitive advantage.

Check out the miniprofiles in the pages following, written by Lorelei Laird, Angela Morris, Stephen Rynkiewicz, Jason Tashea and Stephanie Francis Ward. But don't forget to dive into the longer posts on each Rebel online at LegalRebels.com. There you can find—or add—legal practice strategies, listen to podcasts with Legal Rebels Trailblazers who helped start the legal services revolution, and check out profiles of past Rebels.

Speaking of former honorees, see new interviews with Rebels who have moved on to new challenges. As any contractor or innovator can tell you, construction season never ends.



BUILDING

HER LAW FIRM *Is Her Lab*

Billie Tarascio is experimenting on her law firm for the profession's greater good.

With Modern Law, a divorce law practice in Mesa and Scottsdale, Arizona, and a legal technology company, Access Legal, Tarascio has developed a laboratory she believes creates practices that can make attorneys happier and more efficient, and let them better serve the public.

Through her experiences and driven by metrics, Tarascio has developed four steps to create and assess changes to her firm. First, the team defines its goals. Next, metrics are set around intended outcomes. Then the team hypothesizes potential process or policy changes that may meet its goals. Finally, if the experiment pans out, team members look for software to automate and institutionalize the change.

And though Tarascio is a believer in legal technology, she has learned clients want more than machine efficiency. "I think consumers value our experience and advice," she



says. "It is very clear that they want connection and communication."

Recently, Tarascio teamed up with CuroLegal, a legal technology company, and others to create CuroStudio to develop projects that help close the ever-growing gap in access to justice. Together they are creating a new project, Modern Law Practice, a "plug-and-play law firm model" to help solo practitioners and small firms automate process and procedure and adopt technology.

"This is what Billie has lived and breathed for 10 years at her firm," says Chad Burton, CEO of CuroLegal. "And her firm has been supersuccessful as a result."

—Jason Tashea



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Doing It with DATA

While business owners and in-house counsels usually find outside counsels through referrals, Basha Rubin says that often doesn't lead to a good result in terms of cost and experience. The New York City lawyer believes that data can fill the gap.

In 2013, she co-founded Priori, a legal services platform that pairs attorneys with clients based on detailed experience information, with her law school classmate Mirra Levitt. The service is free for the attorneys in the database who agree to discount hourly rates by at least 25 percent. Clients pay 10 percent of the discount to Priori, which covers things such as request-for-proposal process management and facilitation of both billing and payments.

Businesses submit requests for proposals, and the Priori system matches the requirements with data collected about attorneys in the roster and from feedback from engagements. The client usually gets attorney matches in less than one business day. Database information includes the kinds of deals an attorney negotiated, who the parties were, court appearances they've had, which judges they've faced, and how the matters were resolved. Approximately 10 percent of attorney applicants are admitted to the Priori roster.

"We care about the depth of their expertise," Rubin, 33, says. "We don't work with attorneys who say they are generalists because we found that our clients are less satisfied with those people."

The database screening process also includes what Levitt, 37, refers to as a "social intelligence test," which involves a conversation in person or on Skype with someone from Priori.

"Priori comes from the Latin phrase *a priori* and was intended to communicate that if you hire an attorney proactively rather than reactively, you'll ultimately save time and money," Rubin says.

—Stephanie Francis Ward





Basha Rubin and Mirra Levitt

PHOTOGRAPHS BY ARNOLD ADLER; DAVID FONDA PHOTOGRAPHY



Law in the **LAST FRONTIER**

Miguel Willis, 29, has already created his own job—twice. As a 1L at the Seattle University School of Law, he created an online textbook marketplace for law students. As a 2L, he started the Access to Justice Tech Fellows Program, which awards 10-week summer fellowships to law students working on using technology to improve access to legal services.


“I raised enough funding for the fellows, but I didn’t have enough to run the program,” he says. “So I, in essence, became a fellow in my own program.”

That fellowship sent Willis to Alaska, where he helped the Alaska Court System develop its Justice for All Project for improving A2J. Most of Alaska’s 220 towns and villages are many miles away from urban areas where lawyers congregate. They’re often not connected to the big cities with roads. And for Alaska Natives, who often live in the villages, there can also be language and cultural barriers.

Through the Justice for All Project, the legal community works with existing medical and law enforcement providers, who are more likely to be in the villages, to screen people for potential legal needs. Willis also created a social network analysis for the project—something he had to learn from scratch.

Willis is arguably now doing a third job he created himself: He’s the Law School Admission Council’s first presidential innovation fellow. He’s working with LSAC on creating more diversity in the pipeline of law students.

—Lorelei Laird



Stepping Up A2J, CUTTING COST

Michele Mirto's commitment to access to justice started as a little girl, donating to the food bank and homeless shelter. But it wasn't until 2017 that she learned she'd end up turning the legal aid business model on its head.

As executive director of Step Up to Justice, a Tucson, Arizona-based privately funded legal aid nonprofit, Mirto, 54, wields a shoestring budget and just three staff members armed with legal technology. They lead an army of volunteer lawyers in resolving low-income clients' civil matters—mostly family law but also guardianship, consumer law, bankruptcy and wills and probate.

Step Up to Justice's budget—\$215,000 in 2017—is 95 percent smaller than the average \$4 million budget of a legal aid provider. In 2017, Mirto's firm provided \$1 million worth of free legal services as its staff coordinated 114 volunteer lawyers to serve 1,000 clients—a 20 percent increase in civil legal services in Pima County. Step Up to Justice closes cases for \$215, she says, rather than \$1,800 per case, which is the cost of traditional legal aid providers.

The technology includes a case information system with data on clients, donors and lawyers. Users log on remotely to create case notes and share documents—giving lawyers more work time and clients less hassle.

"It's a different model," Mirto says. "Our staff is not in itself delivering the legal services, so it's a huge cost savings."
—Angela Morris

Scoring LEGAL WORK

In his former job as chief business development officer at Frost Brown Todd in Louisville, Kentucky, James Beckett was hungry to learn how his firm could do better.

"In this highly uber-competitive, commoditized world of legal services, how do we exceed the expectations of our clients and increase our market share and actually have something to differentiate ourselves other than puffery?" he asks. "And I thought there can't be any other better way than performance."

But it was often hard for Frost Brown to get that kind of performance data. So Beckett ended up making his own scorecard. He was on the verge of leaving his firm to commercialize that idea when he met Mark Smolik, general counsel of DHL Supply Chain Americas. Smolik had also created his own scorecard for DHL's outside counsel, and he was interested in commercialization.

That's how the two formed Qualmet, a 2-year-old startup that offers corporate legal departments a web-based tool for measuring their outside counsel's performance—and the value it brings to their bottom lines. Beckett likens it to the kind of performance evaluation any large business might do on its employees, but applied to outside counsels. By aggregating that kind of data, Qualmet also plans to offer customers the ability to measure outside counsel's performance against industry-wide benchmarks.

Beckett, 50, believes measuring performance benefits both sides of that relationship. Outside lawyers can both know where they stand and get a sense of what's important to the client—and therefore how they can become that client's go-to lawyers.

"At the end of the day, this really gets down to behavior," he says. "And if we don't take the time to really unpack behavior, then our ability as legal professionals is going to be hindered."

—L.L.



Replicating IMMIGRANT ASSISTANCE

In the summer of 2014, Stephen Manning was focused on representing mothers with young children in family detention—many of them fleeing violence in Central America. They were being deported much more quickly than usual, and there were hundreds of potential clients and only a handful of lawyers who generally had to fly home at the end of the week.

So Manning, 48, imported something he thought would help: the Innovation Law Lab, a case management system he'd developed for collaboration at his own law firm, the Immigrant Law Group in Portland, Oregon. The system enables a kind of crowdsourcing, allowing teams

to pick up pieces of cases as their skills and time allow.

It's not just collaboration. The Innovation Law Lab also captures details about each case and puts them into a database in an attempt to identify—and then replicate—the characteristics of those cases that were successful. "We need to look at ... those things that are actually done in cases, not just what lawyers think they do," says Manning. "And then turn those into highly repeatable processes so that we can scale."

And it's been successful: In 2016, the lab got more than 30,000 people released from detention, a 99 percent success rate. —L.L.



New Futures in Law

Legal technology suits Lisa Colpoys because "there's always something new and shiny," says the Chicago attorney, who recently left a legal aid career to help build the Institute for the Future of Law Practice's boot camp.

Set up in January by a team of legal academics and lawyers from both in-house and outside law firms, the nonprofit program trains law students in approaching law practice from a business mindset. And it places them in paid internships with employers, including corporate legal departments and law firms. It offers two types of internships: a traditional 10-week summer program and a seven-month residency that takes up both the summer and the following semester.

Since starting in March, Colpoys' work has focused on creating curriculum, assembling the internship program and developing relationships. More than 20 employers are currently hosting IFLP interns from five law schools, Colpoys says. And this year the program had 41 students in the basic boot camp in two cities and five in the advanced boot camp.

"We're trying to develop a 21st-century workforce lawyer, so even if students are going to practice law at a traditional firm, they will know about this technology, they are fluent in business, and can talk to their clients about their businesses," says Colpoys, 54.

Before joining the institute, she served as executive director of Illinois Legal Aid Online. While there, she oversaw four website "redesigns-slash-evolutions."

"One of the things I'm passionate about," she says, "is changing the system."

—S.F.W.



PHOTOGRAPHS BY SNG PARK; WAYNE SLEZAK

a **STAR WARS** Shortcut

In the first-released *Star Wars* installment, Han Solo brags that he can captain the *Millennium Falcon* through a smuggling route in just under 12 parsecs—a parsec being a truly astronomical measurement of 3.26 light-years. The route itself is 18 parsecs, illustrating that Solo is a brassy pilot willing to fly closer to black holes and cut the route by a third.

That discrepancy in distance is the inspiration for Jae Um's new venture, Six Parsecs, a legal market insights company.

"It's about the competitive advantage you get if you're nifty enough," says Um, 35, a self-described *Star Wars* obsessive. "It's about not taking the same route as the other smugglers."

Um believes that she can translate legal

business data into a story that helps law firms and lawyers better navigate a dynamic and shifting marketplace.

Her new endeavor is not a consulting firm but a content-focused business that will create data-based analysis and present it in a digestible way to help law firms, legal departments and startups think about how they compete in the marketplace.

"It drives me crazy that we are constantly talking past each other in this industry," she says.

—J.T.

PHOTOGRAPH BY WAYNE SLEZAK





The Measure of **LEGAL** **INNOVATION**

In Daniel W. Linna Jr.'s hypothetical on evaluating potential trial outcomes, the then-litigator presented colleagues with a decision tree—a chart with branches to show the progress of a class action through summary judgment motion, verdict and award. He went on to show how to assign a percentage likelihood to each potential outcome, including low-, medium- and high-value awards.

“That was my introduction to his budding interest in legal innovation,” says real estate lawyer Carl W. Herstein of Honigman Miller Schwartz and Cohn. “In his litigation work [Linna] developed an interest in analytics and the value of tools such as decision tree analysis to help both lawyers and clients understand risk and potential outcomes in terms of probability analysis. From seeds like this, his interest in legal innovation blossomed in his academic career.”

Last year Linna, 47, introduced his Law School Innovation Index, which tracks legal services innovations at 40 law schools. It lists schools according to 10 legal services objectives they could be teaching, including process improvement, leadership, innovative or entrepreneurial lawyering, computational law, data analytics and applied technology. The previous summer Linna had presented the Law Firm Innovation Index, looking at websites of 260 U.S., Canadian and global law firms for signs of innovation. Together they form the Legal Services Innovation Index.

Linna, who took the improbable step of moving from equity partner at Honigman to full-time engagements at Michigan State University College of Law, insists his ratings aren't rankings for schools or firms but “describe where they're going.”

“You don't just go into a wood-paneled room somewhere and figure out what ideas the smart people have,” Linna says. “We're all lawyers, we're plenty smart and have great ideas. But especially when it comes to innovation and solving really wicked problems, we don't know the answers.”

—Stephen Rynkiewicz

Developing TRUST

When Philippa Ryan first heard about trustless relationships enabled by blockchain technology, her interest was piqued. But when she typed “trustless relationships” into her search engine, she says, “the only thing that came up was an ad for Ashley Madison,” the notorious dating website for married people looking to keep their infidelity discreet.

Today, Ryan, 52 and a lecturer at the University of Technology Sydney, can find more suitable material online. She’s helping fill the gap by writing and speaking around the world on the subject.

Ryan is a leading member of the International Organization for Standardization’s technical committee on blockchain and distributed ledger technologies. Being a part of Standards Australia and the committee’s secretariat, she says the work intends to produce high-level guidelines for governments and technologists to use when legislating or developing the technology around the globe.

Ryan expects the standards, which will be completed in 2020, will put developers and users on alert to technical legal issues, which then can be applied to the technology’s more intentional development.

And beyond flexing her own abilities, she is helping nurture the next generation of experts. Jed Horner, policy manager at Standards Australia, says Ryan “has pioneered the use of interns, including at graduate level, to assist in driving some of the discussions on specific areas of blockchain and [distributed ledger technology], giving them valuable exposure internationally and the ability to strengthen their own skills and capabilities.”

—J.T.



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**SHOULD
BIGLAW FIRMS
WORRY ABOUT
INCREASING
COMPETITION
FROM THE
BIG FOUR
ACCOUNTING
FIRMS?**

4



PHOTOGRAPH BY WAVEBREAKMEDIA/SHUTTERSTOCK.COM

SLEEPING

By Jason Tashea

JAMI MCKEON SAYS SHE'S NOT WORRIED.

Elected chair of Morgan, Lewis & Bockius in 2014, McKeon has been with the legal giant since 1981 and she's seen plenty of rivals, competitors and existential threats to the legal industry come and go. "The legal market has always been highly competitive," she says, "so changes we see today are more about the source of competition."

Law firm consultants, however, tell a different story. According to ALM Intelligence and Altman Weil, law firm leaders are already losing business to this latest source of competition that McKeon is speaking about—and many more are concerned that this could be just the tip of the iceberg.

The source of competition is the Big Four.

Composed of the four largest accounting firms in the world—Deloitte & Touche, Ernst & Young, KPMG and PwC—the Big Four have, over the last decade, regrown their legal services offerings by moving beyond tax law and integrating their legal services into a multidisciplinary approach. While still small by comparison to BigLaw, a recent ALM Intelligence report



Jami McKeon

found that 69 percent of law firms interviewed saw the Big Four as a “major threat.” Altman Weil, meanwhile, found in its 2018 *Law Firms in Transition* survey that nearly two-thirds of law firms with more than 250 lawyers consider the Big Four to be a “potential threat.”

The Big Four have not been shy about encroaching on territory once considered the sole province of law firms. PwC, also known as PricewaterhouseCoopers, has even taken the additional step of launching its own law firm. Opened last September in Washington, D.C., ILC Legal provides non-U.S. legal services to mainly multinational companies through foreign-trained attorneys, according to its website. Its practice areas include entity governance and compliance, labor and employment law, global immigration, mergers and acquisitions, and financial and tax law.

“This is market-driven,” Richard Edmundson, managing partner of ILC Legal, told *The American Lawyer*. “Our clients are increasingly looking for advisers that can provide international coverage on transactions from planning to execution.”

The polyglot office has attorneys from Canada, England, Germany, Poland and Spain, all of whom are admitted in their own country but have “special legal consultant” status in the District of Columbia, allowing them to operate with some limitations in the jurisdiction.

While not offering U.S. legal advice, Edmundson said he believes that the law office, which is not controlled by the accounting firm, could practice American law with the right attorneys. ILC Legal did not return requests for comment.

More recently, Deloitte’s United Kingdom operation entered into an alliance with U.S. immigration law firm Berry Appleman & Leiden. Under the terms of the June agreement, Deloitte will buy BAL’s non-U.S. operations, which include offices in London, Singapore, Brazil, China and South Africa. “With the increased need for cross-border business travel, global organizations are recognizing the value of a firm that can bring a global footprint to help support the challenges of delivery and corporate compliance,” said Kalvinder Dhillon, head of immigration at Deloitte Global, in a statement.

For the time being, American lawyers need not worry much. Federal statutes, as well as state bar regulations, will keep the Big Four from offering traditional U.S. legal services. However, the current landscape hasn’t foreclosed the Big Four from growing and offering services in the U.S. and abroad, which has the potential to shake up a stagnant American legal market. Also, large accounting firms have several advantages over their counterparts in law. For clients looking to save money, there are clear financial benefits for going with a one-stop shop to handle both their accounting and legal needs. Due to complementary consulting services, which include technology and process improvement, they have

the capacity to make their legal arms more agile than most, if not all, law firms.

TAKE TWO

This is not the first time the major accounting firms have tried their hand at practicing law.

Through the 1990s, the then-Big Five—Arthur Andersen collapsed after the Enron scandal in 2002—were quickly growing their legal services divisions, especially in Europe, wrote David Wilkins, a law professor at Harvard University, and Marie Jose Esteban Ferrer, a law lecturer at Ramon Llull University in Barcelona, Spain, in *Law & Social Inquiry*, an academic publication.

Responding to a slowdown in the growth of their auditing portfolios, the Big Five spent the 1990s building law firms in a traditional vein. By 2001, KPMG and PwC were the eighth- and ninth-biggest legal services providers by number of lawyers, respectively, according to the Harvard Law School Center on the Legal Profession.

By the end of the century, the Big Five were threatening to enter markets they had been restricted from, including the U.S., wrote Ferrer and Wilkins.

However, after a series of accounting scandals during the 2001 financial crisis and subsequent regulation, these firms decided to pull back from offering general legal services.

At the time of the crash, Cornelius Grossmann, global leader of EY Legal based in Berlin, was working for Ernst and Young in New York City as an attorney at Donahue & Partners, a German law practice in EY’s Dutch network.

He says that 2001



marked a turning point for their goals in the legal services market.

"In the past, EY tried to establish another global law firm," he says. "When I started rebuilding the practice in Europe, I made it very clear—and that strategy followed through—that we don't want to be another law firm."

Grossmann explains that the law firm model was not as holistic as what EY wanted to offer, which he and other members of the Big Four describe as "multidisciplinary solutions," a combination of legal, financial and consulting services, complemented by technology. Today, EY has 2,100 attorneys practicing in five core disciplines, including employment and mergers and acquisitions, in some 80 countries.

Similarly, Piet Hein Meeter, Deloitte Global's Amsterdam-based managing director of Deloitte Legal, explains that their approach includes legal advice alongside improving document and process management, IT systems, analytics and other technology applications.

"That's almost a consultative type of legal solution, rather than taking a set of facts and analyzing them from a legal perspective," says Meeter.

While each of the Big Four positions itself as different from the others, the service offerings look rather similar. For example, this year at Legaltech, a legal technology conference in New York City, PwC representatives handed out documents that highlighted consulting services to help streamline and improve corporate legal departments. Similarly,

KPMG offered services to digitize and improve

efficiency of general counsel offices, and Deloitte touted its "legal management consulting."

The Big Four also offer help with e-discovery, computer forensics and regulatory compliance.

PwC declined to comment for this story and KPMG did not respond to requests for comment.

According to the 2017 ALM report, this multidisciplinary approach has been a financial boon for the accounting firms: "All four have reported double-digit year-on-year revenue growth in recent years."

The aggressive growth has made Big Four legal departments among the top-10 firms by revenue in France, Italy, Russia and Spain. However, the collective \$900 million in revenue from the Big Four's legal departments still pales in comparison to the \$275 billion of revenue of all U.S. law firms, according to Thomson Reuters.

Nonetheless, this type of growth is a stark contrast to the reality for many BigLaw firms in the U.S., which recovered from the fallout of the Great Recession but have struggled to grow since.

According to a report released in January by Georgetown University and Thomson Reuters, demand for law firm services has been flat since 2010. Additionally, a slight uptick in attorney headcount at U.S. firms over the last five years coupled with the aforementioned flat demand means that

lawyers throughout the industry are experiencing declining productivity. The study found that, across all sectors, lawyers are billing nearly 13 fewer hours per month than they were before the onset of the Great Recession.

Illustrating the decreased demand, Altman Weil's 2017 *Chief Legal Officer Survey* found that 41 percent surveyed said they had cut their outside counsel budget while 56 percent increased their in-house budget.

By comparison, the Big Four have, on average, about 2,200 lawyers apiece, according to ALM. These numbers continue to grow through lateral and new attorney hires. While smaller than the 10 largest global law firms, which have 3,800 lawyers each, the Big Four offer legal services in 72 countries. Those same law firms are, on average, in 29.

NOT SO FAST

There are limits to the international growth, however, for the Big Four.

When deciding what countries to expand into, Grossmann at EY says the firm is driven by demand and regulatory limitations. India, Portugal and the U.S. are just some of the countries where the Big Four have not offered full-fledged legal services because of such restrictions.

In the States, there are two main hurdles keeping the Big Four out of the traditional legal services market. The first is statutory.

The Big Four accounting firms have not been shy about encroaching on territory once considered the sole province of law firms.

Deloitte

In 2002, in the wake of the Arthur Andersen scandal and the 2001 recession, Congress passed the Sarbanes-Oxley Act, which limited auditing firms from providing legal services to audit clients.

The sprawling legal framework covers numerous issues, including the limitation of audit firms to provide certain legal services, which was meant to limit conflicts of interest.

Other countries—Canada, India, South Africa and Turkey—passed similar laws.

However, these limitations have not stopped auditing firms from offering legal and other services to nonaudit clients, “which they all now aggressively do,” wrote Ferrer and Wilkins for the CLS Blue Sky Blog. They conclude that the Big Four’s legal networks are now larger than they were when Sarbanes-Oxley was passed.

They go on to write in *Law & Social Inquiry* that even after Sarbanes-Oxley, “gaps in auditor independence regulation have allowed the Big Four to rebuild their nonaudit businesses, including legal services, in many countries around the world—even in the United States.”

The Public Company Accounting Oversight Board, created by Sarbanes-Oxley and run under the Securities and Exchange Commission, provides external, independent oversight of audit companies. The board’s spokesperson, Colleen Brennan, says, “Existing independence requirements would preclude an issuer’s auditor, or affiliates of the auditor, from providing legal services to that issuer or any of that issuer’s affiliates.” She adds that “the PCAOB monitors for compliance with that requirement and other independence requirements.”

The other major restriction comes from within the legal profession itself. The ABA Model Rules of Professional Conduct, which serve as the basis for the ethics rules of most jurisdictions in the U.S., favor a ban on nonlawyer ownership of law firms and a prohibition on fee-sharing of a legal services business.

Despite that, the ABA has explored the possibility of new

“THEY TELL US THEY’RE NOT PRACTICING LAW; THEY’RE OFFERING ENVIRONMENTAL OR TAX SERVICES ... AND ALL KINDS OF OTHER SERVICES.”

—CAROLYN LAMM



forms of legal services delivery. Predating Sarbanes-Oxley, the ABA created the Commission on Multidisciplinary Practice to study “the manner and extent to which professional service firms operated by nonlawyers were seeking to provide legal services to the public.”

With the Big Four’s initial move into legal services as a backdrop, the commission recommended that the House of Delegates reinforce core values of independent professional judgment, client confidentiality and the avoidance of conflicts of interest while not inhibiting “the development of new structures for the more effective delivery of services and better public access to the legal system.”

This meant allowing lawyers to deliver legal services through a multidisciplinary practice, in which lawyers and nonlawyers provide legal and nonlegal services. This recommendation came with an endorsement of fee- and governance-sharing between lawyers and nonlawyers within an MDP.

The recommendations were debated by the ABA House of Delegates during the annual meeting in Atlanta in 1999.

Carolyn Lamm—a member of the commission and supporter of the recommendations who served as 2009-2010 ABA president—reminded those convened that even without an MDP structure there were some 5,000 lawyers already working at the Big Five accounting firms.

“They tell us they’re not practicing law; they’re offering environmental or tax services. They’re offering litigation support services and all kinds of other services,” she said at the debate and confirmed by email. “And the bar does not have any means to assure that the lawyers at the Big Five comply with any of the ethics regulations and/or core values” of the profession.

To her, the commission’s recommendations would bring licensed attorneys already working in MDPs back into the professional responsibility fold.

“It envisions system safeguards that the MDPs would have to pay for,” she concluded.

While acknowledging that lawyers already work in something resembling MDPs, lawyers opposing any relaxation of the restrictions on such practices warned that allowing for fee-sharing with nonlawyers would end the independence of the profession, diminish the ethical standards around confidentiality and conflicts of interest, and provide negligible benefit to consumers.

In 2000, the House voted against the commission’s recommendations and reaffirmed that fee- and governance-sharing with nonlawyers were not compatible with the rules and values of the profession. The commission was discharged.

According to Dennis Rendleman, ethics counsel at the ABA Center for Professional Responsibility, which housed the commission, the center is not currently working on the topic of multidisciplinary practice. Even so, he says, “the issue is one that will never go away.”

When asked, Meeter says Deloitte is not lobbying to change current laws and rules limiting its business model from expanding into the United States. Grossmann at EY declined to comment.

ACROSS THE SEA

While the movement for fee- and governance-sharing stagnated in the U.S., Australia in 2000 and, more aggressively, the U.K. in 2007 moved forward to create alternative business structure schemes that would allow for nonlawyers to be owners and fee-sharers in law firms.

Although he is not in direct competition with the Big Four, Simon Goldhill—the founder of Metamorph Law in London, a consolidator of small firms—says the ABS structure allows for significant flexibility that the traditional model did not.

“Before its liberalization and opening up to outside influences, the U.K. legal market had remained isolated—indeed insulated—from the development of the 21st-century consumer service culture,” he says.

Michelle Peters, principal at the Business Instructor law firm consultancy in London, says the traditional firm model is not a good business model. First, the billable hour limits profitability because the lawyer must work on a matter to make money. Second, firms are often ruled by committee, which makes direction and institutional change challenging. Third, lawyers are not trained in business development yet are expected to run every aspect of a firm, which cuts into their only mode of making money.

Goldhill adds that traditional law firm structures meant they could not take capital funds to grow their business. As an ABS, they can.

All four of the major accounting firms have secured ABS licenses to practice law in the U.K.

PwC was awarded a license in 2014. During this past fiscal year, the firm’s legal operation in the U.K. brought in about \$91.8 million, up from \$63.6 million in 2015. The most recent revenue numbers put PwC just short of the top-50 U.K. firms by earnings, according to *LegalWeek*.

Jordan Urstadt is the CEO of Partnervine, an online marketplace where firms sell their automated legal documents. He says the Big Four’s increased pressure on the legal market will lead law firms to externalize and “productize” their offerings, which include information,

resources and expert advice.

Both Grossmann at EY and Meeter at Deloitte make clear that technology in the form of artificial intelligence, automation and information management is a critical component of their offerings. Their development and deployment of technology will be accomplished by a mix of in-house development, acquisition and contracting with outside companies.

In one example, PwC teamed up with Partnervine to sell automated legal documents online. By creating this new marketplace, in-house counsels anywhere in the world can assess the offerings and buy the contract they need, saving the lawyer time and creating a passive income stream for PwC.

With many merger documents for sale on Partnervine, Urstadt says, “it’s great because it shows what software can do for M&A—a major driver of revenue at law firms and one of the sacred cows of the legal industry.”

Similarly, Deloitte has alliances with Kira Systems, HotDocs and Thomson Reuters. PwC has teamed up with Google. And EY is working with LinkedIn and Microsoft.

FIRMS ADJUST

To remain competitive, Morgan Lewis has expanded internationally, including in China, and has ramped up its eData services, a discovery and data management program that combines legal and tech professionals.

“We remained focused on offering elite service and building strong relationships with clients who trust us to know their business and give them legal advice in the broad array of areas where they need us,” Morgan Lewis chair McKeon says. “That has been the approach that has made us successful, and the existence of new and different competitors has not changed that.”

Like Morgan Lewis, Simmons & Simmons, a large law firm based in England, has been commoditizing legal information for over a decade. The firm’s navigator product takes regulatory and compliance data from numerous countries, organizes it and

provides it as a subscription service for clients to access.

“The firm has to adapt and look to service their clients in different ways,” says Charlotte Stalin, a partner at the firm’s London office. Similar to McKeon, she denies that any market entrant has forced them to change.

While the firm’s navigator product is a managed service, Stalin says it is more than that because it complements traditional legal advice, which remains their core product. Since the navigator launch in 2007, it has expanded to include derivatives, securities and other subject matter areas.

Law firms offering products like this are still the exception. Instead, “most firms have been able to maintain their profitability at acceptable levels through a combination of reductions in headcount, tightening of their equity partner ranks, reductions in expenses, and continuing (albeit modest) rate increases,” states the Georgetown and Thomson Reuters report.

Not just a big-firm issue, the Big Four’s push into legal services can affect the totality of the legal market.

“I think everyone should be cognizant, regardless of the size of the firm,” argues Chad Burton, a liaison for the ABA’s Commission on the Future of the Legal Profession and CEO of CuroLegal, a legal technology company.

Burton says he believes that rules limiting fee- and governance-sharing at law firms will need to be confronted and changed for the profession to evolve, be more competitive and better serve consumers.

Meeter at Deloitte agrees, saying that he sees good reasons to have rules that maintain the independence of a lawyer, but that “there is a need to revisit this topic given the development of the marketplace.” He adds: “Clients are increasingly demanding that integrated type of approach.”

Peters, who has watched similar changes in the English legal market over the past decade, adds: “The law firms are coming around to the realization that they need to evolve or die.” ■

A woman with dark hair pulled back, wearing a detailed medieval-style metal armor with chainmail. She is looking upwards and to the right with a serious expression. The background is dark with stylized, glowing blue lightning bolts.

The **JOB** Is KILLING Them

Family lawyers are experiencing
a higher rate of threats and violence
than other lawyers

By Lorelei Laird

After lawyer Sara Quirt Sann was murdered at work, her husband evoked Ephesians 6:10-20, a Bible passage about the armor of God, to describe her.

“She had to put her armor on every day and fight for those who needed representation,” Scott Sann wrote on Facebook. “Make no doubt in your mind that she was a warrior.”

Sann, 43, was a solo lawyer, and she did a lot of guardian ad litem and family law work in Wausau, Wisconsin. In early 2017, that included representing Naly Vang in her divorce from Nengmy Vang. It wasn’t going smoothly; Nengmy Vang was pressuring his wife to speed up the process by using a traditional Hmong divorce, in which their clan elders split their property and custody of their seven children. But Naly thought the American court process would better protect her.

It all came to a head on March 22, 2017, when Nengmy stormed into the bank where Naly worked and demanded that she sign divorce papers that didn’t exist. Two of Naly’s colleagues hustled her out the back door—and Nengmy shot them. He then drove to the law firm Tlusty, Kennedy & Dirks, where Sann rented an office, and forced an employee at gunpoint to show him where Sann worked. That employee told the police she then heard a scream, two gunshots and the sound of someone running down the stairs. Nengmy would go on to kill a police officer before officers fatally shot him.

The murders shook up Wausau, a central Wisconsin city of about 40,000 that just a year earlier the FBI had called one of the safest metro areas in the Midwest.

“It was just such a shock,” says Pam VanOoyen, a friend of Sann’s and a judicial coordinator for a Marathon County judge. “We’re not as big as Green Bay or Milwaukee or Madison, even, for that matter. And so we’re all really connected.”

In response, citizens formed Wausau Metro Strong to build a safer community. Among its projects was Sara’s Law, a measure that makes the penalties for battery or threats to a family lawyer a low-level felony, as it would be for battering a police officer or a judge. In most other circumstances, battery must cause great bodily harm to carry the same penalties. The bill passed the state legislature easily; Wisconsin Gov. Scott Walker signed it April 11 in a courtroom named for Sann.

Attorney Jessica Tlusty—who runs the firm that rented Sann her office—helped lead the Sara’s Law effort. She says the law grew out of Scott Sann’s wish that his wife had better protection. Tlusty practices family law herself, and she says threats and violence are too common.

‘IT’S THE RISK YOU TAKE’

A series of surveys on violence against lawyers shows that family lawyers face disproportionate amounts of threats and violence compared to other lawyers. Almost all lawyers in the 27 states surveyed said they’d received some kind of threat or experienced violence. But the rate for family lawyers was higher.

Family lawyers were more likely to have been threatened within the past year and were more likely than lawyers in general to say they were assaulted, especially by someone who had threatened them before. Less than 10 percent of lawyers in both categories said they’d been assaulted.

Lawyers have reported receiving threats about their children being raped, having their car tires slashed, and seeing clients shot to death in front of them.

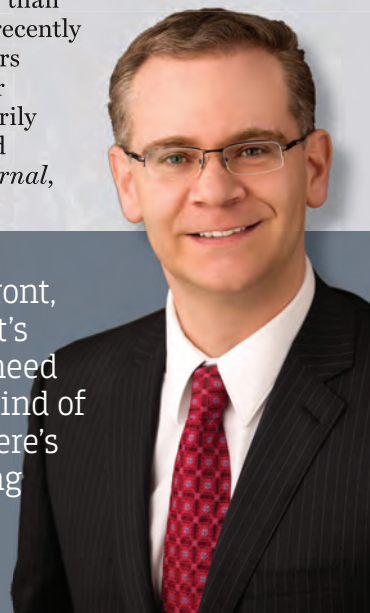
“We are often looked at as the cause of many problems in custody cases because the parties want someone to blame,” Tlusty says. “So threats tend to come toward the attorneys.”

The surveys come from Salt Lake City attorney Steve Kelson, who has a full-time business litigation practice at Christiansen & Jensen. One of his law school professors had said the issue was understudied, and Kelson discovered he was right—no one was tracking it in the United States. He took up the challenge in 2006, surveying Utah State Bar members.

He has since surveyed just fewer than 12,000 lawyers in 27 states, most recently in New Hampshire in 2017. Lawyers generally are recruited by state bar associations to participate voluntarily and anonymously. Kelson provided state-by-state data to the *ABA Journal*,

“It seems as though upfront, many people said, ‘Well, it’s part of the practice—you need to expect it.’ There’s also kind of an impression ... ‘Yeah, there’s a lot of threats, but nothing will happen about it.’ ”

– Steve Kelson



which used it to compile national numbers.

Those numbers reveal that 88.7 percent of all lawyers responding to the surveys had received some kind of threat or experienced violence. The number of all lawyers who said they’d actually been assaulted was much lower, at 8.6 percent—but 42 percent of lawyers also said they’d experienced an in-person confrontation that fell short of assault, and 6.6 percent said they’d had property damaged.

When responses are broken out by the lawyer’s practice area, family lawyers consistently have higher rates of threats and violence. Kelson says criminal lawyers also reported an above-average rate of threats and violence, as did lawyers choosing “general practice,” which could include many practice areas. This might not come as a surprise for lawyers specializing in criminal cases, whose clients or opposing parties sometimes have a

history of violence.

But family lawyers' work is civil—and 92.8 percent, more than lawyers generally, had experienced some kind of threat or violence. Family lawyers also were more likely to say they'd experienced in-person confrontations, property damage or assault. When they were assaulted, the person responsible was more likely to be someone who already had threatened them (8.5 percent vs. 6.4 percent for all lawyers). About a quarter of family lawyers said they'd been threatened within the past year; only 18.4 percent of all lawyers said that.

Kelson's surveys suggest most of those threats are coming from opposing parties. While lawyers in general were more likely to say they were threatened or attacked by a client, only 38 percent said they were attacked or threatened by an opposing party. For family lawyers, that rate was a much higher 54.4 percent. It's a reality for many of the family lawyers who answered Kelson's surveys.

"As a family law attorney, there have been many times when I have been confronted in person ... and threatened," a Nevada lawyer wrote in response to Kelson's 2012 survey. "It seems to come with the type of

law I practice."

"It's the risk you take when you're involved in very high-conflict, highly emotional cases," wrote an Alaska lawyer in 2015 who'd moved away from guardian ad litem work.

The threat isn't limited to attorneys, either. In Arizona in June, Dwight Jones killed two paralegals, Veleria Sharp and Laura Anderson, who worked for the law firm that represented his ex-wife in their divorce. Authorities believe the ex-wife's lawyer was the intended target. Jones also killed psychiatrist Stephen Pitt, who had evaluated Jones at the request of the divorce court, as well as three other people, one of whom might have been mistaken for a counselor who had evaluated Jones' child by court order. Jones ultimately fatally shot himself in a hotel room.

While Jones' motives remain unknown, acrimony in family law cases can be reason enough for caution, especially when children are involved. California attorney Stephen Zollman's practice includes representing parents whose children might be taken away from them. Even as a former public defender, he thinks family court carries more risk than criminal court.

"You can take a lot from people, but when you start talking about taking their children ... there is no

"I felt way more threatened and kind of menaced by the batterers ... as a family law attorney than ever in the years that I spent as a prosecutor."

– Vivian Huelgo

greater loss and greater trigger," says Zollman, a solo in Guerneville in Sonoma County.

The threat is also elevated for lawyers who represent victims of domestic violence. There, the opposing parties have a history of violence—but they're less likely than criminal defendants to be locked up. Vivian Huelgo, chief counsel for the ABA Commission on Domestic & Sexual Violence, says they're also used to having power and control over victims. They might see lawyers as a threat to that control.

"I felt way more threatened and kind of menaced by the batterers ... as a family law attorney than ever in the years that I spent as a prosecutor," Huelgo says.

VEXATIOUS LITIGANTS

Despite getting threats, practicing family lawyers say actual violence isn't frequent—even for people who regularly represent domestic violence victims, such as Allen Bailey of Anchorage, Alaska.

"It's not a weekly or monthly or annual occurrence," says Bailey, a solo and the ABA Section of Family Law's liaison to the Commission on Domestic & Sexual Violence.

But it does happen. Bailey keeps a gun in his desk because of a former client's ex-husband who he suspects



stalked him. The man had stalked the former client, filed a baseless bar complaint against Bailey, and tried to frame him for a financial crime. Bailey has never used the gun, but he has called the police on a few clients' exes who refused to leave his office.

Comments on Kelson's surveys suggest some of Bailey's experiences are common. Family lawyers frequently said angry parties left negative and often-false reviews on lawyer rating websites or social media and sometimes filed frivolous ethics complaints. Confrontations in court or at the office also were widely cited, as were bricks, rocks and bullets through windows.

Survey respondents had some hair-raising stories. An Iowa lawyer wrote in 2013 about receiving a call at home from someone threatening to rape the lawyer's preschool-age daughter. In Kansas,

"He was a criminal law attorney who was acting as an attorney for his friend in this arena. I guess he just let his closeness to his friend get the better of him when he was not prevailing."

— Madeline Marzano-Lesnevich



a lawyer wrote in 2013 about helping a client divide marital property at the home of the client's estranged husband when he pulled out a gun, threatened the lawyer, killed his wife and then killed himself.

Although many of the survey comments cite male aggressors, there are plenty of stories about women. In the 1990s, a female former client of Bailey's killed Jim Wolf, an Anchorage municipal prosecutor as well as a friend and former colleague of Bailey's. Madeline Marzano-Lesnevich, president of the American Academy of Matrimonial Lawyers, says a lawyer at her firm had all four tires slashed by a woman the firm had dropped as a client.

During one divorce case, Marzano-Lesnevich recalls being approached by an opposing counsel in such a threatening way that courthouse personnel intervened. "He was a criminal law attorney who was acting as an attorney for his friend in this arena," says the founding partner at the Hackensack, New Jersey, firm of Lesnevich, Marzano-Lesnevich, Trigg, O'Cathain & O'Cathain. "I guess he just let his closeness to his friend get the better of him when he was not prevailing."

ASSESSING RISK

Despite stories such as these, relatively few lawyers seem to be worried about safety. Marzano-Lesnevich says she hasn't heard it discussed much, even in family law circles. Kelson's surveys show a majority of lawyers in general don't change how they practice law in response to threats, although family lawyers are more likely to.

"It seems as though upfront, many people said, 'Well,

it's part of the practice—you need to expect it,' " Kelson says. "There's also kind of an impression ... 'Yeah, there's a lot of threats, but nothing will happen about it.' "

That's a mistake, says Dr. Jimmy Choi of My Occupational Defense, a San Francisco company that provides self-defense training for the workplace. Choi, who sees his share of threats through his work as an emergency room physician, says the first step is to realize a threat can be dangerous. Human beings tend to think everything will stay normal, he says—which can lead people to dismiss the danger.

The ABA domestic violence commission's standards of practice say safety planning should be used in every domestic violence case. This is mainly for the client's safety, but it can be useful if there's a threat to the lawyer.

One tool the commission recommends is a questionnaire that assesses danger, created by Johns Hopkins University nursing professor Jacqueline Campbell.

Huelgo says lawyers should look for recent changes or escalation

of the violence—more serious injuries, more frequent attacks, attempted strangulation, new abuse of children and pets. Stalking, threats to the victim and threats of suicide also can be red flags. Violence often escalates when the abused partner leaves, she says, because abusers feel their control slipping.

Stephanie Tabashneck, a psychologist who routinely handles child custody evaluations in Boston, performs formal risk assessment in some of her cases. She looks at any past history of violence and the nature of that violence, any mistreatment as a child, the person's attitudes and beliefs, any substance abuse, and recent changes in the person's support system. Research shows that being male contributes to risk, she says, as does access to guns.

The details matter. If a threat includes a specific way to do the harm, such as a gun, and a specific time, such as that evening, "that's a really high risk of violence, and I'd be deeply concerned," says Tabashneck, who recently graduated from the Northeastern University School of Law.

Huelgo also advises lawyers to determine whether information about them is available to strangers. Lawyers who own houses, for example, might be easy to find through local land records and might consider putting their property into a trust or a business with a different name.

The internet is another place to tighten things up. Ian Harris, technology safety legal manager at the National Network to End Domestic Violence, says angry parties sometimes go on "electronic sprees," in which they trash the lawyer on every platform they can. They also could

hack into the lawyer's business records, which could lead to unauthorized access to client information.

The best defense is prevention, says Harris, a former family lawyer from New York City who's now based in Washington, D.C. He suggests lawyers start each case by talking to clients about what platforms their exes use, how they use them and how frequently. This is focused on the client's safety but also might help identify ways technology can be used against the lawyer.

"If somebody hacks into your account or starts a process of trying to take you down online, it's hard if you haven't prepared in advance for that," he says. "Learning how technology is misused against the client is probably the best opportunity to start thinking about [how] somebody might use it against you."

USE YOUR WORDS

Kelson's surveys show threats are most common at the office. For that reason, Huelgo suggests lawyers think about what opportunities they have to make it more secure. Bailey of the ABA Family Law Section says he locks the door when he's in his office alone and keeps an eye out when he's concerned about someone.

Zollman, the solo in Sonoma County, suggests lawyers

not invite clients they have concerns about into the office at all—or have someone else present if they do. If that's not possible, he says, meet them at the courthouse, where they'll be screened by security and will be near law enforcement officers.

But outside the courthouse is a different matter, particularly because court dates make it easy to find out when targeted parties will be in the area. To address that concern, Huelgo of the ABA Commission on Domestic & Sexual Violence suggests talking to court security personnel about alternative entrances. In a higher-risk case, she says, litigants sometimes ask for an escort. Zollman, who's taller than 6 feet, sometimes provides his help to colleagues if he's worried about their safety. Choi of My Occupational Defense says you should never be paying more attention to your smartphone than your surroundings in high-risk situations.

Huelgo says other courthouse personnel can be helpful, too. "A very common practice is to ask the court to detain the batterer for some amount of time," she says. "We've had clerks that detain court papers in order to give the victim and the attorney an opportunity to leave."

For lawyers who can't avoid a hostile confrontation, psychologist Tabashneck suggests that being pleasant

and polite, while it might be difficult, can help. Zollman says he listens to upset parents sympathetically.

"I just sort of say, 'Wow, that's a lot that you've just explained to me. And you rightfully are entitled to all of these emotions,'" he says. "But ... I would just encourage you to take deep breaths, as many times as you need to, to just kind of lower your own stress. Because you want to do the best job you can to explain your position."

Choi teaches his students to try de-escalating situations verbally, using the kind of script often used by doctors and law enforcement. Those scripts emphasize listening, asking about the other person's concerns, giving sympathy or apologies where appropriate, and providing options to solve the problem.

"People will resort to violence if they realize they don't have another option," he says. "So a lot of the scripting that we teach people is to present the aggressor with other options."

Choi recommends lawyers who want to handle physical confrontations invest substantial time in

"People will resort to violence if they realize they don't have another option. So a lot of the scripting that we teach people is to present the aggressor with other options."

— Jimmy Choi

training, such as martial arts, which he offers. Under stress, he says, people are more likely to remember the training if it's been drilled into them. For those who'd rather not, he suggests creating or finding escape routes. On the street, this could mean ducking into an open business. In the office, he says, there should be more than one way to leave every room.

At Thlusty's office in Wausau, her firm has responded to the murders with substantial new security protocols, such as only taking clients by appointment and buzzing them in rather than allowing them to walk in. VanOoyen, the judicial coordinator in Marathon County, says a lot of lawyers in the area have taken similar steps—especially those who practice family law.

VanOoyen says the courthouse where she works also has drastically tightened security. Before March 2017, the courthouse had no permanent metal detector—just a portable one used for specific high-profile cases. Now there's permanent security at the front, and the building's other entrance is closed. Not everybody likes it, she says, but she feels much safer.

"We still get people that come in, and they're angry and upset and what have you," VanOoyen says. "However, at least now I don't have to worry about, 'Gee, do they have a gun in their purse?'" ■



yourAba

MORE THAN THE LAW

**Incoming President Robert Carlson
sees expansive roles for attorneys**

By Stephanie Francis Ward

Butte native Robert M. Carlson says that besides practicing law, Montana lawyers take on significant volunteer positions with the state's food banks, school boards and university alumni associations. As president of the American Bar Association, Carlson hopes to promote the idea that there's more to being an attorney than providing legal representation.

"Lawyers are a focal part of their communities, and that's true everywhere else in the country; people look to lawyers to do things," he says. "The Montana bar is full of diverse lawyers, in terms of practice type and firm size. They are active in this state just about every way I can think of, and without them it would not be as good of a place to live as it is."

The partner with Butte's Corette Black Carlson & Mickelson says that for now, he has no plans to create new task forces or commissions during his ABA presidency.

"We have been talking about this as being a relay, not a sprint. There are a lot of good things that are happening, and we want to keep moving them forward," says Carlson, who hopes that during his term the ABA will carry on its work toward bringing in more members and promoting the importance of an independent judicial system. He'd also like to see continued work involving changes in legal education and bar admissions, and the promotion of wellness for lawyers and law students.

Regarding member recruitment, Carlson mentions ABA Blueprint, which will include new features. The next version of Blueprint will also have a more robust tech infrastructure, with a focus on data analytics that will allow the ABA to make quicker improvements in the app and provide members with more services.

He's also hopeful about a new membership model that the ABA House of Delegates approved at the August annual meeting. It reduces the dues categories from 157 to five, ranging from \$75 for lawyers with less than five years' experience to \$450 for those with 20 or more years of

experience. Though new bar admittees (who previously got free membership for a year) would be added to the dues list, other members could see reductions from about \$20 to more than \$300.

“We think we have a great membership value, and we know we need to do a better job of communicating that,” Carlson says. “We’ve made a lot of strides this year in reorganizing and strengthening the association in years to come.”

LED HIS STATE BAR

An ABA member since graduating from the University of Montana School of Law in 1979, Carlson says he

Carlson also chaired the ABA Day in Washington Planning Committee for two years; co-chaired the Litigation Section’s ABA Resource Committee; and was a member of the Standing Committee on Bar Activities and Services, the Commission on Racial and Ethnic Diversity in the Profession, and the council of the ABA Section of International Law.

LAW WAS ON THE AGENDA

The son of a mechanical engineer and a homemaker, Carlson says he’s known since fifth grade that he wanted to be a lawyer. Inspiration came from historical novels his parents purchased about the American Revolution

“We think we have a great membership value, and we know we need to do a better job of communicating that. We’ve made a lot of strides this year in reorganizing and strengthening the association in years to come.”

—Robert Carlson



became active with the organization following his time as president of the State Bar of Montana from 1993 to 1994 and a stint on the National Conference of Bar Presidents’ executive council.

“It really opened my eyes to a broader vision of what bar services are about,” he says.

Carlson chaired the ABA’s House of Delegates from 2012 to 2014. “Being able to be in a room with that many bright people from around the country, doing good work on behalf of the profession, is one thing that stayed with me,” he says. “Also, it’s a really diverse group of people—including firm size, practice size, geography, ethnicity, race and gender. If we could get our justices to look a little more like this, we’d be moving in the right direction.”

During his interview with the *ABA Journal*, Carlson mentioned that the theme for Law Day in 2019 will be “free speech, free press and a free society,” and that the annual pro bono celebration will focus on disaster relief services. And in November there will be a virtual meeting for the ABA Board of Governors set in Chicago with district and section board members participating remotely.

“We’ve been encouraging people to use this technology to hold meetings. Hopefully, if we do this in an organized fashion, it will open up opportunities to young lawyers and solo and small-firm lawyers who can’t leave the office for two or three days,” says Carlson. He previously chaired the ABA Standing Committee on Meetings and Travel

and the framing of the U.S. Constitution.

After a state supreme court clerkship and briefly working as staff attorney with the Montana Department of Business Regulation, Carlson in 1981 joined the law firm where he still practices. He had always wanted a job with the firm, partially because it represented the Montana Power Co., where his father worked, and members of the firm were well thought of in Butte.

“This was my dream, to work at this firm after law school,” says Carlson, 64. “I can look out my office window and see my high school. Being able to practice in your hometown and make a career out of it—it’s been great.”

He and his wife, Cindy, have three children, and they enjoy walking in the Butte mountains with Tessie, their Portuguese water dog. Carlson also enjoys fly fishing, skiing and watching baseball—his favorite team is the New York Yankees. He is also a University of Montana Grizzlies fan, who before taking a leadership position with the ABA would often make the 125-mile trip to Missoula to watch them play.

Friends describe Carlson, a civil litigator who does insurance-defense work, as someone who listens more than he talks. “Bob is as smart as they come. He gathers information,” says John Schulte, a former Board of Governors member and past president of the Montana bar who practices in Missoula. “He knows how to connect with people and figure out who you are.” ■

SHOWRUNNERS

Couple's friendly fundraising competition launches marathon event to benefit legal aid

By Lee Rawles

Philanthropy is a family affair for ABA members Crystal and Michael Freed. Separately and together, they have worked to raise money and awareness for causes close to their hearts.

"We both want to raise our daughters to know about giving back and not being entitled," says Michael, a shareholder at Gunster in Jacksonville, Florida. He's been an ABA member for 22 years; she just returned to membership last year.

Since 2008, when Crystal left her job as a commercial litigator, she's focused her career on advocating for victims of human trafficking. She formed the Freed Firm, in which she represents clients and acts as a community advocate.

Crystal came to the United States from Trinidad and Tobago with her family in 1990. Violence was common in her household. "One of the reasons I care about victims of human trafficking and survivors of human trafficking is because I don't want anyone to ever feel as powerless

Her friends Sarah Symons and John Berger run a shelter in Jalpaiguri, India, for survivors of human trafficking and were hoping to expand their building to a third floor—and they would need about \$40,000. The numbers seemed serendipitous.

Crystal had a Bollywood-themed benefit ball as a nod to her family's East Indian heritage and the Jalpaiguri shelter that would receive the funds, and she was able to achieve her \$40,000 goal.

Crystal's success spurred her husband to create a philanthropic goal last year. He'd been doing pro bono work with the nonprofit Jacksonville Area Legal Aid for years and wanted to create a fundraising event to benefit them.

"She turned 40, and I turned 50. So \$50,000 seemed like a good amount to raise," he says.

COURTHOUSE CHALLENGE

He hit on a bold plan. He had begun running seriously only the year before but completed four marathons and three ultramarathons. He thought a marathon event, called Freed to Run, could be a way to raise funds and awareness of the need to support legal aid services. He'd start in the state capital of Tallahassee and run to his hometown of Jacksonville. If he ran the length of a marathon every day, it would take him six days.

"It was really a God thing because when I came up with the idea and we looked at the map, if you go down I-90, about every 25 to 28 miles there's a courthouse," Michael says. "So you basically have a marathon between each courthouse, which works out really nicely."

There's another reason for the fortuitous spacing of courthouses,



and it dates back to the days when judges rode circuit. "It's as far apart as a judge could ride in a day, which is coincidentally about the length of a marathon," says Jim Kowalski Jr., president and CEO of JALA. "You can't kill a judge's horse."

"As a wife I was like 'What? Can your body do that?'" says Crystal with a laugh. After determining he was serious, she consulted a triathlete friend about how she could help sustain Michael during the grueling six-day run from May 28 to June 2, 2017. Crystal drove ahead in a van with the couple's daughters, giving Michael a water break every 3 miles or so.

Michael completed all six



Members Who Inspire is an ABA Journal series profiling exceptional ABA members. If you know members who

do unique and important work, you can nominate them for this series by emailing inspire@abajournal.com.

as I felt as a child," Crystal says.

As her birthday approached in July 2016, she wanted to mark the occasion in a significant way. "Forty is one of those pivotal moments in life," she says.

marathons and raised nearly \$70,000. To his surprise, many people ran alongside him, and he was seen off in the mornings by cheering crowds at the courthouses. On the final day, there was a barbecue on the Duval County Courthouse lawn to welcome him to the finish line.

"I didn't know what it was going to be when I did it last year; it could have just been a sore old man running across the state, but it's really turned into something neat," he says.

ONWARD AND UPWARD

Buoyed by the success of the first Freed to Run event, JALA approached the Freeds with a proposition. JALA is part of the Northeast Florida Medical Legal Partnership, which provides legal services to more than 200 pediatric patients a year.

These could range from ensuring a family is able to build a ramp to make their home accessible for their child's wheelchair to making sure a child receives the health care accommodations at school that they're entitled to under federal law.

The legal aid organization discovered that if it established an endowment for the NFMLP and raised \$1 million over the next five years, the Baptist Health Foundation would provide 125 percent matching funds to bring the total to \$2.25 million.

JALA asked the Freeds if they would make Freed to Run an annual event and the main fundraiser for the endowment. "Michael and his wife, Crystal, have a particular affinity for this issue," Kowalski says.

"I do a lot of legal work in the health care community, so I'm very appreciative of what the health care community does to make our community a better place, particularly for pediatric patients and folks that can't necessarily afford to pay their way," Michael says.

JALA combined what Michael raised in his first year with its own funds to put \$100,000 toward that \$1 million target, and they began planning for Freed to Run's second year.

"The very first thing they said—particularly the serious runners—was 'Yeah, we're not doing this in May or June.' And that's when we started looking at dates," Michael says. The planning committee settled on Dec. 2 to 7. "December is that giving month, where people are focused on doing for others in particular," he says.

Rather than asking people to repeat Michael's 2017 feat of six marathons in six days, Freed to Run 2.0 will be completed this year in relay teams of up to 12 members, with runners completing a few miles each. Michael wants to

recruit at least three teams for each day of the event and is asking each team to raise \$10,000. If they can sustain that level of support each year, they'll hit the fundraising goal within the five years as planned.

Instead of relying on the Freed family van, Jacksonville company Elite Parking Services of America is donating a party bus to transport the teams and create a festive atmosphere for the runners. The route will remain the same, beginning at the Florida Supreme Court building and ending at the Duval County Courthouse. On the last day, runners can register to accompany the relay teams for the last 5K, ending in a party on the courthouse lawn.

Now that Crystal will not be needed for transportation support, she intends to strap on her running shoes as part of the Women's Giving Alliance team.

Kowalski says two JALA teams will participate in the December event, one representing the board and one the staff. "I'm staffing the staff team with ringers," he jokes. "This isn't a race. It's hopefully going to be as fun as possible."

STATE OF NEED

The need for civil legal aid donations is particularly dire in Florida because the state does not allocate funds for civil legal aid. "Even the District of Columbia provides \$9 million," Kowalski says. "We're at zero."

Gov. Rick Scott began vetoing the state legislature's appropriations for the Florida Access to Civil Legal Assistance Act each year after he took office in 2011. After his 2014 veto, the state legislature stopped allocating money for the program in the budget.

The economic recession and the low interest rates that followed also affected the state's funds for interest on lawyers' trust accounts, reducing the amount of money available to legal aid organizations.

"We've lost as a legal community the ability to convey how legal aid attorneys can impact people's lives," says Kowalski. "There's a lack of focus on telling these important stories, and Mike is helping us communicate that in a very powerful and personal way."

Michael downplays his importance in Freed to Run's new trajectory.

"What I've tried to do is deflect the attention from me," he says. "Not to shirk from the platform—because I think that if you have a platform you have to use it for the common good—but to redirect people back on the issue and back on the things that we can do in our communities to unite instead of polarize. That's all too common nowadays." ■

To find out more about Freed to Run, including how teams can sign up to participate, go to jaxlegalaid.org/freedtorun.



RISING UP

Young Lawyers Division honors
40 up-and-coming attorneys

By Lee Rawles

For the third year, the ABA Young Lawyers Division is highlighting some of the best and brightest of its members with its On the Rise—Top 40 Young Lawyers awards.

“We thought we needed to have a program in place to really spotlight some of the great young lawyers that we have around the country,” says Tommy D. Preston Jr.

Preston became the chair of the YLD at the close of the annual meeting in August, but in 2015 when On the Rise was being developed, he was the YLD’s membership director. “We wanted to really make sure that we created new and exciting programs to engage more young lawyers in the ABA, so this is a recognition program but it’s also a member-engagement program,” he says.

The inaugural awards were given out in 2016, and the third class of On the Rise honorees was announced this summer.

“These are people who are members but aren’t necessarily officers and leaders in the ABA Young Lawyers Division or one of our other entities of the association,” says Preston, director of national strategy and engagement in the government operations office of the Boeing Co. “Many of these young lawyers are mailbox members;

they’re connected to the association but not necessarily actively engaged. So we see this program as a way for us to really find young lawyers who are doing neat things in the profession but also to bring them into the organization in a more intimate way.”

To qualify for the 2018 On the Rise awards, candidates had to be members of the ABA, licensed to practice in the United States or its territories, age 36 or younger, and nominated by someone familiar with their professional work. A selection committee of current and past ABA leaders reviewed all nominations to select the 40 lawyers who would be honored in this year’s class.

“The leaders of the YLD tend to get recognized often; we tend to have the opportunity to meet with leadership of the association more often,” Preston says. “But we really wanted people to see that there are a large number of young lawyers that represent the best of our division, that represent the best in terms of young lawyers that are in the profession.”

To learn more about each of the 2018 On the Rise honorees or to view the previous winners from 2016 and 2017, go to ambar.org/ontherise. ■



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Bonilla practices commercial and intellectual property litigation with an emphasis on patents. He is a co-chair of the firm’s Latino affinity group and participates in the Pathfinder Program of the Leadership Council on Legal Diversity.



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Collins defends health care providers in personal injury, wrongful death and government investigation matters. She is vice-chair of the ABA Health Law Litigation Committee and editor of an upcoming ABA book on common issues in long-term care litigation.



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Fenwick is an associate who focuses on general liability defense. She is active with the Young Lawyers Division and the Tort Trial & Insurance Practice Section and is a 2017-2018 TIPS Now scholarship fellow.



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Graham's practice focuses on workers' compensation matters, representing local small-business owners, and is appointed counsel for patients in involuntary hospitalization proceedings. Graham will be president of the Wyoming State Bar in 2018-2019.



SAMUEL GREENBERG: MUNGER, TOLLES & OLSON, LOS ANGELES

Greenberg is a partner who focuses his practice on the taxation of domestic and international transactions. He also teaches partnership tax at the University of Southern California and income tax timing at the Loyola Law School as an adjunct professor.



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Hollywood is a principal in her firm's antitrust and trade regulation group. She prosecutes class actions involving price-fixing, unlawful monopolization and other anti-competitive practices and has helped recover more than \$1.5 billion for victims of anti-competitive conduct.



ERNEST D. HOLTZHEIMER: MONTGOMERY MCCracken WALKER & RHOADS, PHILADELPHIA

Holtzheimer is an associate whose practice focuses on mergers and acquisitions, financing transactions and general corporate matters. He is on executive committees for the Philadelphia Bar Association and is a fellow with the ABA Business Law Section.

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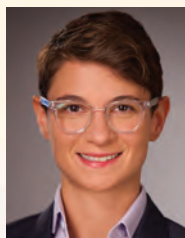
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Korberg practices complex commercial and constitutional litigation at the trial and appellate levels. She participated in *United States v. Windsor* and multiple cases in Mississippi that invalidated the state's bans on same-sex marriage and adoption.



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Kwan is a litigator who defends companies in product liability, class action and commercial matters. She is part of the ABA's Young Lawyer Leadership Program and is a classically trained violinist who has performed at Carnegie Hall.



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Lang focuses his tax incentive, tax credit and project finance practice on current tax advantaged and incentive programs, particularly the new Qualified Opportunity Zone program in the recent Tax Cuts and Jobs Act.



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Liang represents borrowers, lenders, development/multilateral institutions, export credit agencies and other financial institutions in connection with domestic and cross-border financial transactions. He is on the Commercial Transactions Committee of the California Lawyers Association.



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Lingos founded her firm to provide transactional legal services to small businesses and startups. She is an adjunct professor at the Northeastern University School of Law, where she teaches law practice management and access to justice.



ANNA LOZOYA: JESSE BROWN
VA MEDICAL CENTER, CHICAGO

Lozoya is a risk manager, using her prior experiences as an attorney, auditor and nurse to ensure veterans receive optimal medical care. She is a board member of the Hispanic Lawyers Association of Illinois.



LAUREN MARSICANO:
MARSICANO & LEYVA, MIAMI

Marsicano founded her firm to assist business owners in areas including complex commercial litigation, real estate law and international law. She is vice director of liaisons for the ABA Young Lawyers Division.



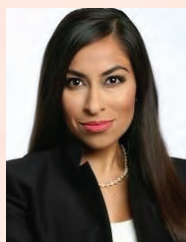
MICHAEL NGUYEN:
SAN FRANCISCO DISTRICT
ATTORNEY'S OFFICE

Nguyen is an assistant district attorney, practicing in the general felonies unit. He has tried more than 40 jury trials to verdict. He co-chairs the ABA Criminal Justice Section's Young Lawyers Committee.



KARL O. RILEY:
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Riley defends Fortune 50 clients in federal and state forums against various consumer protection statutes, discrimination and harassment claims, and in wage and hour disputes. He is a fellow of the American Bar Foundation.



KRISTEN RODRIGUEZ:
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Rodriguez is a partner who handles various complex commercial and class action litigation cases, providing counsel on contracts, torts, advertising, media law, privacy and insurance. She is chair of Dentons' Latino Professional Network.



GRAHAM RYAN:
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Ryan is a business litigation attorney and alternative dispute resolution practitioner. He had a three-year term as head of the Disaster Legal Services program in Louisiana and helped launch the first Hackcess to Justice event.



MAGGIE E. SCHROEDTER: HIGGS
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Schroedter specializes in commercial litigation with special emphasis on business disputes, business reorganization and other insolvency matters. She is on the board of directors of the Lawyers Club of San Diego and is president of the San Diego Bankruptcy Forum.



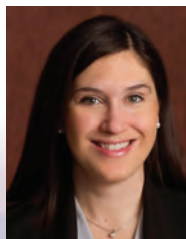
JOHN SPRAGENS:
LIEFF CABRASER HEIMANN & BERNSTEIN, NASHVILLE, TENNESSEE

Spragens represents plaintiffs in large consumer class action and whistleblower cases in federal courts across the country. He has pursued multidistrict litigation against pharmaceutical industry participants, tobacco companies and robocallers.



CHRISTOPHER SUAREZ: WILLIAMS
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Suarez is a litigator who focuses on technology, privacy and intellectual property issues, including the emerging internet of things. A former teacher, he advocates on behalf of students who have special needs and disciplinary charges.



DANIELLE N. TWAIT:
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Twait defends clients in complex litigation matters including defamation, invasion of privacy, commercial contractual disputes, class actions, intellectual property disputes and consumer fraud claims. She is an executive committee member for the Coalition of Women's Initiatives in Law.



JULIA USHAKOVA-STEIN: FENWICK &
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Ushakova-Stein focuses her practice on U.S. tax planning and tax controversy matters. She has represented Fortune 500 and major multinational companies in federal income tax matters and mergers and acquisitions transactions, counseling clients on cross-border complexities.



KODI VERHALEN:
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Verhalen practices energy and environmental law. She is also a mediator for the Hennepin County Court Pro Bono Mediation Project. A licensed engineer, she is a past president of the National Society of Professional Engineers.



JILL ALBRECHT WEIMER:
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Weimer is a shareholder with the international labor and employment law firm focusing on litigation, investigations, auditing and training. She is a founding member of Law Bridge, a non-profit organization providing community outreach in Pittsburgh.



SHEILA WILLIS: FISHER & PHILLIPS,
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Willis is an associate who practices labor and employment law. She is president of the South Carolina Women Lawyers Association, president-elect of the South Carolina Bar Young Lawyers Division and membership director for the ABA Young Lawyers Division.



ROBERT WINNING:
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Winning practices in the corporate restructuring and creditors' rights group, advising clients on restructurings, reorganizations and liquidations and representing official committees in Chapter 11 cases. He is on the board of the Samuel Field Y, a human services organization.



DIORA ZIYAEOVA:
DENTONS U.S., NEW YORK CITY

Ziyaeva is an international arbitration specialist, licensed in New York and Uzbekistan, whose practice focuses on investor-state arbitration, commercial arbitration and cross-border enforcement of arbitration awards. She is an adjunct professor at Fordham Law School. ■

World of Words

ABA-supported Marrakesh Treaty expands access to print materials for blind people **By Rhonda McMillion**

Less than 10 percent of the millions of books published each year are available in formats that make them accessible to blind and visually impaired people, according to the World Blind Union.

In the hopes of providing greater access to printed literary works for the 285 million blind and visually impaired individuals worldwide, the Senate voted in June to approve a resolution to ratify an ABA-supported treaty.

Signatories to the Marrakesh Treaty to Facilitate Access to Published Works to Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled agree to adapt their domestic copyright laws to allow written works to be converted into accessible formats such as braille, large print or digital for personal use and noncommercial distribution. A total of 40 countries are party to the treaty, which also requires that the countries allow eligible people and libraries to export and import works between those countries.

While the United States has already adopted similar exceptions, more than 130 countries designated by the World Intellectual Property Organization have not. As a result, reproducing written works in braille or other writing systems for the disabled in those countries may constitute a copyright violation, and the import or export of accessible formats across international borders may not be allowed.

The treaty, which is administered by WIPO, was negotiated in June 2013 in Marrakesh, Morocco, and submitted to the Senate in February 2016 by President Barack Obama. In his letter of transmittal, Obama noted that the United States played a leadership role in negotiating the treaty, and that its provisions are broadly consistent with existing U.S. law. The treaty came into force in September 2016 when Canada became the 20th nation to ratify it.

REMOVING BARRIERS

The ABA expressed support for prompt ratification of the Marrakesh Treaty in April, when the Senate Foreign Relations Committee convened a hearing on the access and copyright issues related to it.

“Ratifying the treaty would help open doors to countries worldwide, allowing literature to be disseminated in accessible formats with no borders,” ABA Governmental Affairs Director Thomas M. Susman wrote in a letter to the committee.

At the hearing, Manisha Singh, assistant secretary of state for the Bureau of Economic and Business Affairs, said the treaty would allow Americans who are blind or visually impaired to access an estimated 350,000 additional works.

“Accessing information, especially in a timely fashion, has been one of the significant barriers posed by blindness and print disabilities,” testified Scott C. LaBarre, a member of the ABA Board of Governors who

has been blind since age 10. LaBarre was involved in the 2013 treaty negotiations as the National Federation of the Blind’s lead delegate. “Those without such disabilities take for granted the ability to pick up a book or other printed material and simply read it.”

The Senate Foreign Relations Committee, in its executive report to the full Senate, stated that the treaty “strikes a careful balance, providing that copyright protection should not impede the creation and distribution of such accessible format copies, including the exchange of such copies internationally to designated beneficiaries while providing for appropriate safeguards to protect the interests of copyright holders.”

The report emphasized that the treaty provides assurance to authors and publishers that the system will not expose their published works to misuse or distribution to anyone other than the intended beneficiaries.

The final steps include the enactment of S. 2559, implementing legislation that adjusts U.S. copyright law to fully comply with the treaty’s language and requirements. The Senate passed the bill and sent it to the House for consideration. After passage of the implementing legislation, the U.S. president, as the chief diplomat of the United States, would submit documents to WIPO agreeing that the government will abide by the treaty. ■

► This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillion is editor of *ABA Washington Letter*, a Governmental Affairs Office publication.

ABA Notices

2019 REGULAR STATE DELEGATE ELECTION

Pursuant to Section 6.3(a) of the ABA’s Constitution, 17 states will elect State Delegates for three-year terms beginning at the adjournment of the 2019 Annual Meeting. The deadline for filing petitions is Dec. 4. For rules and procedures, go to ambar.org/2019StateDelegateElection. If you are interested in filing or have questions, contact Leticia Spencer (leticia.spencer@americanbar.org, 312-988-5160).

2018 NEVADA STATE DELEGATE VACANCY ELECTION

Pursuant to Section 6.3(e) of the ABA’s Constitution, the state of Nevada will elect a State Delegate to fill a vacancy due to the nomination of Rew R. Goodenow, who was elected to the Board of Governors. The term will commence immediately upon certification by the Board of Elections and expires at the conclusion of the 2021 Annual Meeting. The deadline for filing petitions is Sept. 20. For rules and procedures, go to ambar.org/NevadaVacancy. If you are interested in filing or have questions, contact Leticia Spencer (leticia.spencer@americanbar.org, 312-988-5160).

FALL 2018 • Save the Date

For the latest info, go to americanbar.org and click on Calendar.



Oct. 3

From Work, to the Pharmacy and Then Home: A Well-Being Approach to Depression and Anxiety Webinar

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Oct. 3-6

2018 Section of Family Law Fall CLE Conference

Location: Tucson, Arizona • Section of Family Law



Oct. 4-6

ABA Forum on the Entertainment and Sports Industries 40th Anniversary Annual Meeting

Location: Las Vegas • Forum on the Entertainment and Sports Industries • CLE Credit options



Oct. 5

ABA Lawyer Retreat

Location: Vail, Colorado • Law Practice Division



Oct. 17-20

Environment, Energy, and Resources 26th Fall Conference

Location: San Diego • Section of Environment, Energy, and Resources
CLE Credit



Oct. 26

Legal Skills Conference

Location: Washington, D.C. • Government and Public Sector Lawyers Division



Nov. 7-10

12th Annual Labor and Employment Law Conference

Location: San Francisco • Section of Labor and Employment Law
CLE Credit options



Nov. 14-16

2018 Professional Success Summit: Networking and Advancement for Racially and Ethnically Diverse Litigators

Location: Houston • Section of Litigation • CLE Credit



Nov. 21

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"Well, your honor, you did say we should make ourselves at home in your courtroom."
—Joe Pickard of Littleton, Colorado

JOIN THE FUN Send your caption for the legal-themed cartoon below to captions@abajournal.com by 11:59 p.m. CT on Sunday, Sept. 16, with "September Caption Contest" in the subject line.

For complete rules, links to past contests and more details, visit ABAJournal.com/contests.



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The government's crusade against Chaplin was one of the first uses of the Immigration and Nationality Act.

US Pushes Charlie Chaplin into Exile

Charlie Chaplin and his family were midway across the Atlantic, London-bound from New York City aboard the *RMS Queen Elizabeth*, when word reached them that his return to the U.S. was likely to be complicated.

Chaplin, who never relinquished British citizenship, had been granted a re-entry permit. But Attorney General James P. McGranery waited until Sept. 19, 1952, two days after the ship set sail, to announce that immigration authorities would detain Chaplin for questioning upon his return. The purpose, McGranery suggested, was to determine—as for any new immigrant—whether the internationally known comedian, 63, had the physical fitness, sound mind and good morals worthy of admittance to his home of 40 years.

To Chaplin, the move was the latest in a decadeslong campaign against him—one that intensified with the rise of anti-communist politics and its bone-deep suspicion of foreigners, artists and, most of all, Hollywood. And he had reason to believe that.

McGranery's announcement, calculated in its timing, was later shown to be the product of intense FBI scrutiny that abetted public attacks by influential politicians, defamatory press accounts, national boycotts by citizenship groups, and criminal charges tied to his relationship with a young actress.

Though never shown to be a member of any particular organization or political party, Chaplin was widely assailed for presumed communist leanings; and, for his part, he never denied deep sympathies for the powerless or poor. Reared on the impoverished streets of London, Chaplin's work veered far to the left of the self-conscious capitalism that predominated his era. His most popular films—including *Modern Times* and *The Great Dictator*—carried a working-class bias against industrialization and authoritarianism that meshed poorly with postwar capitalism and its anti-communist zeitgeist.

Even worse, he was independent. As one of the original investors in the United Artists film studio, Chaplin was rich—and a capitalist. He owned the lucrative rights to

Sept. 19, 1952



Attorney General James McGranery

most of his own performances and couldn't be intimidated by studio bosses. In the run-up to World War II he had urged American neutrality, but he later abandoned that position. And during the war he expressed support for the Soviet Union, at the time an ally. After the war, he refused to abandon friends who had actually embraced communism.

In 1947, when questioned about his sympathies at a press conference for *Monsieur Verdoux*, Chaplin retorted: "These days, ... if you step off the curb with your left foot, they accuse you of being a Communist." And when invited to appear before the House Un-American Activities Committee, he shot back a telegram to its chairman, J. Parnell Thomas: "I am not a Communist. I am a peacemonger."

Chaplin's public image was further complicated by a lawsuit brought by aspiring actress Joan Barry, who claimed the actor, more than 30 years her senior, had fathered her child. Although blood tests indicated Chaplin had not, they were inadmissible in California courts and he lost the case. So in 1944, federal prosecutors followed with criminal charges, alleging that a trip to New York with Barry for "immoral purposes" violated the White-Slave Traffic Act, aka the Mann Act. Though a jury acquitted him, it lent fodder to his critics.

Initially, Chaplin seemed determined to fight to re-enter the United States. But in April 1953, he surrendered his re-entry permit to U.S. officials in Switzerland, where he lived until his death in 1977.

The measure against Chaplin was one of the first uses of the Immigration and Nationality Act, created in 1952. Aimed at denaturalizing and deporting mobsters, it became a useful tool for U.S. officials to deter visits by artists and intellectuals—writer Graham Greene, actor Yves Montand, poet Pablo Neruda, among many—whose works (or personal histories) they considered inimical.



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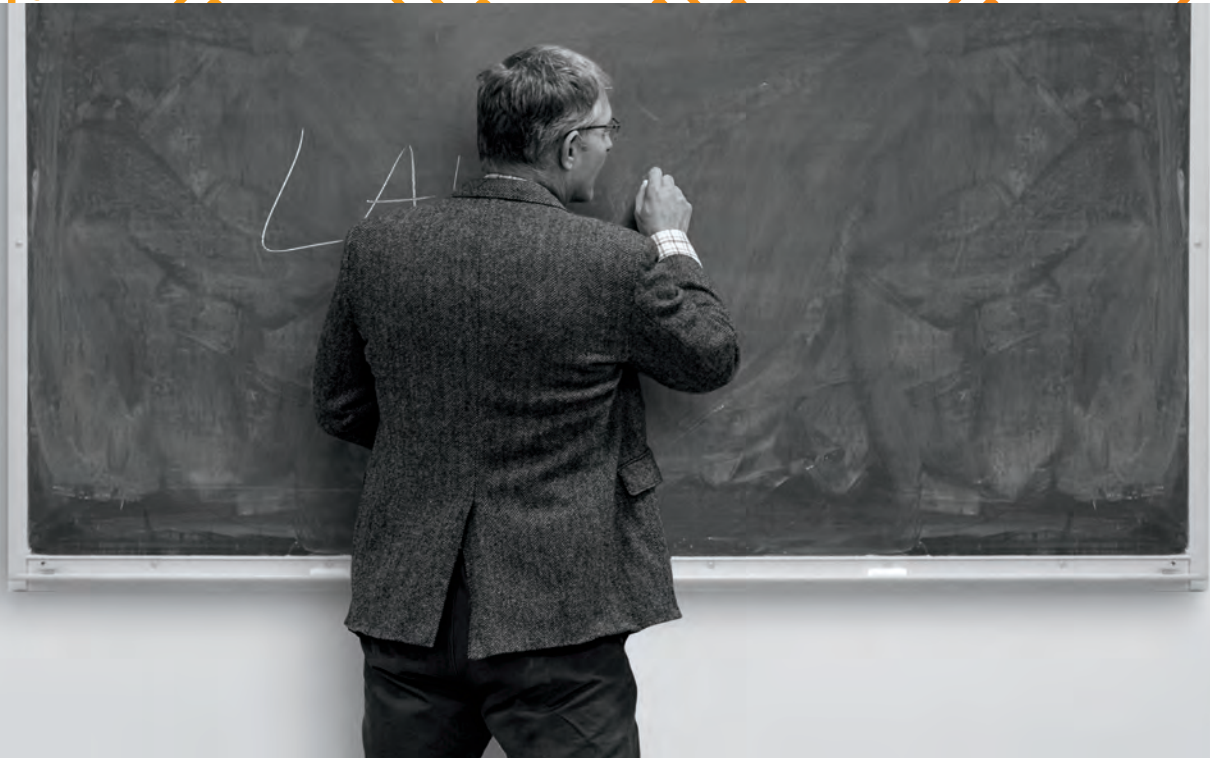
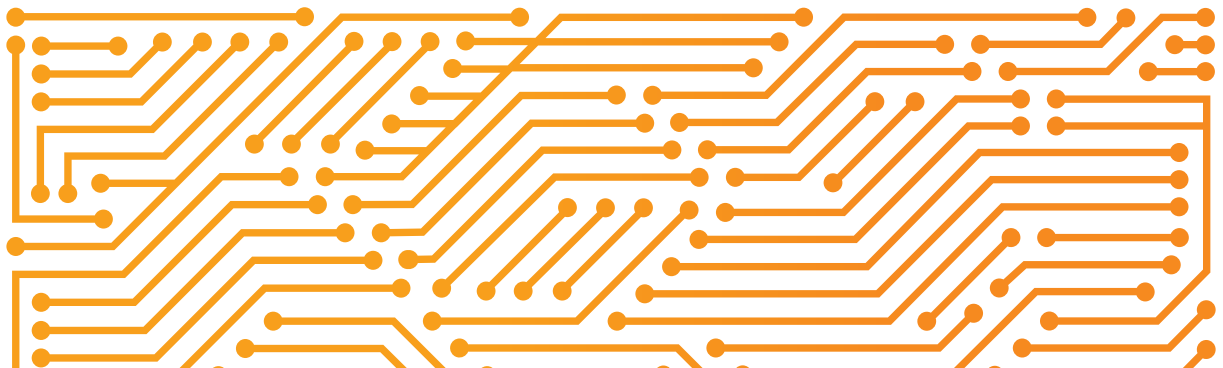
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