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ATTORNEY WRITES BOOK ON SNEAKER LAW

VOL. 108, NO. 4
AUG/SEPT 2022

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THE LAWYER'S MAGAZINE

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LEGAL Sleaze

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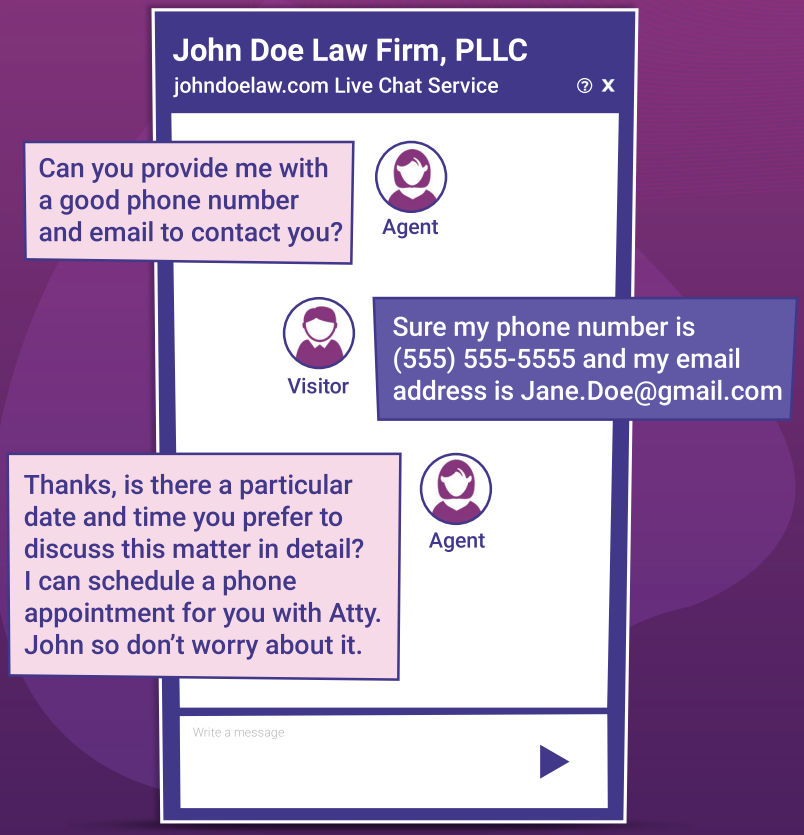

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INSIDE

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The Dire Need for Judicial Security

Congress needs to enact legislation and provide funding to ensure the safety of our judges

BY REGINALD TURNER

A free, fair and unbiased judiciary is essential to the rule of law and a properly functioning democracy. But judges cannot do their jobs effectively if they are under attack or feel their families are being threatened.

The ready availability of judges' personal information on the internet and the ease with which such information can be shared through social media puts our judges at risk every time they issue a decision that may be controversial or unpopular.

The threat is all too real. In July 2020, a gunman impersonating a delivery driver arrived at the home of Esther Salas, a judge for the U.S. District Court for the District of New Jersey, killing her 20-year-old son, Daniel Anderl, and critically wounding her husband, Mark Anderl.

The gunman—a self-described "men's rights lawyer"—had apparently targeted Judge Salas for her handling of a case he had brought challenging the all-male draft and had plans to target other judges as well, including the chief judge of the New York Court of Appeals.

The gunman was able to obtain Judge Salas' home address and other personal information through public online directories.

The attack on Judge Salas' family is, unfortunately, one in a long line of instances in which judicial officers have been targeted at their homes.

In 2015, a gunman shot Julie Kocurek, a judge in Travis County, Texas, for presiding over his criminal trial. In 2005, a dissatisfied litigant arrived at the home of Joan Lefkow, a judge of the U.S. District Court for the Northern District of Illinois, and fatally shot her husband and mother.

And in just the first part of this year, an armed man who said he wanted to kill U.S. Supreme Court Justice Brett Kavanaugh was arrested June 8 outside the justice's Maryland home and charged with attempted murder. Five days earlier, retired Wisconsin Judge John Roemer was shot to death in his home by a man whom he had sentenced to prison over a decade ago. In both cases, the men obtained the addresses of their targets on the internet.

Threats against federal judges and court officials are rising fast. They quadrupled from 2015 to 2019, according to the U.S. Marshals Service. In 2021, federal judges and court personnel received more than 4,500 threats and inappropriate communications.

Taking action

In response to the Kavanaugh threat, Congress quickly passed legislation extending police protection to the immediate families of Supreme Court justices. President Joe Biden signed it on June 16.

But unfortunately, Congress has not yet passed the bipartisan legislation named for Judge Salas' son: the Daniel Anderl Judicial Security and Privacy Act. The law would restrict online access to federal judges' personal information, give federal marshals more resources to assess and track threats against judges, and fund improved security devices for judges' homes.

The ABA has supported and advocated for this legislation, even lobbying for it during ABA Day this year. And the threats are only getting worse. In 2020, a survey of 572 judges by the National Judicial College found that 84% of judges felt security for their families is inadequate, with a majority citing their home address and other personal information being too easily accessible through public records.

Congress needs to pass the Anderl Act and look at increased funding and other legislation to ensure the safety of all of our judges.

This issue is just one of many that affects the legal profession and our country. As my term as ABA president comes to an end, I feel honored to have been able to address some of these matters and thankful for all the work and support that our wonderful members have provided. As I prepare to pass the gavel to Deborah Enix-Ross, I am confident that the association will continue to flourish under her leadership and carry out its mission of improving life for lawyers. ■

Photo by Danny Duran

Introducing ATEM Mini Pro

The compact television studio that lets you create presentation videos and live streams!

Blackmagic Design is a leader in video for the television industry, and now you can create your own streaming videos with ATEM Mini. Simply connect HDMI cameras, computers or even microphones. Then push the buttons on the panel to switch video sources just like a professional broadcaster! You can even add titles, picture in picture overlays and mix audio! Then live stream to Zoom, Skype or YouTube!

Create Training and Educational Videos

ATEM Mini's includes everything you need. All the buttons are positioned on the front panel so it's very easy to learn. There are 4 HDMI video inputs for connecting cameras and computers, plus a USB output that looks like a webcam so you can connect to Zoom or Skype. ATEM Software Control for Mac and PC is also included, which allows access to more advanced "broadcast" features!

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Letters From Our Readers

Genoa U.S. Indian Industrial School

Cultural clashes

As a member of the Indigenous Affairs Subcommittee of Pacific Yearly Meeting (of Quakers) and a former member of the Indian Affairs Committee of New York Yearly Meeting, I very much appreciated Matt Reynolds' article on Indian boarding schools, "America's Lost Children," June-July, page 42.

Most of these schools were operated by religious denominations—including Quakers—and we Quakers are now learning about our part in this tragedy and seeking to determine how we can help repair the damage that was done in stripping children from their families and stripping them of their language, heritage and culture through these acts that echo down to our own generation.

As the article states, there was often physical abuse as well, and there were many deaths among the children in these schools. These policies of the Indian boarding schools over the course of a century and more have been forces destructive of the culture and community of many Indigenous tribes and nations across North America. Making people aware of this part of our history is an important step in building the awareness and understanding that is a first step toward creating right relationships between the Indigenous tribes and nations and those of us who are part of the larger non-Indigenous community. Thank you for helping broaden that knowledge and understanding.

Tom Rothschild
El Cerrito, California

Laptop thoughts

"Do digital distractions justify law professors' prohibitions on laptops?" ABAJournal.com, April 19, as suggested by Stephanie Francis Ward's web article? Noted Massachusetts Institute of Technology professor Patrick H. Winston was one of the prominent human cognition and artificial intelligence researchers in the U.S. He likewise banned the use of laptops in his lectures about optimum written and oral presentation. Winston noted that brain research indicated the human brain has a single language processing center, and that processing on laptops and other electronics directly interfered with absorbing the lecture content. It may be the law school faculty is a bit more up to date on education research than the grievant. A specific accommodation might be in order, though.

Joseph Kashi
Soldotna, Alaska

Wikimedia Commons; Shutterstock; courtesy of Stratton Horres

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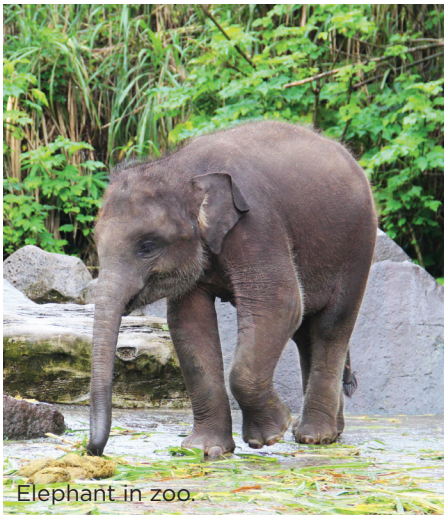

Elephant in zoo.

Elephant freedoms

Regarding the web story "Happy the Elephant isn't a person entitled to freedom from detention, top state court rules," ABAJournal.com, June 15, it's puzzling that the New York Court of Appeals failed to recognize Happy the Elephant for the person she is since in a separate case, New York's Fourth Judicial Department wrote that "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals."

There is growing agreement among lawyers and laymen that our legal system must recognize appropriate rights for animals based on the self-evident truth that they are thinking, sentient beings deserving of respect, consideration and legal protections for their own sake—not in relation to how they can be exploited by humans. We now understand that animals aren't "things" to dominate but rather breathing, feeling beings with families, dialects, interests, intellects and emotions. They love, share joys and sorrows and want to live their lives unimpeded, just as humans do.

Society's fundamental understanding of identity is evolving at a rapid pace. Some states now offer gender-neutral driver's licenses. A captive orangutan named Sandra was given legal personhood by an Argentine court. A Loyola Marymount University ethicist said that dolphins "qualify for moral understanding as individuals." Even rivers in Canada, India and elsewhere have been recognized as "legal persons." It's only our entrenched ignorance and hubris that has led us to deny other-than-human-animals their innate right to equal standing.

Jeffrey S. Kerr
Chief Legal Officer
PETA Foundation

Letters to the Editor

You may submit a letter by email to abajournal@americanbar.org or via mail: Attn: Letters, ABA Journal, 321 N. Clark St., Chicago, IL 60654. Letters must concern articles published in the *Journal*. They may be edited for clarity or space. Be sure to include your name, city and state, and email address.

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Insights with Jack Newton

The Art of Getting Paid

By Jack Newton

In the last two years, online payments have become a significant and clear determiner of success for law firms. According to research in the *2020 Legal Trends Report*, firms using online payments earned an average of $15,000 more per lawyer than firms that didn't.

As businesses continue to benefit from the rapid technology adoption that we've seen over the last two years, these insights are far from surprising.

There's something to be said for meeting your customers where they are—and when it comes to paying for goods and services, more clients are moving online.

Today's consumers have come to expect the ease and convenience that services like Amazon, Netflix, and Uber have made popular. As a result, online payments have become commonplace across all types of businesses, and failing to navigate this potentially friction-filled milestone can sour an otherwise positive experience with a firm. Online payments have become so ubiquitous that traditional methods of payment have steadily declined.

A study from the Federal Reserve in 2021 indicates that the use of cash accounted for just 19% of all payments, which is down 27% from just two years prior. According to the same study, consumers are also more likely to pay for goods and services remotely instead of in-person.

The use of checks, typically used for higher-value purchases, dropped 63% between 2000 and 2015—a trend that's estimated to have started in the 1990s. In 2018, the Federal Reserve reported that consumer preference for checks dropped 23% for bill payments and 8% for other purchases.

At this stage, *not* accepting online payments creates two potential problems for law firms. The first is losing out on the ease and efficiency of automating billing and payment workflows. The second is the added barrier created for clients when paying their legal bill. Put together, these problems threaten to reduce cash flow—and likely hinder total collections—which in turn creates a difficult headwind against profitability.

While payment providers make it easier than ever to get started with online payments, lawyers need to be aware of some key considerations.

Many law firms miss the importance of using a legal-specific payment provider that is IOLTA compliant. Since lawyers have very strict duties to uphold when managing client trust funds, choosing the wrong payment processor could result in severe penalties and even disbarment. One of the points of contention here is that non-legal payment processors will transfer trust payments to an operating account and deduct a transaction fee from the client's deposit, which goes against professional rules.

Another key consideration for law firms is transparency in processing fees. Online payments have become a necessary cost to do business—one that in many cases pays for itself through better convenience, efficiency, and total collections. But card networks are complex, and the type of card used, in addition to hundreds of network variables, can result in unpredictable costs. When using a payment service like Clio Payments, you get flat rate transactions with no hidden fees, so you always know what you're paying.

Finally, the benefit of efficiency and automation shouldn't be overlooked. Using an online payments solution offered within a legal practice management solution like Clio Manage saves having to manage multiple products—and ensures your payments work in tandem with the fee tracking and billing associated with your matters and clients. All of your transactions are easily linked to specific bills and financial record-keeping, and you don't need to worry about additional subscription fees or support.

Whether you're a solo managing a practice yourself or are working in the context of a larger firm, billing and collections represent a significant—and resource-taxing—administrative function. Finding ways to simplify and improve these systems—while creating a better, more efficient experience for your clients—will end up paying dividends in the long term.

Jack Newton is the CEO and Founder of Clio and a pioneer of cloud-based legal technology. Jack has spearheaded efforts to educate the legal community on the security, ethics, and privacy issues surrounding cloud computing, and is a nationally recognized writer and speaker on the state of the legal industry. Jack is the author of *The Client-Centered Law Firm*, the essential book for law firms looking to succeed in the experience-driven age, available at clientcenteredlawfirm.com.

Business of Law

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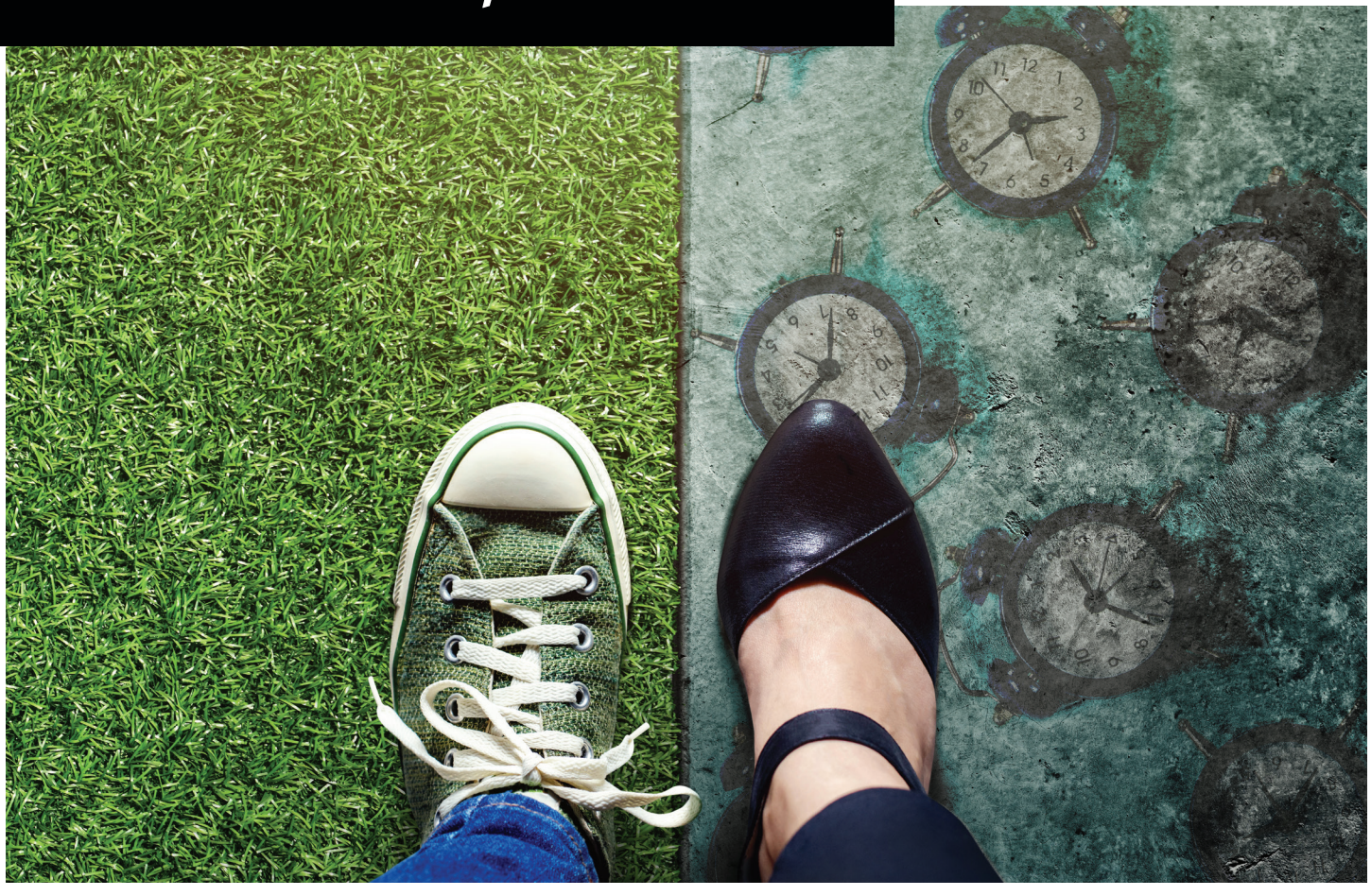

LAW FIRMS

Warm Welcome

Law firms are using wellness programs to recruit new lawyers

BY DANIELLE BRAFF

When Sarah Irwin saw a job posting for Lyda Law Firm earlier this year, she was intrigued. The firm—which has 12 lawyers across one brick-and-mortar office and a handful of virtual offices in California, Colorado, Oklahoma, Texas and Washington—was transparent about its expectations and benefits, and offered flexible schedules, encouraging lawyers to take time off for their well-being and mental health.

At Irwin's previous firm, she was expected to be tied to her phone so she could respond to colleagues and clients at any time, so the idea of being remote and trusted to handle her own business as she saw fit seemed too good to be true.

Sarah Irwin

However, she says, not only was it true, but it also works.

"It's OK if I decide to start work at 12 p.m. or end work at 1 a.m., but also if I want to start work at 8 a.m. and end work at 5 p.m., it's fine," Irwin says. "And I still get my work done because I am rested and don't have to feel guilty about getting that rest."

Irwin started working as an attorney in the San Antonio office in February, switching from a large personal injury firm in the same city.

"The culture of this firm, knowing that we will get our work done

Photo illustration by Sara Wadford/Shutterstock; photo courtesy of Sarah Irwin

even if we aren't at a desk from 8 a.m. to 6 p.m., drew me to this firm," Irwin says. "The trust in my ability to work independently, and the appreciation of my life outside the firm convinced me to make the switch from a normal in-office position."

Attorneys generally choose a law firm based on prestige, salary, location and future goals. But today, many are adding another criterion to the list: wellness programs. Self-care, which used to be a foreign concept to law firms, has finally entered the conversation.

In 2017, the National Task Force on Lawyer Well-Being released a long list of tangible strategies to address attorney stress, responding to a 2016 study by the ABA and the Hazelden Betty Ford Foundation that surveyed nearly 13,000 practicing lawyers on their mental, physical and behavioral health. It was a watershed moment, with between 21% and 36% of attorneys classified as problem drinkers and approximately 28% reporting struggles with depression.

Something had to be done.

While the task force's well-being list included educating lawyers on issues such as substance abuse and suggested that the stigma of asking for help be eliminated, some firms took this a step further, offering their attorneys benefits such as extra days off, free gym memberships and gratis mental health help.

Anastasia Allmon

One possibly unexpected benefit for the firms: Attorneys were drawn to them specifically because of the wellness offerings. Anastasia Allmon, a personal injury lawyer at Farris, Riley & Pitt in Birmingham, Alabama, was offered positions at a few different firms in 2015, but it was the wellness overtures at FRP that sealed the deal for her.

"With this law firm, I was able to get a gym membership, a large variety of food on-site for free and discounts from mental health professionals—all of which I have since taken full advantage of," Allmon says. "These kinds of benefits made it easy to pick between my offers."

Clayton Hasbrook, an attorney with Hasbrook & Hasbrook in Oklahoma City, says his firm places a big emphasis on its wellness offerings, which include a burnout adviser and flexibility in working hours.

"We were already offering most of these wellness programs even before the pandemic, but we started offering flexibility afterward," Hasbrook says. "I believe these benefits and wellness programs have improved our reputation in the legal industry, and more lawyers have started looking favorably upon firms that offer them."

Win-win

William Shepherd, partner and chairman of the well-being committee at Holland & Knight, says he is aware that wellness programming can set some firms apart from others and can often play a role in a candidate's decision. Potential candidates comment that they like that the firm values and invests in the whole person.

Wellness initiatives at his firm include career coaching, special interest groups like a new parents circle, a Peloton riding group and lawyer-led mindful meditation sessions.

Recruiters for Latham & Watkins in Washington, D.C.—across the platform and at every level—speak with prospective employees about the firm's health and wellness programs.

Annette Sciallo

"We frequently speak at a variety of law school events about mental health and well-being, for example, and are continually impressed at how eager law students are to discuss this topic," says Annette Sciallo, the director of global benefits and well-being for the firm. Sciallo says recruits are impressed by the depth and breadth of the firm's offerings, which include mindfulness training, annual physical competitions, custom-built training and dedicated mental health counselors.

The reason why recruits should be—and are—so influenced by wellness offerings is because they are an extension of the way the firms treat their employees, says Sonia Menon, the chief operating officer at Neal Gerber Eisenberg in Chicago.

NGE launched a host of well-being initiatives in 2019 after signing the ABA Well-Being Pledge—which called on employers to support lawyers' physical and emotional health—including an on-site gym, chair massages, health food options, a bike-sharing discount program, seminars on everything from

Photos by Ken Riley; courtesy of Latham & Watkins

heart health to mental health and wellness days off.

"We know from talking to recruits and individuals we hire that today, most law students and lateral attorneys are looking for firms whose values align with what is important to them, and mental health and well-being are often top of mind," Menon says.

That's why Mark Sadaka, the founder of Sadaka Law in Englewood, New Jersey, started offering wellness programs two years ago, even hiring a full-time burnout adviser last year who guides employees to find balance.

Other Sadaka perks include gym memberships and the permission to leave early if your work is done.

Immediately, Sadaka says, new hires were impressed. "They conveyed this to us through availing of services and showing gratitude through improvement in work conditions," Sadaka says. "The productivity increased by leaps and bounds during this time."

But will all productivity increase by leaps and bounds if attorneys are encouraged to take days off, shorten their billable hours and leave work early in the name of wellness?

New York City-based firm Hach & Rose's wellness programs, which were launched in 2019, include a monthly paid mental health day off and a 25-day-per-year leave allowance. Michael Rose, a co-founder of the firm, says these days off have been mutually beneficial for the firm and for the attorneys. Even with the 25-day-per-year leave, everyone still meets their hours, Rose says, speculating that the extra time off is the incentive they need to keep them focused and on track.

"It gives the lawyers the opportunity to unwind and de-stress away from the pressure of work, which, in turn, makes them sharper and more focused when they are in work," he says. "One of the lawyers who we hired during the pandemic told me during their monthly one-to-one last week that the mental health day was a godsend and made working here a dream come true." ■

Photo illustration by Sara Wadford/Shutterstock

TECHNOLOGY

Going Viral

Once unpopular, QR codes have taken off, thanks to the pandemic

BY RICHARD ACELLO

It starts out with something innocuous, like "mushrooms or pepperoni?" Next thing you know, your pizza topping preferences are out there for the whole world to see.

The vehicle is a QR (quick response) code. Those are the black-and-white barcodes resembling boxes full of squiggles, squares and dots that have become ubiquitous on all forms of advertising. Invented in 1994 by engineers at the Japanese company Denso Wave, a Toyota parts supplier, as a means of tracking those parts, QR codes became more widespread in the 2010s as companies started using them to provide users with access to a wide range of services, including restaurant ordering, electronic payments and gaming.

However, the technology didn't quite catch on. Turns out, many people were confused by the codes and didn't know

Linn F. Freedman

what to do with them. *Inc. Magazine* found in 2012 that 97% of consumers did not know what a QR code was. Additionally, most smartphones at the time did not have a native app or scanner that could read the code, forcing users to download a special program, which led to even more confusion and inconvenience. According to a 2013 study by marketing analytics firm Marketing Charts, only 21% of smartphone users had ever scanned a QR code.

But then the pandemic hit, and QR codes became very popular as people looked for a contact-free way to share information. According to eMarketer, in 2019, 52.6 million smartphone users scanned a QR code. This year, it is estimated that 83.4 million will scan a code, and by 2025, QR codes will be scanned by 99.5 million smartphone users, nearly double the 2019 mark. To drive traffic, eMarketer encourages its readers to create QR codes that are innovative, such as games to obtain discounts or provide access to promotions and deals.

Privacy advocates, however, see a darker side to QR codes.

"Really sensitive information about you is being collected and monetized by the QR code-generation company," says Nicole A. Ozer, technology and civil liberties director of the American Civil Liberties Union of Northern California.

Ozer says QR generators can use the codes to get your phone's unique device identifier and location information. "Companies share the information they retrieve with other marketing companies, so the big picture creates much more info than just you retrieving a menu," she says. "Most of the restaurants have no idea that they are being used as a cog in this huge ecosystem."

While that information may seem innocuous, Ozer cautions that companies can extrapolate all sorts of information from a given data point and make important assumptions about people that could have major repercussions in their lives.

"So now they know I like pepperoni pizza," Ozer says. "That info could be provided to my health insurance or life insurance companies. Then if these companies get more information about someone—for instance, if they eat takeout every day or if they engage in risky behavior like skydiving—they can use it to determine how much coverage, if any, someone should have." Ozer suggests consumers pass on QR codes and request a paper menu instead.

Scan safely

Issuers of QR codes also must evaluate the risks to their clients, says Linn F. Freedman, chair of the data privacy and cybersecurity team at Robinson & Cole.

"Any technology that uses code, like phishing—or in this case, QRishing—presents the ability for bad actors to leverage the information. So as the issuer, you want to make sure you have sufficient security measures in place," Freedman says. "Bad actors can victimize you or your clients. The information could be used to even perpetrate a fraud in your name."

Pointing out the wide use of QR codes, Freedman referenced the bouncing QR code deployed by Coinbase in a February Super Bowl ad that was scanned by more than 20 million people in one minute. The traffic was so heavy, it caused the app to crash. "I am concerned that the Coinbase ad gave people a false sense of security," Freedman says. "I'm concerned that people are getting comfortable with QR codes without understanding that they can be malicious, just like links or texts."

The popularity of QR codes increases the possibility that consumers could unwittingly scan them, thereby giving access to a hacker to do all sorts of malicious things, like installing spyware or tracking consumer behavior or stealing sensitive information.

The situation is now such that governments are issuing QR code warnings. The FBI advises using caution when entering login, personal or financial information from a site navigated to from a QR code. Additionally, do not download an app from a QR code or a QR code scanner app. If you receive an email saying a payment failed from a company with which you recently made a purchase, and the company states you can only complete the payment through a QR code, call the company to verify.

North Carolina Attorney General Josh Stein

North Carolina Attorney General Josh Stein says QR codes can be helpful, "but like any technology, it can be used against us." Stein advises that consumers should exercise caution with QR codes.

"If you order through the QR code, check the URL to make sure it's really the restaurant," he says. ■

Photo courtesy of Robinson & Cole; by Jonathan Drake

How Attorneys Can Avoid Commingling Funds

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This article originally appeared on the LawPay blog.

When speaking with lawyers and bar association representatives across the county, we have found that many attorneys experience a great deal of confusion about trust accounting—particularly when it comes to commingling funds.

In this article, we'll discuss the basics of fund commingling, the consequences of doing so, and how attorneys can avoid serious state bar violations by following proper trust accounting practices and using software designed specifically to support trust account compliance.

What Does Commingling Mean?

When a lawyer takes on a client and accepts money upfront from that client (or holds funds on the client's behalf), the attorney accepts a fiduciary responsibility to appropriately and legally handle those funds. Those funds, commonly referred to as a retainer, typically must be deposited in the attorney's IOLTA. Commingling of funds refers to the mixing of funds that are ethically and/or legally required to be kept separate (e.g., retainer funds that were supposed to be deposited in the IOLTA were put into the firm's operating account).

Examples of fund commingling include:

- Mixing client funds with a law firm's operating funds or a lawyer's personal funds
- Using client funds to pay the firm's business expenses or the lawyer's personal expenses
- Preemptively pulling client funds from the IOLTA before the attorney earned that money

Many attorneys may accidentally engage in commingling due to confusion over which funds qualify as client funds that must be held in trust and which funds can be deposited into the firm's operating account.

Potential Consequences of Commingling Funds

If a lawyer accidentally or intentionally engages in the commingling of funds, they can face various professional and legal sanctions. Commingling of funds by a lawyer constitutes a violation of the state bar's rules of professional conduct. This can subject the attorney to discipline by the state bar, which can include a reprimand, suspension from the practice of law, or in particularly egregious circumstances, disbarment.

Avoid Commingling by Establishing Separate Operating and Trust Accounts

Lawyers can avoid the risks of commingling funds by having two separate accounts: a trust account (also referred to as an IOLTA) for holding client and third-party funds, and an operating account for collecting the fees the lawyer is legally entitled to and from which to pay their expenses. (Note: under some circumstances, state bars require law firms to open trust accounts.)

These trust accounts are usually subject to specific requirements, such as being held at a bank with physical branches within the state. Depending on the bar, lawyers are also required to take certain actions with their trust account(s), including:

- Reporting overdrafts to the state bar
- Forwarding all accrued interest to the bar
- Providing copies of canceled checks
- Designating the account specifically as a trust account

While some law firms may only need one single trust account to handle all client funds, for larger firms or those firms that handle complex legal matters, opening separate trust accounts for each client may be appropriate. Practicing detailed and regular trust accounting can also avoid this risk as well.

Practice Matters

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STORYTELLING

Making Your Case

Storytelling problems and solutions

BY CHRIS ARLEDGE

I taught many trial advocacy courses for lawyers in America and knew what to expect.

Participants—usually big-firm associates—were almost uniformly smart, hardworking and eager, and at least in the beginning, lost in the courtroom.

But I thought things would be different when I went to teach in Dublin. Every participant in my advanced advocacy course was a barrister with at least 20 years of experience. They, too, were smart, hardworking and eager. And they also were lost.

That's when I began to understand the root of the problem for most trial lawyers. It's not just a failure to know or practice the usual trial advocacy pointers we get in CLE programs, such as using leading questions on cross. The problem is more fundamental. Lawyers all over the world struggle with storytelling.

Storytelling is critical to how people process information. It's how we see and make sense of the world around us.

Only in the context of a story are facts memorable, understandable and impactful. Only with stories can we appeal to the whole person—the intuitive and emotional sides as well as the logical.

To become better storytellers, lawyers need to leave the insulated world of legal practitioners and study what makes other professional storytellers—like novelists, journalists, advertisers and filmmakers—effective.

Don't: Convey information—particularly boring information—outside of a narrative.

Many direct examinations start with a question like, "Can you give us the highlights of your educational background?" Is that storytelling? Did *The Godfather* start with Michael Corleone talking about his college major? Is the first page of *The Great*

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Gatsby a copy of Jay Gatsby's CV? We must stop throwing facts at the jury—particularly boring ones—and tell a story instead.

Don't: Allow your story to become secondary to your message.

Because we have a case to win, we smash our facts into our predetermined mold to get to the conclusion we want the jury to reach. This is an ineffective tactic, as we've seen with some movies and television shows where the primary goal is to promote a political, philosophical or religious position. Think, for example, about the Netflix movie *Don't Look Up*. The comet coming for Earth is an obvious metaphor for climate change, and the characters who refuse to take it seriously—almost all of them—are flat and idiotic. You may or may not agree with that premise, but the message of the film flattens the characters, overwhelms the plot and ultimately cannot persuade anybody; where you are after the film is exactly where you were when it started.

Lawyers obviously have important messages to communicate at trial, but we cannot allow our desire to impart a message or moral destroy the story itself.

Do: Focus on real characters, not archetypes.

When handling our characters or trial witnesses, we aim to prove our side is good and the other is bad, hoping the jury will align with our cause. But we do this by offering flat, unbelievable characters that destroy our credibility. We paint the other side as monstrous, greedy, uncaring or even selfish. But eventually, the other side will put somebody on the witness stand, and that person is rarely a monster. In fact, they look presentable, they smile, they are well-spoken, they have a family, they love puppies. In turn, this caricature we offered in opening fails to resemble the flesh-and-blood witness on the stand. We staked our credibility on a story about a flat character that is flawed, because by depriving the characters of their depth, the story we tell about them is no longer true.

Do: Embrace your characters' flaws.

We make a similar mistake with our own clients, glossing over faults and mistakes; we think a jury will sympathize with our client only if there's no hint of error or wrongdoing. Does your client have flaws? Admit them. The jury will discover them anyway, and you save credibility. The greatest heroes and villains are complex. Han Solo was a smuggler and selfish but also a hero. Hannibal Lecter was brilliant, cultured and talented but also a monster. Your witnesses have flaws, and the other side's witnesses have strengths. Embrace these real complexities.

Do: Know the importance of casting.

We often assign our clients to roles they simply cannot play. I don't just mean that we ignore bad facts and assert questionable ones—those are obviously problems. But we ignore the importance of casting. Danny DeVito will never play James Bond. It's hard to imagine Tom Hanks as a villain, though he did step up to play the "bad guy" in the film *Elvis*. You can give certain actors the right wardrobe, props and lines, but the role will not work. Yet we routinely ask this of our clients.

In my first trial with real money on the line, the other side tried to portray their plaintiff as a superstar sales executive; in opening, he sounded like Tom Cruise from *Top Gun*. But he wasn't confident or swashbuckling or heroic; he was smart, reserved and had an underwhelming presence. The plaintiff's counsel should have built a story around his true nature. The truth is ultimately more compelling.

Do: Remember that stories are built on facts, and facts take time.

We cannot rush the jury to the conclusion. An effective story has a lesson or several, and a well-told story will convey that message clearly. Does anyone really need to explain the moral of *The Boy Who Cried Wolf*?

In depositions, we focus on obtaining favorable conclusions or characterizations instead of building out specific facts that make a complete plot. In direct exams, we have our witnesses stress their conclusions—"It was a horrible place to work"—but often without detailing what exactly made it horrible. On cross, we put our best fact in front of a witness and then try to bully them into agreeing with our conclusion, instead of walking through the story with context, allowing the facts to undercut the false narrative from the other side. With the right facts and context, the conclusion follows.

And it's not a terrible idea to hold back a little to raise suspense. Highlight an issue that needs to be decided without telling the jury how they will be asked to decide it. You will better retain the jury's interest and be more persuasive if the jurors believe they've figured something out for themselves.

Tell your story. Take your time. Save some things. Build suspense. Focus on telling a compelling and true story rather than battering your audience with a desired conclusion. Act, in other words, like a storyteller. ■

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This column reflects the opinions of the author and not necessarily the views of the ABA Journal*—or the American Bar Association.*

Chris Arledge

Photo courtesy of Ellis George Cipollone O'Brien Annaguey

WORDS

Judge's Rules

The four Reavley principles

BY BRYAN A. GARNER

On May 23, Chief Judge Priscilla Richman of the New Orleans-based 5th U.S. Circuit Court of Appeals convened an unusual en banc hearing. It was to celebrate the life and judicial contributions of the late Judge Thomas M. Reavley, who was a member of that court from 1979 until his death in 2020 at the age of 99. He was the oldest sitting federal judge in the country. Before his federal service, he had spent nearly nine years on the Texas Supreme Court. He was universally considered a wise and careful judge.

My Reavley clerkship was the most rewarding year of my professional life. The experience locked into place important principles of conduct and of judging. Although I've never been a judge, I'm a serious student of judging. I've taught judicial writing to courts in about half the states and in several of the federal circuits. When teaching that subject, I emphasize four principles Reavley taught.

If you've read this far and have started to conclude that this column is for appellate judges but not others, please bear with me. Every lawyer can benefit from the Reavley principles.

Make sure you're well-informed not just about the parties' contentions but also about the record.

All the legal and factual contentions must be understood in light of the record. Ideally, a judge or a trusted clerk must read the record from beginning to end. You say that's not possible in a high-volume court? You may be right, but it's certainly possible (and should be expected) in any appellate court that has discretionary jurisdiction. In a high-volume court, the relevant excerpts, normally supplied jointly by counsel, should be scrutinized.

For the advocate, this principle means that you must rely on the actual record, not your recollection of it. Once again, that means reading the record. But there's another part of the principle: You must be well-informed about your adversary's contentions. Just as people who rely on memory may skew their understanding of ascertainable facts,

Judge Thomas M. Reavley offered this approach: State the central problem clearly, decide the case cleanly, give reasons briefly and be done.

Photo courtesy of Baylor Law

they may skew their understanding of their adversary's positions.

It's hard to listen sympathetically to an adversary, but that's precisely what good lawyers learn to do—before pouncing on the real (not the imagined) jugular.

Make sure that everything you've said about the record is utterly honest.

If there are inconvenient facts, you mustn't brush them away with rhetorical flourishes. Yes, judges have been known to do that. A paragon on the bench will deal with these facts candidly—even if doing so might alter a desired result.

In a 1982 memo to law clerks, Judge Reavley wrote: "Beyond any other cause, judges most often err because of an inadequate understanding of the record. If you misstate the record or twist the effect of the evidence, I will be humiliated." He added: "If you are working with me on a particular opinion, you are responsible for the absolute accuracy of the citations and quotations there."

It's no surprise that advocates might be inclined to fudge uncomfortable facts, whether consciously or unconsciously. Once that's discovered by a court, though, the advocate's credibility plummets. So it's a good idea to have rigorous fact-checking. The best practice, when possible, is to have someone other than the writer check the facts. That's how the *ABA Journal* and other reputable publications do it. There's no reason a lawyer, whenever possible, shouldn't approach it the same way.

Write your opinion with the losing side in mind.

OK, this is a judge-specific principle. The idea is that the winning side will inevitably be happy enough with the result—unless it's some kind of Pyrrhic victory. The ideal judge cares that the losing side knows that their positions have been understood. They should know why they've lost. Ideally, they'll be convinced that their case was decided by judges who are diligent, wise and humane. That's how we build respect for the rule of law.

This idea of respecting the loser is one reason why humor in opinions is so difficult to handle well. Unless it's deftly and gently executed, the loser may well conclude that (a) the judge spent more time going for laughs than arriving at a sound decision; or (b) if the jollity is at the loser's expense, the judge is simply callous. People who have staked their claims in court want to be taken seriously.

Be succinct.

Write no more than necessary. And make your prose so clear that a smart high school student could follow what you're saying. Doing this engenders respect for the law and the courts. In Reavley's view, judges should avoid trying to restate the law within a field. Leave that to the law reviews. And even though the judges are supposed to know the whole record in a case, they should exclude almost all of it from their opinions. The idea is to include only facts that illuminate the analysis. The Reavley approach is to state the central problem clearly, decide the case cleanly, give reasons briefly and be done.

Judge Reavley blamed legal education for the loquacity to which so many lawyers are inclined. He warned his clerks: "Students are taught to look for every issue they can connect to a given set of facts or contentions, and then to pursue every argument of which they can conceive. The result is a clutter that neither enlightens the listener or judge nor persuades."

He used an analogy to America's favorite pastime: "No detours, no distractions. Think of a baseball diamond: Stay on the base path to first and second and third and then home base. ... You must outline or lay out your bases. Most lawyers seem to use the parts of the briefs required by the rules for their only outline: statement of the case, the facts, the issue and the argument. From there, they just write and write and write. Seldom will you read a brief where the writer has thought and pared and shaped her writing to take the reader by the hand onto the playing field and down the base path."

Every lawyer with any experience has encountered colleagues at the bar who see no problem with adding more material to a brief or its appendixes. The ancient rhetorician Quintilian spoke against this practice nearly 2,000 years ago: "We must not always burden the judge with all the arguments we have discovered, since by doing so we shall at once bore him and render him less inclined to believe us."

The point is that *attention* is a scarce resource, in a judge's chambers as elsewhere. Writers are foolish to presume that it's always in ample supply. Readers will rebel by turning their attention to other things. It happens all the time.

Whenever I'm writing, I always try to keep the Reavley principles in mind. Even though Judge Reavley wasn't much interested in grammar, he taught me more about legal writing than anybody else.

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Bryan A. Garner

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ETHICS

Avoiding Unlawful Client Solicitation

Attorneys must ensure subordinates know the dos and don'ts

BY DAVID L. HUDSON JR.

Most attorneys understand they must refrain from improper solicitation of potential clients for pecuniary gain, but a new formal opinion clarifies that practitioners must go even further. Beyond their own actions, lawyers are obligated to train their employees to avoid similarly unlawful solicitous behavior.

In Formal Opinion 501, the ABA Standing Committee on Ethics and Professional Responsibility explains that a solicitation under Model Rule 7.3(a) is a communication initiated by or on behalf of a lawyer or law firm directed to a specific person that the lawyer knows or reasonably should know needs legal services. Rule 7.3, as amended in 2018, carves out an allowance for direct face-to-face solicitation if the contacted person is with a lawyer, with a family member or close friend of the lawyer, or with a person who routinely uses the types of services offered by the lawyer.

But the formal opinion reminds lawyers they also have ethical responsibilities regarding third parties who solicit on their behalf.

"The ethics opinion does a service by advising lawyers of what is and is not permitted concerning solicitation," says ethics expert Peter A. Joy, who teaches professional responsibility at Washington University in St. Louis School of Law.

"I think it is particularly helpful in reminding lawyers that they are responsible for their employees and to caution lawyers about using lead generators."

Knowledge is power

Under Rule 8.4(a), it is professional misconduct for a lawyer to knowingly assist or induce another to violate the rules—including engaging in impermissible solicitation.

The lawyer is subject to discipline under 8.4(a) if he or she knows of the third party's conduct or requests or authorizes it. However, the opinion also cautions that "it would be manifestly unfair and illogical to hold a lawyer responsible for another's actions that the lawyer does not even know about."

Much of the opinion examines lawyers' responsibility for the conduct of their employees or agents. It explains that lawyers also can run afoul of Rule 5.3 if they do not control their employees and allow them to engage in unlawful solicitation. Under Rule 5.3, lawyers with supervisory authority "must discuss ethical rules with these employees," including the rule against solicitation in 7.3.

The opinion acknowledges that "what constitutes a prohibited 'solicitation' on behalf of the lawyer versus merely making a recommendation about the lawyer can be complicated."

To help clarify, the opinion gives four solicitation hypotheticals and explains whether they are permissible. The first three include:

- A lawyer obtaining a list from a local sheriff of people arrested and calling these people to offer legal services.
- A lawyer hiring a professional lead generator to obtain client leads for mass tort cases.
- A paralegal at a law firm who doubles as a paramedic directly soliciting accident victims on behalf of her law firm.

In all three of these scenarios, the lawyers violated the Model Rules by either engaging in direct solicitation in violation of 7.3(b); knowingly assisting another in violation of the rules under Rule 8.4(a); or failing to train nonlawyer legal assistants on ethical responsibilities under Rule 5.3(a), (b) and (c). In the last instance, the lawyer has violated Rule 5.3(b) because the lawyer knows the employee is engaging in improper solicitation but failed to take steps to stop such impermissible conduct.

The opinion, however, offers a fourth hypothetical of a lawyer asking a banker who is a personal friend or colleague to provide the lawyer's name and contact information to anyone who might need estate planning. "Recommendations or referrals by third parties who are not employees of a lawyer and whose communications are not directed to make specific statements to particular clients on behalf of a lawyer" are not solicitations.

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Joy says the hypotheticals provided draw clear lines for lawyers to differentiate permissible versus disallowed conduct. "I used the opinion in my legal ethics course this past semester, and it helped my students better understand the rules in practice. If it helped my students, it should help the practicing bar."

Impact on free speech

While legal experts praised the opinion for its useful guidance, including detailed hypotheticals, some wonder whether the existing anti-solicitation rules would survive a First Amendment challenge. In 1978, the U.S. Supreme Court ruled in *Ohralik v. Ohio State Bar Association* that rules banning direct face-to-face solicitation by an attorney of an accident victim in the hospital did not violate the First Amendment.

But the court was sharply divided in 1995's *Florida Bar v. Went For It Inc.* when it narrowly upheld a Florida rule that banned attorney solicitation letters to accident victims or their family members for 30 days after the accident. The majority reasoned that the 30-day ban furthered the state's substantial interests in ensuring the privacy rights of accident victims and the reputational interests of the bar. However, the dissent noted that the ban on solicitation letters deprived accident victims of needed information about legal services at a time when some most needed it. The dissent also pointed out that there was no ban on communication by insurance adjusters.

Since the *Florida Bar* decision, the court has increased protections for commercial speech, or advertising. Legal experts predict that this increased protection for commercial speech may translate into greater protection for attorneys who advertise and solicit business.

"The opinion addresses the rules as they are, but the unsettled issue around solicitation is whether the remaining ban on solicitation would survive a First Amendment challenge in today's Supreme Court or even in many state supreme courts," Joy says. "I don't think it would."

Rodney A. Smolla, dean and professor at Delaware Law School of Widener University, offers a similar assessment of how problematic the anti-solicitation rules are under modern First Amendment jurisprudence. "While some may see the opinion as a laudatory advance in the right direction, I believe the entire existing regime of attorney solicitation rules remains fundamentally flawed," he explains. "The anti-solicitation provisions remain anachronistic and paternalistic, out of step with the sophistication of modern consumers and the arc of modern First Amendment law." ■

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INTERSECTION

Blowing Up *Roe*

Crusaders protecting the unborn willingly sacrifice the living

BY LIANE JACKSON

***Intersection** is a column that explores issues of race, gender and law across America's criminal and social justice landscape.*

Our country's conservative establishment wants you to know that life is sacred—or rather, every life is sacred as long as that "life" is unborn. Once a human being enters this world, all bets are off.

The same right-wing legislators consumed with "protecting" babies in the womb demonstrate apathy toward the women carrying those babies and children who breathe air. Their "right to life" doesn't include protection from semi-automatic rifles and mass shootings at elementary schools, as guns have become the No. 1 killer of children and adolescents in the United States. The protection doesn't encompass fundamental needs like prenatal care, food, shelter or education.

Instead of focusing on salvaging the shrinking lifespans of Americans already alive, conservatives have spent decades strategizing ways to strip rights from women and mothers with a hypocritical, evangelical zeal.

While they have succeeded in reversing *Roe v. Wade* and forcing women to carry babies and give birth, this country continues to fail the living through inaction and indifference. For example:

- *Childbirth?* More maternal deaths occur in the U.S. than any other industrialized nation.
- *Health care?* Either you need a job with good insurance or the affluence to afford it.
- *Education?* You'll get a decent one if you live in the right neighborhood or have the financial means for private school, otherwise you're out of luck!
- *Child care?* Is someone able to stay home with the kids? If not, there better be surplus funds for good day care or a nanny.
- *School safety?* Giving all teachers guns and removing doors are the latest bizarre suggestions to prevent continued slaughter in classrooms.

According to a June CBS News poll, 44% of Republicans said mass shootings are something we have to accept as part of a free society, while 72% of the nation as a whole believes these massacres could be prevented if we really tried. But Republicans are apparently loath to try. It's deathly clear that gun lobby money and gun worship have become entrenched in the political landscape at biblical proportions: For conservatives so loved their weapons, they allowed our sons and daughters to perish so that gun rights could have everlasting life.

Slippery, bloody slope

The conservatives of the U.S. Supreme Court, through rulings blocking gun control, greenlighting executions, condoning abortion-provider bounty hunting and forced maternal labor, have demonstrated a ghastly tolerance for violence.

During oral arguments in *Dobbs v. Jackson Women's Health Organization,*

in which all three appointees of former President Donald Trump indicated their support for rejecting stare decisis and eliminating a woman's right to choose, Justice Sonia Sotomayor asked whether the court would "survive the stench that this creates in the public perception that the Constitution and its reading are just political acts."

But it's a bit late for that concern. The Supreme Court is protected from popular will or accountability and is now seen for what it has become: an ultraconservative, unelected body ruling by fiat. And while the Constitution may set out this country's foundational principles, it is overwhelmingly a political document used and abused to interpret modern-day rights through an archaic and exclusionary historical lens.

Even though an overwhelming majority of Americans support a woman's right to choose—with a May CNN poll showing 66% opposed overturning *Roe*—more than a dozen states were already armed with trigger laws that would ban abortion if *Roe* was reversed. Others are now in the process of implementing similar legislation.

Rather than an equal protection argument, the court's 1973 ruling in *Roe* was based on a right to privacy under the substantive due process clause of the 14th Amendment, which provides that there are some liberties unspecified in the Constitution so important they cannot be infringed upon by the government. But these liberty-protected rights are now in jeopardy after *Dobbs*, with the court demonstrating a complete disregard for well-established precedent, eviscerating its own abortion rights decisions in both *Roe* and 1992's *Planned Parenthood v. Casey*.

The court's willingness to toss stare decisis and ignore popular will impacts not only women's bodily autonomy but also has implications for a host of other privacy-related protections going forward, including gay and transgender rights. In his concurrence, Justice Clarence Thomas foreshadowed future actions, writing the court should "reconsider all of [its] substantive due process precedents," which would include rulings on same-sex marriage and contraception and could potentially limit access to in vitro fertilization.

Little fires everywhere

If the blood on American streets is any indication, it would seem there are more important issues at stake than what goes on inside a woman's uterus, such as the fact that this country has already had more than 300 mass shootings this year. But gun violence isn't the three-alarm fire it should be.

The court's decision in *New York State Rifle and Pistol Association v. Bruen* will gut a wide range of commonsense gun-control measures currently in place across the country at a time of escalating terror and murderous rampages by kids and adults with easy access to high-powered weapons.

Instead of the court's disingenuous reliance on a vague and dusty amendment designed in the days of muskets and gunpowder, the exigencies of modern society should dictate the path forward. But even benign proposals like a ban on assault rifles, tougher background checks and a higher age threshold to purchase lethal weapons have been rejected by a National Rifle Association lobby that cares more about protecting access to guns than protecting innocent children.

At least everyone may soon be able to carry a handgun in public—solving one of our country's most pressing problems: the need for more deadly weapons on the street.

Conversely, Canada moved with alacrity to basically eliminate the ability of most citizens to purchase guns at all. Canadians, along with much of the developed world, have now been deprived of the liberty of becoming victims of wanton gun violence.

But no such deprivation for our citizenry. At least clusters of nonsentient cells can rest assured that zealous lawmakers have secured their right to grow into embryos, then fetuses and eventually fully formed babies. As for those babies after they've left the womb—thoughts and prayers are with you. ■

This column reflects the opinions of the author and not necessarily the views of the ABA Journal*—or the American Bar Association.*

HOW I WON THE CASE

The President v. Omarosa

Winning at arbitration, against the odds

BY JOHN PHILLIPS

It was fate that brought Omarosa Manigault Newman and me together back in 2013, when we were both guests on Jane Velez-Mitchell's HLN television show. I was there with the family of Jordan Davis to talk about their son who had been killed in Jacksonville, Florida, in a confrontation arising from racism and a dispute over loud music.

Afterward, I followed Omarosa on social media and sent her Jordan Davis wristbands. I remember the excitement when she followed me back on Twitter. I told my wife, "Well, look at that!" I thought I had made it.

Meanwhile, 1,000 miles away, Donald Trump was planning his run for

John Phillips and Omarosa Manigault Newman

president of the United States. By the end of 2015, Omarosa, who had appeared on Trump's show *The Apprentice*, reached out to his team to join the campaign.

It took a while for the campaign to get properly assembled, but on July 25, 2016, Omarosa asked Trump's team: "Can you let me know when I will get my NDA and paperwork and an official date for my announcement?" This was a pivotal question, as Omarosa's NDA, or nondisclosure agreement, would become the center of a legal battle pitting the president of the United States against his former employee, who became my client.

Stifling speech

An NDA is an agreement designed to keep secrets, and these sorts of clauses have come under increasing scrutiny by courts.

The NDA in Omarosa's employment contract was facially overbroad, vague, even venturing on the comically obtuse. Yet people signed NDAs in droves to secure White House jobs.

In the end, Omarosa accepted a position as a senior adviser and did her job well—so well that she made enemies on all sides. But Omarosa was also prudent, keeping copious notes and recording conversations. Indeed, the onetime "apprentice" was an apprentice no longer.

In December 2017, Omarosa's employment was terminated by Chief of Staff Gen. John Kelly in the White House Situation Room—a room usually reserved for extremely important or top-secret meetings. During the meeting, Omarosa recorded Kelly using what she considered veiled threats about her reputation in an attempt to intimidate her from speaking out in the future.

Shortly thereafter, I got a call from Omarosa. I had just landed in the Bahamas and was in a cab. I told her I would call her back when it was more private. Once in my hotel room, she unloaded the whole story on me.

Several months later, things began to escalate. Omarosa had gone on *Celebrity Big Brother* and said the president's

HOW I WON THE CASE

administration was "not my circus, not my monkeys." She would eventually be sued for this very statement.

She also said, "I was haunted by tweets every single day, like what is he going to tweet next?"

And when asked by fellow celebrity cast member Ross Mathews, "Would you vote for [Mr. Trump] again?" Ms. Manigault Newman responded, "God no, never. In a million years, never."

These were part of the allegations in a multimillion-dollar lawsuit filed against Omarosa for breach of her NDA.

Omarosa described the White House as a "den of distrust," and she was willing to not only talk about it, but also to write about it. On Aug. 14, 2018, Omarosa published a book titled *Unhinged: An Insider's Account of the Trump White House*, in which, among other things, she called Trump unqualified, narcissistic, misogynistic and racist. Omarosa asked me to go on the publicity tour with her as an adviser, and I accepted.

The litigation

After the release of Omarosa's book, Trump filed an arbitration action, claiming she had violated her agreement not to disclose "confidential information."

At its core, this was a seminal First Amendment issue with the questions of whether a president can prevent citizens from stating their opinions and whether government entities can protect immoral or illegal behavior in office through NDAs.

The case escalated quickly. Trump called Omarosa a "dog"on Twitter. Omarosa went on *Meet the Press* to promote her new book. Motions to dismiss, motions for summary judgment and countless pages of briefs were filed and counter-filed. All of a sudden, we were watching impeachment hearings not only as concerned American citizens but to counter a defamation suit.

In February 2020, we finally had a full-day arbitration hearing in New York City. At its conclusion, every count was dismissed. We celebrated on the marquee of the Hard Rock Café in Times Square.

But the celebration was short-lived. The arbitrator allowed the Trump campaign to amend its petition. The amended complaint included hundreds of new allegations. More weaponized litigation followed. We were granted discovery but lost a motion to depose Trump—the

Photo by Law Offices of Phillips & Hunt

only person allowed to determine what was considered "confidential information" in his own NDA and who bragged about "suing Omarosa" on Twitter to intimidate others similarly situated.

I don't think I've wanted to take a deposition more. We didn't *need* it, but we wanted it.

Standing up to Goliath

Weaponized litigation kills justice. It wastes resources and allows the powerful to win by financially exhausting the other side.

We had nothing to lose and everything to win, yet the thousands of hours of essentially unpaid work was, at times, overwhelming.

This case should have been unimaginable—a United States president attacking fundamental constitutional rights through outrageously unenforceable nondisclosure agreements. It took far too long to get past the frivolous defenses and experts while lawyers like Charles Harder billed Trump's campaign millions of dollars. All in an attempt to stifle free speech.

We won in the Trump campaign's chosen forum. In April, we received a $1.3 million attorney fee award. You win big cases by accepting tough challenges. As lawyers, we have an obligation to confront injustice. We hope this energizes more lawyers to take on David vs. Goliath cases.

I hope more people will come forward and blow the whistle on corrupt government behavior. Kudos to Omarosa Manigault Newman for not backing down. It was a team effort and a win we can all be proud of. ■

John Phillips is the founder of Phillips & Hunt, based in Jacksonville, Florida, with offices in multiple states. The firm takes on a variety of cases, including personal injury, criminal justice and family law.

This column reflects the opinions of the author and not necessarily the views of the ABA Journal*—or the American Bar Association.*

BOOKS

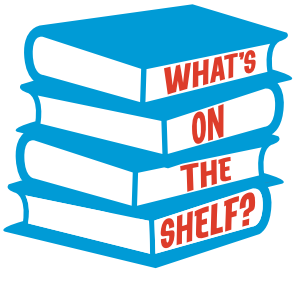
The Constitution Gets Strict Scrutiny

New books offer fresh takes on America's founding text

BY LIANE JACKSON

The U.S. Supreme Court handed down some monumental and controversial decisions this session on issues ranging from abortion access to gun control, sparking renewed public debate and interest in our constitutional and civil rights.

Two new books offer an engaging layperson's primer on the Constitution's most important aspects—from the preamble to the Bill of Rights to the 14th Amendment.



Utilizing different styles, *The Constitution Explained: A Guide for Every American,* by David L. Hudson Jr.; and *Allow Me to Retort: A Black Guy's Guide to the Constitution,* by Elie Mystal, give expert assessments of this country's foundational document and its effect on history as well as current events.

The Constitution Explained: A Guide for Every American

David L. Hudson Jr., a First Amendment scholar, assistant professor at Belmont University College of Law and *ABA Journal* contributor, told me we're living in a "propitious time" to become more informed about the Constitution, quoting Martin Luther King Jr.'s "Letter From Birmingham Jail": "The time is always ripe to do right."

"The pandemic, protests of various types, impeachment attempts, Jan. 6, mass shootings, a Supreme Court leak—there are a panoply of reasons why this is a good time," Hudson says.

In *The Constitution Explained*, Hudson says he tried to elucidate difficult constitutional concepts clearly and effectively, drawing on decades of First Amendment experience and teaching. He hopes breaking down what can be an intimidating document will help promote civic literacy at a time when an informed citizenry is as important as ever.

Allow Me to Retort: A Black Guy's Guide to the Constitution

The Nation justice correspondent and columnist Elie Mystal pulls no punches in *Allow Me to Retort*. Mystal explained to me his writing process, his goals for what readers take away and why he decided to focus his first-ever book on constitutional issues from a person of color's perspective. His responses have been edited for clarity:

"From a certain point of view, I've been writing this book in my head for 20 years. So processwise, actually writing it all down was pretty quick. I took a monthlong sabbatical from *The Nation* and wrote most of it in that time.

"Ever since law school, before that even, I've had almost exclusively white people explain to me what the Constitution means. When I was younger, I'd asked questions about 'why' and was told about theories of interpretation invented by other white people. When I was older, I'd propose changes and was

told by still other white people that we 'couldn't' interpret the document in a more fair, more just way. I decided to write a book about these issues because I was sick of these issues constantly getting shoved to the back of the line by those interested in preserving the status quo.

"I want people to learn how to fight. Originalists smoothly make claims about our constitution that can simply not be supported in an equal and fair pluralistic society. Too often, good, intelligent, well-meaning people cede space to charlatans and bad-faith actors who would oppress others. I want people to learn how to not do that. I want people to see the weaknesses in those arguments and dismantle them. I want to cede no more intellectual ground to these people who long ago abandoned the moral high road.

"At every point in history, conservatives have been the ones trying to limit the rights and equality of Black people, immigrants, women and the LGBTQ community.

"The Constitution is only as good as the people enforcing it, and so long as you let conservatives control the meanings, the principles, even the word-for-word definition of what the Constitution *means*, they will always interpret it to mean less rights and less protections for people who don't happen to be cis hetero white men." ■

10 QUESTIONS

Just for Kicks

This New York City lawyer turned his sneaker obsession into a practice niche

BY JENNY B. DAVIS

Kenneth Anand

As a teenager in New Jersey in the early 1990s, Kenneth Anand was obsessed with sneakers. Every evening, as he cleaned his treasured Air Jordans with a toothbrush, he'd dream of the day when he could be as fresh dressed as his hip-hop heroes.

Anand went on to achieve that dream—and much, much more. Today, this New York City-based lawyer not only rocks the latest kicks, he stands at the forefront of sneaker-related law, entrepreneurship and investment in both the physical world and the metaverse.

Anand, a former general counsel and head of business development for Ye (formerly Kanye West)'s Yeezy Apparel, now represents fashion brands and creatives as of counsel for Jayaram Law, a boutique intellectual property and business law firm with dedicated offices in New York City, Miami and Chicago.

Anand is even bringing his sneaker experience to the classroom. The award-winning self-published textbook he co-authored in 2020, *Sneaker Law: All You Need to Know about the Sneaker Business*, has been adopted by Harvard Law School, Parsons School of Design and others, and he is currently an adjunct faculty member at the University of Miami School of Law.

I totally get your love of hip-hop, sneakers and streetwear culture. But I have to ask, why law school?

I always had a burning desire to help creative people. I grew up in a household with creative people—my grandmother was a painter, my brother's a painter and my parents are both phenomenal writers—and I've seen creatives get marginalized all my life. I actually had some experience with that myself. I was a hip-hop producer before I went to law school and originally intended to be a music lawyer. I found that the music business was so grimy, it really turned me off to being a lawyer in that field. I quickly turned to employment law, which I found was very human, with many real-world elements. That started my career in litigation, and I worked for various employment boutique firms here in New York City until I started my own firm in 2009. That's when I started spreading my wings a little bit, and I began to represent entertainment clients, fashion clients and the occasional sneaker client.

How did you segue from representing fashion clients to becoming a part of Ye's Yeezy empire?

When I was working at law firms, I had many creative contacts who were involved in music, fashion and sneakers who were growing their businesses but couldn't afford the rates that my firms charged. When I started my own firm, I was able to build a stable of clients because I could provide a more flexible rate structure. I also was able to do some things for free for friends because I believed in them, and I took some cases on contingency. One of my clients was

Photo by Paul Jun

good friends with Kanye and went to work for Yeezy. A short time later, he asked me if I would help with some legal work. At that time, I was at a crossroads in my life. I was no longer a solo, and I had joined a California-based firm, as I saw many of my fashion and entertainment clients moving from New York to Los Angeles. I wasn't dissatisfied with my legal career, but I definitely wasn't as passionate about it as I would have liked. So I threw a Hail Mary out there. I said, "Hey, why don't you just hire me to be the general counsel, and I'll do whatever you need on the legal front?"

And it worked! How did it feel to be there?

Like my entire career had come full circle. I was now a lawyer at a place that was the mecca of streetwear, sneakers and culture, working for one of the most influential people in the world who was also a creative genius. I stayed there for 2½ years, and it was a wonderful time. It was intense and stressful, but it never felt like work to me because I was waking up every day doing exactly what I loved.

What was it like working with an icon?

I have never seen anyone work harder in my life than Kanye West. You'd think that when you come from law and move to a fashion environment, you wouldn't see that kind of discipline, but he was remarkable. He even inspired me to go back to school and get my executive MBA.

You eventually left Yeezy and went back into private practice. Why?

It was just time. I met the head of our firm when I was at Yeezy. He reached out to me, and I enjoyed our talk—there are very few lawyers who understand the creative space, and I could tell he had the right vibe and was building something special with his firm. When I left Yeezy, I swore that I would never practice law again, but he said, "I'd love to have you at the firm—you can refer business, and we can work on some fun things together," and now here I am, working on interesting things with people I respect and admire. I've been sucked back into law, but I am loving it!

You've also co-founded a streetwear licensing company called 3 8 0 Group, and you're chief operating officer and GC of Rares.io, which sells fractional ownership shares of sneakers and made the news last year for paying $1.8 million for Ye's own Nike Air Yeezys. But a lot of the innovation in the streetwear space right now involves digital drip like NFTs and wearables. What do you think? Are you involved in the metaverse?

I started hearing the buzz about Web 3.0 and NFTs. I've never been afraid of new technology—I built my first computer at 7, and I play video games. So when I heard about this, I understood the hype, and I was eager to connect with this new community that's blurring the lines between fashion and tech and streetwear and tech. I think some of the most successful people in streetwear, the ones who are disruptors, are just nerds. They're people who weren't accepted by the mainstream and did their own thing, so it's only right that they are now disrupting a digital space. I am definitely roaming around the metaverse—if you see me there, I'll be in a full suit of knight's armor and a pair of Yeezy Wave Runners. I look really fresh, and everything is glowing like Tron. But I'm still bald.

I'd like to talk to you about the "sneaker law" book. How did you get the idea to do this book?

Sneaker Law is like my baby. It took four years to write. I met my co-author after I started reading the articles he was writing for Complex about legal protection of sneakers. At the time, he was in law school and interning at Complex and I was a partner in a law firm, but I was eager to connect with him. Networking isn't just up the food chain—you should network with anyone who inspires you. We became great friends and came up with this idea to write a business and legal textbook about the sneaker industry that presented intimidating topics like intellectual property, distribution and manufacturing in a way that was digestible and fun to read. If you look at it, it looks like it might be a civil procedure textbook, but then it's red foil-stamped with the word "sneaker law" that's stylized with a Metallica-Yeezus vibe. Then when you open it up, you realize it's nothing like any textbook you've ever seen.

It sounds like your unique approach has worked—the book has really blown up.

It's kind of solidified us as experts in the field. Now we're often quoted in the news on anything that happens in this space. Over 40 law schools have invited us to lecture on sneaker law, and it's now being taught independently at several schools, including Parsons. My co-author and I have become adjunct professors at law schools, and we've even lectured at Harvard Law School, which was unexpected. We are just so happy to be teaching about sneakers—it's what we love.

Why did you decide to self-publish?

It would have been hypocritical to go to a publisher for a book on entrepreneurism. The whole point is to tell our readers that, no matter what business you're in, whether it's sneakers or something else, you need to learn it inside and out and then try to do it on your own. So we learned how to publish a book ourselves. We may not sell as many copies as, say, Simon and Schuster, but we own it all. No one can tell us how to do it or what to do with it, and we take the lion's share of the profits. You know, it's like Jay-Z says, you have to own your own masters.

And there's merch! I love the branded T-shirts you have on your website.

Thank you! We're very proud of the brand we've built. You have to have a little swag because that's what sneaker culture is all about. ■

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BANKRUPTCY LAW

Gaming the System?

Inside the 'Texas two-step' strategy profitable companies use to file for bankruptcy

BY MATT REYNOLDS

Attorney Leigh O'Dell is strongly opposed to Johnson & Johnson's attempt to halt thousands of civil claims over liability for its products by moving them from civil to bankruptcy court.

O'Dell says the otherwise solvent health care company's use of a Texas law to place one of its subsidiaries in bankruptcy is "just wrong."

"It undermines a plaintiff's ability to vindicate their rights in the court system and the fundamental right to trial by jury," says the Beasley Allen shareholder, who represents thousands of women alleging J&J's baby powder or talc products have given them ovarian cancer.

And O'Dell is not the only lawyer crying foul. Others argue that otherwise solvent companies and other organizations are misusing the bankruptcy courts to shield their assets and avoid accountability in civil court. In recent years, Purdue Pharma, USA Gymnastics and Boy Scouts of America also have filed for Chapter 11 bankruptcy to avoid civil liability.

But it is J&J's use of a 1989 Texas statute on divisive mergers that is facing scrutiny in federal courts and in Congress. Some lawmakers want to end the use of the legal move nicknamed the "Texas two-step." The law allows a company to incorporate in Texas, restructure with a "divisive merger" and split into two or more entities. The company is then free to file for bankruptcy in the jurisdiction of its choosing. Delaware has a similar law.

In 2021, J&J used the Texas law to spin off a subsidiary facing the litigation, Johnson & Johnson Consumer Inc., into two new business entities. In one of the new entities, J&J placed all of the subsidiary's liabilities related to talc. It put the subsidiary's nontalc assets and liabilities in the other. The new entity saddled with the liabilities, LTL Management, then filed for bankruptcy, putting more than 35,000 claims against J&J in civil court on hold. In some cases, plaintiffs with cancer were about to go to trial, O'Dell says.

Critics have likened this maneuver to a fraudulent transfer, though Texas law makes it legal. But other legal experts say it protects companies with mass tort liabilities from crumbling under potentially unforeseen and insurmountable litigation costs.

Fair play?

O'Dell has won more than $2.9 billion in damages for five women in suits against J&J. She says the company is trying to cap its financial exposure, allowing it to reap all the benefits of bankruptcy without the disadvantages.

"You're talking about Johnson & Johnson having a credit rating that's equaled by Microsoft. It's better than the U.S. government's," O'Dell says. "When you have this separation of liabilities from the assets that would have been available to a plaintiff in litigation, that is undermining the plaintiff's claim and ability to recover."

Paul H. Zumbro, a bankruptcy attorney with Cravath, Swaine & Moore, understands that people with pending civil cases will feel aggrieved. He likens plaintiffs in jury trials to people in a lottery, where some win big money verdicts and others walk away empty-handed. That can't happen in a bankruptcy, Zumbro says, adding that in some cases, the bankruptcy system is a fairer and more efficient way to resolve mass tort cases. "There's a fundamental principle of bankruptcy that everybody is entitled to the same recovery."

University of Georgia School of Law professor Lindsey Simon wrote a paper published in the *Yale Law Journal* this year called "Bankruptcy Grifters" about how more companies are turning to

Photo illustration by Sara Wadford/Shutterstock

bankruptcy courts to resolve mass tort litigation. She agrees there are upsides for both creditors and debtors.

"Bankruptcy courts are designed to maximize value and distribute things as fairly as possible," Simon says. "While the individual's voice is small, I challenge people to say how much of a voice they have in a mass tort case. I suggest it's not that big."

And corporate bankruptcy expert Anthony J. Casey of the University of Chicago Law School notes that J&J has said it will provide funding for plaintiff-creditors based on a bankruptcy court's determination of how much the subsidiaries are liable for. LTL also will create a $2 billion trust.

"That makes this merger not a fraudulent transfer and really leaves the creditors no worse off. In one sense, they're better off because now they have an automatic promise that Johnson & Johnson will back the payment," Casey argues.

Regulation question

The Official Committee of Talc Claimants filed a motion to dismiss J&J's Chapter 11 filing, saying it was filed in bad faith. But in February, U.S. Bankruptcy Judge Michael B. Kaplan sided with J&J, agreeing that bankruptcy court was a suitable venue for the plaintiffs to get an equitable and efficient resolution of their claims. Because of an impasse in settlement negotiations, Kaplan could yet allow some tort claims to move forward in state court. But at a July hearing, he did not seem amenable to doing so, the *Wall Street Journal* reported. He is expected to decide the issue at a later date.

The 3rd U.S. Circuit Court of Appeals in Philadelphia took up four appeals against J&J in May. O'Dell is hoping the court will rule that the filing is part of a litigation strategy and throw out the bankruptcy petition. In June, the Justice Department filed an amicus brief with the 3rd Circuit accusing J&J of misusing the bankruptcy code and said its filing was a "weapon against tort claimants rather than a good-faith means of reorganization."

According to Simon, the worst-case scenario for companies such as J&J is they get kicked out of bankruptcy court. "The upside is massive, because they can regain control over the whole landscape of litigation," she says.

Ending the practice altogether would require a U.S. Supreme Court ruling outlawing the maneuver or changes to the bankruptcy code, Simon explains.

House and Senate Democrats have proposed a piece of bicameral legislation, the Nondebtor Release Prohibition Act of 2021, which would make two changes. First, it would bar companies from filing for bankruptcy for at least 10 years after they restructure using a divisive merger. Second, it would prevent nonconsensual third-party releases like those used in the Purdue Pharma bankruptcy plan for claims arising from the opioid epidemic. The circuits are currently split on the issue of whether the releases are permitted.

Those releases mean creditors and future claimants can't sue members of the Sackler family, who founded Purdue Pharma, in civil court. Some experts are expecting J&J to seek third-party releases as part of a bankruptcy plan, which means plaintiffs and creditors would not be able to hold the parent company liable.

Zumbro argues the legislation is too sweeping and could have unintended consequences.

"The issue about a fraudulent transfer of assets away from creditors is already addressed by existing [state and federal] laws. I don't think any new barriers to bankruptcy are necessary or appropriate to deal with this issue," Zumbro says.

Congress should "proceed with caution," Dechert bankruptcy attorney Shmuel Vasser wrote in a November post on his firm's News & Insights blog.

"Troubled companies, including those with mass tort liabilities and other claims giving rise to crushing litigation costs and seemingly endless assault on the judiciary's time and resources, should be able to avail themselves of the flexible tools required to accomplish a successful reorganization, with the bankruptcy court serving as a gatekeeper protecting all interests at play," Vasser wrote.

'Universal problem'

But Kevin C. Maclay, a bankruptcy lawyer at Caplin & Drysdale in Washington, D.C., whose practice focuses on protecting creditors' rights in Chapter 11 cases, believes lawmakers should intervene.

Earlier this year, Maclay told the U.S. Senate Committee on the Judiciary that in the 4th U.S. Circuit Court of Appeals in Richmond, Virginia, a finding of bad faith is not enough to prevent companies from moving forward with their bankruptcy petitions.

Because of the legal precedent, judges' hands are tied, he said.

"When there is such a widely used scheme where the wealthiest corporations go into bankruptcy to disadvantage some of their disfavored creditors, that is a universal problem that, I would submit, calls for a universal answer," Maclay said.

And retired bankruptcy judge Judith Klaswick Fitzgerald says after restructuring in Texas, companies have the freedom to reincorporate in a jurisdiction where they believe their bankruptcy petition will have the best chance of success.

"Debtors tend to like the 4th Circuit because motions to dismiss are hard there. That's not true in some other circuits," including the New Orleans-based 5th U.S. Circuit Court of Appeals, Fitzgerald says.

There are other downsides for creditors, because they don't have as much leverage in bankruptcy proceedings as they do in civil court, Casey says. And in bankruptcy, unlike in civil trials, there are no findings of wrongdoing, Simon adds.

"When you're talking about an opioid victim or someone dying of ovarian cancer, you're forced to deal with what it means to be a creditor in bankruptcy when really you're inherently a plaintiff trying to stop a wrongdoer," Simon says. "It's the collision of two systems." ■

Photo illustration by Sara Wadford; photos by Mondadori Via Getty Images; Silver Screen Collection/Getty Images; AMERICAN MOVIE CLASSICS (AMC)

Photo illustration by Sara Wadford/Shutterstock

Are pop culture's unethical, incompetent, crooked lawyers examples of art imitating life?

BY VICTOR LI

(V.O.)

Coming this fall: Justice is blind. Which is for the best, since it means she can't see what the lawyers at Wynn, Bigg & Bragg are up to. There's the criminal lawyer who only remembers the "criminal" part of his education. There's the win-at-all-costs bare-knuckle brawler who considers ethics rules to be mere suggestions. There's the incompetent ambulance chaser who runs faster than Usain Bolt whenever he hears that sweet siren. They believe that the best defense is a great offense—especially if that offense has the other team's signals and plays and has paid off the refs. *The Fixers*—coming soon to a streaming platform near you. The road to justice has never been this crooked.

The above might not be for a real show, but it very well could be. When it comes to pop culture, it can be good to be bad. That's especially true for lawyers in movies, television shows, books and plays. Pop culture is full of tropes, archetypes and caricatures that show lawyers in the worst possible light.

Not only are these characters entertaining, but they also can mean big business. Several films featuring characters who are less than competent and/or utilize underhanded or even illegal tactics have gone on to become box-office hits, most notably *Liar Liar* (1997), which grossed over $300 million worldwide.

Other hit films such as *Presumed Innocent* (1990), *Legally Blonde* (2001) and *The Lincoln Lawyer* (2011) have proved to be enduringly popular, so much so that they have been or are in the process of being remade for different forms of media. Meanwhile, TV shows such as *L.A. Law, The Practice, Boston Legal, Better Call Saul* and those in the *Law & Order* franchise not only have racked up ratings and awards but also have spawned legions of imitators. Even authors have made hay out of bad lawyers, with some, most notably John Grisham and Scott Turow—both of whom hold law degrees—writing and optioning numerous bestsellers.

Some of these bad lawyers are so popular and beloved, they end up becoming heroes. For instance, when the *ABA Journal* picked the "25 Greatest Fictional Lawyers (Who Are Not Atticus Finch)" in 2010, the list included characters such as shady fixer Michael Clayton (*Michael Clayton*), ruthless litigator Patty Hewes (*Damages*) and ethically challenged attorney Alan Shore (*The Practice*, *Boston Legal*).

Of course, there's a reason why these and many other fictional bad lawyers resonate with the public: Plenty of people dislike and distrust lawyers.

Patty Hewes of *Damages* (left, played by Glenn Close) and Alan Shore of *The Practice* and *Boston Legal* (above, played by James Spader) often took zealous advocacy to the extreme, disregarding ethical obligations to help their clients. From 2004 to 2009, Close and Spader won a combined five Emmy Awards for their performances on their respective shows.

In a January Gallup poll ranking professions by honesty and ethical standards, only 19% of respondents had a high or very high opinion of lawyers, putting them at a comparable level with journalists, business executives and local politicians.

Meanwhile, in a widely cited 2013 Pew Research study weighing public perceptions of the perceived contributions of 10 different industries, including the military, teaching and medicine, lawyers came in dead last.

"A good story always has to have a strong villain or antagonist," says Michael Asimow, dean's executive professor of law at Santa Clara University School of Law and co-author of *Law and Popular Culture: A Course Book*. "And as we know, the general public despises and distrusts lawyers. Representations of bad lawyers resonate with the audience because that's what they think lawyers are really like."

Holding out for a hero

But it wasn't always that way. It used to be unthinkable for a studio to produce a lawyer-centric movie or television show in which the main character does anything but use his or her powers for noble purposes.

The primary paragons were Gregory Peck's portrayal of Atticus Finch in *To Kill a Mockingbird* (1962) and Raymond Burr's performance as the titular character in the *Perry Mason* TV series (1957-1966). Both characters were heroic straight arrows revered for their greatness. Films such as *Inherit the Wind* (1960), *12 Angry Men* (1957) and *Judgment at Nuremberg* (1961), and TV shows such as *The Defenders* (1961-1965) and *Owen Marshall, Counselor at Law* (1971-1974) reinforced the notion that lawyers, judges and jurors all operated in good faith.

"Up until the 1970s, about two-thirds of movies presented lawyers positively—Atticus Finch is the most famous. In many, many movies, lawyers were the good guys—competent, dedicated professionals," Asimow says.

He argues that things started to change with the Watergate scandal, which ensnared many lawyers, including the president. And then the U.S. Supreme Court, in *Bates v. State Bar of Arizona* (1977), struck down bans on lawyer advertising, opening the floodgates for those commercials you see on television about getting money for you. (See "Ad it Up," April 2017, page 34.)

"There was a change in the way lawyers were shown in the movies, and this change matches up with polling data about lawyers," says Asimow, who co-authored the 2021 book *Real to Reel: Truth and Trickery in Courtroom Movies* with Paul Bergman.

Philip N. Meyer, a professor at Vermont Law School and author of *Storytelling for Lawyers,* traces this change in perception back to the Vietnam War era.

"There was a deep cynicism of the law and that it didn't apply fairly to people," he says. "Even in movies like *The Godfather* and *Dirty Harry*, there's this underlying notion that the law doesn't achieve justice, and in order to get justice, you go outside the law. Lawyers are not effective in enforcing the rule of law, or worse, sometimes they're hypocrites. They're not achieving justice but actively subverting it."

Meyer adds that even in movies where justice ultimately prevails, it's often a nonlawyer who achieves it, such as *Erin Brockovich*, the 2000 film in which Julia Roberts portrays a legal assistant who took on an energy company.

Carrie Menkel-Meadow, distinguished and chancellor's professor of law at the University of California at Irvine School of Law, has a more practical theory.

"I used to write about ethical issues that came from these shows, and a lot of writers were former lawyers," Menkel-Meadow says. "I think many of these writers are people who didn't like being lawyers, so they're writing critiques of it."

Dramatic license

Once lawyers are established in pop culture as sleazy, ill-intentioned or as objects of ridicule and scorn, it's difficult to change those public perceptions. L.J. Shrum, a professor of marketing at HEC Paris, argues that most people don't have much firsthand experience with the occupations portrayed on TV or in the movies.

"We base our knowledge on how things work based on what we see. If it seems plausible, if it seems right to you, then you accept it," says Shrum, who studied this phenomenon in his 1995 paper *Assessing the Social Influence of Television: A Social Cognition Perspective on Cultivation Effects*.

Asimow, Meyer and others point to the 1982 film *The Verdict* as a turning point in how lawyers were portrayed on screen.

The film was based on an adapted screenplay by future Pulitzer Prize winner David Mamet and starred Paul Newman as Frank Galvin, a burned-out alcoholic who only takes on a medical malpractice case in hopes of pocketing one-third of the likely settlement and drinking it all away. But after visiting the victim, he decides to try to win the case and finds himself up against an unethical defense team willing to win at any cost and a judge who seems to be biased against him.

"Redemption stories are always interesting," Asimow says. "That's always a very satisfying story."

Meanwhile, a similar phenomenon occurred on TV. Shows such as *Night Court* (1984-1992) and *L.A. Law* (1986-1994) broke with their predecessors and portrayed lawyers in a less-flattering light. In particular, *L.A. Law*, which was created by Steven Bochco and Terry Louise Fletcher and ran for eight seasons on NBC, was more concerned with dramatic license than a law license, and its soap-style storylines and glamorous setting made it more like *Dallas* or *Dynasty* than *Perry Mason*.

Lawyers were once positively portrayed in pop culture. That started to change as movies including *The Verdict* (top) and television shows such as *Night Court* (middle) and *L.A. Law* (bottom) focused more on flawed characters and sensational stories, both from comedic and dramatic angles.

Photos by 20th Century Fox; NBC; Fox Television Studios; photo illustration by Sara Wadford; photo by Michael Tighe/Donaldson Collection/Getty Images; Shutterstock

Perry Mason (Raymond Burr) and Hamilton Burger (William Talman) vie in *Perry Mason* (left); Rusty Sabich (Harrison Ford) in *Presumed Innocent*.

"Law is based on conflict. People usually go to lawyers because they have a problem or conflict with someone else that needs to be addressed," says Marshall Goldberg, former counsel for the U.S. Senate Judiciary Subcommittee on Constitutional Rights, who went to Hollywood and wrote for shows such as *Diff'rent Strokes*, *L.A. Law* and *Life Goes On*. "Conflict is natural for good drama. As such, the nature of the legal profession lends itself to drama."

Prior to joining the writing staff at *L.A. Law*, Goldberg wrote for the *The Paper Chase*, a television adaptation of the famous 1973 film about law school life that was accurate but not a hit.

On the other hand, *L.A. Law* was wildly successful, winning 15 Emmys, including taking outstanding drama series honors four times and landing in the Nielsen top 30 during its first six seasons. However, any resemblance to real-life lawyering was strictly coincidental.

"My perspective on legal shows, in general, is that authenticity is not really valued within the entertainment industry. It's about ratings—what's commercial and what's dramatic," says Goldberg, adding that Bochco would tell writers to focus more on the story and less on realism. "You have to get into a completely different mindset. Make it seem just authentic enough so viewers think 'I'm entering into a fascinating world.'"

Goldberg notes that he and his father were both lawyers, and the canons of legal ethics mattered deeply to him. Yet he also knew plenty of lawyers who weren't as ethical and provided excellent fodder for characters like Arnie Becker, the womanizing divorce lawyer played by Corbin Bernsen.

"Arnie Becker wasn't hard to write because there are people who are like that," says Goldberg, who is currently working on a docuseries about the criminal justice system for the Oprah Winfrey Network and Discovery+. "So much of the justice you receive depends on the quality of the lawyers involved. There's a whole range of lawyers in terms of competence and ethical sensibilities. And that was also present on *L.A. Law*."

Good vs. evil

Then again, maybe the rise of "bad lawyers" isn't such a recent phenomenon after all. Maybe they were always there to begin with—a byproduct of the adversarial system.

As novelist Turow points out, *Perry Mason* may have portrayed its titular character as a hero, but that wasn't the case for all lawyers on the show. Most notably, Mason's usual courtroom opponent, Hamilton Burger, was certainly no hero. He wasn't very sympathetic, nor was he very competent.

It's not a stretch to take that to its logical extreme and portray a lawyer in much worse light—especially against the backdrop of the courtroom, which amplifies conflict and drama inherent to our legal system.

"I think the moral and ethical failings that are common to lawyers are common to all human beings," says Turow, whose 1987 novel, *Presumed Innocent*, was made into a 1990 Hollywood blockbuster starring Harrison Ford. "The difference, of course, is that as lawyers, you have enormous power to do bad things. Good things as well. But the law degree and the machinery of the law often magnifies significantly the moral failings that are broadly shared: lust for power, money, the narcissism that drives the hunger to win."

Photos by Getty Images; LMPC via Getty Images; Hulton Archive/Getty Images; photo illustration by Sara Wadford/American Movie Classics (AMC); Shutterstock

Fletcher Reede (Jim Carrey) can only tell the truth in *Liar Liar* (left); Henry Drummond (Spencer Tracy) and Matthew Brady (Fredric March) battle over evolution in *Inherit the Wind*.

With that in mind, Turow says he uses shades of gray in his books and creates characters who have good and bad qualities. "I grew up with the Perry Mason and Atticus Finch model," he says. "I don't know if I believed them completely. In terms of my own writing, I really didn't want the black-and-white world. I think I reacted against that."

In *Presumed Innocent*, for instance, the main character, prosecutor Rusty Sabich, is on trial for murdering his former lover. However, he is arguably the most ethical character in the book, at least from a legal standpoint. The characters around him—from his colleagues at the district attorney's office who are now trying to put him in prison, to the police officer who's investigating the crime, to Sabich's defense lawyer, to the presiding judge—are the ones doing legally questionable things throughout the course of the book. Turow says this was deliberate: He wanted to portray Sabich as someone so convinced of his own goodness that he didn't or couldn't see he was no better than anyone else.

"His most cockeyed moment is when he criticizes [his defense attorney, Sandy Stern] for holding up the trial judge to threaten to reveal his secrets," Turow says. "He literally seems to be saying, 'I really didn't want to win that way,'—that's a hell of a thing for a guy on trial for murder to be saying. But that reads a lot on Rusty."

On the flip side, Fletcher Reede, the lead character in *Liar Liar* (played by Jim Carrey), may not have been convinced of his own goodness but was perfectly willing to lie to anyone and everyone else to convince them.

The idea for the 1997 film came to script co-writer Paul Guay one day in March 1990, when he jotted down a one-line note that read: "For one day, a guy who's been a liar must tell the truth." After flirting with making their lead character a politician, a used car salesman or a boxing promoter, Guay and writing partner Stephen Mazur decided to make him a lawyer—in part because they realized many people could relate to that.

"There are thousands of lawyer jokes for a reason," Guay says.

They also felt the courtroom was an ideal setting for a clash of ideas, emotions and characters. In the movie, Reede, a compulsive liar and successful lawyer but horrible husband and father, is cursed to not tell a lie for 24 hours. The curse occurs during an important trial, so Reede must figure out how to win without being able to do what he does best.

Guay, who cites *To Kill a Mockingbird* and *Inherit the Wind* as two of his favorite movies, saw the courtroom as an ideal vehicle for Reede to realize the error of his ways.

"Our hero represents a woman who is divorcing her husband and demands child custody," notes Guay, who says he and Mazur pitched a sequel for *Liar Liar* but were told Carrey didn't do sequels. "She doesn't care about them but wants to win. That's a pretty emotional thing to put our hero in the middle of. But you can feel the way it changes him from someone who wouldn't remotely think about others but is then forced to understand the harm he's causing and become a better person."

Like Goldberg, Guay says he and Mazur did not prioritize authenticity. "I very much want the average person to believe what it is that we're saying, and I'm less interested in whether an expert would be able to find a minor flaw in something," says Guay, who says he is currently working on a comedy based on a real-life story that made international headlines. "It sounds like I'm promoting lying, but I'm really promoting storytelling. Sometimes you need something that works as a

metaphor or symbol or something that's more powerful than whatever the literal facts might be."

What's old is new

When it comes to pop culture, themes, characters and tropes never go out of style—they just get reimagined, repackaged and remade for a new audience. In February, Apple+ announced a new limited series based on Turow's *Presumed Innocent* with J.J. Abrams as a co-executive producer and David E. Kelley as showrunner. Around the same time, ABC produced a pilot for a proposed *L.A. Law* reboot starring original cast members Bernsen and Blair Underwood alongside several newcomers. In May, however, the network opted not to pick it up.

Nothing seems to be off-limits, as even venerated figures such as Mason and Finch have undergone a darker, grittier face-lift for a more cynical generation. In 2020, *Perry Mason* premiered on HBO, portraying its title character (played by Matthew Rhys) as a PTSD-scarred World War I veteran who drinks too much and makes a living in the sleazy world of private investigations prior to becoming a famed defense attorney.

And in December 2018, an Aaron Sorkin-penned adaptation of *To Kill a Mockingbird* opened on Broadway that pre-

Old characters, new interpretations: Ed Harris reimagines Atticus Finch on stage (above), while Perry Mason (Matthew Rhys) gets a darker backstory on HBO.

Photos by Bruce Glikas/WireImage; HBO; photo illustration by Sara Wadford/NBC; Shutterstock

sented Finch as a more complex figure who seems comfortable with, or is at least indifferent to, the racism around him and only becomes the anti-racist icon we know and love at the end of the play.

The Harper Lee estate sued Scott Rudin, the producer of the Broadway adaptation, in March 2018, alleging that the play undermined the original spirit of the book and character. According to the *New York Times*, Tonja Carter, lawyer for the Lee estate, even said Sorkin's Atticus was "more like an edgy sitcom dad in the 21st century than the iconic Atticus of the novel." The lawsuit was settled two months later.

For Menkel-Meadow, bringing back characters such as Finch and making uplifting movies about lawyers like the 2019 film *Just Mercy*, an adaptation of the bestseller by Bryan Stevenson about his work helping death row inmates, show that some people are getting sick of all the bad lawyers.

"I think there's a real need to have heroes again, to want to believe there are good people," Menkel-Meadow says, pointing out that in December 2021, *New York Times* readers picked *To Kill a Mockingbird* as the best book of the last 125 years. "Good lawyers can make the world and the country better. And right now, we're in one of those cultural moments where people want to believe in something good."

They're not all bad: Bryan Stevenson (Michael B. Jordan) fights the good fight in *Just Mercy* (above); Atticus Finch (Gregory Peck) of *To Kill a Mockingbird* remains the gold standard.

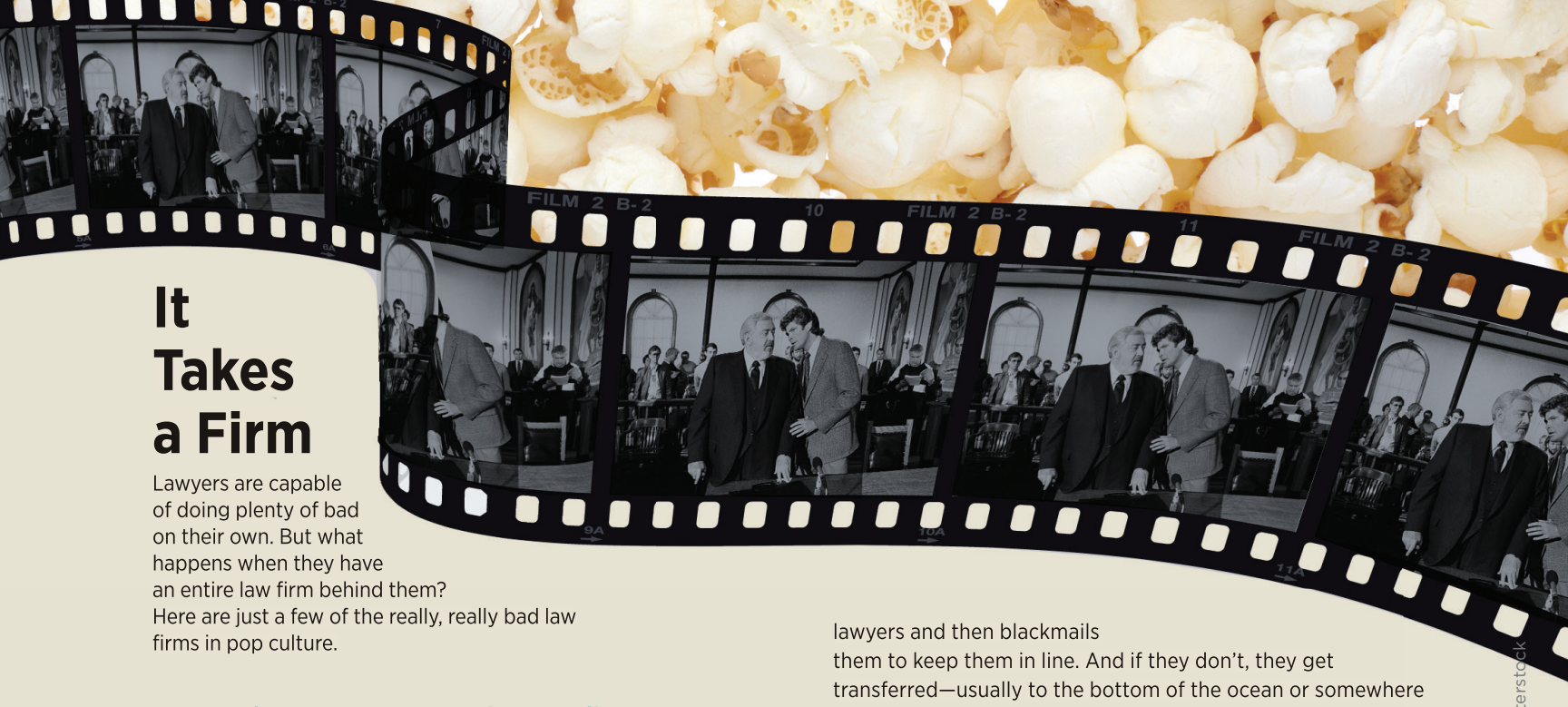
Meyer, however, sees it as a product of our modern-day society, where divisiveness and cynicism are rife.

"When you reinvent things, like songs, the listener has the model of the old song in their mind and you play against that," Meyer says. "I think that's exactly what happens when someone like Aaron Sorkin reinvents Atticus Finch. He plays against the original to fit our times."

Or maybe it just boils down to the simple fact that there are more sources of content available than ever, and that has been a boon for longer, more complex storytelling. Shrum argues that studios, desperate for content, will care more about quality than whether they're promoting good lawyers or bad ones.

"We need more stories, and it's a question of whether you can find a good story," he says. ■

Photos by Warner Bros.; Silver Screen Collection/Getty Images; photo illustration by Sara Wadford/Bettmann/Contributor; Shutterstock



It Takes a Firm

Lawyers are capable of doing plenty of bad on their own. But what happens when they have an entire law firm behind them? Here are just a few of the really, really bad law firms in pop culture.

Dewey Cheatem & Howe (various media)

The archetype of the sleazy law firm in fiction, the origins of Dewey Cheatem & Howe are murky. Most commentators credit the Three Stooges (although *Car Talk* on NPR used the joke extensively).

Since then, it has become a popular punchline and professional shorthand to describe unscrupulous lawyers and firms. The firm underwent a resurgence when venerated Wall Street firm Dewey & LeBoeuf went bust (see "Dewey's Judgment Day," February 2015, page 36), resulting in all sorts of "Dewey Cheatem"-related puns from the media.

Bendini, Lambert & Locke (*The Firm*)

John Grisham has made a living writing about bad lawyers and their firms. It started with his 1991 bestseller, *The Firm*, made two years later into a blockbuster film starring Tom Cruise and Gene Hackman. It focuses on a young associate who joins a shady tax firm in Memphis, Tennessee, that turns out to be a front for organized crime. The firm doles out expensive perks to recruit lawyers and then blackmails them to keep them in line. And if they don't, they get transferred—usually to the bottom of the ocean or somewhere else where accidents tend to happen.

Bendini, Lambert & Locke is one of many shady law firms in the Grishamverse, including White and Blazevich (*The Pelican Brief*), Tinley Britt (*The Rainmaker*) and Whitney & Cable & White, the firm in *The Runaway Jury* that uses unethical jury consultant Rankin Fitch (played in the movie by Hackman).

Milton, Chadwick, Waters (*The Devil's Advocate*)

Please allow him to introduce himself. He's a man of wealth and taste. He's been around for a long, long year. His legal skills will tempt your faith. The lawyer-as-devil trope has been done before—most notably in the famous short story *The Devil and Daniel Webster* (1936) and on *Saturday Night Live* with Jon Lovitz as Satan.

But it's never been done with as much gusto and over-the-top mania as it was in the 1997 Al Pacino tour de force *The Devil's Advocate*. As John Milton, Pacino plays a senior partner at what looks like a typical white-shoe firm in New York City. Except he can manipulate anyone with nothing more than his words and suggestions—and he has an entire firm full of demons that

can carry out his nefarious plans. In other words, he's a very effective lawyer.

Wolfram & Hart (*Angel*)

A portmanteau of the words Wolf, Ram and Heart, the hell-based firm was actually a front for demons and other supernatural beings intent on bringing about a worldwide apocalypse. With an army of talented and morally indifferent lawyers, the firm used its knowledge of the law (and its many, many loopholes) to represent their depraved clients. The firm served as one of the main recurring antagonists on *Angel*, a *Buffy the Vampire Slayer* spinoff that focused on one vampire's quest for redemption—that is until the final season, when Angel becomes CEO of the Los Angeles office of Wolfram & Hart, a potential breach of ethics

rules relating to nonlawyer ownership of law firms. Then again, with Armageddon approaching, ethics rules probably weren't at the top of everyone's minds.

Hewes & Associates (*Damages*)

If a bad person does bad things for a good reason, is she still bad? Or is she just Patty Hewes? Played by Glenn Close, Hewes thought nothing of blackmailing opposing lawyers, suborning perjury, bribing witnesses and even trying to have her own associate killed—all in pursuit of the greater good. In five seasons, Hewes and her firm (including at times, partner Tom Shayes, protégé/rival Ellen Parsons and fixer/would-be hit man Uncle Pete) took down corrupt CEOs, Ponzi schemers, polluters and other powerful people and companies who had hurt many more people than she ever could. All at considerable cost to herself and those she claimed to love.

Wexler McGill/Saul Goodman & Associates (*Better Call Saul* and *Breaking Bad*)

Meet Jimmy McGill, a con man lawyer whose own brother tried to get him disbarred in *Better Call Saul*. Taking on the alias Saul Goodman (as in, "It's all good, man!") in part because of ethical violations, McGill and his romantic/professional partner, Kim Wexler, pull off confidence scams for fun and engage in underhanded legal tactics for work. Goodman goes further in *Breaking Bad*, laundering money and doing lots of other illegal things to protect his clients, meth kingpins Walter White and Jesse Pinkman. Despite his many crimes, Goodman escapes prison or death—although we'll learn his ultimate fate when *Better Call Saul* wraps up its sixth and final season in August.

—Victor Li

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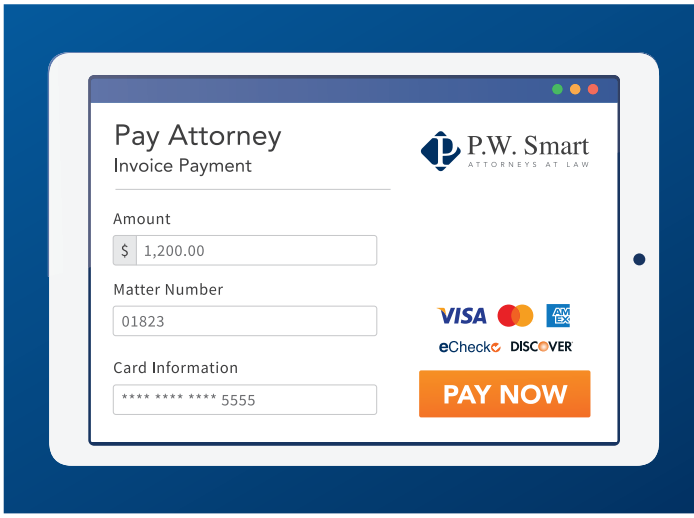

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PSYCHEDE Rx

Legal battles aim to expand patients' access to psilocybin and other hallucinogens

BY AMANDA ROBERT

Erinn Baldeschwiler wants to incorporate psilocybin, the active ingredient in psychedelic mushrooms, into her medical treatment.

Photo by Yosef Kalinko/ABA Journal

In March 2020, as people around the world felt increasing fear and uncertainty over COVID-19, Erinn Baldeschwiler suffered a devastating blow. The 48-year-old mother of two teenagers from North Bend, Washington, felt a lump on her chest and soon discovered she had stage 4 metastatic breast cancer. Tumors had spread throughout her body, including to her lymph nodes, adrenal glands and bones, and she received sobering news that she might live for only two more years.

For the rest of her limited time, Baldeschwiler wanted the best possible quality of life. She chose immunotherapy over chemotherapy and its debilitating side effects. She also asked doctors at the Advanced Integrative Medical Science Institute, an oncology clinic in Seattle, for help with the severe anxiety and depression that came with knowing she wouldn't watch her children grow up.

After consulting Dr. Sunil Aggarwal, her palliative care physician and the co-director of the AIMS Institute, Baldeschwiler began ketamine-assisted psychotherapy. In two separate sessions, a therapist brought her into a dimly lit treatment room. She put on eyeshades, listened to relaxing music and received an intramuscular injection of ketamine, an anesthetic drug that can facilitate therapeutic trances and help ease existential distress.

After each session, Baldeschwiler met again with the therapist to process her experience, which she describes as helping her develop an inner sense of peace.

"I am not against modern medicine, because it has kept me alive for the last couple of years. But we're multifaceted, multidimensional beings," Baldeschwiler says. "This is really diving into the whole emotional side and finding mental clarity and spiritual ease around everything, because life will throw you a lot of things that you have to manage, like a death diagnosis."

While Indigenous communities have long integrated plant-based psychedelics such as

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peyote and ayahuasca into their spiritual practices, interest in using both natural and synthetic hallucinogenic substances to alleviate depression and anxiety as well as anorexia, substance use disorder and other mental health conditions has increased in recent decades.

Scientific studies pointing to psychedelics' benefits, which include euphoria and profound shifts in perception, as well as journalist Michael Pollan's 2018 bestseller, *How to Change Your Mind: What the New Science of Psychedelics Teaches Us About Consciousness, Dying, Addiction, Depression and Transcendence*, helped fuel this enthusiasm. The legal landscape is also changing as more jurisdictions aim to decriminalize or even regulate the use of psychedelics.

Baldeschwiler and other patients have been particularly drawn to the idea of incorporating psilocybin, the active ingredient in psychedelic mushrooms, into their medical treatment.

In 2018 and 2019, the U.S. Food and Drug Administration designated psilocybin therapy, which is currently being studied in clinical trials, as a "breakthrough therapy" for treatment-resistant depression and major depressive disorder.

"I have always been very much interested in other avenues of treating whatever pain and suffering we might have as opposed to just taking a pill," says Baldeschwiler, who talked to Aggarwal about using psilocybin in her own therapy. "I don't want to take an antidepressant drug if there is an alternative, and especially if there is a natural alternative."

Dr. Sunil Aggarwal challenged the DEA in court, asking to use psilocybin to treat his patients.

While federal and Washington state "Right to Try" laws allow terminally ill patients to access certain investigational treatments, the U.S. Drug Enforcement Administration in February 2021 prevented Aggarwal from obtaining psilocybin for his patients. This led to a legal battle that Baldeschwiler says is wasting her and her peers' precious time.

"If there is something out there that can safely help us move through this transition to death and find a sense of peace and calm in making that transition, then by all means we should have that option," Baldeschwiler says.

Fight to try

In 2012, Aggarwal became involved with the New York University Psilocybin Cancer Project and its research into how psilocybin affects anxiety and psychosocial distress in advanced cancer patients.

An NYU study was published four years later, showing not only substantial improvements in anxiety and depression among participants but also decreases in their feelings of hopelessness and increases in their spiritual well-being. More than six months after receiving psilocybin, up to 80% reported lasting reductions in anxiety and depression.

After co-founding the AIMS Institute in 2018, Aggarwal wanted to try psilocybin-assisted therapy with Baldeschwiler and Michal Bloom, a retired Department of Justice attorney with advanced ovarian cancer.

"These are patients who are having a significant psychospiritual burden of illness and depression and anxiety associated with that," Aggarwal says. "They both utilize ketamine therapy, but we wanted to try psilocybin therapy and hope it can

Photo courtesy of Dr. Sunil Aggarwal

have a powerful effect to help palliate some of their emotional and spiritual distress."

Because the Controlled Substances Act placed psilocybin in Schedule I in 1970, no distributor would provide the drug to Aggarwal without the DEA's permission. Schedule I drugs, which also include heroin and marijuana, are thought to have no FDA-approved medical use and a high potential for abuse.

Some in the medical field also worry that most studies of psychedelics have been conducted with small groups of people who were prescreened for certain underlying conditions. Dr. Michael Bogenschutz, a psychiatry professor who directs the NYU Langone Center for Psychedelic Medicine, told the *New York Times* last year that this makes it difficult to determine whether those who take the drugs without supervision will have adverse reactions.

Aggarwal began working with Kathryn Tucker, special counsel and co-chair of the Psychedelic Practice Group at Emerge Law Group in Seattle. In January 2021, Tucker asked the DEA to give Aggarwal guidance on how to order psilocybin for therapeutic treatment.

Despite Tucker's argument that psilocybin met the requirements under the federal and Washington state Right to Try laws, the DEA said in its response a month later that it could not fulfill Aggarwal's request. The DEA told Tucker that "absent an explicit statutory exemption to the Controlled Substances Act," it had no authority to waive the law's requirements. The federal agency suggested instead that Aggarwal apply to be a Schedule I researcher.

The DEA did not respond to multiple requests for comment.

Tucker and her co-counsel took the matter to the 9th U.S. Circuit Court of Appeals at San Francisco in March 2021. They attracted amicus support from multiple groups, including a coalition of attorneys general from eight states and Washington, D.C., who said they had "an interest in avoiding undue federal regulation, particularly criminalization, of the practice of medicine."

"My goal with this case is to compel acknowledgment by the DEA that Right to Try is the law of the land, and the DEA must find a way to accommodate it," Tucker says.

The 9th Circuit heard arguments in September 2021 and dismissed the case Jan. 31. The court said it lacked jurisdiction to review the DEA's response, which was an informal letter and not a final agency action.

"I'm a bit disheartened that we waited nearly five months, and after five months, it feels like they took a legal technicality approach to dismiss us," Aggarwal says. "They didn't even want to consider the heart of the issue—that these people are dying, need a solution, and Right to Try seemed like the right one."

Forward movement

The case of Abigail Burroughs, a Virginia teenager who battled head and neck cancer, was influential in the Right to Try movement.

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Researchers with the Multidisciplinary Association for Psychedelic Studies have been conducting clinical trials of psychedelic-assisted therapy.

After a year of treatment, Burroughs' condition hadn't improved. Her oncologist suggested she take an experimental drug, but the FDA denied her request to access it through a "compassionate use" program. She became too ill to participate in a different clinical trial and died at age 21 in June 2001.

Her father created the Abigail Alliance for Better Access to Developmental Drugs and sued the FDA, arguing that terminally ill patients without treatment options have a constitutional right to try drugs that are shown to be sufficiently safe in clinical trials.

The district court dismissed the suit. But in May 2006, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit reversed the dismissal and remanded the case to the district court.

The FDA successfully petitioned for an en banc hearing, and the full D.C. Circuit vacated the earlier panel's decision, finding there was "no fundamental right 'deeply rooted in this nation's history and tradition' of access to experimental drugs for the terminally ill."

But the en banc panel noted that "the alliance's arguments about morality, quality of life and acceptable levels of medical risk are certainly ones that can be aired in the democratic branches."

Christina Sandefur, the executive vice president at the Goldwater Institute, a free-market public policy organization in Phoenix, developed an interest in advancing health care freedom and took the appellate court up on its offer: She began working on a model Right to Try bill to share with state lawmakers and patient advocates.

"There had been no movement at the federal level for decades," Sandefur says. "We thought what we needed to do was get reform in a place that was closer to the people and show this is truly something that patients want and need all over the country."

Colorado became the first state to adopt a Right to Try law in 2014, and according to the Goldwater Institute, 40 other states enacted similar statutes within the next four years. In May 2018, Congress passed federal legislation that recognizes the right of terminally ill patients to access investigational treatments.

"It's something that literally touches everyone," says Sandefur, who also helped draft an amicus brief in the AIMS Institute's case. "Everyone knows someone they've had to say goodbye to early because they faced a terminal illness, and there is this innate sense of anger and frustration with a system that is outdated."

Matthew Zorn, a partner in Yetter Coleman's Houston office, also found the AIMS Institute's case raises profound policy questions, including whether the medical system benefits individuals with terminal illnesses.

Zorn began focusing on regulatory and constitutional issues involving controlled substances in 2019, and he later joined Tucker in representing Aggarwal and his patients.

"There is a perception—and, frankly, it is very hard to battle against it—that drugs are bad," Zorn says. "Anytime you're dealing with that in a case, and you're walking into federal court, you're running uphill on an incline."

Zorn hoped to help draw attention to the more complicated narrative, one in which dying patients are in a different place than most when evaluating the risks and benefits of treatments. Despite the case's outcome, he doesn't regret raising the profile of the issue.

Photo courtesy of MAPS

"What brought me into this space and what keeps me here is the very people who need this most are not being served by their government right now," Zorn says.

Shifting psychedelics policy

Ismail Ali's work with the Multidisciplinary Association for Psychedelic Studies includes promoting reforms that permit the safe use of psychedelics.

He explains that the San Jose, California-based nonprofit research organization opened after the DEA added MDMA, the active ingredient in ecstasy, to Schedule I in 1985. The drug joined LSD and other psychedelics, which were studied extensively by scientists and psychotherapists through the 1960s but deemed dangerous by the federal government after the counterculture embraced them for recreational purposes.

Despite reports of their adverse effects, which included "bad trips" and suicide, advocates called for more research into psychedelics for medical treatment.

After studying the use of MDMA with therapy for PTSD, MAPS in 2016 released Phase II clinical trial results showing two to three sessions improved participants' conditions. It could receive FDA approval for the first psychedelic-assisted therapy as early as 2023.

"There was a sense that if we could get the science right, we could prove that the policy as it currently operates is not working the way we want it to, not only because it doesn't deter drug use, but it doesn't keep people safer," says Ali, MAPS' director of policy and advocacy.

Those plans have come to fruition as cities and states are expanding access to psychedelics. In May 2019, Denver became the first city to decriminalize the personal use and possession of hallucinogenic mushrooms. Oakland and Santa Cruz in California; Somerville and Cambridge in Massachusetts; and Washington, D.C., followed with measures making arrests for the use or possession of natural psychedelics the lowest priority for law enforcement.

In November 2020, Oregon voters approved a ballot initiative that would legalize the use of psilocybin for mental health treatment in supervised settings. The Oregon Psilocybin Services Section is now creating the country's first regulatory framework for psilocybin services. It will begin accepting applications for licensure in January 2023.

"With psychedelic policy so far, it was 20 years or 30 years of just research, and now you have all these approaches happening simultaneously," says Ali, who serves on the Oregon Psilocybin Advisory Board's Equity Subcommittee. "There has been a huge increase in the size and the breadth of the movement to change policy."

Advocates in other states are also working to shift their psychedelics policy. Lawmakers introduced a proposal in Washington in January that was based on Oregon's legislation. It would have allowed the state's health department to regulate psilocybin so adults could use it in controlled settings, but it failed to pass.

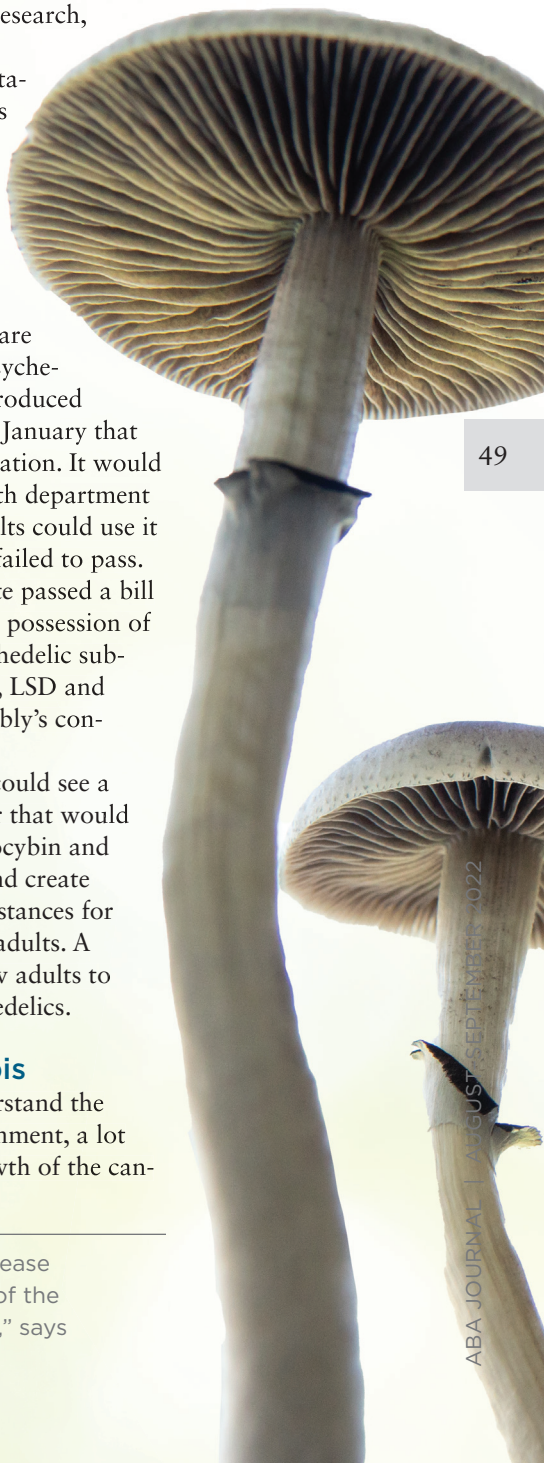
The California state Senate passed a bill last year to decriminalize the possession of small amounts of seven psychedelic substances, including psilocybin, LSD and MDMA. It awaits the Assembly's consideration.

And in Colorado, voters could see a ballot initiative in November that would decriminalize the use of psilocybin and other natural psychedelics and create regulated access to these substances for mental health treatment for adults. A separate measure could allow adults to use or possess natural psychedelics.

Lessons from cannabis

For lawyers looking to understand the evolving psychedelics environment, a lot can be learned from the growth of the can-

"There has been a huge increase in the size and the breadth of the movement to change policy," says Ismail Ali of MAPS.



Photos by Maximillian Rainey; Shutterstock

nabis industry, says Vincent Sliwoski, the managing partner of Harris Bricken Sliwoski and editor of its Canna Law Blog and Psychedelics Law Blog.

As a business lawyer in Portland, Oregon, he began advising cannabis clients in 2010, when there was only a state statute permitting people with certain medical conditions to grow marijuana or ask someone to do it for them.

However, Sliwoski says, as companies began to interpret the statute liberally and create their own retail market for medical cannabis, the Oregon legislature moved to implement regulations. State lawmakers approved a medical marijuana dispensary registry system in 2012, and voters decided to legalize recreational marijuana in 2014.

Sliwoski says other states followed a similar model. According to the National Conference of State Legislatures, 37 states and Washington, D.C., permit the medical use of cannabis. Nineteen states and the nation's capital have legalized its recreational use.

"I think because people saw cannabis roll out without all of these ill effects and ill societal effects that prohibitionists have been predicting, it makes it a little easier for psychedelics, other Schedule I drugs, to follow along," Sliwoski says. "There is a model for states now regulating something that is a Schedule I substance under federal law."

Sliwoski points to differences between the drugs that could make the path easier for psychedelics. While the cannabis industry evolved in stages, people in states like Oregon have shown a desire to move directly into regulating the use of psychedelics. He adds that several law firms have created psychedelics practices despite questions around whether lawyers can advise clients on activities that are illegal under federal law.

"There is a sea change, like in the zeitgeist, at a really fast pace that we didn't see with cannabis," he says.

A national Psychedelic Bar Association launched in 2021 to connect attorneys who want to explore novel legal and policy issues involving psychedelics. Ali and Tucker were involved in its creation, and Zorn became an early member.

Graham Pechenik, a patent attorney and the founder of Calyx Law in San Francisco, is also a member of the PBA. He initially worked with cannabis entrepreneurs but began assisting startups and venture capital firms that showed increasing interest in psychedelics in late 2019.

There are now several companies trading on U.S. stock exchanges and dozens of private companies that focus on the drugs. Pechenik anticipates an uptick in legal work within these companies, which mostly concentrate on medical research and development since little else is legal.

"As the space starts to develop in Oregon, and as other states start to have legalized psychedelic services, there will be more and more opportunities to have a specialty as a lawyer working with companies that provide psychedelic therapy," Pechenik says.

"Potentially—and this may be more than a decade down the road—there could also be an adult use or recreational psychedelics market."

What comes next for AIMS' patients?

As psychedelics gain momentum, Tucker continues to push the federal government to provide a pathway to psilocybin-assisted therapy for patients with advanced cancer.

On Feb. 2, two days after the 9th Circuit's decision in the AIMS Institute's case, Tucker and her co-counsel filed a petition asking the DEA to reschedule psilocybin to Schedule II.

They have also asked the DEA to authorize their clients' access to psilocybin for therapeutic use under federal and state Right to Try laws. The DEA said on June 28 that it would not reconsider their request, and the next day, Tucker asked the agency to confirm that its response is a final agency action.

Tucker says they plan to return to court and seek expedited review of their case.

Sen. Patty Murray, D-Wash., the chair of the U.S. Senate Committee on Health, Education, Labor and Pensions, played an influential role in the passage of the federal Right to Try law. In a statement provided to the *ABA Journal*, she said she has asked the DEA about the issues raised by patients from her state.

"I understand how personal this issue is and how hard it can be to talk about, and I appreciate the patients speaking up about the unimaginably challenging experience they are going through, sharing their stories and advocating for support to help them deal with end-of-life anxiety and depression," Murray said.

In the meantime, Aggarwal is exploring the relationship between psychedelics and religious use. In the early 1980s, the federal government issued an exemption for peyote, a Schedule I hallucinogen, when used in the Native American Church's religious ceremonies.

In 2006, the U.S. Supreme Court sided with a religious organization that used hoasca, a sacramental tea made from a plant containing the Schedule I drug dimethyltryptamine, in the decision *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.

"I'm kind of leaning on religious freedom and the rights that are inherent in that framework," Aggarwal says. "There are churches that are here in the country that my patients could potentially access, so I'm trying to align with those churches and see if I can refer my patients to them."

Baldeschwiler learned in October that her cancer had stopped responding to treatment, and she received a six-month prognosis. She started a different type of immunotherapy in June. When asked about her wishes for the future, she says she wants the DEA to see the humanity in patients with terminal illnesses.

"I would love to see the stigmas overcome and for people to realize that the whole purpose of Right to Try laws is to provide relief from extreme pain and suffering," Baldeschwiler says. "If you're anybody who would want to deny or restrict that, I just don't know how you can live with yourself." ■

Shutterstock

"If there is something out there that can safely help us move through this transition to death and find a sense of peace and calm … then by all means, we should have that option."

— ERINN BALDESCHWILER

Photo by Yosef Kalinko/ABA Journal

Migrant detainees claim exploitation at corporate-run detention centers

BY HANNAH HAYES

When Goodluck Nwauzor arrived at the U.S. southern border in May 2016, he hoped his nightmare was over and that the American dream was within reach. Nwauzor, formerly a small business owner in Nigeria, became a target of the violent militant group Boko Haram. When they burned his business and home to the ground, he fled and traveled for six months through South and Central America before arriving at the U.S. border.

"I said I would like to have asylum," Nwauzor would later testify in court. "I believe my life will be safe if I find myself in America."

Instead, he was detained in a center in Tacoma, Washington. It was there he found himself cleaning showers for the 50-60 other migrants in his pod seven days a week, earning only $1 a day.

"I need the money desperately," Nwauzor explained. "I have no choice. I have to do it so I can get the money and do my paperwork."

After 13 months at the Northwest Detention Center, Nwauzor was granted asylum. But his journey didn't end there—Nwauzor became the named plaintiff in a groundbreaking class action lawsuit against the GEO Group, one of the biggest private prison contractors in the country. In that case, a federal jury awarded $17.3 million to 10,000 detainees who were compelled to work for less than minimum wage. In a related lawsuit filed by the state of Washington, the judge also ordered GEO, which operates dozens of detention centers across the U.S., to pay an additional $5.9 million to the state for unjust enrichment.

For decades, activists have been challenging what has become a widespread policy of paying little to nothing for work done by immigrant detainees. The October 2021 verdict in *Nwauzor*

Photo illustration by Sara Wadford/ABA Journal; Shutterstock

v. the GEO Group has been hailed as not just a success story but also a potential game changer for a practice advocates say violates civil rights.

In addition to the back pay GEO must pay detainees, the charge of unjust enrichment may significantly alter the landscape of immigrant detention in the United States.

"If we continue to go after these labor practices, we can potentially end the private detention system because it won't be profitable for these companies to get into the business," says Anita Sinha, associate professor of law and the director of the International Human Rights Law Clinic at American University Washington College of Law.

The Tacoma case is just one in a wave of lawsuits nationwide challenging the policy of paying immigrant detainees $1 a day, allowing the private companies who run detention centers to reap huge profits.

"I hope that this will contribute to the success of those other cases," says Adam Berger, an attorney with Seattle-based Schroeter Goldmark & Bender and the plaintiffs' lead counsel in *Nwauzor v. GEO*. Berger points out that the decision came from "a unanimous jury of ordinary people, opening the door to possibilities that this [policy] will be seen in a different light."

Outdated policies reexamined

Under the Immigration and Customs Enforcement's Voluntary Work Program, detainees were paid an allowance for work performed at a rate set by Congress in 1950 and codified in the 1978 Appropriation Act. Under the act, Congress appropriated $1 per day for work that would be done by civil detainees who may be in the country illegally but have not necessarily committed a crime; many are waiting on asylum claims. Civil detainees were afforded a different standard than people in custody for

the purposes of punishment, who are exempt under the Fair Labor Standards Act.

The *Nwauzor* case is on appeal, but immigration activists hope it might turn the tide for a number of similar cases documenting labor abuse in detention centers. Two earlier complaints about forced labor failed in the New Orleans-based 5th U.S. Circuit Court of Appeals. In 1990, a judge ruled that the detainees were not protected under the FLSA; and in 1997, the court held that the work was "a communal contribution" and not in violation of the 13th Amendment's prohibition of involuntary servitude.

In *Nwauzor*, plaintiffs argued that the detainee workers were employees of GEO because "they were doing the bulk of the labor needed to keep the facility running. Under the Washington state Minimum Wage Act, that made them employees, and they were entitled to minimum wage rather than $1 a day," according to Berger.

Jacqueline Stevens is a professor of political science at Northwestern University and the founding director of the Deportation Research Clinic at Northwestern's Buffet Institute for Global Affairs. The clinic maintains a database that tracks the misconduct of federal, state and local agencies implementing deportation laws.

In 2009, Stevens was investigating a series of cases involving the unlawful detention and deportation of U.S. citizens. While driving to the Stewart Detention Center in Lumpkin, Georgia, to investigate a case in which a U.S. citizen had been deported to Mexico, she was asked by the individual in question if she could try to collect the $32 owed to him for buffing floors while he was detained.

"I thought to myself, he's a U.S. citizen, and this corporation is paying him $1 a day to buff the floors? I knew that this was legal for criminal prison, but this was civil detention," Stevens says. The revelation led Stevens to pursue a series of Freedom of Information Act requests to uncover the nature of the program and whether it was legal to pay less than minimum wage to those not charged with a crime.

Because detention centers fall under the purview of immigration law, the issue seemed murky at first. "The courts have ruled that immigration law affords lower due process protections when it comes to deportation and different presumptions for so-called aliens, so those claims are generally treated with a lower layer of scrutiny," says Stevens, whose focus at the time was U.S. citizens who were being detained or deported. "U.S. citizens can't be treated that way, and eventually it became clear to me that as a labor issue, this might not be kosher."

In her investigation, Stevens discovered that Congress stopped appropriating funds for civil detainee labor in 1979 without explanation; however, the Immigration and Naturalization Service, a precursor of ICE, continued with the $1-a-day policy in detention centers.

One of the class members represented by Berger is a 43-year-old detainee who worked at the Tacoma detention center between 2017 and 2020 and described the experience as a "nightmare." According to Berger, the detainee—who asked not to be named—fled to the U.S. in 1990 with his mother at age 12 after they were kidnapped by a drug cartel. ICE picked him up in 2017 and sent him to the Tacoma detention center. He worked in various capacities at the Northwest Detention Center during the time he was there.

Photo by Karras Creative

Attorney Adam Berger (far left) and professor Jacqueline Stevens (far right) have investigated cases of immigrants who were paid only $1 a day; a detainee (center) works in the Northwest Detention Center in Tacoma, Washington.

When the security guard asked him if he wanted to work, the detainee jumped at the chance, Berger says.

"He said he wanted to do something, but at the time he didn't know the work would be so hard." In the three years he spent at NDC, he cleaned the showers and his section's living quarters and occasionally did touch-up painting around the facilities.

Whether the work was one hour or four, the pay was the same. He was once asked to clean the visitation areas where the attorneys and families meet.

"It took him four days, working probably three to four hours each day, to wax the floors," Berger recounts. "His reward for that exhausting work was $2."

At one point, his client was given the opportunity to work in food preparation, a plum assignment because detainees were often given extra rations. When he fell ill one morning, he says he was awakened by a forceful "slap" on the back and ordered to work. When he told the guards he was sick, he was sent to work anyway.

According to Berger, the detainee filed a complaint, pointing out the physical violence was caught on camera. "As a result, he was promptly taken off kitchen duties and sent back to cleaning showers. He was also moved to another living area while the offending officer remained untouched." His asylum case is still pending.

While *Nwauzor* focused on the use of migrant labor and refusal to pay minimum wage, some other cases are claiming the practice violates the Trafficking Victims Protection Act. Since 2000, changes to the TVPA combating human trafficking broadened the definition of coercion. This led to changing legal strategies focusing on the TVPA in addition to unfair labor practices and unjust enrichment. "Previously, challenging the terms and conditions of prison labor under the 13th Amendment was generally unsuccessful," Sinha says. "However, changes in the TVPA have made what constitutes trafficking more clear." Included in this is the word "coercion," which is proving to be a game changer in recent cases.

While complaints about coerced voluntary work programs have focused largely on private contractors, a lawsuit was filed in April against an Illinois county and sheriff, alleging they instituted a forced labor program without compensating detainees. Plaintiffs are pursuing class action status for former detainees of the McHenry County Adult Correctional Facility in a suit seeking $5 million in damages for those forced to work "without compensation and against their will," according to the lawsuit. Illinois ended the policy of detaining immigrants in local jails earlier this year.

Volunteered or coerced labor?

The TVPA was strengthened in 2003 to allow victims to hold their traffickers accountable. In 2008, partially in response to a U.S. Supreme Court ruling that narrowly defined forced labor, the TVPA was amended again. The amended Section 1589 allowed for more subtle forms of coercion, and unlike the FLSA,

Photos by AP Photo/Ted S. Warren, File; Susan Lehman

it does not provide exemptions for government contractors or prisons.

In many of the pending cases, detainees say they were coerced into working or were threatened with discipline or even solitary confinement if they complained or refused to work. While GEO and CoreCivic, another one of the largest private prison contractors, say their programs are voluntary, a number of other class action lawsuits allege that detainees are coerced into working under threat of punishment, violating the TVPA.

Sofia Casini is the director of visitation advocacy strategies at Freedom for Immigrants, an organization that advocates for the end of immigration detention. While working as visitation coordinator of Grassroots Leadership, supporting women detained inside the CoreCivic-operated T. Don Hutto Residential Center in Texas from 2016 to 2019, she was made aware of "exploitation and abuse related to the voluntary work program" in the center.

"It took many months of building trust for women to share what they were experiencing," says Casini, who points out that many in the women-only center are asylum-seekers who have already experienced deep trauma.

According to Casini, a 19-year-old woman from Mexico reported she hadn't been paid in two months because of a "technical glitch" in the commissary system. "The real-life impact was that she went two months without having any money on her commissary account and was eventually deported without ever receiving her wages."

Others claim that guards threaten to write up poor character reports if they refuse to work, and these reports allegedly would be included in their immigration files to be reviewed by the asylum judge in determining whether the women could stay in the country.

"This threat was repeated when women spoke out about any form of abuse, including solitary confinement, medical and sexual assault," Casini says. "For anyone who has escaped their country to save their own life, this threat of a 'bad character report' being the deal breaker in whether or not they're granted asylum seems incredibly risky. Many would rather endure whatever they face."

The successful litigation of *Nwauzor v. GEO* may be a harbinger of things to come in other complaints against GEO and CoreCivic. According to the Human Trafficking Legal Center, at least 17 cases against prison companies, municipalities and detention facilities, among others, have been filed in federal court on anti-trafficking charges, involuntary servitude and forced labor laws. At least six of them address immigrant detention centers.

Both GEO and CoreCivic say they are simply contractors following ICE guidelines that allow for compensation of $1 per day.

But as Andrew Free, co-counsel in *Nwauzor,* points out, "As a matter of law, Congress stripped the federal government of its ability to set the rate and to pay it, but it didn't strip the contractors of their duty to compensate people for work performed under state law, and the court has now recognized that repeatedly."

In the most recent development, the Deportation Research Clinic obtained a letter from ICE to GEO through a Freedom of Information Act request demonstrating that GEO was aware of its obligations to pay minimum wage. In the letter, dated June 18, 2018, ICE denied GEO's request for further compensation for labor costs, stating specifically that while the reimbursement rate for labor was $1 per day, it was up to GEO to "ensure compliance with all applicable federal, state and local work safety laws and regulations."

Photos by AP Photo/Ted S. Warren; courtesy of Azedah Shahshahani

"All of the evidence points to the forced nature of this program, and this exploitation needs to end," says attorney Azedah Shahshahani (center); detainees walking toward the the recreation area (far left) and on kitchen duty (right) inside Northwest Detention Center.

Photo by AP Photo/Ted S. Warren, File

Other recent rulings have broken the pattern of past decisions holding that the defendants were exempt as federal contractors, minimum wage laws do not apply in detention centers, and the prisons were following ICE guidelines. A 2020 decision by the Atlanta-based 11th U.S. Circuit Court of Appeals, *Barrientos v. CoreCivic Inc.*, held that the TVPA does in fact apply to federal contractors operating federal detention facilities.

But in a case filed in 2014 by detainees at the Aurora Contract Detention Facility, which houses over 1,500 people, the U.S. District Court of Colorado ruled that GEO was not an employer akin to a private business. Still, Nwauzor's case against GEO went in a different direction.

"We were able to prove that GEO called all the shots, and they decided who would work where and otherwise—they had all of the hallmarks of an employment relationship," Berger says. Indeed, in at least two other cases, a federal judge denied a motion to dismiss based on these grounds.

Now with a landmark jury trial victory in Washington and split decisions in other circuits, court watchers speculate the forced labor question may go all the way to the Supreme Court. In the meantime, the decision in the Tacoma case may put further pressure on President Joe Biden's administration to halt the privatization of the detention system.

Private profiteering

Critics of voluntary labor programs say the issue goes beyond prison walls. Many detention centers and prisons are built in rural communities and come with the promise of jobs and other economic benefits.

"The myth of prosperity and jobs is something that needs to be exposed," says Azadeh Shahshahani, an Atlanta-based attorney and co-counsel in a class action suit against CoreCivic at the Stewart Detention Center in Georgia. In 2017, Stewart County was singled out by a U.S. Census Bureau report as one of the poorest counties in the nation.

Currently, ICE contracts approximately 70% of its facilities to private operators GEO and CoreCivic. Since private companies are beholden to shareholders looking to maximize profits, the potential for exploitation is higher than if facilities were government-run, critics say.

The increase in the number of detention centers run by private corporations dovetails with policies and legislation criminalizing immigration. Increasing the numbers of immigrants detained has meant profitable contracts for private prison companies like GEO and CoreCivic. According to the American Civil Liberties Union, around 28% of GEO's and CoreCivic's revenue came from ICE detention contracts in both 2019 and 2020. In 2021, GEO Group had $2.26 billion in revenue while CoreCivic, which runs 113 facilities, had $1.86 billion.

The biggest cost by far is labor, which means that if private prison companies were forced to pay minimum wage, they'd likely abandon the detention business as unprofitable, Sinha says.

In a statement released to the press, GEO said they "strongly disagree" with the jury's verdict in *Nwauzor* and believe their claims were wrongfully dismissed.

GEO is appealing the ruling to the San Francisco-based 9th U.S. Circuit Court of Appeals, which halted litigation in *Novoa v. GEO Group*, a case in Adelanto, California, in which detainees allege the contractor violated California's minimum wage and unfair competition laws, the TVPA and unjust enrichment. After the *Nwauzor* verdict, the judge issued a stay in *Novoa* pending a decision on the company's appeal. The case is expected to be heard in October.

In all of these cases, activists say their end goal is to stop the exploitation of migrants by demanding minimum wage and to end the private detention system altogether.

"All of the evidence points to the forced nature of this program, and this exploitation needs to end," Shahshahani says. "We do hope to build on this momentum to get private prison corporations out of the business of incarcerating human beings and making money off of human pain." ■

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ABA Treasurer's Report

Kevin L. Shepherd

Each year, the treasurer provides a report on the association's finances that is printed here in the *ABA Journal*. In these reports, I will seek to provide helpful information about the association's financial health as well as current and relevant trends.

In my second *Journal* report as treasurer, I will cover the association's fiscal year 2021 audited results, finances through the first eight months of fiscal year 2022 (unaudited), an update on the association's pension liability and progress made on the fiscal year 2023 budget.

Fiscal year 2021 consolidated results

The fiscal year-end 2021 financial statement audit was successful. We received a clean (unqualified) opinion from our auditor, Grant Thornton. See the ABA financial statements and audit report at ABAJournal.com/audit_report_2021.

Fiscal year 2021 was challenging due to the lingering impacts of the COVID-19 pandemic, but our association did an excellent job managing expenses to mitigate revenue shortfalls.

In spring 2020, when the fiscal year 2021 budget was produced, we knew that the pandemic would impact financial results, and we reduced revenue accordingly for what we knew at the time. Despite our attempt to rightsize for fiscal year 2021, you can see in the table to the right that total operating revenue for fiscal year 2021 was $180.1 million, or $12.9 million short of budget. Although grant revenue continued to increase—by almost $14 million more than budget and $4 million more than prior year—it was not enough to overcome the prolonged effects of the pandemic, as the largest component of the $12.9 million total revenue shortfall was meetings-related. The continued effects of the pandemic meant the association was unable to conduct many of the in-person meetings it had anticipated.

Thankfully, our association was able to mitigate completely the revenue shortfall to budget from the pandemic, as total operating expenses were $29.5 million lower than budget. Having fewer in-person meetings also meant fewer meetings-and-travel expenses for the association. Staff also did an excellent job of finding other efficiencies, such as saving significant money on printing and postage by performing more work digitally.

As a result of all operating activity, we ended the year with a consolidated operating surplus of $5.3 million, which was $16.5 million better than the $11.3 million budgeted operating deficit.

Consolidated Results: Final Fiscal Year 2021
Amounts in Millions

				Variance to:	
	Actual	Budget	Prior	Budget	Prior
Operating Revenues	$180.1	$193.1	$196.8	$(12.9)	$(16.7)
Operating Expenses	174.8	204.3	184.6	29.5	9.7
Operating Surplus/(Deficit)	**$5.3**	**$(11.3)**	**$12.3**	**$16.5**	**$(7.0)**
Net Investment Gain/(Loss)	$56.1	$10.6	$17.4	$45.6	$38.8
Investments Used in Operations	(14.7)	(16.0)	(17.5)	1.3	2.8
Other Nonoperating Items	(1.4)	(1.5)	(1.8)	(0.1)	0.4
Results Before Pension Adjustment	**$45.4**	**$(18.1)**	**$10.4**	**$63.5**	**$35.0**
Year-End Pension Adjustment	21.4	—	(2.2)	21.4	23.5
Change in Net Assets	**$66.7**	**$(18.1)**	**$8.2**	**$84.9**	**$58.5**

Below the operating line, the association benefited from incredibly strong financial markets, with an unprecedented $56.1 million of investment gains. Our association also used $14.7 million of investments to support operations and incurred $1.4 million of nonoperating net expenses. The strong financial markets also benefited our pension plan, as we recognized a $21.4 million pension gain after determination of the association's pension liability by the association's independent actuaries; a more in-depth discussion of the association's pension obligation will be provided later in this report. As a result of the activity above, the association's net assets increased by $66.7 million through the 12 months ending Aug. 31, 2021.

Photo courtesy of Venable; chart by Sara Wadford/ABA Journal

Fiscal year 2022 results through April 30

Fiscal year 2022 has continued to provide revenue challenges as the effects of the pandemic have lingered, particularly in the area of in-person meetings. However, there are reasons for optimism. The table below shows that while consolidated operating revenue through April 30 is $7.6 million lower than budget, it is $14.5 million higher than prior year to date. The positive grant revenue trends we have seen over the past several years have continued, as grant revenue is $2.4 million higher than budget and $8.3 million higher than prior year to date, demonstrating the great value of our good works both domestically and internationally. Although fiscal year to date meeting fee revenue is $5.7 million lower than budget, the month of April saw the highest amount of meetings revenue since March 2019, almost a year before the pandemic began, a hopeful sign for the future.

Although consolidated total revenue has fallen short of budget through April, our association has continued to do a commendable job managing expenses, as total expenses are $14.5 million lower than budget.

As of April 30, 2022, the association's consolidated net operating deficit of $3.2 million is $6.9 million better than the budgeted deficit of $10.1 million and almost flat from prior year.

Consolidated Results – April 2022 FYTD
Amounts in Millions

				Variance to:	
	Actual	Budget	Prior	Budget	Prior
Operating Revenues	$123.3	$130.9	$108.8	$(7.6)	$14.5
Operating Expenses	126.5	141.1	111.7	14.5	(14.8)
Operating Surplus/(Deficit)	**$(3.2)**	**$(10.1)**	**$(2.9)**	**$6.9**	**$(0.3)**
Net Investment Gain/(Loss)	$(27.5)	$8.0	$43.3	$(35.5)	$(70.8)
Investments Used in Operations	(7.5)	(7.6)	(9.9)	0.1	2.4
Other Nonoperating Items	(0.7)	(1.9)	(1.0)	1.1	0.2
Change in Net Assets	**$(38.9)**	**$(11.6)**	**$29.5**	**$(27.3)**	**$(68.4)**

The association has a modest $3.2 million operating deficit, but its $38.9 million decrease in net assets is greatly impacted by the considerable financial market volatility this year, which has resulted in the $27.5 million of investment losses seen in the table above, eliminating part of the investment gains we enjoyed in fiscal year 2021. These losses illustrate the importance of the association's past prudence in safeguarding our investments, as despite these unfavorable recent results, the association still has a healthy long-term investment balance of $275.5 million as of April 30, 2022. Through April 30 of fiscal year 2022, the association has used $7.5 million of investments to support operations and has $0.7 million of nonoperating net expenses. Thankfully—and fortuitously—association financial services staff timed the sale of general operations investments that support association activities so they were sold before Jan. 31, when the markets were still near or setting record highs.

Financial position as of April 30

Despite the recent substantial decline in financial markets and its significant impact on our investment portfolio, our financial position remains very strong, as we have total assets of $315.4 million and liabilities totaling $131.6 million, resulting in total net assets of $183.7 million. Of the $183.7 million of total net assets, $125.9 million are unrestricted sections, divisions and forums net assets. The remaining $57.8 million are general operations/Fund for Justice and Education net assets (of which $16.1 million are restricted). Below is our association's balance sheet.

Consolidated Statements of Financial Position
Amounts in Millions

	Apr. 30 2022	Aug. 31 2021	Prior Year Variance Fav/(Unfav)
Assets			
Cash & Equivalents	$0.1	$6.4	$(6.4)
Long-Term Investments	275.5	311.0	(35.5)
Other Assets	39.8	40.2	(0.4)
Total Assets	**$315.4**	**$357.7**	**$(42.3)**
Liabilities			
Deferred Revenue & Deferred Rent Abatement	$56.9	$66.9	$10.0
Pension Liability	11.3	9.7	(1.7)
Loan to Fund Pension Liability	29.5	35.4	5.9
Other Long-Term Debt	12.5	-	(12.5)
Payables & Other Debt	21.4	23.0	1.6
Total Liabilities	**$131.6**	**$135.0**	**$3.4**
Net Assets			
Total Unrestricted	$167.7	$206.3	$(38.6)
Total Restricted	16.1	16.4	(0.3)
Total Net Assets	**$183.7**	**$222.7**	**$(38.9)**

Pension liability update

The association's pension liability continues to improve. The pension liability is calculated by our actuaries once per year. This calculated balance is as of the end of the fiscal year,

Charts by Sara Wadford/ABA Journal

or Aug. 31, 2021. During fiscal year 2021, our net pension liability decreased by $18.5 million.

The pension plan is a separate legal entity that has its own assets consisting of high-quality liquid investments. The pension liability is determined as the difference between the pension's assets and the plan's obligation, or the amount owed to current and future retirees in retirement benefits. During the fiscal year, both components of the liability improved as follows:

The pension assets grew by $12.0 million to $158.1 million because of strong financial market returns.

The pension obligation declined by $6.5 million to $167.8 million. The decline was due to the fact that the plan paid $11 million in benefits and because interest rates increased modestly through Aug. 31, 2021, more than offsetting the increase in accrued amounts owed to plan participants. Since then, interest rates have increased significantly. If rates stay at this higher level, the pension obligation will fall further and reduce the pension liability even more.

The association has been successful in managing this

ABA Net Pension Liability
Amounts in Millions

	FY 2021	FY 2020	FY2020 to FY2021 Improvement
Assets	$158.1	$146.1	$12.0
Obligation	(167.8)	(174.3)	6.5
Net Pension Liability	**$(9.7)**	**$(28.2)**	**$18.5**

significant obligation. In fiscal year 2016, the pension liability was $95 million. As of Aug. 31, 2021, it is less than $10 million, an $85 million improvement. We accomplished this through $80 million of low-cost loans used to fund the pension and several transactions that reduced the number of individuals in the pension plan. Of the $80 million of loans, $50.5 million has been repaid as of April 30, leaving a remaining balance of $29.5 million.

Fiscal year 2023 budget

As of this writing, staff has completed initial input of our association's preliminary fiscal year 2023 budget. Preliminary consolidated budgeted revenue is about $207 million, an increase of more than $9 million from the final fiscal year 2022 budget.

As discussed earlier in this report, grant revenue is up $8.3 million over last year for the eight-month period ending April 30, 2022. Looking forward to next year, we expect this growth trend to continue as the grants' full-year total budget of $86.4 million reflects a total increase of over $13 million from the fiscal year 2022 budget. This increased grants activity also benefits the association's general operations in that it allows the association to recover more of its overhead costs

"The continued effects of the pandemic meant the association was unable to conduct many of the in-person meetings it had anticipated. Thankfully, our association was able to mitigate completely the revenue shortfall."

from grants. The fact that unrelated third parties want to fund our work convincingly demonstrates its value. We should all take pride in the tremendous work our association performs for the betterment of our world.

Although grant activity is expected to increase significantly, general operations revenue is expected to decrease by about $4 million from the fiscal year 2022 budget. Most of the decrease is from using less investment income in operations, but both dues and meetings-related revenue are also expected to slightly decline from the fiscal year 2022 budget, emphasizing the need to attract new members and improve retention of existing members.

To compensate for this decreased revenue and achieve the required general operations balanced budget of revenue and expenses that support our core activities, expense savings were found in several areas: the increased overhead expense recoveries from grants mentioned earlier; shared staff and other efficiencies identified by senior staff; and a reduction in general operations contributions to sections, divisions and forums.

On an aggregate basis, budgets for sections, divisions and forums have remained stable year over year.

The budget is preliminary, as much can occur in the time remaining of fiscal year 2022. We are encouraged by the diligent efforts of staff and our member leaders to find efficiencies in their areas while not materially disrupting efforts to acquire, engage and retain members. We look forward to a successful fiscal year 2023 and beyond. Thank you for the opportunity to serve as your treasurer. ■

Chart by Sara Wadford/ABA Journal

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edited by
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Courtesy of Katten Muchin Rosenman

Janet Goelz Hoffman has been an ABA member since 1978.

MEMBERS WHO INSPIRE

Succession Planning

In retirement, Janet Goelz Hoffman supports nonprofits through pro bono and mentoring

BY AMANDA ROBERT

More than 40 years ago, Janet Goelz Hoffman set out to help those who help others, building a sizable client base of nonprofit organizations before retiring as a partner at Katten Muchin Rosenman on Jan. 31, 2021.

Now in the next chapter of her career, the veteran public finance attorney continues to prioritize the needs of nonprofits at Katten's Chicago office as a senior counsel and pro bono counsel. She not only assists these clients with transactional pro bono matters, but she also is mentoring younger attorneys who are also interested in making pro bono part of their practice.

As a teenager living in a small suburb of Pittsburgh in the 1960s, Hoffman thought her career choices were limited to teacher, nurse, librarian or secretary.

But after receiving a full-tuition scholarship and enrolling in the National College of Education in Evanston, Illinois, Hoffman realized women had other options. She enjoyed "bookish things" and transferred to nearby Lake Forest College, where she earned a bachelor's degree in economics and minors in philosophy and literature.

Hoffman, who also was inspired by lawyers in the civil rights movement, decided her next stop was the Northwestern University School of Law. By then, she was married to Brian Hoffman, a chemistry professor at Northwestern, and they had two young daughters.

Because Northwestern allowed her to take its three-year program over four years, Hoffman spent one summer with Chicago Volunteer Legal Services. During her other summers, she helped nonprofit and government clients at public finance boutique firm Borge and Pitt and worked at Kirkland & Ellis. She joined the larger firm's tax department after she graduated in 1978, and while she liked the work, she missed helping nonprofits.

"I was good at the kind of law that moved money from one person's pocket to another. But it mattered to me whose pocket the money ended up in, and it mattered to me what they did with the money once they got it," says Hoffman, who joined the ABA in 1978. "That little boutique law firm did complicated work, but the money ended up in the pockets of governments and not-for-profits, and they did things with that money that just spoke to me more."

In 1982, she returned to Borge and Pitt, where she handled complex financings and governance and restructuring issues for nonprofits across the country. She became a partner and represented many nonprofit clients long after her firm merged with Katten in 1987.

"Some clients that I started working with back in the '80s were still clients

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.

when it was time to turn them over to younger lawyers," Hoffman adds.

Helpful handoff

As Hoffman planned for retirement, she thought about how to ease the transition for her clients and colleagues.

She wanted her clients to receive the same attentive service and knew it would be helpful to connect them with senior associates and young partners who understood their organizations and their business environments.

Janet Goelz Hoffman was able to matchmake her Katten colleagues with her existing clients and provide ongoing support after her retirement.

She tried to pair clients with attorneys who had similar personalities, work styles and appreciation for their missions.

"These not-for-profits are mission-driven organizations, and they make their decisions not only based on the economics of the decision but how it aligns with their mission," Hoffman says. "And sometimes it isn't the same decision that a for-profit entity would make.

"So I tried to match people who would be, if not sympathetic to the mission, understanding of it and willing to think about those sorts of issues."

Hoffman started the multiyear process by working alongside the selected attorneys on her clients' matters. She then gradually moved out of her position as their primary contact while still being available to attend client meetings and answer questions.

"You're just the person in the background that they can consult if something comes up," Hoffman says. "You're involved maybe at the beginning and the end but not during the middle. And I have to say, I'm very pleased with how it worked out."

Chad Doobay, a partner in Katten's Chicago office, started working with Hoffman a year after he joined the firm in 2006.

He immediately recognized her skill in managing complex deals for hospital systems, cultural institutions and continuing care retirement communities and wanted to learn everything he could from her.

"I knew this was the attorney that I wanted to model myself off of in every way," Doobay says. "She very much mentored me in my public finance practice … and had the intention over probably the past five years to pass her book to me and to some other attorneys.

"She did that very generously and with care, because she cares about these clients."

Creative transactions

After stepping back from her regular caseload, Hoffman had more time for pro bono.

Throughout her career, she drew from her experience with nonprofits and focused on transactional matters for smaller organizations that were often unable to afford legal assistance. In addition to taking on additional cases, she increased her supervision of young attorneys who needed help with their pro bono projects.

Hoffman enjoyed this work, and she talked to Katten in 2019 about stepping into a new role as pro bono counsel after she retired.

"They were very enthusiastic," Hoffman says. "I think they saw the benefit of that kind of mentorship, and it gives us an opportunity to take on much more complex transactional pro bono on a more consistent basis."

Jonathan Baum, the director of pro bono services at Katten, who also works in Chicago, is a litigator by background. He often asked Hoffman for help with transactional work when she was a partner. He was thrilled when she joined him in managing pro bono for the firm.

"In addition to her analytical ability and her warmth, she has this wealth of experience," Baum says. "She's probably worked with hundreds of nonprofits over the years. One of the things that makes her such an asset, both to the clients and the people she's mentoring, is there is probably nothing that a nonprofit has experienced that she hasn't seen before."

Hoffman helps clients like Oklahoma-based Folds of Honor—which provides scholarships to spouses and children of fallen and disabled service members—update their corporate documentation or procedures and navigate tax issues. She regularly handles real estate or other contracts for arts organizations, including the Northlight Theatre in Illinois.

She also helps startups establish as nonprofit corporations, register with the attorney general as charities in their states, obtain federal tax exemptions and apply for sales tax exemptions. One client is Lakou, an organization that provides construction training to increase development in Haiti.

"They are wonderful projects for young lawyers to work on because they learn about how a business starts up and its structure," Hoffman says. "That's one of the places that I particularly like being able to work with people on, because the organizations are doing exciting work, and it's a great learning opportunity."

Hoffman, who has four daughters and seven grandchildren, still lives in Evanston and supports local nonprofits in her spare time.

She serves as chair of the board of directors of the Leslie Shankman School Corp., which operates the Hyde Park Day School and Sonia Shankman Orthogenic School. She is also on the board of directors for Covenant Living Communities and Services, one of the largest nonprofit senior housing organizations in the United States.

Hoffman chose to engage in this work for several reasons, including to

Photo courtesy of Katten Muchin Rosenman

contribute to her community and to develop both as a person and as a lawyer.

"It gave me perspective on the operations and governance issues of a not-for-profit that informed my professional advice to clients," she says. "Sometimes the most tidy legal solution isn't the best path for a not-for-profit. Serving on boards has helped me understand the need to marry our legal advice with sensitivity and support for the core mission of each of my not-for-profit clients." ■

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ENVIRONMENTAL LAW

A Fresh Approach

ABA steps up efforts to advance environmental justice

BY AMANDA ROBERT

As Howard Kenison prepared to chair the ABA Section of Environment, Energy and Resources in August 2020, he put environmental justice at the top of his list of initiatives.

In particular, Kenison planned to create a task force to review and possibly revise a 1993 resolution related to environmental justice.

The measure, submitted by the Standing Committee on Environmental Law (which later merged with SEER), pledged support for laws, regulations and policies that ensure "a disproportionate share of the burden of environmental harm does not fall on minority and/or low-income individuals, communities or populations."

Kenison, a shareholder at Jones & Keller in Denver, recognized much had changed since the ABA turned its sights on environmental justice more than 25 years ago. According to the U.S. Environmental Protection Agency, environmental justice is defined as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income, with respect to the development, implementation and enforcement of environmental laws, regulations and policies."

A 1982 protest in Warren County, North Carolina, strengthened the national movement seeking social justice and environmental protection. During the protest, members of the predominantly African American community, civil rights leaders and other activists tried to stop a toxic waste landfill from being placed in the county, resulting in the arrests of more than 500 people.

The protest led to several studies over the next several years examining the relationship between race and hazardous waste siting decisions. By the early 1990s, the EPA created the National Environmental Justice Advisory Council, and President Bill Clinton issued an executive order directing federal agencies to make environmental justice part of their missions.

Advocates recently have used federal civil rights laws, such as the Fair Housing Act, and state laws to support environmental justice. Several lawmakers have also proposed specific environmental justice legislation, including the Environmental Justice Act of 2021, which would strengthen legal protections for individuals affected by environmental injustices.

"There had been a lot of developments on environmental justice issues around the country, and I frankly felt it was time to take a fresh look at it as the section that had the most direct involvement with environmental justice," Kenison says.

Modern approach

James May received a call in November 2020 from Kenison, who asked him to lead SEER's Environmental Justice Task Force.

May, a professor and founder of the Global Environmental Rights Institute at Widener University Delaware Law School, agreed and helped recruit other members to discuss ways the section could further environmental justice. Their conversations, which later included the Section of Civil Rights and Social Justice and the Center for Human Rights, culminated in a new resolution that the House of Delegates adopted in August 2021.

The resolution calls on the association to advance environmental justice principles and considerations in its programs, policies and activities; and to work with governmental bodies to establish laws, regulations and other measures "that reflect the right of every human being to dignity and a clean and healthy environment."

It also urges law firms, legal departments, lawyers, law schools and bar associations to include members of communities of color, Indigenous communities, low-income communities and other vulnerable populations in decisions and initiatives involving environmental justice.

At the same time, SEER sought to set up an ABA-wide task force on environmental justice to assist with implementation of the new policy.

"The House of Delegates has a fair number of resolutions, but they don't have ways to implement them, and that was important to us," May says. "We proposed to the Board of Governors after going through the president's office with President [Reginald] Turner on board to assemble a cabinet-level group."

Turner appointed 13 task force members, including May, who serves as a

special advisor. It also has representatives from SEER, CRSJ, the Center for Human Rights, the Business Law Section, and both lawyer and nonlawyer experts in environmental justice.

Michelle Diffenderfer, the current chair of SEER, credits her colleagues for their diligent work on the resolution, which she says provides an important historical perspective on environmental justice. She also commends the ABA for meeting the moment. "You learn so much about the history of environmental justice in this country and the different ways governments and entities have tried and failed to use environmental justice in the courts, and then more recently the use of civil rights laws that have gained some success," says Diffenderfer, president and shareholder of Lewis, Longman & Walker in West Palm Beach, Florida.

"The timing of the environmental justice resolution and the creation of the ABA task force couldn't be better, especially with the Biden administration's big push on environmental justice and some environmental justice legislation moving through Congress."

Seeking justice

Longtime advocates Gwen Keyes Fleming and Quentin Pair serve as co-chairs of the ABA Task Force on Environmental Justice.

Fleming, a partner in DLA Piper's Washington, D.C., office, was chief of staff to the EPA during the Obama administration and the regional administrator to EPA Region 4, where she worked on environmental justice with eight Southeastern states and six federally recognized tribes.

Pair became a senior trial attorney in the U.S. Department of Justice's environmental enforcement section in 1980. He was the environmental justice coordinator and represented the department as a senior career representative on the Federal Interagency Working Group on Environmental Justice until his retirement in 2015.

Fleming currently serves as an environmental justice advisor for SEER's council; Pair helped lead its first Special Committee of Environmental Justice from 2003 to 2008.

From Pair's perspective, the ABA's latest commitment to environmental justice represents a "massive leap" forward.

"I don't mean to demean my own work or that of the first committee, but the new resolution holds the bar professionally responsible and says, 'We as lawyers, the American Bar Association, need to promote environmental justice and be active in it,'" says Pair, who is also an adjunct instructor at Howard University School of Law. "It affects the basic reason for the bar association, which is to set standards of legal access for all people and promote the American principle of equality for all."

The task force, which began meeting this spring, is preparing a report that examines the ABA's work around environmental justice and identifies any gaps. The report could also suggest new policies, outline legal education needs and share best practices with members, law schools and legal organizations.

The group's other goals include studying federal, state and local proposals involving environmental justice; working with government entities, such as the Council on Environmental Quality and the White House Environmental Justice Advisory Council; and advising the ABA's Governmental Affairs Office on environmental justice advocacy.

"The late congressman John Lewis said that environmental justice is the civil rights issue of our time," Fleming says. "Lawyers have always been at the forefront of fights for civil rights, and so who better to be in a position to analyze laws and identify opportunities to change laws to benefit communities and get rid of the vestiges of environmental racism that have led to these communities bearing an undue burden of pollution?"

Fleming says it was also important to engage community leaders in the work of the task force. One of these members is LaTricea Adams, the founder, president and CEO of Black Millennials 4 Flint, a civil rights and environmental justice organization that aims to eradicate lead exposure.

"I'm able to bring a bit more nuance of what is actually happening on the ground," says Adams, who is based in Memphis, Tennessee, and also serves on the White House Environmental Justice Advisory Council. "To be honest, it's the easier part to get policies passed, to get things in writing. But what I bring in is the real deal, like, 'This is what happens if a policy isn't being implemented or if a policy isn't working.'"

The task force plans to release its report by the end of the year, but its work will continue through August 2023. ■

REPORT FROM GOVERNMENTAL AFFAIRS

Optimizing Outreach

In-person lobbying is returning, but digital advocacy will remain

The pandemic forced organizations like the ABA to adopt new ways to connect with their elected officials and lobbyfor policy changes of interest to their professions.

In-person lobbying was the meat and potatoes of ABA advocacy for decades, but closing the halls of Congress to the public for more than two years elevated digital communications to the forefront. With Capitol Hill reopening, face-to-face meetings will again become part of the ABA's advocacy tool kit. But virtual lobbying also is here to stay.

For decades, ABA lobbyists, leaders and members served as witnesses at hearings, met with congressional and administration officials and their staffs and, just as importantly, developed rela-

tionships with federal officials and their staffs outside hearing rooms and offices.

There is tremendous value in these encounters. In face-to-face meetings, ABA representatives can watch the interactions between officials and their staffs, read their body language and social cues, and become aware of their interests and sensitivities. They can also buttonhole elected officials or staff for informal conversations that can convey more information on a pending piece of legislation than might be garnered from a formal meeting. In the halls or over a cup of coffee in a congressional café, ABA representatives can further explain the ABA's positions on pending issues.

A major area where in-person advocacy has yielded results is ABA Day, the legal profession's largest lobbying event. For more than two decades, hundreds of ABA leaders and members gathered annually on the Hill to personally lobby congressional representatives on access to justice and other issues important to the legal profession. Leading political figures also addressed the group in person, sharing details of pending legislation and their thinking on issues of the day.

One success story is funding for the Legal Services Corp. Over the decades, ABA Day advocacy has helped ward off efforts to defund the program and has been instrumental in achieving increased funding to enable access to the justice system for more low-income and vulnerable Americans.

Power of adaptation

But the ABA also has consistently looked ahead at how it can improve and expand its influence. Recognizing the changing advocacy landscape, the ABA launched its digital initiatives several years ago. During the pandemic, it moved digital advocacy to the forefront. ABA Day was not canceled by COVID-19; it has been held virtually for the past three years.

The three virtual ABA Days continued the success of decades of in-person ABA Day events. More than 600 registered for this year's two-day event in April, when participants sent 1,200 messages to Congress and engaged in 21,000 social media interactions. ABA Day probably will resume in-person events in 2023, but we also expect to host a digital component.

Through the power of the internet,

thousands of people who could not have traveled to D.C. to meet with officials have been able to participate in ABA-organized lobbying campaigns that have advanced ABA policies.

The ABA Grassroots Action Center provides tools to help contact elected officials directly. With a few clicks, participants can send letters through the message portal, join in social media campaigns on Twitter, Instagram and LinkedIn, and meet with elected officials by teleconference or videoconference to discuss issues important to our profession.

Another pandemic success was the ABA-led Student Debt Week of Action in September 2021. For the all-virtual event, the ABA teamed up with other professional organizations for online events in which participants learned about the student debt crisis and communicated to the White House and Congress about how student loan debt negatively impacts the lives of millions of Americans.

Using social media and email advocacy, participants urged officials to provide substantive and meaningful relief. During the seven-day period, there were 1,200 streams of the events, more than 122,000 social media interactions and over 1,400 letters and emails on student debt relief sent to members of Congress and the Department of Education. After the Student Debt Week of Action, the Department of Education announced a temporary waiver of certain rules of the Public Service Loan Forgiveness Program, making more people eligible for loan forgiveness, and the White House extended a pause on student loan repayments.

In-person lobbying and digital advocacy are complementary approaches to a critical goal: ensuring the legal profession is heard amid the hubbub of Washington, D.C., politics. Each approach brings value to the advocacy process, and both will play a critical role in ensuring the ABA's voice continues to be heard in our nation's capital. ■

This report is written by the ABA's Governmental Affairs Office and discusses advocacy efforts by the ABA.

ABA Notices

For more official ABA Notices, please visit ABAJournal.com in September.

NOMINATING COMMITTEE BUSINESS SESSION AND CANDIDATES FORUM AT THE 2022 ABA ANNUAL MEETING

The secretary hereby gives notice that the Nominating Committee will meet in conjunction with the 2022 ABA Annual Meeting on Sunday, Aug. 7, from 9 to 11 a.m. CT at the Hyatt Regency Chicago hotel, beginning with the business session. Immediately after the business session, the Nominating Committee will hear from candidates seeking an officer nomination at the 2023 midyear

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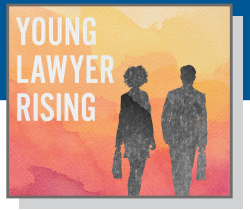

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meeting and will review the final agenda and procedures for the Aug. 8-9 meeting of the House of Delegates. This portion of the meeting is open to association members. In addition, immediately following the Candidates Forum, the Nominating Committee will meet in executive session from 11 a.m. to noon CT.

NOTICE BY THE SECRETARY: MEETING OF THE MEMBERSHIP

The secretary hereby gives notice to the members of the American Bar Association that the meeting of the membership will be held in conjunction with the 2022 annual meeting Nominating Committee Business Session and Candidates Forum on Sunday, Aug. 7, at 9 a.m.

2023 STATE DELEGATE ELECTION NOTICE

Pursuant to Section 6.3(a) of the ABA Constitution, 18 states will elect state delegates for three-year terms beginning at the adjournment of the 2023 annual meeting. The deadline for receipt of nomination petitions is Thursday, Dec. 8. Go to ambar.org/2023-statedel to find the states conducting elections as well as election rules and procedures.

ANNUAL MEETING OF ABE MEMBERS

The Annual Meeting of the Members of the American Bar Endowment will be held in Chicago at the Hyatt Regency hotel on Monday, Aug. 8, at 8:45 a.m. The agenda includes the election of two board members. The nominees for those positions are Roberta D. Liebenberg of Philadelphia and Patricia Lee Refo of Phoenix. Go to abendowment.org for the full text of this Notice.

2023 BOARD OF GOVERNORS ELECTION NOTICE

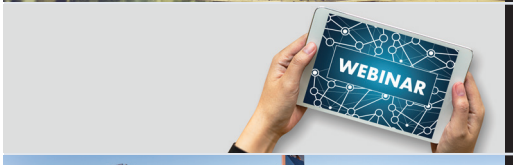
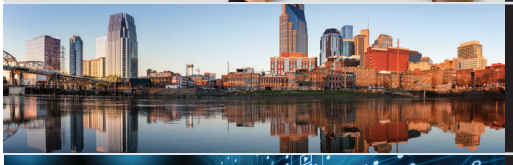
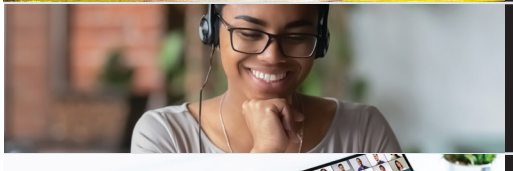
At the 2023 midyear meeting, the Nominating Committee will announce nominations for district and at-large positions on the ABA Board of Governors for terms beginning at the conclusion of the 2023 annual meeting and ending at the conclusion of the 2026 annual meeting. Pursuant to Section 2.1 of the association's constitution, the committee will nominate individuals from the following states to represent the districts noted: Rhode Island (District 1), Michigan (District 2), Virginia (District 4), Georgia (District 6), Louisiana (District 12) and South Carolina (District 19). The Nominating Committee will also nominate members from the sections of Business Law, Infrastructure and Regulated Industries and Intellectual Property Law to serve as section members-at-large and one young lawyer member-at-large. Nominating petitions must be filed electronically at BoardofGovernorsElections@americanbar.org by Jan. 4. Go to ambar.org/boardelection for the full text of this notice.

ABA Events

SAVE THE DATE

Summer-Fall 2022

For the latest info, go to americanbar.org and click "Events."

	Aug. 3-9	**ABA 2022 Annual Meeting** Location: **Chicago** ABA • CLE
	Aug. 4	**Virtual Office Hours: Preparing for the MPRE** JD Advising; Law Student Division • Webinar
	Aug. 17	**Fidelity and Surety Law 2022 Midwinter Conference** Location: **Nashville, Tennessee** Tort Trial and Insurance Practice Section • CLE
	Aug. 23	**Maintaining Ethical Standards in Your Law Office Technology** Law Practice Division • CLE • Webinar
	Aug. 30	**E-Discovery Best Practices** Business Law Section • CLE • Webinar
	Sept. 7-9	**8th Annual Southeastern White Collar Crime Institute** Location: **Braselton, Georgia** Criminal Justice Section • CLE
	Sept. 13	**Laws on Buying and Selling Art and Collectibles** Section of Intellectual Property Law; Forum on the Entertainment and Sports Industries; Solo, Small Firm and General Practice Division • CLE • Webinar
	Sept. 13-15	**2022 ILS Madrid Fall Conference—Europe and the Americas—Synergies and Challenges** International Law Section • CLE • Webinar
	Sept. 15-17	**Business Law Hybrid Section Annual Meeting 2022** Location: **Washington, D.C.,** and online Business Law Section • CLE
	Sept. 20-22	**2022 National Conference for Lawyer Assistance Programs** Location: **Washington, D.C.** Commission on Lawyer Assistance Programs • CLE

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Short URL: ambar.org/abainsurance

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Aug. 2, 1790

US Conducts First Constitutional Census

BY ALLEN PUSEY

When the U.S. Constitution was approved in 1787, one of its first requirements was a government head count of the nation's population—to occur within three years. The task was important enough to be included in Article 1, Section 2, which follows just after a short description of Congress itself.

The count, to be carried out every 10 years thereafter, would determine the makeup of the House of Representatives as well as the basis of federal policies toward the first 13 states, the Southwest Territory (now Tennessee) and the districts of Kentucky, Maine and Vermont.

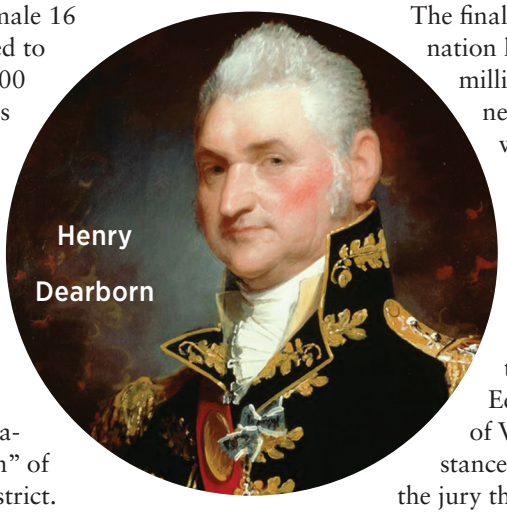
Congress assigned the task to President George Washington, who delegated it to Thomas Jefferson, his secretary of state. Both believed the constitutional head count was important to establish the nation's credibility to the rest of the world. The plan that emerged was to have the actual population count conducted by U.S. Marshals Service, the federal law enforcement agency established by the Judiciary Act of 1789. The marshals conducting the survey were presidential appointees, some of them Washington's personal friends and allies.

The Census Act of 1790 authorized funds for the marshals and gave them nine months to complete their task. The marshals deployed deputies on foot and horseback to do the actual counting. By the end of the census, which had to be extended for some states, 1,650 enumerators were used at a cost of $25,727.67.

Unlike the detailed questionnaire of a modern census, the goal of the six questions in the first census was to count every inhabitant of the various areas as of Aug. 2, 1790.

It placed those inhabitants in one of five categories: "free" white males 16 years and above; free white males under 16; free white females; all other (meaning nonwhite) free people; and slaves. "Indians not taxed" were excluded from the count.

The integrity of the count was backed by civil penalties: a $20 fine for any free white male 16 or older who refused to cooperate and a $200 fine for enumerators who failed to file their reports or who willfully filed an inaccurate count. Each marshal was required to swear under oath that he would file "a just and perfect enumeration and description" of the people in his district.


Henry Dearborn

For the fast-growing nation, the scope of the census was a moving target.

Maine was still part of Massachusetts. Rhode Island hadn't yet ratified the Constitution when the Census Act passed. Vermont became a state in March 1791, so its census was taken later in the year. The District of Columbia was not created by Congress until July 1790, so its inhabitants were counted as citizens of Maryland.

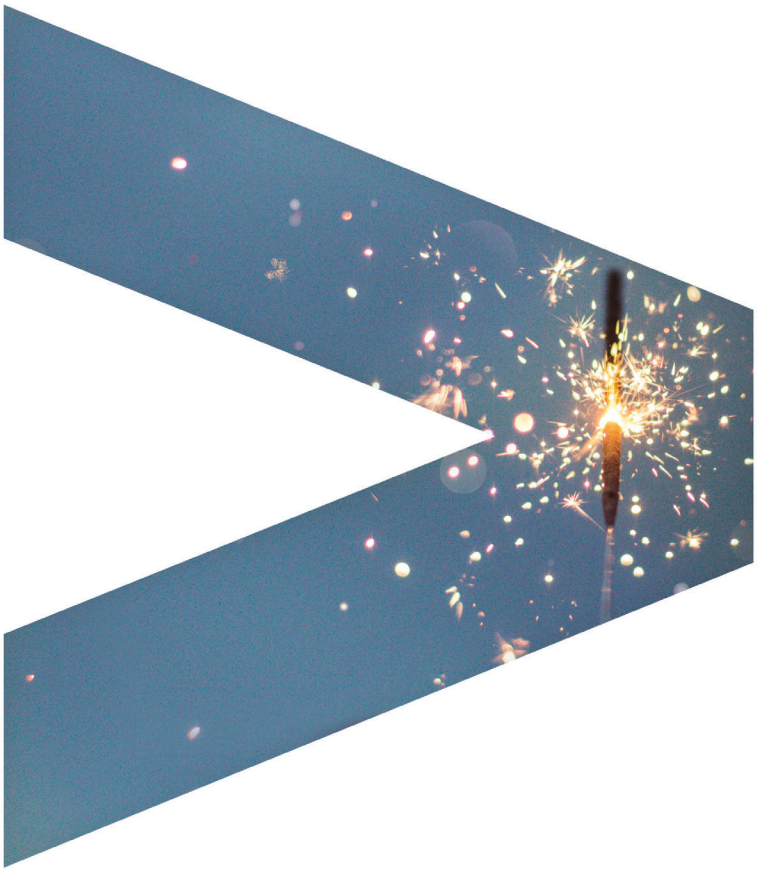
Who's counting?

The compressed timeline for the count produced vastly different styles of operation among the marshal-enumerators. Henry Dearborn, a hero during the American Revolution and later Jefferson's secretary of war, personally counted the inhabitants of at least 23 towns in three counties in Maine. Isaac Huger, a longtime personal friend of Washington, failed to meet the census deadline for South Carolina and had to secure a congressional extension to avoid an $800 fine. Under Thomas Lowrey, a businessman, New Jersey was first to deliver its census report in April 1791. And under Clement Biddle of Pennsylvania, several census enumerators included occupations as part of their count, an economic indicator formally included in the 1810 national head count.

The final tally showed the nation had more than 3.9 million inhabitants, nearly 18% of whom were classified as slaves.

Several of the marshals aside from Dearborn gained later historical fame beyond their census duties. Edward Carrington of Virginia, for instance, was foreman of the jury that acquitted Aaron Burr of treason in 1807.

William Blount, who as territorial governor was the only nonmarshal involved in the census, became the first senator impeached by Congress. And Robert Forsyth, who evolved his political appointment in Georgia into a more traditional law enforcement role, was shot dead in 1794 while serving a civil warrant, becoming the first federal law enforcement officer killed in the line of duty. ■



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Congratulations to our Outside Counsel Diversity Awards winners for advancing inclusion and diversity—Baker McKenzie, Allen & Overy, McDermott Will & Emery, Lewis Silkin, and Osler, Hoskin & Harcourt LLP.

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