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THE LAWYER'S MAGAZINE

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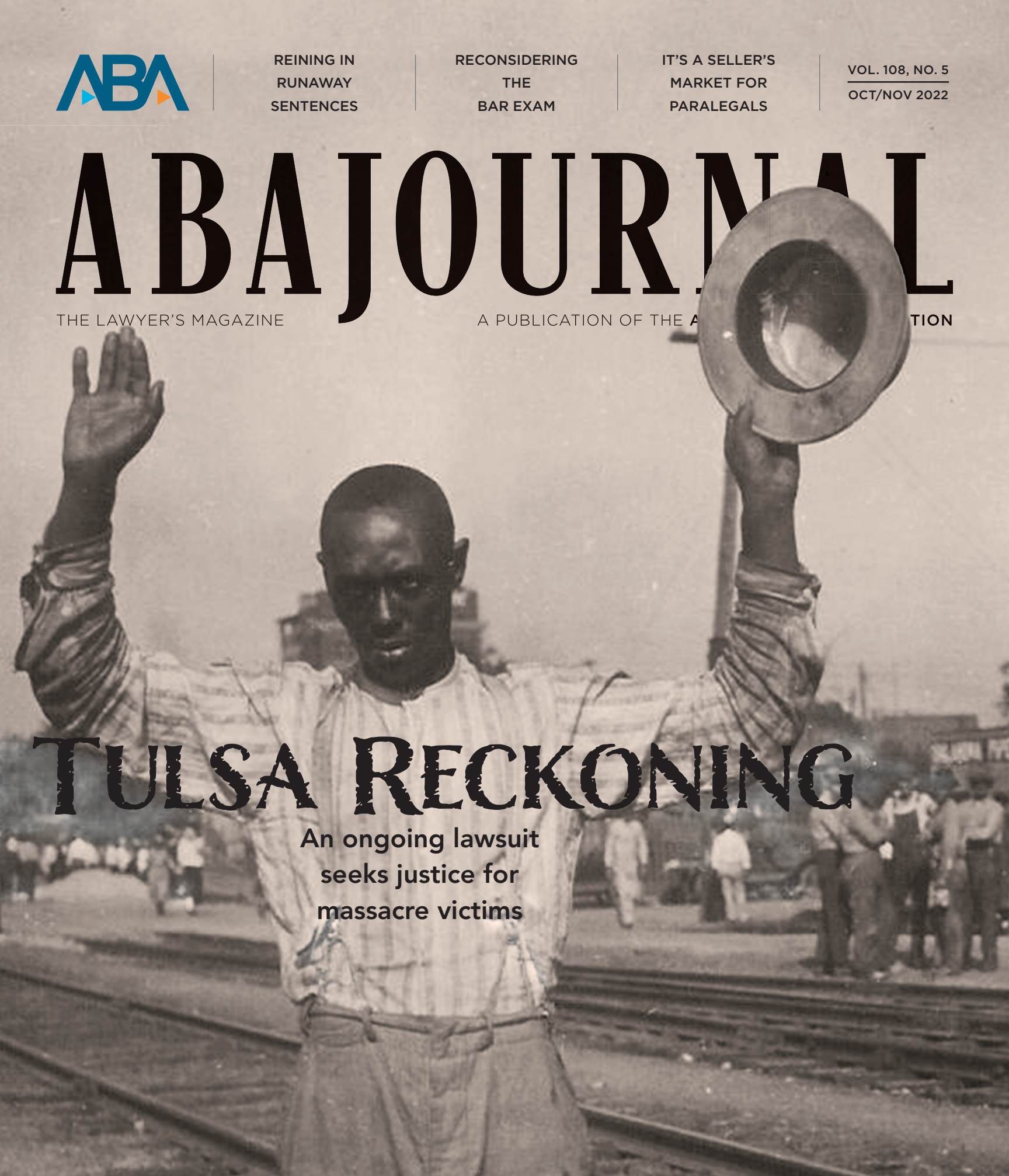

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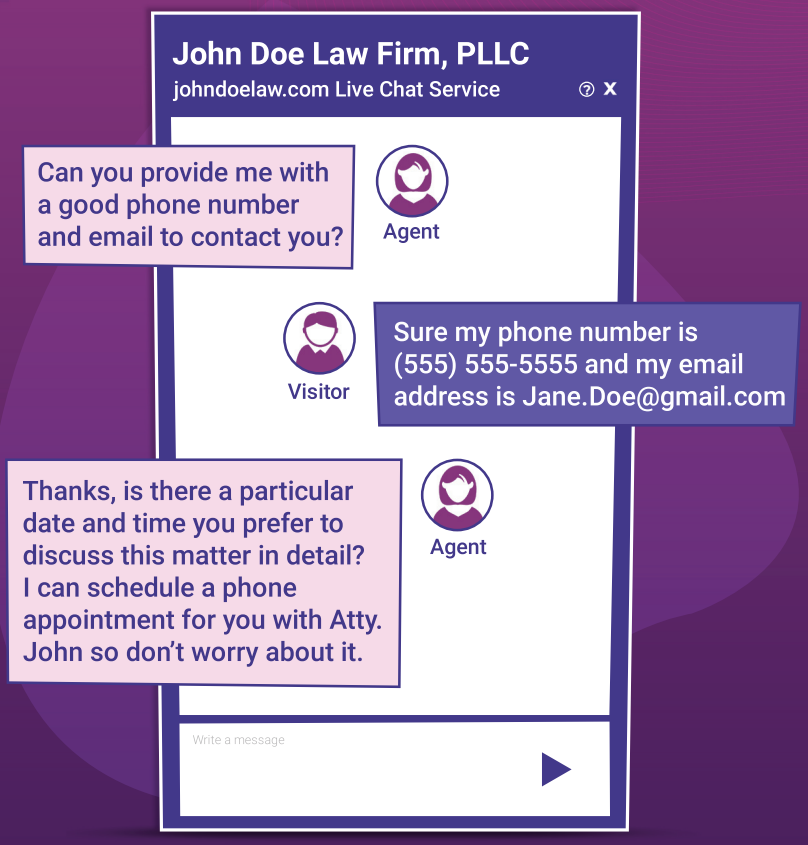

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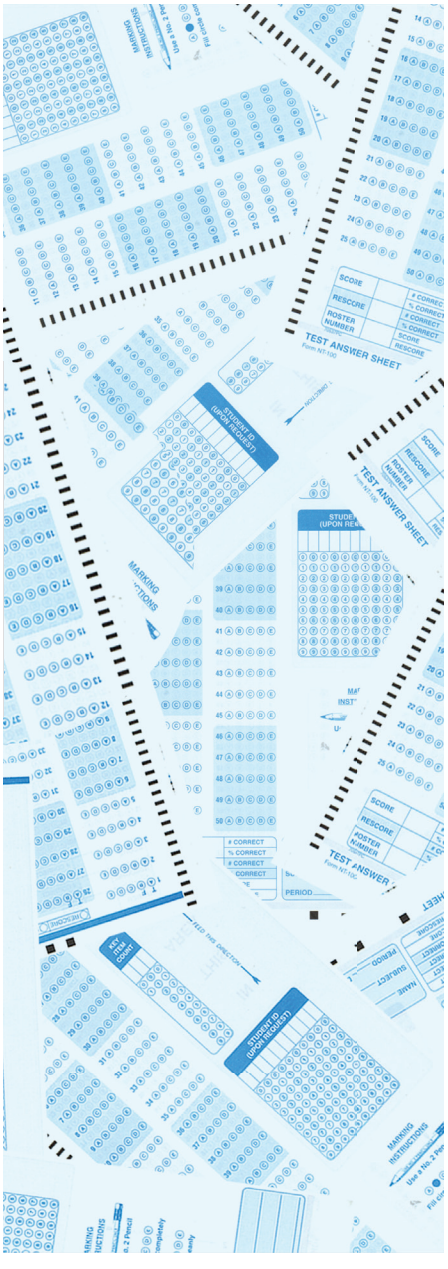

INSIDE

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In This Issue

ABA Giving Day

Advancing Democracy, Equity & Justice

Save the Date: October 27, 2022

ABA Giving Day is your opportunity to support charitable programs that advance democracy, equity, and justice across the country! Over 15 ABA programs and entities will be featured that uphold the rule of law, diversify the profession, and provide free legal services.

Democracy

- Commission on Immigration
- Rule of Law Initiative
- Section of State and Local Government Law
- Section of Civil Rights and Social Justice

Equity

- Commission on Women in the Profession
- Commission on Sexual Orientation and Gender Identity
- Judicial Division
- Legal Opportunity Scholarship Fund
- Litigation Section

Justice

- Commission on Law and Aging
- Criminal Justice Section
- Commission on Homelessness & Poverty
- Section of Environmental, Energy, and Resources
- Section of Taxation
- Standing Committee on Pro Bono and Public Service

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Fund for Justice and Education

ABA Giving Day is sponsored by the ABA Fund for Justice and Education, the charitable arm of the Association. Held in conjunction with the National Celebration of Pro Bono — a time that recognizes the collective power of free legal services — ABA Giving Day promotes multiple ways you can help ensure a just society.

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Agree to Disagree

Civics, civility and collaboration can guide us to a better society

BY DEBORAH ENIX-ROSS

In the 18th century, John Wesley, the English founder of Methodism, had a feud over doctrine with his colleague George Whitefield that split their followers. But despite their differences, the two remained friends and concentrated on their common goals.

Before Whitefield passed away in 1770, he had asked that Wesley deliver the memorial sermon. In it, Wesley summed up their relationship, writing, "There are many doctrines of a less essential nature … In these, we may think and let think; we may agree to disagree."

"Agree to disagree" is what lawyers do around negotiation tables every day. We do it in mediation, in arbitration and in courtrooms after a judge has heard both sides and issued a ruling. "Agree to disagree" is what we should do in the big tent that encompasses the diversity of membership in the American Bar Association.

Today, our country is divided over many issues. This division manifests itself in the workplace, on school boards, in courtrooms and in threats against law enforcement and our judges. It is worth noting, however, that different opinions and ideas have always existed. When these ideas are freely and respectfully debated and listened to, the process can make our country stronger.

Instead, the level of animosity and division has reached a point where neighbor is attacking neighbor and even family members are turning on each other. We have seen attacks on the justice system, the norms of our democracy and the rule of law.

Our differences are aggravated by incivility in public discourse and a general lack of understanding of civics.

But lawyers can help. We are uniquely positioned to lead the way in promoting civics, civility and collaboration—the cornerstones of our democracy—to restore confidence in our democratic institutions and to protect the rule of law. Lawyers appreciate that although our differences may be stark, we know how to work together to resolve them. We know how to agree to disagree. The ABA House of Delegates demonstrates this process of expressing our viewpoints but also listening to those of others.

Model behavior

Lawyers can model the behavior we wish to see, and the ABA has the resources and ability to embrace this role. And we will make it a focus of this coming year.

We will have leadership from our new Commission on the Cornerstones of Democracy. We have built collaborative networks of state and local bars and civic organizations, and we have the policies to advocate for a more just society. We have developed a conversation guide for state and local bar associations—and civic, professional and government organizations—to use in programs that will model civil discourse on hotly contested issues.

We will feature civics and civility programming at events throughout the 2022-2023 bar year. Also, we will collaborate with other legal organizations on programming and activities.

In August, we kicked off our events with a program at the University of Miami, my alma mater, titled "Journalism and Civility as Cornerstones of Democracy," where the importance of civility in journalism was discussed.

We will concentrate our Cornerstones program not just on lawyers, but across all professions because this has become a societal problem.

Civics and civility also will be the focus of the national programming and resources for Law Day in May, and questions will be added to our annual ABA Survey of Civic Literacy.

Americans can listen to each other and accommodate differing views. Collaboration and civility will be critical as the ABA and lawyers everywhere begin to understand the profound changes in law and society that we are now witnessing.

Through careful consideration of all sides, lawyers can turn down the heat and increase the light we need to bridge our differences. More than ever, this will require us to model generosity in our thoughts and behaviors as we respect views beyond those that give us immediate comfort and self-assurance.

As we tackle our serious modern problems and search for solutions, perhaps we can take heed of advice from 250 years ago and "agree to disagree." ■

Photo by Harvey Tillis

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!

Use Professional Video Effects

ATEM Mini is really a professional broadcast switcher used by television stations. This means it has professional effects such as a DVE for picture in picture effects commonly used for commentating over a computer slide show. There are titles for presenter names, wipe effects for transitioning between sources and a green screen keyer for replacing backgrounds with graphics.

Live Stream Training and Conferences

The ATEM Mini Pro model has a built in hardware streaming engine for live streaming via its ethernet connection. This means you can live stream to YouTube, Facebook and Teams in much better quality and with perfectly smooth motion. You can even connect a hard disk or flash storage to the USB connection and record your stream for upload later!

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With so many cameras, computers and effects, things can get busy fast! The ATEM Mini Pro model features a "multiview" that lets you see all cameras, titles and program, plus streaming and recording status all on a single TV or monitor. There are even tally indicators to show when a camera is on air! Only ATEM Mini is a true professional television studio in a small compact design!

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Letters From Our Readers

Real effect of overruling *Roe*

I was disappointed in the column titled "Blowing Up *Roe*," August-September, page 23. It maligned individuals with differing views, disrespected six U.S. Supreme Court justices and used inflammatory language. As attorneys, we are expected to treat each other civilly and not base our judgments on raw emotion.

From our nation's beginnings, the founders placed a high value on life. The Declaration of Independence pronounced that we have certain unalienable rights, including "life, liberty and the pursuit of happiness." It stated the role of government is to "secure these rights." Later, these values were reflected in the civil and criminal law.

Prior to *Roe v. Wade*, virtually all states protected the lives of unborn children except to preserve the lives of the mothers and in instances of rape or incest. *Dobbs v. Jackson Women's Health Organization* traced this 185-year history.

It is a mischaracterization to state that "conservatives" are concerned only with life in the womb and not after birth. For example, pregnancy care centers provide assistance for mothers both before and after the child's birth; churches provide food and clothing drives; and Safe Haven/Baby Moses laws allow a mother to give up her child without penalty.

Language such as "blowing up *Roe*" and a "slippery, bloody slope" do not provide the proper legal framework. Courts do not "blow up" anything, but they will overturn precedent when it is incorrectly decided or no longer just.

Dobbs was a thoughtful opinion that provided a detailed discussion of legal history concerning abortion; articulated how the court decides if a right is a fundamental right; addressed the standard for overruling one of its precedents; and provided extensive footnotes.

Dobbs did not end abortion. The court returned the abortion issue to the states, where it historically had been. States appropriately decide medical issues because legislatures can hold hearings, obtain the latest medical information and review advances in medical technology to determine whether the law needs to be updated to reflect medical science.

As the high court stated in *Dobbs*, *Roe* did not end the abortion debate. Both liberal and conservative justices have long recognized that it fueled the debate. By returning the issue to the states, the court respected the democratic process. The people through their elected representatives can decide the abortion issue; determine what regulations, if any, should apply; and how to support women and their unborn or born children.

Linda Schlueter
San Antonio

Abortion travel benefits

None of us is surprised that Americans hold widely differing views about the morality of abortion, nor is anyone surprised that employers might consider responding creatively to the U.S. Supreme Court's *Dobbs v. Jackson Women's Health Organization* opinion by modifying employee benefits. ("Law firms aiding staffers to secure abortions in post-*Dobbs* world see possible risks and rewards," ABAJournal.com, July 26.) It would be surprising, though, if members of the ABA fail to think like lawyers about what the law actually permits.

May an employer lawfully provide fringe benefits for abortion that it does not provide for nonabortion-related medical needs? Equal Employment Opportunity Commission pregnancy discrimination guidance—issued under the Obama administration—clearly states that Title VII of the Civil Rights Act of 1964 prohibits discrimination against an employee "based on her decision not to have an abortion." It also states, "If an employer decides to cover the costs of

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abortion, it must do so in the same manner and to the same degree as it covers other medical conditions."

There is good reason for this guidance. The employer's provision of abortion travel expense is being discussed as a humanitarian gift, a protection of civil rights; but in fact, an employer may have perverse incentives to facilitate abortion, since its employees who have abortions may take less leave and may generate lower health care costs than its employees who give birth to children. An employer with its eye on the bottom line would, for the same reasons, incentivize sterilization if it could make that appear benevolent. For the cynical employer, fertility is a bug and not a feature in its female employees. An ostensibly pro-choice position—this time, the abortion travel benefit—can ironically suppress choice and instead coerce a pregnant woman to abort.

Title VII does not permit an employer to give cash awards to employees who abort without also providing the same cash payments to employees who wish to become pregnant, or to maintain a pregnancy to childbirth, or to obtain maternal and/or fetal health care.

Many women who suffer from infertility or miscarriage—and women whose unborn children have serious medical conditions—desire medical care that they cannot obtain without incurring the costs of travel.

Title VII neither requires nor precludes an employer's provision of abortion coverage. But it does not permit an employer to discriminate on the basis of an employee's intention to continue rather than to terminate a pregnancy.

And pregnancy discrimination under Title VII is by no means the only issue to which lawyers should be alert. Their employer-clients also should be warned that the Americans with Disabilities Act may require an employer that provides special benefits for abortion to provide equivalent benefits for the health concerns of disabled employees.

Pregnancy, childbirth and abortion are not job-related. In America, employers, like employees, are permitted to hold widely differing views about these issues. But the law requires that employers not discriminate on the basis of the choices that a pregnant employee makes.

Sharon Fast Gustafson
Arlington, Virginia

Correction

"Succession Planning," August-September, page 63, should have stated that Janet Goelz Hoffman went to law school before her marriage to Brian Hoffman.

The *Journal* regrets the error.

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.

SPONSORED COLUMN

Insights with Jack Newton

Leading the Vision for Legaltech

By Jack Newton

The legaltech industry has grown significantly in recent years, resulting in substantial investment and consolidation. In the last three years alone, Clio led these trends, raising a combined $360 million in Series D and Series E investment rounds, the latter resulting in a $1.6 billion valuation.

Most recently, we announced Clio's centaur status—a title reserved for private companies that achieve more than $100 million in annual revenue. This success has helped us shape the investment and acquisition space for legaltech by investing heavily in our partners.

When we launched in 2008, Clio was the first cloud-based practice management system, and we've been leading the industry ever since. We had a bold vision for legal—one that many thought was impossible at the start. Yet, today, the cloud has since become pervasive in every aspect of legal—with Clio being the de facto operating system for small to medium sized firms.

Expanding practice management with built-in payment processing

It's been one year since we launched Clio's native payments platform, giving law firms more seamless payment experiences in Clio.

It's been one of our biggest, most successful feature launches, and we did it because law firms want payment processing capabilities that are deeply rooted within their wider collections processes. By adding these features into Clio's billing capabilities, we've made collections easier and more efficient for both lawyers and their clients.

The response from our customers has reinforced our decision. We've seen rapid adoption among both new and existing customers, and their feedback has been overwhelmingly positive.

Building a unified experience in Clio

Seamless and frictionless product experiences will define the future of legaltech. Legal professionals today want solutions that are more connected. The launch of Clio Payments is an example of how we're giving customers more of what's essential to running a profitable legal practice—all within Clio.

To date, our focus on the needs of our customers—and the needs of their clients—has contributed to so much of Clio's success in building the only legal operating system that is easy-to-use, affordable, and comprehensive of what's needed to run a law firm.

That's why, in addition to building the highest-rated practice management software—we've also invested in advancing the industry's best client intake, court calendaring, and document automation capabilities within the Clio platform.

The legaltech platform for law firms to build on

Clio remains the only true platform in legaltech. This means that our customers have the ability to customize Clio with over 200 specialized app integrations.

Since starting Clio, we've worked with countless lawyers. We know how important it is for many firms to be able to customize workflows to specific firm goals. We also know that many areas of legal practice require unique capabilities to manage and execute against specific legal procedures and areas of expertise.

To further enable the many customizations available to our customers, we continue to invest in our partners through the Clio Ventures program and the annual Launch//Code developer contest. We also connect the wider legaltech market each year at the Clio Cloud Conference—an event that has grown to become the largest, most exciting legal conference in the world.

Leading the market

Clio has been leading a vision for cloud-based legal technology that is set on furthering law firm success. It's a vision I've been personally invested in from day one.

Looking forward, customers can expect to see us advance Clio's core functionalities, while continuing to invest in our partners, as we build a lasting 100-year company that will transform the legal experience for all.

Clio is the largest, most trusted brand in legaltech, and we'll continue to trailblaze our vision for a cloud-based and client-centered future for legal.

If you're at all interested in learning more about what we're building—or how Clio benefits law firms—I highly encourage you to reach out to someone on our knowledgeable and passionate team.

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

edited by
VICTOR LI
victor.li@americanbar.org

LAW FIRMS

In Demand

Thanks to hybrid and remote work, the paralegal market is red-hot

BY STEPHANIE FRANCIS WARD

With virtual office platforms, you can see whether colleagues are available to chat, eat lunch together as avatars sharing a cyber picnic table or exchange ideas on interactive whiteboards.

These programs are meant to help build teamwork and office camaraderie while increasing productivity, but some lawyers make the mistake of using the platforms to micromanage staff.

"What an attorney was doing was taking the technology, and if their staff wasn't there on the dot, they'd say, 'I saw you got in at 8:01,'" says Stacey Lake, an inactive paralegal and business owner whose work focuses on nonlawyer legal staffing.

These days, that's not a successful strategy for retaining support staff, who have seen significant growth in available jobs, with employers willing to pay significantly more and let them work from home as much as they want, Lake says. She adds that paralegals and other nonlawyer employees—she refers to both as "teammates" rather than staff—are in high demand, and many employers are having a hard time hiring and keeping them. It's a seller's market for paralegals.

According to the U.S. Bureau of Labor Statistics, employment of paralegals and legal assistants is expected to grow 12% between 2020 and 2030, and that's faster than the average for all occupations.

The agency estimates that the median annual pay for those jobs in 2021 was $56,230.

In the Los Angeles area, Lake says, the annual salary for paralegals with 10 or more years of experience now ranges from $65,000 to $120,000. Remote work arrangements, which were uncommon pre-pandemic, today are nonnegotiable for many candidates, according to Lake and others.

That's been hard for some lawyers to accept.

"There is a big control aspect, and sometimes attorneys have trouble trusting the team. They are operating under the risk of malpractice, so I'm sure that fear drives the control," says Lake, add-

Photo illustration by Sara Wadford/Shutterstock

Stacey Lake: It's a bull market for paralegals and nonlawyer employees.

ing that rather than focusing on where and how much someone works, lawyers should think about their own goals and how the people they supervise can help meet them.

Pre-pandemic, median annual salaries for paralegals ranged from $50,000 to $52,000 nationally, according to Carl Morrison, director of legal operations for MGM Resorts International/The Cosmopolitan of Las Vegas. He also serves on the ABA Standing Committee on Paralegals' Approval Commission.

He's seeing an uptick in remote paralegal positions, including at in-house legal departments.

There are "old-school lawyers" who want to print everything out, but a growing number of attorneys embrace technology, says Morrison, who thinks paralegals working remotely often do more than if they were in a physical office.

"Paralegals I have spoken with about this topic agree that it's easy to squeeze in a little extra work after they've put a child to bed at night, or in between doing laundry or other household tasks," Morrison adds.

Here to stay

Acceptance of remote work tends to vary by industry, according to Barbara Larson, executive professor of management at Northeastern University's D'Amore-McKim School of Business. For work centered on regulation, including the practice of law, there tends to be more reluctance, she says.

"Anything that involves high levels of sensitivity or secrecy, there would be more resistance and more concern that remote cannot be done well. That shift of mindset is a bigger stretch," adds Larson, whose work includes a 2020 *Harvard Business Review* article titled "A Guide to Managing Your (Newly) Remote Workers."

For the long term, Larson thinks that many employers will have hybrid work models in which employees are physically in the office a few days per week. She says she'd be surprised if most employers go back to requiring people to work out of a physical office five days per week for jobs that don't require a physical presence.

Molly McGrath, who does paralegal recruiting work and advises law firm management on hiring and training support, is launching a book in January titled *Fix My Employees*.

"That's what I hear from attorneys all the time. Here's the deal, though—they really need to be on high alert for retaining employees," says McGrath, adding that many sought-after paralegals are interested only in jobs that don't require going to an office.

She also claims legal employers tend to have a poor framework for employee communications and feedback, and

Hybrid and remote work options are here to stay—even in the legal industry, according to Barbara Larson.

Photos by Vail Fucci Photography; courtesy of Stacey Lake

Maintaining open lines of communication is vital—especially in a virtual/remote practice, Molly McGrath says.

remote work often draws attention to the problem.

McGrath hears two frequent complaints from paralegals: Client files get backlogged with lawyers, and it's hard to get attorneys' attention or feedback. So if lawyers fear long-term remote work arrangements could lead to a breakdown in staff communications, the problem may already exist with their workers in the office, according to McGrath.

She adds that daily check-ins and respect can go a long way with workers. Check-ins are easily done remotely with videoconferencing software and cloud-based communication tools.

"Employees simply value time, attention, feedback and leadership over money. When you hire right and provide employees with consistent, intentional time and leadership, they will never leave," she says. ■

MIND YOUR BUSINESS

Silver Lining

How law departments can survive or even thrive in the event of a coming recession

BY BARRETT AVIGDOR

The pandemic's global economic and human impact has created new challenges for in-house legal teams. Supply chain disruptions, sharp increases or decreases in consumer demand, and the impact of uncertainty surrounding remote work options have pushed in-house legal teams to rethink the work they are doing and how they are doing it.

It is widely anticipated that the U.S. economy is headed toward a recession. Consumer prices and the cost of living are rising, and when coupled with a tight labor market, hiring is becoming even more challenging for many industries. As these stresses affect companies, their in-house legal teams also suffer a significant impact.

Economic downturns

The impact of changing business practices on legal teams depends on the businesses they support. For example, some companies may chase riskier customers, possibly resulting in an increase in contracting and litigation volume. Other companies may respond to a drop in consumer demand by aggressively cutting costs, forcing general counsel to find ways to generate savings quickly. These challenges present legal leaders with opportunities to demonstrate their ability to think and act as effective business leaders.

Business-focused approach

In a business downturn, the general counsel must adjust legal strategy in a

way that is aligned with the business yet continues to anticipate and manage risk appropriately.

The legal team needs to be part of the solution that allows the business to survive and thrive during and after this period of upheaval. The most successful legal teams will use this opportunity to align more closely to the business and become nimbler and more responsive than before. In-house legal teams that demonstrate the ability to truly solve business problems rather than simply identify legal issues will be well positioned to weather the current economic turbulence.

Like any good business leader, a general counsel should make decisions about how to respond to economic changes based on data. When there is pressure to cut costs, it is easy to point to legal as a cost center and demand an across-the-board reduction. It is up to the general counsel to focus on the value delivered by legal and make informed decisions about how to continue delivering that value in a more cost-effective way.

Conducting an audit of the current coverage your team is providing—and who is doing which work—is a good starting point.

You want to ensure you are leveraging talent and technology to deliver services as efficiently as possible. By categorizing work based on the level of legal complexity, need for understanding of the business and level of risk, you can make informed decisions about how best to deploy resources.

It's very difficult to conduct these audits internally. The legal department does not have the objectivity or the time to do them, and the human resources team is not familiar enough with the details of legal work to categorize it accurately.

To help you to maximize this opportunity, an external expert can conduct the audit, categorize the work, and provide recommendations for how best to align people and technology to do the work.

The expenditure on an outside consultant to conduct this type of audit should be more than offset by the savings generated by redistributing work to the lowest competent level and by the retention of high performers who will benefit from seeing more strategic work.

Barrett Avigdor: Auditing your team's coverage is a good starting point.

Agility and adaptability are key. As you design a response to current economic changes, you want to put in place solutions that can be scaled up and down to respond to future changes. This means identifying and working to retain your key people, utilizing contract lawyers and outside counsel where appropriate, and leveraging technology, such as artificial intelligence-driven matters management systems or data-driven vendor software.

Upheaval creates opportunity

Market changes and pressures put stress on businesses and the legal departments that support them. Legal leaders who take a passive approach generally end up looking less like business leaders and more like managers of cost centers that are ripe for budget cuts. Developing and implementing a business strategy for your legal department can help you navigate current market turbulence and come out with a stronger, more agile legal team. It also positions the general counsel as a business leader, not just a lawyer.

Here is a checklist to help you develop a smart business strategy to help your legal team navigate an economic downturn:

1. **Start with data.** Conduct an audit to know who is doing which work. Scrutinize your outside counsel spending as well to look for opportunities to push work to a lower-cost resource. Gather data to inform and support your decisions.
2. **Analyze your team's value proposition.** Economic upheaval drives changes in the business and in what the business needs from legal. Be sure you are clear on the value that legal brings to the business, and focus resources on the highest-value-add activities.
3. **Be sure you identify your key players and keep them engaged.** Your strongest performers are the people who will get the team through difficult times and provide agility to respond to more changes ahead. Be sure you know who those people are and give them the kind of work that keeps them engaged and growing.

Barrett Avigdor is executive director of the in-house counsel recruiting and advisory services groups at Major, Lindsey & Africa.

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

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6 Things I Wish I Learned in Law School

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This article originally appeared on the LawPay blog.

Being a lawyer is inherently stressful. The first few years of practicing law are arguably the most anxiety-inducing periods of your life (aside from 1L finals and the bar exam). As you enter the real world, you'll learn very quickly that law school did not teach you how to actually practice law.

But rest easy! Practicing law doesn't have to be as terrifying as it seems. Below is some advice from seasoned attorneys across the country from their years of experience (tips they wished they'd learned in law school).

1. **Learn how to work a case from start to finish.** From drafting a petition to filing it, getting it served, actually trying the case, and closing out the file, you need to know how to work an entire file without any help or support. This usually means sitting with a senior paralegal and observing, asking as many questions as possible.

2. **Your client's problems are not your problems.** It is easy to become emotionally invested in a case, especially in your first year of practice. To preserve your sanity, you need to divorce yourself from the emotions of the case. Just because your client is going through a tough time does not mean you need to, as well.

3. **Confirm everything with everyone via email.** Did a partner give you a deadline for a project? Confirm it via email. Did opposing counsel confer with you over the phone about a discovery deadline? Confirm it via email. Email is your best friend and will save you from many future headaches when people try to dispute events.

4. **Become comfortable talking about money.** It's inherently awkward to finish a phone call with a client by saying they owe money. But it's money they are obligated to pay, and you do not work for free. Keep a spreadsheet open all day and track your hours as you go. You should know at any time if any of your clients owe you money. If they have not paid their invoice, you should personally be following up with each non-paying client.

5. **Familiarize yourself with the most common objections and exceptions to hearsay.** Trying a case in a courtroom is an anxiety-riddled adventure. You can make it easier by memorizing the most common objections and exceptions to hearsay. Objection, non-responsive, and the hearsay exception of admission by the opposing party will become powerful tools in your kit.

6. **Every court has local rules - learn them.** Don't rely on the paralegals to know every rule of every court. Ultimately, it is your bar card on the line, and you bear the responsibility of blowing an arbitrary deadline imposed by the court.

Pressure and drama go hand-in-hand with the practice of law, especially for your first few years. However, by utilizing some of the tips outlined above, you can hopefully alleviate stress and become a better attorney in the process. Just remember—every attorney goes through this period in their legal practice. Have grace with yourself, and remember that you are not alone.

Legal Technology

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LEGAL TECHNOLOGY

Welcome to the Metaverse

Virtual worlds and Web3 are all the rage right now—but the law is stuck at Web1

BY LAURA LOREK

If a thief steals a CEO's avatar and makes an inflammatory statement while impersonating the executive that tanks the company's stock, that's a crime in the metaverse.

Or if a person sexually harasses another avatar in the metaverse, they could open themselves up to criminal or civil liability.

Avatars can be held liable, but cases will be difficult to prosecute with existing laws, says Jesse Lake, an associate at the New York City office of Latham & Watkins.

"Current laws have not been tailored to provide adequate recourse to the many transgressions that can occur in a virtual world," says Lake, who wrote "Hey, You Stole My Avatar!: Virtual Reality and Its Risks to Identity Protection," which was published in the *Emory Law Journal* in 2020.

The metaverse, a colloquial term for a network of immersive 3D virtual worlds; and Web3, a new iteration of the internet that includes virtual reality, augmented reality, mixed reality, cryptocurrencies, non-fungible tokens and more, are evolving to become another Wild West technology frontier where existing laws are hard to apply, legal experts say.

According to Lake, the problem is that the Communications Decency Act of 1996 has not been updated. The law was drafted in the early stages of the internet to help cultivate businesses and give them sweeping immunity from liability for things that happened on their platforms. But nearly three decades later, the law has not been adapted to deal with social media platforms or the metaverse.

"As these companies grew and they became trillion-dollar market cap companies, we didn't adjust for the liability," Lake says, adding that current law gives a strong judicial preference toward protecting the anonymity of anonymous online users and sweeping immunity for internet service providers and social media platforms.

The metaverse market is in its early stages, but Lake predicts there will come a time when people spend as much time in the metaverse as they do in the real world.

Early games like *Second Life*, *The Sims* and *Minecraft* already have created virtual worlds that people spend hours in every day. But an increase in computing power that allows for more immersive game play and the invention of new technologies like haptic suits that simulate physical sensations in the virtual world are making the experiences even more real, says Jason Epstein, a partner and co-head of Nelson Mullins' technology and procurement industry group.

"The law of the metaverse is following a similar pattern of earlier emerging technologies—from the dot-com era to cloud computing, electronic contracting, blockchain and now the metaverse. There will be some new laws created, but it will also be about the application of established law to this new technology," says Epstein, who is based in Nashville, Tennessee.

Trademark and copyright issues are among the first to have arisen in the metaverse, Epstein says. In a closely watched high-profile case filed in January, French luxury brand Hermès sued artist Mason Rothschild for trademark infringement after Rothschild created and offered NFTs in the metaverse featuring new designs and interpretations of Hermès' famous Birkin handbags. Additionally, in February, Nike filed a trademark infringement case against sneaker reseller StockX after the latter launched NFTs featuring Nike shoes. Both suits are pending in the U.S.

District Court for the Southern District of New York.

Big business, big problems

Some companies are investing billions of dollars in the virtual world. In October 2021, Facebook CEO Mark Zuckerberg announced the company was changing its name to Meta Platforms Inc. to focus on bringing the metaverse to life. Meta's Horizon Worlds, launched two months later, is a free virtual reality online video game that uses the Oculus VR headsets.

But Meta's Horizon Worlds will not be the only metaverse. There will be lots of virtual worlds available on a lot of other platforms. The global metaverse market was estimated at almost $39 billion in 2021; it is expected to rise to $47 billion this year and reach nearly $679 billion by 2030, according to a report by Statista, a German research firm.

"The pandemic has accelerated the use of platforms like the metaverse," Epstein says. "The pandemic has opened people's eyes as well as tolerance for doing things other than face to face. The early technology winners of the pandemic were Webex, Microsoft Teams and Zoom. What's driving the metaverse is it's a new economy and new digital world. And a whole new engagement of people to people."

That means problems that exist in the real world can be exacerbated in the metaverse. Consumers already complain about having their social media accounts stolen, but virtual reality and interactions in the metaverse take identity theft to a new level, says Rob Holmes, the founder and CEO of MI:33, a Plano, Texas-based private investigation firm.

"It's happening," Holmes says. The technology exists to scan a person's physical attributes and create a digital avatar with their likeness. Some of those avatars of real people are being sold in virtual marketplaces. Celebrities are the main targets, but it can easily happen to anyone, Holmes warns. With avatars, criminals can commit all kinds of frauds, such as stealing credit card numbers, accessing personal information and tricking others into believing they are you.

> "This new virtual world poses many potential benefits, but obviously potential sources of harm and litigation as well."
>
> —Leeza Garber

In May, a researcher from nonprofit advocacy group SumOfUs reported that her avatar was raped by another avatar while using Meta's Horizon Worlds. In a statement, Meta says it does not allow that behavior in Horizon Worlds.

"Personal Boundary is on by default at almost four feet for nonfriends to make it easier to avoid unwanted interactions, and we don't recommend turning off safety features for people you do not know," according to Meta's statement. "We want everyone using our products to have a good experience and easily find the tools that can help in situations like these so we can investigate and take action."

So far, there hasn't been any litigation related to harassment or assault in the metaverse, says Leeza Garber, a consultant and attorney specializing in cybersecurity and privacy law. She is also an internet law lecturer at the University of Pennsylvania's Wharton School. "This new virtual world poses many potential benefits, but obviously potential sources of harm and litigation as well," she says.

New laws should be formulated concerning the metaverse, Garber adds. She recently taught an online course for the Practising Law Institute titled "Misconduct in the Metaverse: Can Your Avatar's Actions Get You Arrested?" The answer is yes, she warns.

"The legal community must address Web3 and the metaverse in order to help build a safe and ethical playing field," she says.

Not foolproof

The issue of misuse of avatars in the virtual world is of great interest to companies using virtual reality for training and the metaverse for meetings, Garber says. The metaverse has ignited the interest of law firms and corporate counselors, and several law firms and departments have set up practices specializing in the nascent technology while utilizing it for marketing purposes. Meanwhile, the Walt Disney Co., Gucci, Nike and other companies are creating high-level executive positions to focus on the metaverse.

"While some argue that the hype surrounding the metaverse is larger than the actual growth of the space, the legal community is becoming aware of the way in which we will have to translate and apply settled law into a completely new sphere because many companies are staking their claims in this new world," Garber says.

People also will have a variety of avatars in the metaverse just like they have a variety of email accounts currently, says Neil Elan, senior counsel at Los Angeles-based Stubbs, Alderton & Markiles. In many cases, the avatar looks nothing like the person.

Celebrities including Mark Cuban, Serena Williams, Justin Bieber, Jimmy Fallon and Madonna use NFTs of cartoon apes designed by Bored Ape Yacht Club as their avatars on social media accounts. An NFT avatar is an authenticated record of property recorded on the blockchain and tied to a digital wallet, Elan says. That makes the avatar more secure and difficult to steal. Yuga Labs, the creators of Bored Ape Yacht Club, is also creating a metaverse called Otherside.

But blockchain is proving that the old scams still work on the new technology. Actor Seth Green tweeted in May that four of his NFTs were stolen, including a Bored Yacht Ape Club NFT. Green says he was the victim of a phishing scam.

"For at least a decade, courts are going to struggle. They are going to use the current legal framework," Elan says. "The next 10 years are going to be really messy. Over time, there is going to be a new set of laws." ■

Starting Your Own Law Firm Checklist

☑ 1 Choose your practice area

Select an area of law to practice considering both your ideal work environment and long-term career satisfaction. Explore underrepresented fields of law.

☑ 2 Name your firm

Individual states will have varying requirements for naming law firms. Generally, the name of an owner or partner must be included in the title of the firm.

☑ 3 Obtain the necessary licenses and permits

Determine if your state requires you to establish your firm as a business entity and which type of entity you qualify for:

1. Sole Proprietorship
2. General Partnership
3. Limited Liability Partnership
4. Professional Service Corporation Professional Association
5. Professional Limited Liability Company

☑ 4 Open bank + trust accounts

Set up your business's accounts and secure malpractice insurance, if necessary. This includes:

- Operating Account
- IOLTA
- Non-IOLTA Trust Account

☑ 5 Sign up for business insurance

Check your state's rules on professional liability coverage and consider protecting your firm with professional liability insurance. This could include:

- Professional Liability
- Workers' Compensation
- Health Insurance
- Property, Casualty & Cyber Insurance

☑ 6 Calculate costs + business expenses

Create a budget that suits your personal and business needs. Consider the following variables:

- Hourly rate/daily income
- Anticipated overhead
- Personal budget/living costs
- Work schedule/bandwidth

☑ 7 Establish your hourly rate

Determine your baseline rate by dividing your expenses by the number of billable hours you will work. Not all hours spent on the business will be considered billable hours. This can be calculated for weekly, monthly, or annual budgets. Research the rates of other lawyers in your area with your similar levels of expertise to better contextualize your hourly rate.

☑ 8 Find an office/workspace

Decide whether a physical or virtual office will best suit your practice and clients' needs.

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Tabs3
Reliable Software. Trusted Service.

BY DAN BERLIN

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Dan Berlin is the President and CEO of Software Technology, LLC, the maker of Tabs3 Software. He has been at the forefront of legal technology for over 35 years. In addition, he is a member of several national legal industry advisory boards and has been a speaker and panelist at national and regional conferences.

Practice Matters

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YOUR VOICE

‘Right’ your future

Take a self-deposition to steer your retirement strategy

BY STRATTON HORRES

You might be grappling with questions around retirement, or perhaps you’re feeling the effects of practicing law in challenging times. If you’re feeling out of sorts in your practice, retirement plans or personal life, may I suggest a solution that worked for me? Look no further than your own legal training and experience.

When I struggled with my retirement strategy, I took a self-deposition to prioritize my goals, and through this process of self-interrogation, I discovered the answer was to retire in stages.

The ‘right wall’

One of my heroes is Joseph Campbell—author of *The Power of Myth* and a professor of literature at Sarah Lawrence College for 38 years—who spent his life studying and teaching comparative mythology. Campbell urged his students to follow their “bliss.” He also famously said, “There is perhaps nothing worse than reaching the top of the ladder and discovering that you’re on the wrong wall.”

Well, how do you find your own “bliss” and the “right wall”?

You can find it through self-examination that leads to self-discovery! Lawyers are trained in the Socratic method, a question-and-answer process for achieving knowledge. And that’s exactly what trial lawyers do in depositions—undertake an interrogation process that gets to the truth of the matter. So why not depose ourselves to get to our own truths? After all, the very process is called discovery!

The self-deposition

I have developed a self-deposition framework based on more than 40 years of trial experience that can help lawyers and others find their bliss—in other words, help us to set our ladders against the right walls.

The oral deposition is perhaps the most valuable tool in a trial attorney’s arsenal. We recount depositions as evidence at trial or to impeach witnesses who try to change testimony. In a deposition, a witness is placed under oath and questioned about the facts of a case by skilled attorneys. It is a very formal legal proceeding, and a certified court reporter takes down every word. After the oral deposition is completed, a written line-by-line transcript is generated and sent to the witness to sign before a notary. The penalty for not answering the questions truthfully can be criminal perjury.

The process

Admittedly this is a daunting exercise, just like a legal deposition but intensely personal. One afternoon, I closed the door to my study, took out a few sheets of paper and took my own deposition. Before I started, I promised myself that I would be completely honest.

I fashioned an oath similar to the one a witness takes on the stand with the right hand on the Bible: “I swear to tell the truth, the whole truth and noth-

Photo illustration by Sara Wadford/Shutterstock

ing but the truth." My personal deposition involved five distinct steps:

1. Create a narrative based on the issue on my mind to frame my questions.
2. Pose a series of basic but broad-sweeping questions.
3. Reflect on the first two steps, and then repeat step No. 2 with more direct and pointed follow-up questions akin to a cross-examination designed to dig deeper still and gain more insight.
4. Reflect further on the second set of answers, and then compare the first and second sets of answers.
5. Authenticate the process with a loved one or a close confidant.

The narrative

In this initial step, frame the issue you're facing—retirement, in my case. It's autobiographical, so clearly write out the issue and what you hope to gain from the self-deposition.

Sample questions

Once you have completed the narrative and framed your issue, get ready to tackle some difficult questions in part II. These questions should be open-ended to allow for a complete answer. They may appear deceptively simple at first, but they are designed to make you think. There are no trick questions and no right or wrong answers. The only bad answer is the one never written or not written honestly. Take your time with each one, and then repeat this exercise with more specific follow-up questions and a guide to further assist you in answering them.

Direct questions for your deposition:

Q: Do you enjoy what you do for a living most of the time?
Q: Are you satisfied, challenged and fulfilled by what you do?
Q: What do you like about it, and what do you not like about it?
Q: Do you wish you were doing something else?
Q: If so, what would you be doing?

Photo by Wilson Elser Photo

Stratton Horres suggests that lawyers depose themselves to discover their own truths.

Q: Do you wake up wanting to go or dreading going to work?
Q: Do you feel that you have any limitations on doing what you really want to do?
Q: If you are not doing what you really want, what obstacles are in your way?
Q: How difficult would it be to remove them and do what makes you happy?
Q: What are you waiting for?

Sample cross-examination questions:

Q: Do you feel complete, or as if something important is missing from your life? Explain your answer. If you feel complete, describe the reasons. If you do not, describe why not.
Q: Based on your answers to the above, do you believe that you are climbing the right ladder that will lead to your bliss?
Q: If you aren't, what changes would you have to make to start climbing the ladder that leads to your bliss?
Q: Are you willing to make these changes and live your bliss?

Reflect and verify

After answering these questions, reflect on your answers and, finally, verify them with a trusted person for feedback and authenticity. This is akin to signing your deposition transcript. Then you will have completed your deposition!

This exercise was a very enlightening and a very painful experience as well as an honest assessment of who I was and what I wanted next in my life. Through this exercise, I discovered my own "right wall" for my retirement plan and beyond, and so can you.

The legal deposition turned out to be the ideal tool for self-discovery. The questions can easily be tailored to your own situation, whether it involves relationships, spirituality, love, family, friends or interests—there's no limit.

Stratton Horres is senior counsel at Wilson Elser's Dallas office in its complex tort and general casualty practice, focusing on catastrophic high-exposure cases and crisis management. His email is stratton.horres@wilsonelser.com.

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YOUR VOICE

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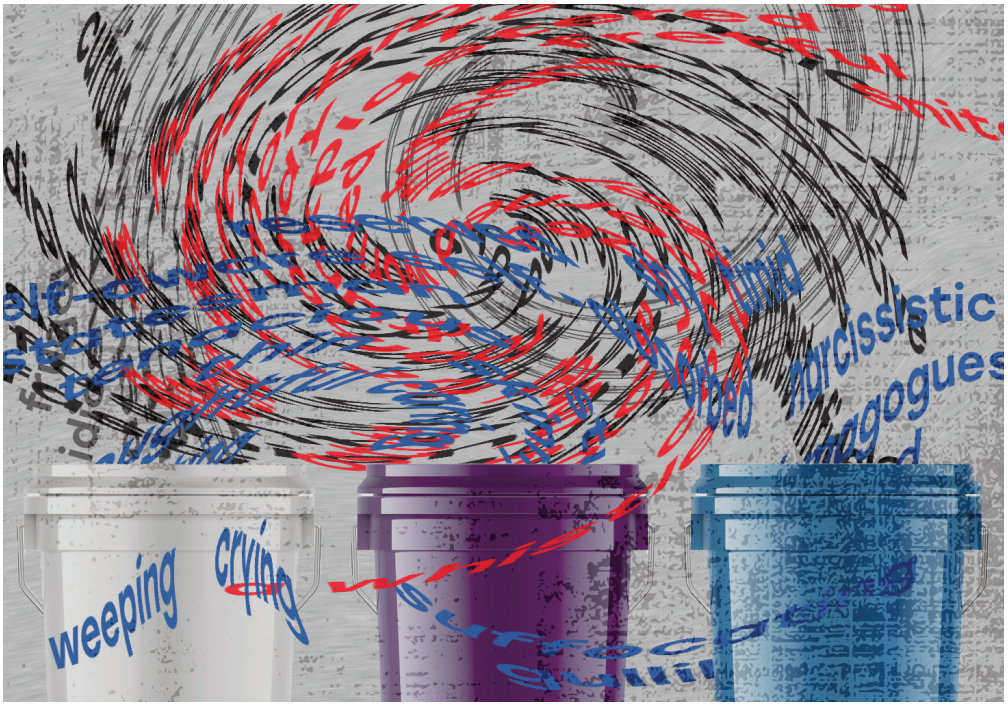

WORDS

Spin Conjugations

'The denotations might be the same; the connotations are entirely different'

BY BRYAN A. GARNER

I'm firm. You're obstinate. Those other people are just plain pigheaded.

I'm an enthusiast. You're a fanatic. They're lunatics.

So many things can be characterized positively, rather neutrally and extremely negatively. For word-lovers, inventing examples of trifurcated terminology can be a great parlor game.

The idea first became popular in 1948, when the philosopher Bertrand Russell spoke on a radio program and mentioned what he called "emotive conjugations," which are variable depictions of the same phenomenon based on differing perceptions or points of view. They follow an I'm/you're/they're pattern, and in their three categories, they mimic verb conjugations (*go/went/gone*, etc.). They're used to show different slants on a trait, mindset, act, etc. The idea is to say I'm X (very positive); you're Y (much less positive, perhaps negative); they're Z (quite negative). Hence, I've *reconsidered*; you've *changed your mind*; they've *flip-flopped*. The denotations might be the same; the connotations are entirely different because they make us feel more or less favorably disposed. Word choice can affect how we perceive and describe the very same things or behaviors. I call these linguistic trios "spin conjugations," some call them "emotive conjugations" and still others, "Russell conjugations." The grammatical term *conjugation*, of course, is here used in a jocular, figurative sense.

Some spin conjugations relate to international affairs: I'm a *freedom fighter*. You're a *guerrilla*. They're *terrorists*.

Many relate to politics: I'm a *conservative*. You're a *reactionary*. They're *fascists*. Or I'm *liberal*. You're *left-leaning*. They're *communistic*.

Lawyers, of course, are well familiar with the impact that labeling can have. Sometimes there are only two real choices: *pro-life/anti-abortion* and *pro-choice/pro-abortion*. In recent lawsuits, lawyers and judges had the choice between using the neutral *abortion providers* or the more tendentious *abortionists*. We generally expect judges to use neutral terminology that is considered acceptable to the people being referred to. But it doesn't always turn out that way.

It comes up in litigation involving nonbinary people (as many prefer to be called). Are they *nonbinary*, *transsexual* or *gender-dysphoric*? Similarly, do we say *gay*, *homosexual* or something else? There are lots of old dysphemisms to avoid if we seek to be—or to appear—fair-minded.

Refuse to play ball

In our book *Making Your Case: The Art of Persuading Judges*, U.S. Supreme Court Justice Antonin Scalia and I discussed the importance of the "semantic playing field." Labels can make an enormous difference. We cite the example of a lawsuit challenging regulations on speakers at college campuses. You might call it *hate-speech litigation*, or you might call it *speaker-ban litigation*.

The lawyers challenging the regulations, of course, used the latter phrase—and remarkably, they succeeded in getting everyone else to use the same phrase. Once that happened, the result seemed almost preordained. So you must remain semantically acute: You should be wary of adopting an opponent's slanted characterization. The slanting can be subliminal.

One aspect of linguistic astuteness involves denials of derogatory characterizations. If someone calls your client a liar, you'd be ill-advised to assert, "My client is not a liar!" It's far better to avoid the negative term altogether. Don't repeat the negative word *liar*. Instead, you might say, "My client has

Illustration by Sara Wadford

dedicated her entire career to truth-telling and transparency," or something of the kind. Once you start repeating the connotatively charged word your opponent has planted, that's what will stick in readers' and listeners' minds. If someone falsely accuses you of being late, don't say, "I wasn't late." Instead, say, "I was right on time." Avoid the word *late*. To assert that you *weren't late* makes you sound defensive; to say that you were *right on time* makes you sound confident.

Oh, and by the way, in terms of spin conjugations, I'm *self-confident*. You're *self-satisfied*. They're *brazenly smug*. You see? When the change is subtle, as in the shift from the first to the second category, the writer isn't just saying something to you but whispering as well.

The most interesting examples provide starkly different characterizations of the same phenomenon: I *made a clean breast of things*. You *confessed*. They *spilled the beans*. Or I *informed against* someone; you *betrayed* that person; they *double-crossed* or *ratted on* the person.

I'll leave you with a few more examples. See whether you can devise a half-dozen more that you've actually encountered in your work as a lawyer. I'll collect and publish them, perhaps in this very space. Send your examples to info@lawprose.org. Happy conjugating.

I'm	You're	They're
assertive	aggressive	bossy
astute	crafty	cunning
big-boned	fat	morbidly obese
brave	foolhardy	reckless
buzzed	drunk	plastered
concerned	worried	fretful
curious	inquisitive	nosy
devout	pious	churchy
diplomatic	expedient	sycophantic
displeased	irked	fuming
an enthusiast	a fanatic	lunatics
fashionable	trendy	faddish
fastidious	finicky	anal-retentive
forthright	blunt	tactless
a freethinker	an atheist	infidels
frugal	cheap	skinflints
idiosyncratic	eccentric	wacko
imaginative	unrealistic	delusional
an intellectual	a brainiac	eggheads
open-minded	nonjudgmental	unprincipled
an orator	a lecturer	pontificators
otherwise occupied	inattentive	oblivious
principled	methodical	ideologically driven
reserved	shy	timid
self-aware	self-absorbed	narcissistic
a statesman	a politician	demagogues
tenacious	stubborn	bullheaded
thin	skinny	scrawny
thoughtful	caring	suffocating
trusting	credulous	gullible
weeping	crying	blubbering
a whistleblower	an informant	snitches

Bryan A. Garner is the president of LawProse Inc., distinguished research professor of law at Southern Methodist University Dedman School of Law, and the author of more than 25 books relating to jurisprudence, advocacy, legal drafting, English grammar and legal lexicography. Follow him on Twitter: @BryanAGarner

Bryan A. Garner

Photo by Winn Fuqua Photography

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

ETHICS

Speaking to the Press

Ethical constraints and pitfalls when engaging with the media

BY DAVID L. HUDSON JR.

A criminal defense lawyer's client faces a barrage of negative pretrial publicity. The attorney, wanting to counteract the negativity, speaks to the press and offers a very different version of events than what's been in the media. The attorney then goes further and makes comments about the conduct of the prosecutor and the judge in the case. Can the lawyer engage the media in this manner, speaking out about a pending case? Or do ethics rules prohibit such conduct?

On one hand, attorney comments outside of the courtroom certainly could have an impact on court proceedings. But attorney speech often contributes to the public's understanding of the judicial system and serves other values. Furthermore, as constitutional law guru Erwin Chemerinsky wrote, an attorney's duty to zealously represent clients "often is best served by the attorney speaking to the press."

Most attorney speech about cases and the judicial system qualifies as political speech, which represents the core values behind the First Amendment. But attorneys are officers of the court, and their speech rights are limited in comparison with those of others.

The starting point is Rule 3.6 of the ABA Model Rules of Professional Conduct, which deals with trial publicity. Subsection (a) provides:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Subsection (b) of the rule identifies statements that lawyers may make, and subsection (c) offers a safe harbor provision that allows a lawyer to make statements to counteract negative pretrial publicity.

SCOTUS-approved standard

The U.S. Supreme Court approved the standard identified in Rule 3.6(a)—the substantial likelihood standard—in *Gentile v. State Bar of Nevada* (1991). In that case, criminal defense attorney Dominic Gentile held a press conference after his client had been indicted on charges of stealing drugs and traveler's checks from a safe deposit vault.

At the press conference, Gentile said his client, who owned the business that rented the safe deposit vault, was innocent and that a certain police detective was the likely culprit. Gentile said his client was a "scapegoat."

Gentile made these statements six months before a scheduled trial date. After the trial, in which his client was acquitted, the State Bar of Nevada charged Gentile with violating a state ethics rule based on ABA Model Rule 3.6. The rule provided:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

However, a provision in the Nevada rule stated, "A lawyer involved in the investigation or litigation of a matter may state without elaboration: the general nature of the claim or defense."

Gentile argued in his brief that he could not be sanctioned for his speech unless there was a finding of "actual prejudice or a substantial and imminent threat to a fair trial." In effect, Gentile was advocating for a clear and present danger standard.

Photo illustration by Sara Wadford/Shutterstock

The Supreme Court, however, rejected the clear and present danger standard for this type of attorney speech and upheld the substantial likelihood standard. The court offered two primary reasons for adopting the lower standard: (1) the identity of the speaker; and (2) the timing of the speech. With respect to the identity of the speaker, the court in *Gentile* noted that lawyers in pending cases have "special access to information through discovery and client communication." According to the court, their statements are likely to be viewed as highly authoritative.

The court also reasoned that the timing of the speech noted that restricting attorney speech during the trial will only postpone the attorney's comments until after the trial. The court also noted that the rule was neutral as to all points of view.

However, a bare majority of the court agreed with Gentile that the Nevada pretrial publicity rule was void for vagueness because Gentile reasonably believed that the safe harbor provision of the rule (allowing statements about the general nature of the defense) protected him in making his statements at the press conference.

The court wrote,"The fact that Gentile was found in violation of the rules after studying them and making a conclusion demonstrates that Rule 177 [the Nevada rule] creates a trap for the wary as well as the unwary."

Gentile himself supports the general balance set by Rule 3.6. "The rule after my case allows for rebuttal of what has been placed in the public mix by one's adversary," he told the *ABA Journal* in an interview. "Studying it and developing both a strategy and an explanation as to what it rebuts is a must if one seeks its protection."

He does not believe his speech at the press conference had an impact on the case. "On the other hand, it was immensely important for my client's emotional stability and self-image," Gentile said. "It made him able to walk with his head higher than it otherwise would have. He was harmed in the court of public opinion until I spoke out, and then he felt his reputation was improved. His resolve had been diminished and then was restored. Any trial lawyer will tell you how important that is."

The gag order problem

A related problem arises from both the limited nature of Rule 3.6 and judges' desire to maintain control over the cases in their courtrooms. The media's increased interest in—or at least greater coverage of—high-profile cases has led some judges to impose gag orders and other measures designed to prevent carnival-like atmospheres, such as during the Sam Sheppard or O.J. Simpson criminal trial, in which the perception was that the case was being tried in the press rather than the courtroom.

"We have a big gag order problem in certain parts of the country," says Margaret Tarkington, a law professor at Indiana University Robert H. McKinney School of Law and a leading expert on attorney speech. "There are too many judges who issue overly broad gag orders on attorneys. These are mostly unconstitutional because they prohibit too much speech. They not only violate attorneys' free-speech rights but also negatively impact the public's right to access about court proceedings and open courts. Because Rule 3.6 has proven to not be a very workable standard, courts have turned to gag and sealing orders to keep things under wraps. This is concerning, because attorneys can serve as an important check on the judiciary and the court system."

A need for balance

Tarkington believes Rule 3.6 should be rewritten. It "sets a bizarre standard because it is keyed to prejudice the jury pool or the actual proceeding," she says. In addition, she notes that many of the most problematic attorney statements concerning cases are made well before the actual court proceedings.

Prosecutors and defense attorneys have very different clients and also very different obligations, Tarkington says. Rule 3.8 of the Model Rules explicitly allows prosecutors to make extrajudicial statements "that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose." Criminal defense attorneys, on the other hand, often would prefer to avoid any pretrial publicity at all for their clients unless they are "trying to do damage control," she notes.

"Rule 3.6 is not protective enough of lawyers' First Amendment rights because attorneys have a First Amendment right to speak about the judiciary and the court system," says Tarkington, author of *Voice of Justice: Reclaiming the First Amendment Rights of Lawyers*. "Lawyers have the training and experience to provide to the public a valid critique about the judicial system and the judiciary."

Even though she has serious critiques of Rule 3.6, Tarkington believes there should be some regulation of lawyers who make outrageous statements in the media that have no basis in law or fact. She also believes "the First Amendment does not prohibit a state from preventing lawyers from lying to the public." She points to the example of lawyers who consistently made statements about a stolen election and massive voter fraud without providing a basis for such statements. Overall, considering their potential ethics exposure, Tarkington says lawyers should use caution before making unsubstantiated comments to the media. ■

David L. Hudson Jr. teaches at Belmont University College of Law. He is the author, co-author or co-editor of more than 40 books. For much of his career, he has focused on the First Amendment and professional responsibility.

David L. Hudson Jr.

Photo courtesy of David Hudson

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PROFILE

Behind the Mic

Jason Flom's podcasts shine a light on criminal injustice

BY KEVIN DAVIS

When Jason Flom was a boy, his father, Joseph, a renowned mergers and acquisitions lawyer, gave him a piece of advice: "Do whatever you want for a living, but make the world a better place because that's the only success that matters."

Flom, who grew up in New York City, became a highly successful record executive with a knack for discovering and nurturing major talent. He served as chairman and CEO at Atlantic Records, Virgin Records and Capitol Music Group and launched the careers of recording artists such as Katy Perry, Lorde and Kid Rock. He's also the founder and CEO of Lava Records.

But the success that matters most to Flom is his work as an advocate for criminal justice reform and as host and producer of the podcasts *Wrongful Conviction* and *Righteous Convictions*. Flom's interest in criminal justice was sparked when he read a newspaper article about a man named Steven Lennon, a nonviolent first-time offender sentenced to 15 years in prison for cocaine possession. The story resonated with Flom, once a substance abuser himself.

"I'm not a religious person, but I thought, 'There but for the grace of God go I,'" Flom says. "I had been

Photo courtesy of The Press House

sober about eight years by then. Had circumstances been different, it could have been me."

Flom thought Lennon's sentence was clearly disproportionate to the crime. "After I read that article, I was flabbergasted—and I decided I had to do something, but I didn't know what to do."

He called Lennon's mother. "I offered her some money to hire a new lawyer," Flom says. "So I called the only criminal defense attorney I knew. I knew him because he had worked for recording artists who got into some trouble. He agreed to take the case pro bono."

A judge eventually granted Lennon an early release, and Flom had a new calling: He became a founding board member of the Innocence Project and joined the board of FAMM, also known as Families Against Mandatory Minimums.

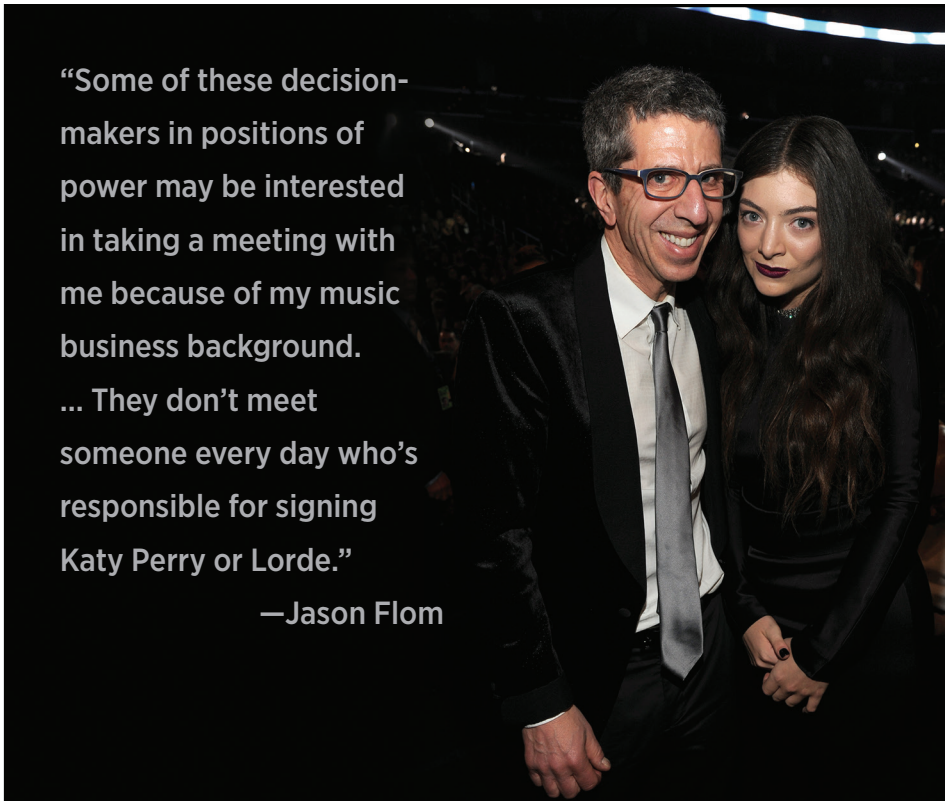
Inspired by the work of the Innocence Project, Flom started his *Wrongful Conviction* podcast in 2016.

"I'm so endlessly inspired by these people—by their strength and spirit and will to live and let go of all this bitterness," he says of the wrongly convicted. "I thought if we could create a living document to memorialize these cases and inspire people to take action and get motivated to do things to change the system, we could make a difference."

Amplifying the stories

The podcast guests tell compelling, heartbreaking tales of injustice, false confessions, and of their lives and families being torn apart. "It's pretty cathartic for them to have their stories told," Flom says. "They want to help others. It could help jurors in the future to avoid mistakes. This has had a definite impact. It's one of my proudest moments."

Among the powerful stories is the saga of Daniel Villegas, who was 16 when he was coerced into confessing to a double murder in El Paso, Texas. He was granted a new trial after 19 years in prison and was offered a deal called an Alford plea, which would have allowed him to plead guilty, maintain his innocence and be freed without having to serve more time behind bars.



"He wanted to take a plea," Flom says. "His wife said she heard this podcast and learned the tricks that police used, and they listened."

Villegas decided to go to trial. "As a result, he was found actually innocent," Flom says. "Having and hearing about those kinds of things makes me want to work harder, smarter and better, and amplify what we're doing here today."

Flom has taken his campaign further by producing another podcast, *Righteous Convictions*. "I couldn't resist the play on words," he says. "It centers around me interviewing people who are doing extraordinary things to improve our criminal justice system. It's trying to shine a light on the amazing work they're doing and inspiring others to take actions in their own lives that will make a difference."

Flom is grateful that his celebrity and relationships with music stars have given him entrée into this world. "It sometimes helps me to open doors that otherwise might be closed to me if I was just a straight-up advocate," he says. "Some of these decision-makers in positions of power may be interested in taking a meeting with me because of my music business background. For them, they don't meet someone every day who's responsible for signing Katy Perry or Lorde, Matchbox Twenty, Kid Rock and Greta Van Fleet."

He sometimes feels as if he's leading a double life. "I had this moment about three years ago. I was on death row in Texas to visit and conduct an interview with a guy named Rob Will—an innocent man," Flom recalls. "I spent about four hours there talking with him through the bulletproof glass, and it was a very powerful experience."

Afterward, he flew to Los Angeles. "It was Grammy week. I ended up sitting in the front row with my son, and it literally popped into my head that I just went from death row to the front row," he says. "It's definitely a yin-yang thing. I consider it a great privilege to be of service to other people. This is not a hobby. This is my work."

And that work has led to real change. "The podcast has been cited by lawmakers in different states where they

Photo by Kevin Mazur/WireImage

Longtime advocate Jason Flom discusses criminal justice reform at the United Justice Coalition's Inaugural Social Justice Summit in New York City in July.

have been motivated to create reform laws, such as demanding interrogations be recorded, and in a compensation bill for the wrongly convicted," he says. "I never thought this humble little podcast could have an impact."

Flom is carrying forward the spirit of his late father, whose legal career with Skadden, Arps, Slate, Meagher & Flom was a success by any measure but whose legacy also was also defined by his philanthropy. "My dad would be proud." ■

MY PATH TO LAW

Finding What It Takes

How law, family and history shaped my career

BY JASON ST. JULIEN

***#MyPathtoLaw** is a guest column that celebrates the diversity of the legal profession through attorneys' first-person stories detailing their unique and inspiring trajectories.*

Life is a dance. For more than a decade, the legal profession has been the floor on which I've danced. It's been hilariously comical, painfully awkward and immensely powerful. At its best, practicing law is a medium through which we experience and discover who we are when the lights are the brightest, when we've fallen short and when we dare to lead. That is our profession's genius. Here's

Photos by Shareif Ziyadat/Getty Images for United Justice Coalition; Photography G

what I've discovered while dancing to our profession's mesmerizing tune.

My answer

Practicing law has a way of confronting us—exposing our imperfections and insecurities. However quick and witty we think we are, whatever sleight of hand we employ, despite our most cleverly conceived tactics, we cannot escape ourselves. In those moments of self-doubt, I've asked myself, "Do I have what it takes?" I got answers from my parents.

My parents are from St. Martinville, Louisiana. My grandfather worked two jobs. His primary job was as a laborer at the local canned goods factory. His second job was as the janitor at the local bank. Being the janitor required him to work in the evenings and in the early morning before going to the factory. My father and his two sisters took turns accompanying my grandfather before and after school to help him complete his tasks. This resulted in evenings and early mornings at the bank.

Early mornings with his dad drilled a mastery of discipline into my father. It served him well. My father went from working as an animal caretaker (feeding and cleaning up after rodents at a cancer research facility), to starting as a roustabout in the Gulf of Mexico oil fields, to attending college, to becoming a petroleum engineer, to elevating himself to high-level management positions in two of the world's largest oil and gas companies.

My mother's grit equaled my father's. She is one of 12 and graduated from college with a degree in music education. She student-taught at a high school in the projects where 15-foot-high fences decorated with concertina wire enclosed the school grounds for safety. Students and staff carried weapons. She even recalled the time when a student pulled a knife and threatened to stab her. My mother went on to obtain her master's degree in guidance and counseling, and she worked at St. Martinville Junior High and St. Martinville High School. She and her sisters were blessed with beautiful voices. Known as the James Sisters, they represented Louisiana in a cultural exchange program with France, traveling the French countryside singing at various engagements. After retiring from education and counseling, my mother returned to work as a counselor at the high school I attended. In those four years, she gave me a master class in communication, love and service.

I sourced my ability to dance from my parents. In the darkest times, they are my answer.

Photo by Cyrus McCrimmon/ The Denver Post

Then-Assistant U.S. Attorney Jason St. Julien greets participants in a court-run Gang Resistance Education and Training program in 2016.

The dance

After graduating from college with a psychology degree, I taught seventh-grade Texas history and reading at Pearland Junior High South in Pearland, Texas. I also coached football and basketball. I wanted to increase my earning potential and pursue a career that opened doors across various professions. I called on my cousin Mark Chretien, who is a patent attorney at Greenberg Traurig in Houston, for advice. He asked me, "Have you ever considered law school?" In that moment, before I could even answer the question, my dance had begun.

Mark's question led me to a range of experiences. It led me to LSU's Paul M. Hebert Law Center, where my lone escape from studying was tailgating on Saturdays in preparation to watch my cousin Ryan St. Julien play football for the school. I somehow survived my 1L year, which allowed me to study abroad that summer in Lyon, France, to travel to London, Paris, Athens, Mykonos, Rome, Normandy beach and run with the bulls in Pamplona, Spain. Those experiences paved the way for me to move to New Orleans to clerk for a federal judge after graduation.

After New Orleans, I found my way to Denver to clerk for then-Chief Judge Wiley Y. Daniel of the U.S. District Court for the District of Colorado. One of the most important conversations we had was about his participation in the Landmark Forum, a development program designed to teach participants to "put the past in the past" and create a life they love. The Landmark Forum gave me a level of peace I didn't know existed and paved the way for me to hit the ground running as a criminal prosecutor at the U.S. attorney's office in Denver. My heart skipped a beat every time I was in court and made my appearance: "Jason St. Julien, for the United States." There is something about representing

the United States. The honor. The privilege. The duty.

There will come a time

It all makes sense. All of it.

On Tuesday, May 19, 2020, I did not know that a string of text messages, a bike ride and meditating in a cemetery would lead me to publish a *Denver Post* op-ed on what my experience was like being a Black man after George Floyd's murder. What I did know weeks later while sitting on a barstool in my kitchen, was that everything I had ever experienced in life had led to this one moment—the moment I chose to publish the op-ed despite the possible career and life consequences. The title? "The unrelenting, frustratingly delicate balancing act of being Black."

All the briefs, memorandums and responses I had written in 10 years laid the foundation for me to effectively communicate to readers. Every closing argument I toiled over, trashed and reworked gave me a sense of what I must immediately convey to capture readers' attention. Each intellectually rigorous foray into some sparsely used legal theory, vague statute or undecided issue provided a certain level of comfort with the unknown. And it made sense. All of it—on a barstool in my kitchen. My life has never been the same.

There will come a time when our profession's genius will call on the sum of your experiences, shortcomings and victories. However measured, whether noticed or unnoticed, rest assured, your dance will make a difference in others' lives.

So when the music plays, don't sit on the sidelines—dance. ■

Jason St. Julien is lead counsel of community trust for Airbnb. He is a former federal prosecutor, and his 2020 race relations op-ed in the Denver Post *put him in the Black Lives Matter national conversation.*

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

10 QUESTIONS

Parallel Pursuits

This Boston lawyer has spent nearly four decades developing dual careers in law and advocacy

BY JENNY B. DAVIS


Michael N. Sheetz

In 1986, Cooley partner Michael N. Sheetz was a freshly minted law school graduate heading to Boston to start his career in commercial litigation. But he knew he wouldn't be satisfied focusing solely on his private practice. So he also began volunteering for the Anti-Defamation League.

Fast forward more than 35 years, and Sheetz remains actively engaged as both a lawyer and an ADL volunteer, parallel pursuits he has likened to dual careers. In his practice, Sheetz advises corporate boards, executives and universities; litigates complex business issues for companies such as Uber; and leads his firm's sports practice, representing organizations including the Pac-12 Conference.

In his work with ADL, he has held numerous leadership positions, including chairing the New England regional board and co-chairing ADL's Global Leadership Council. In February, Sheetz began a three-year term as president of the ADL Foundation, the organization tasked with funding ADL's fight against antisemitism and hate.

Let's go back to 1986. You started what essentially grew to be like two careers at the same time. What made you think, "I'm a new associate; this seems like the perfect time to also start volunteering," and then not only start volunteering but continue at the same time you were developing a practice?

I was lucky enough to figure out early on that the way I was going to be most fulfilled, the way I was going to be happiest, the way I was going to be the best lawyer I could be was to have lots of different balls in the air all at the same time. If I was just going to spend all day working on the law, that was not going to be the best and highest use of Mike Sheetz. I do feel like my parallel paths of working hard as a lawyer and volunteering for many, many hours with ADL, giving back and standing up—it just suits my personality. And it's been simpatico with becoming a good lawyer and building a legal practice.

What made you choose ADL?

I wanted to give back as an advocate because that's what I liked to do, and I felt I could be effective that way. ADL is an advocacy organization, so it was a natural fit. My first role at ADL was to be part of the civil rights committee, diving into legal issues that were the hot topics of the day in the mid-'80s.

Was there something in particular that ADL was involved with at the time where you were like, "Yeah, that's what I want to roll up my sleeves and do too?"

Absolutely. There were a lot of issues that we rolled our sleeves up with, but I am most proud about ADL's eventual adoption of a position in favor of same-sex marriage many years before other national civil rights organizations took on the issue. Massachusetts was the first state to establish a state constitutional right to marriage for same-sex couples, and I helped lead the charge locally and then nationally for ADL to adopt

a stance in favor of legalizing same-sex marriage. I was selected to present the "pro" argument before ADL's national commission shortly before the commission formally adopted ADL's policy statement in the early 2000s.

I had no idea ADL was involved in issues like this—when I think of the group, I think more about fighting antisemitism.

The ADL was founded by Jews in response to stark antisemitism at the turn of the 20th century, but we definitely embrace a large agenda and non-Jewish supporters. There are really two parts of the ADL mission: fighting antisemitism on one hand, and promoting civil rights on the other hand. I've found that over the years, the pendulum of emphasis has swung back and forth. I am Jewish, but when I got involved, it wasn't so much because of the antisemitism prong, it was really because of the civil rights prong.

Do you think that lately that pendulum is swinging back to the antisemitism side or that this type of hate has become more of a problem recently?

Yes. Unfortunately, in recent years I would say the need for fighting antisemitism as ADL's first priority has become much more profound. I spent a lot of time in the early years of my involvement focusing on non-Jewish communities like communities of color and other groups that have historically suffered from injustice and discrimination. Now, the Jewish community is under attack. It's less secure than it's been at any time in my 35 years of involvement.

The Pittsburgh synagogue shooting being a recent example.

Today in America, Jews feel insecure. They feel physically insecure in their institutions and in their daily lives. And unfortunately, there are lots of examples of why they feel that way. It's all the more reason why a stable, well-funded and vibrant ADL is critically necessary. We are the go-to organization for fighting antisemitism.

This seems like a perfect segue to talk about your position as ADL Foundation president. I know the foundation is a separate entity that's focused on financials, but what does that mean in terms of what you do? What does the job entail?

I work closely with the senior leadership of the ADL, both the volunteer side and the professional side. The foundation's board of directors is pretty large—35 people, all of whom have been very committed ADL volunteers for many years, like myself. We have professionals who manage and direct the money, and we have volunteer leaders who are financial professionals who supervise the managers. My role is as much a leadership and governance role as anything else. I keep abreast of—and contribute to—ADL's priorities of the day. What are our points of emphasis? What positions will ADL take on key civil and human rights issues? How should ADL allocate its limited resources? What resources will be necessary for future initiatives and programs? I keep in touch with key ADL staff and volunteer leaders, including the board, helping give life to volunteers' passion for activism and also ensuring proper governance and process for the foundation. And I work to make sure that we conserve and grow the foundation's financial resources. All of this entails a lot of Zoom meetings, in-person meetings and planning.

Was there a learning curve?

Not really. In my role as a lawyer, it's very common for me to advise boards of directors and to use my judgment and my knowledge of governance to help organizations work more efficiently and to lead them in the direction they want to go. And I think those skills have been useful as president of the foundation.

I'd like to ask you about your recent involvement in a lawsuit over the Boston public school system's admissions policy to its exam schools. You represented ADL pro bono and filed an amicus brief supporting the school system's policy in the district court, and you have filed another amicus now that the ruling in favor of the school system is being appealed to the 1st U.S. Circuit Court of Appeals. How does it feel to be working for ADL but in your capacity as a lawyer?

I love the fact that I can use my training and experience as a lawyer to advance issues important to ADL and me. The Boston school [system's] case is one example, but I have participated as amicus for ADL in a number of state and federal appellate cases over the years. And I had the privilege to testify before the legislature for ADL on important bills, like the anti-bullying legislation some years ago.

Let's talk client development. Has your ADL work ever helped you land a client, and do you think your existing clients appreciate your commitment and your contribution to ADL?

I can confidently say that I have never sought to exploit my ADL ties to build my legal network or my legal business. But I will say that anything that gets you out in the community and gets you a more developed network and puts you in touch with people who run businesses or make important decisions, it's all going to be supportive of your legal business. And I think it's a good practice for a lawyer to be doing that, to be out in the community, engaged in leadership roles. So I found them to be very symbiotic, my legal career and my volunteer career. And I do think Cooley's clients respect and appreciate and support Cooley's pro bono efforts, like my ADL work. We are all drawn to people who have similar values, and I think the majority of my clients have values that are closely aligned with my values. They also recognize, unfortunately—and I keep saying "unfortunately," but it's true—that this work is more important now than it's ever been. ■

Photo courtesy of Cooley

National Pulse

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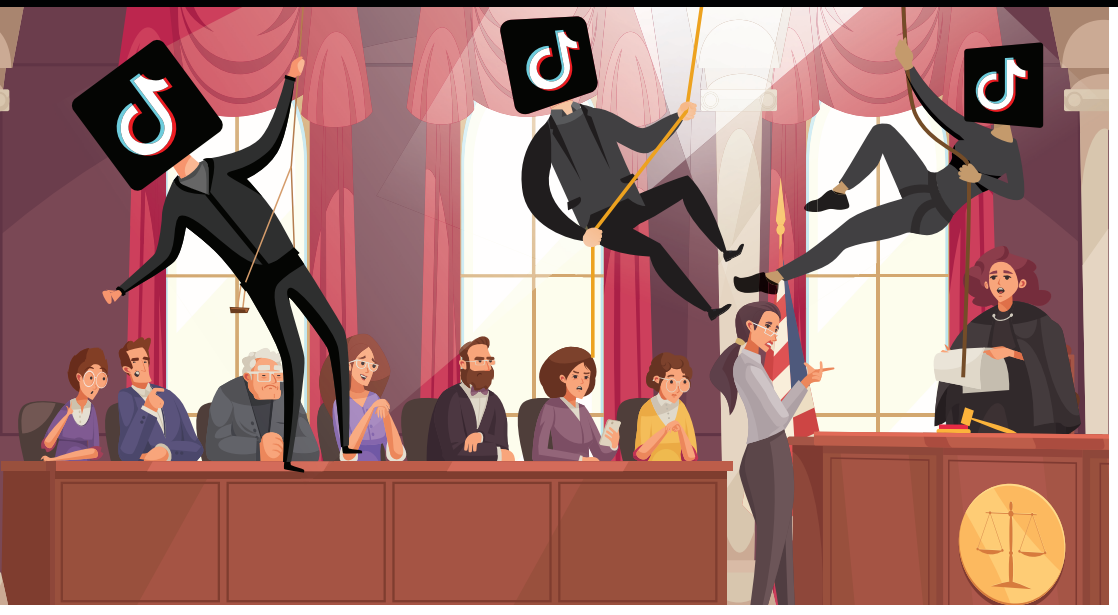


LITIGATION

Trial by TikTok

How social media hijacked the *Depp v. Heard* defamation trial

BY DANIELLE BRAFF

It was hard to avoid hearing about Johnny Depp's $50 million defamation suit against ex-wife Amber Heard and the subsequent trial, even if you tried. In addition to the seemingly 24/7 streaming of trial content on the Law & Crime network, *E! News* and countless YouTube channels, there were also billions of TikTok viewers absorbing details of the trial, in which Depp argued that Heard defamed him in a 2018 *Washington Post* op-ed when she described herself as a "public figure representing domestic abuse."

Heard countersued, saying Depp defamed her when his then-lawyer accused her of perpetrating the abuse hoax. In June, the jury found that Depp had proven defamation in regard to three statements in Heard's op-ed, and that Heard had proven defamation on one statement from Depp's former attorney. The jury awarded Depp $10 million, while Heard was awarded $2 million. In July, both parties filed notices of appeal, meaning a sequel could be in the works.

Bite-sized snippets of everything from Depp's half-smiles to Heard's allegedly fake tears to her lawyer's questioning paired with the theme song from *Curb Your Enthusiasm* were blasted over TikTok. Videos of Depp and his legal team laughing and eating candy while Heard's lawyers presented their case went viral, as did clips of Depp's attorney, Camille Vasquez, objecting repeatedly during Heard's testimony. Oftentimes, the videos had titles like "Johnny Depp's lawyer destroys Amber Heard" or "Amber Heard's lawyers get roasted by TMZ!"

The hashtags #JusticeForJohnnyDepp and #AmberTurd—after an allegation that Heard defecated in her and Depp's bed—each got more than a billion views and appeared to have completely hijacked the case. The videos overwhelmingly sided with Depp: As of early September, #JusticeForJohnnyDepp had racked up 21.6 billion TikTok views; #JusticeForAmberHeard had accumulated 132.4 million. Was a court verdict even necessary when TikTok had already declared a victor?

A slippery slope

The entire case has attorneys worried.

"The burden is on the lawyers—and to some extent, on the trial judge—to use with greater vigor than in the past available tools like meaningful juror questionnaires and extended voir dire," says Jack Sharman, partner and chair of the white-collar criminal defense and corporate investigations practice group at Lightfoot, Franklin & White.

According to a study of 2,300 Twitter accounts, Cyabra, a firm in Israel that tracks online disinformation, found that 11% of the conversation surrounding the trial from March 13 to April 16 was driven by fake accounts, compared with just 3% to 5% of the fake accounts narrating any average online conversation.

Meanwhile, media monitoring platform NewsWhip reported that from April 4 to May 16, the trial generated more average social interactions per published article than President Joe Biden, the U.S. Supreme Court's leaked abortion decision in *Dobbs v. Jackson Women's Health Organization* and the ongoing Russia-Ukraine war.

While this isn't the first trial to be publicly broadcast and dissected by the public (readers of a certain age might remember "If if doesn't fit, you must acquit"), it may be the first major trial to be disseminated by social media. The public, which overwhelmingly sided with the *Pirates of the Caribbean* star, chose snippets of the trial to broadcast via TikTok highlighting what they deemed as wins for the Depp team, while every stutter, every slip by Heard's legal team was amplified online by Depp fans ready to attack.

"Seeing things like this on social media can be disheartening for attorneys and parties to a trial, and there's a possibility that it could also affect witnesses who are preparing to testify, so TikTok definitely could affect testimony at a trial or lead to heightened emotions while on the stand," says Sabrina Shaheen Cronin, the founder and managing partner of the Cronin Law Firm in Bloomfield Hills, Michigan.

Stay vigilant

Law firms are wondering what steps they can take to prevent bias like this going forward. And if they can't prevent it, how can they use social media apps like TikTok in their favor?

The biggest issue is the jury. While jurors are instructed not to look at media during trial, it's important to make sure they're sequestered and don't have access to social media, which is nearly impossible, says Andrea Sager, owner of Andrea Sager Law and Associates and CEO of the Legalpreneur in Houston.

Throughout the case, attorneys should follow jurors' social media accounts, and jurors who comment on things they have seen or heard should be removed, says Clyde Guilamo, a Chicago criminal defense lawyer. This job is generally not done by trial counsel, but by someone on the trial team who is familiar with social media, he says.

While attorneys and courts don't have much power to control what is said about cases or the light in which things are reported, they do have some control over whether the information is disclosed at all, Cronin says.

In some states, depending on their particular laws, courts can determine that a case is too sensitive or the parties in the case could be harmed by public opinion and decide that the courtroom will be closed, meaning they will not allow cameras or recording devices inside, she says.

"Doing this, however, does not ensure that someone in the courtroom won't talk to a reporter outside of the room, or that a reporter won't attend the trial and take notes themselves," she notes.

Johnny Depp and Amber Heard meet in court.

Courts can also determine that certain information is protected and not to be released to the public during trial. This means the court would enter an order stating that the information is to be confidential and only discussed in the courtroom with the judge, and someone who violates this rule would be subject to punishment from the court, Cronin says.

It's also important for the attorneys to request that the court issue an order directing the attorneys, witnesses, jury and anyone present at the trial not to share any information about the trial on social media during the litigation.

"If the court declines to issue the order, then it is up to the attorney to speak with the jury at the time of jury selection, opening and closing statements with regard to refraining from drawing their opinions from social media, and to only base their decision on the evidence produced at trial," says Sandra Radna, a New York divorce attorney.

One of the issues is that lawyers are often too hesitant to address the topic directly for fear of alienating jurors, Sharman says. The standard admonitions from the bench to not look on Facebook are usually of only modest effect: Lawyers and judges need to be more blunt, he says.

Jury instructions from every state contain guidance about the use of social media, but these instructions are frequently buried or are an afterthought, says Adam Zayed, managing attorney and founder of Zayed Law Offices in the Chicago area. It would be reasonable, he says, for jury instruction committees in each state to consider a specific instruction regarding social media.

"Some might suggest that threatening potential jurors with contempt of court in the event of improper social media usage is the way to go, but generally, we think informing them that this type of conduct may lead to a mistrial and thus, a waste of everyone's time is the better approach," Zayed says. No juror wants to waste everyone's time and to undermine the system. Zayed says another idea would be to reiterate the instructions every day of the trial rather than once before the trial begins.

On the other hand, attorneys could use social media to their advantage, as Depp's team appeared to do, whether purposely or not. He and his attorney appeared to flirt as they shared candy and offered each other secret smiles.

If the budget allows, Sharman says, a firm could hire a sophisticated team to monitor social media traffic. "Such monitoring could provide an input into juror mindsets and potentially help shape arguments," he says, adding that this could have obvious ethical implications.

According to Rule 3.5 of the ABA Model Rules of Professional Conduct, lawyers are not allowed to influence jurors or prospective jurors by "means prohibited by law," and ABA Formal Opinion 480 restricts lawyers' ability to use social media to engage in public commentary.

Ethically, it would be an issue if an attorney were commenting via social media about a case they're actively trying, says Michael Elkins, partner and founder of MLE Law in Fort Lauderdale, Florida. "However, an attorney with a good social media presence in advance of a high-profile case should continue putting out their regular content and building their brand," Elkins says. ■

ARBITRATION

Dispute Resolved?

A new law ended mandatory arbitration in workplace sex assault and harassment complaints. Is a wider ban next?

BY TERRI WILLIAMS

Forced arbitration has long been a controversial practice in the United States.

According to an American Association for Justice report released at the end of October 2021, the number of employment disputes that were resolved in arbitration increased by roughly 66% from 2018 to 2020. The AAJ, a critic of forced arbitration, has argued that when workers (as well as consumers and patients) are forced into arbitration, they're much more likely to lose since the system is stacked against them. In addition to not having a right to a jury, there's no transparency, no right to discovery, and other essential checks and balances are missing from the process.

At least one component of forced arbitration, however, has now ended.

On March 3, President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. The law forbids employers from forcing employees into arbitration in cases involving allegations of sexual assault or harassment. It also prevents mandatory waivers of the right to bring sexual assault or harassment class action lawsuits or collective claims against employers. This is a rare issue that has garnered significant bipartisan support in Congress: The bill was passed by a vote of 335-97 in the House on Feb. 7 and then passed by voice vote in the Senate three days later.

Perhaps trying to build on that momentum, two weeks after Biden's signature, the House approved the Forced Arbitration Injustice Repeal Act of 2022—which would eliminate forced arbitration in all employment, consumer and civil rights cases—on a much narrower, near-party line vote. The bill is currently in the Senate, where it was referred to the Judiciary Committee.

If it passes in the Senate this time and is signed into law, what will this mean for plaintiffs and companies? Could this spell the end for forced arbitration in the U.S.?

Pros and cons

Companies and employers have a strong incentive to keep mandatory arbitration in place for everything ranging from workers' contracts to user service agreements.

"On one hand, it is a mechanism for parties to resolve disputes in a confidential manner that can be quicker and less expensive than resolving the dispute in court," explains Amy Karff Halevy, a partner at Bracewell in Houston who represents employers in all areas of employment law.

She adds that ending mandatory arbitration in all instances would force companies to "rethink how they handle disputes not only with their employees, but also with customers—as the bill would invalidate any pre-dispute mandatory arbitration agreements related to antitrust, consumer and civil rights claims."

Halevy and others argue that the FAIR Act would result in more disputes ending up in the court system, resulting in a severe backlog. In particular, it would open the door to many potential class action lawsuits—especially from consumers, who often don't have a real choice to accept or decline mandatory arbitration provisions when purchasing goods and services.

Joe Brennan, professor at Vermont Law & Graduate School, points out that forced arbitration clauses are usually in the fine print of consumer contracts of everything ranging from cellphone user agreements to software licenses.

"For example, if you want a cellphone carrier, it's a take-it-or-leave-it option—so you either agree to their terms, or you decline the use of their product," he says.

Photo illustration by Sara Wadford/Shutterstock

A fear of increased class actions has been a major factor in keeping the mandatory arbitration structure alive.

"The opposition to the FAIR Act can be best summarized as the 'anti-lawyer' opposition—and it may sound funny, but the opposition is couched in the belief that the FAIR Act would produce more class action lawsuits to the benefit of the class action lawyers who bring them," says Jamie E. Wright of the Wright Law Firm in Los Angeles. Wright says there's a widely held belief that plaintiffs receive only a small portion of the settlement while attorneys take millions of dollars in contingency fees. "Lastly, the opposition points out that the right to arbitration has been federally protected as a means of resolution since 1925," she says.

Arbitration also is popular with employers because studies show that plaintiffs are less likely to win. According to the AAJ, the five-year average win rate of American consumers forced into arbitration who received a monetary award is 5.3%. And it's getting even worse. In 2020 (the latest year with available data), only 577 Americans in forced arbitration won a monetary award, which is a win rate of only 4.1%. "More people climb Mount Everest in a year (and they have a better success rate) than win their consumer arbitration case," the report notes.

That's not to say there are no benefits for plaintiffs. Jessica Glatzer Mason at Foley & Lardner in Houston believes some claimants would continue to choose arbitration even if it were no longer mandatory. And this is particularly true in nonconsumer issues.

"I believe they may prefer to proceed in a confidential forum on these personal claims, in addition to it often being more streamlined and quicker," she says.

On the other hand, Wayne Cohen, a partner at Cohen & Cohen Attorneys in the Washington, D.C., area, says that while arbitration can help both individuals and corporations, when it's mandatory and the bargaining power is uneven, there's an opportunity for abuse.

"Mandatory arbitration always favors those in power—meaning corporate America—over the individual," Cohen says. "Matters are no longer tried to a jury of one's peers, but rather in general to an arbitrator who likely does not have the same lived experience in terms of socioeconomic background."

And he says an arbitrator may reach a very different conclusion than a jury would. "Mandatory arbitration clauses typically extinguish any appellate rights; this means that there is no oversight for a rogue arbitrator."

That's not to say that arbitration is perfect for employers. As the use of arbitration has grown, its cost for employers has increased, says Will Manuel, a Jackson, Mississippi-based partner at Bradley Arant Boult Cummings. "Whereas discovery used to be relatively limited, some businesses are seeing larger and larger bills from lawyers who feel that they need a good bit of discovery to defend the case," he says. The lack of an appeal process also makes employers uncomfortable, Manuel says.

Too big to fail?

Another roadblock is that over the last decade, arbitration has become heavily entrenched as a means of resolving disputes.

"The matter is too important to many businesses, both big and small—a constituency that crosses party lines," Mason says. "The value of the class action waiver, confidentiality and finality to businesses—a benefit available only in arbitration—is likely to be protected by the business lobby."

Also, there may not be the same level of energy to pass the FAIR Act. "The momentum behind the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 was fueled largely by some high-profile sexual harassment cases that were covered by arbitration agreements and were 'quietly' resolved," Manuel says. But without that level of press or pressure, he doesn't think there will be a public outcry to change the arbitration system.

Additionally, the U.S. Supreme Court has taken an expansive view of mandatory arbitration clauses ever since upholding their validity in *AT&T v. Concepcion* in 2011.

In March, President Joe Biden signed into law a bipartisan bill ending mandatory arbitration in workplace sex assault and harassment cases.

In June, the court actually went the other way in the case of *Southwest Airlines Co. v. Saxon* and ruled in favor of a Southwest baggage handler, saying she was exempt from a mandatory arbitration clause because she was engaged in interstate commerce.

According to Ben Noren, associate chair of Davidoff Hutcher & Citron's labor and employment law practice and based in New York City, *Saxon* was decided on very narrow grounds and was consistent with the Supreme Court's overall jurisprudence exempting workers frequently engaged in foreign or interstate commerce from the Federal Arbitration Act.

"The *Saxon* holding does not impact the court's prior decision in *Epic Systems v. Lewis* [2018], which upheld employers' ability to force employees to enter into arbitration agreements and class action waivers," he says. "There is no indication that the Supreme Court will be going back on its decisions that recognize the right of parties to use mandatory arbitration clauses." ■

Runaway Sentences

BY KEVIN DAVIS

Truck driver's 110-year sentence for role in a fatal crash sparks new focus on mandatory minimums

Photo illustration by Sara Wadford/ABA Journal

Standing in front of a judge, tears in his eyes, Rogel Aguilera-Mederos wanted to say something before being sentenced for killing four people and injuring six others after he lost control of his runaway truck on a Colorado highway.

Truck driver Rogel Aguilera-Mederos was charged with causing a crash that killed four people.

At 26 years old, he was facing the possibility of spending the rest of his life in prison. He lowered his surgical mask to speak.

"My English is not very well, but I'm going to try," Aguilera-Mederos, a Cuban immigrant, said to Colorado District Court Judge Bruce Jones at his sentencing hearing in December.

For the next 16 minutes, Aguilera-Mederos cried as he begged for forgiveness, spoke of his love of God, his commitment to family and his empathy with the victims. "I am not a criminal," he said. "I would have preferred God taken me instead of them because this is not life."

Aguilera-Mederos, an inexperienced truck driver, was just 23 when the crash happened in 2019 in Jefferson County, outside Denver. He said his brakes failed as he rapidly descended from the mountains on I-70 at speeds of up to 85 mph, plowing into traffic and igniting a deadly inferno. Prosecutors said his negligence and indifference were to blame for the 28-vehicle crash and that Aguilera-Mederos could have taken evasive action by using a runaway truck ramp.

Killed that day were Miguel Angel Lamas Arellano, 24; William Bailey, 67; Doyle Harrison, 61; and Stanley Politano, 69. Their surviving family members, along with others injured in the crash, sat behind Aguilera-Mederos as he tearfully pleaded for mercy. They also had spoken about the pain they endured, the lives cut short, the emotional toll it had taken. They wanted justice.

"What I want today is that I'm begging for forgiveness," Aguilera-Mederos said. "This was a terrible accident, I know. I take the responsibility, but it wasn't intentional."

A jury already had decided that it was more than just an accident, convicting Aguilera-Mederos of 27 criminal counts related to the fatal crash.

The judge said he had no choice but to hand down the sentence required by law—110 years in prison. "I will state that if I had the discretion," the judge said through his mask, "it would not be my sentence."

The judge noted that none of the victim impact statements demanded that Aguilera-Mederos spend the rest of his life in prison. "There was forgiveness reflected in those statements," he said. "But also a desire that he be punished and serve time in prison, and I share those sentiments. ... I accept and respect what the defendant has said about his lack of intent to hurt people, but he made a series of terrible decisions, reckless decisions."

Until that moment, the case was little known outside of Colorado. But that changed overnight as the news spread through social media, along with video clips of Aguilera-Mederos making his tearful plea. Suddenly, millions of supporters were signing an online petition seeking a reduction in his prison time and calling for changes in mandatory minimum sentencing laws.

"The next day was when the media blitzkrieg started. I mean, it was just crazy," recalls Aguilera-Mederos' defense attorney, James Colgan. "It was lightning fast how it happened. Before I knew it, I was getting a call from the governor's office."

A new driving opportunity

More than two years before that call from the governor, Aguilera-Mederos was living in Houston when a friend and fellow truck driver recommended him for a job at a small trucking company. Aguilera-Mederos, who'd had his Texas commercial license for less than a year, applied for a position with Castellano 03 Trucking. The owner, a fellow Cuban immigrant, Yaimy Galan Segura, had no experience running a trucking company when she started it at the suggestion of a neighbor. She learned about the business online and created a limited liability company.

Aguilera-Mederos' runaway truck ignited a deadly inferno on I-70 outside Denver.

Lakewood Police Department via AP; AP Photo/David Zalubowski, File

The company had a history of violations. The Federal Motor Carrier Safety Administration records show it was cited for 30 safety violations in the two years prior to the crash. The company received 23 vehicle maintenance violations, 10 involving brake issues. The company also was cited twice because its drivers did not adequately speak and read English.

Segura hired Aguilera-Mederos after verifying he had a Texas commercial driver's license, checking his safety record and contacting a couple of references, though he had not listed his most recent employer. Within two weeks, Aguilera-Mederos was on the fateful run that would forever change his life and those of dozens of others.

On April 25, 2019, Aguilera-Mederos was hauling a trailer full of lumber from Wyoming to Texas when he passed through the Colorado mountains and began a dangerous descent on I-70. During the trial, he testified that he had no experience driving in the mountains. His brakes got hot and began to falter.

When Aguilera-Mederos realized his brakes were out, he considered several options, such as driving on the median or on the shoulder, he said. When he saw another truck blocking the shoulder, he swerved and hit the trailer "but once I hit it, I was not able to control anything," he said.

"A few seconds before that, I said, 'Dear God, don't let anything bad happen,'" Aguilera-Mederos later testified. "At the moment of the impact, I closed my eyes and hugged the wheel."

His lawyer said the crash was unavoidable. "This was someone who could not control a runaway vehicle, even with his best efforts and everything he knew how to do," Colgan said, blaming the brake failure on improperly maintained parts before the trip began.

Prosecutors told a different story, saying that Aguilera-Mederos made a series of poor decisions and could have prevented the crash. Witnesses said Aguilera-Mederos was driving recklessly before the crash, and along the route he had stopped to check the brakes but kept going even though he knew there were problems.

Charging the case

After Aguilera-Mederos was arrested, the Jefferson County DA's office, then led by Peter Weir, charged him with 42 separate criminal counts, including vehicular homicide, first-degree assault, attempted first-degree assault and reckless driving. Aguilera-Mederos had two different defense lawyers represent

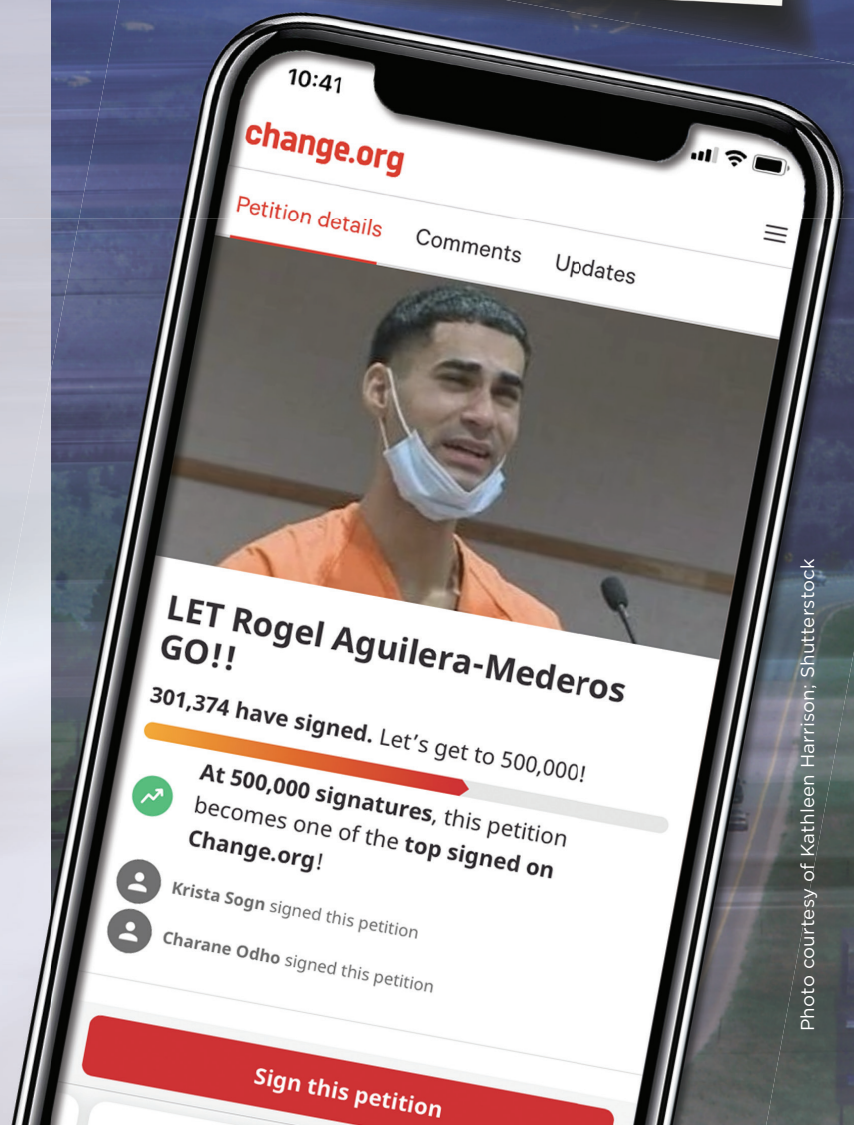


Photo courtesy of Kathleen Harrison; Shutterstock

Kathleen Harrison (top left) with her husband, Doyle; William Bailey and his brother Duane (above); a supporter created a Change.org petition for Aguilera-Mederos (bottom left).

Photos courtesy of Duane Bailey; Brownstein Hyatt Farber Schreck; Shutterstock

him before he landed with Colgan after a referral from a Cuban friend in Houston.

"When I first met Mr. Mederos, he was quiet and tearful. Very remorseful yet adamant that this was all a tragic accident," Colgan says. "I found him to be very upset and traumatized. And I don't want to diminish what happened to the people who died. He has PTSD about this as well."

Colgan says he was not aware of any plea discussions before he took over the case in May 2020. So he decided to open up talks.

"I sat down with some people in the DA's office, and we had a very long conversation about a potential plea," he says. While he wouldn't disclose the DA's offer, he said it was unacceptable.

The DA's office, now headed by Alexis King, did not respond to requests to discuss the case with the *ABA Journal*.

Among the charges were six counts of first-degree assault and 10 counts of attempted first-degree assault. What made those charges noteworthy was that the law in Colorado says the act must be committed intentionally and with "extreme indifference to the value of human life." First-degree assault in the state carries a penalty of 10-32 years in prison. If convicted, the sentences must be served consecutively.

By contrast, the charge of vehicular homicide states, "If a person operates or drives a motor vehicle in a reckless manner, and such conduct is the proximate cause of the death of another, such person commits vehicular homicide." The penalty for vehicular homicide can vary between 2-6 years, depending on whether one is under the influence.

Colgan, a former prosecutor, knows that DAs often overcharge cases for leverage, but he had never seen anything this extreme, especially in a case in which it was clear his client did not intend to kill or harm anyone. He also questions why his client would face both assault charges and vehicular homicide for the same victims.

Stan Garnett, a former DA in Boulder County, Colorado, and now a shareholder at Brownstein Hyatt Farber Schreck in Denver, believes the volume of charges was excessive.

"I think prosecutors need to become more careful and more prudent about what they charge," he says. "They do

Criminal defense attorney Stan Garnett, a former DA, says judges used to have more sentencing discretion.

"I would have preferred God had taken me instead of them."

—Rogel Aguilera-Mederos

Right: William Bailey with his wife, Gage Evans.

it to create plea bargaining pressure so that a defendant will feel obligated to take whatever deal is on the table because if they go to trial, it could be catastrophic. You want to have a system where people feel comfortable exercising their right to trial."

Up until the 1990s, Colorado had few minimum mandatory sentencing laws, which allowed judges to determine sentences in most cases.

"That system, in my opinion, worked pretty well. But it wasn't perfect," Garnett says. "With the late '80s and early '90s increase in crime rates, similar to what we're seeing now around the country, legislators started putting into place more and more mandatory sentencing."

These laws not only created minimum mandatory sentences, "but also sentences that had to be served consecutively," he says. "It means that a DA is able, by how they fashion the charges on the case, to predict pretty accurately what the sentence will be."

In the Aguilera-Mederos case, "this was kind of the perfect storm of all of this coming together," Garnett says.

"Given the way the case was charged, and the way the jury's verdict was, you ended up having a judge with his hands tied."

A petition sweeps the nation—and beyond

Not long after the crash in 2019, a young Colorado woman posted a petition on Change.org, the organization that has tapped into the power of social media to advocate for causes that range from commuting sentences to passing small-town municipal ordinances. The petition sought to absolve Aguilera-Mederos of criminal responsibility, saying that the crash was an accident, and his employer bore much of the blame.

KCNC-TV CBS Denver; photo courtesy of Duane Bailey

It noted that Aguilera-Mederos complied with the police and was not drunk or on drugs. In the beginning, there were just a few hundred signatures.

More than two years later, after news of his sentence spread, support rocketed. "It really was extraordinary," says Amanda Mustafic, communications director at Change.org. "It came to our attention because it was spiking."

Not only were people in the U.S. signing on, but thousands from Mexico and other Spanish-speaking countries in South America also were signing the petition. Mustafic says "Justice for Rogel" was among the fastest-growing petitions on Change.org in the U.S. in 2021. The count reached 5,117,660 signatures.

"The images of him crying was a touchstone for so many people," she says. "People did feel he was a scapegoat. I think there was a feeling that we overcriminalize."

Truckers also joined in support of Aguilera-Mederos, with TikTok videos and calls for a boycott of driving in Colorado. Adding to the swell of support was Kim Kardashian, who posted several tweets after she said she took a "deep dive" into the case. "Colorado law really has to be changed, and this is so unfair," she wrote.

Aguilera-Mederos' lawyer read many of the online comments. "There were a lot of articulate arguments as to why this was a miscarriage of justice," Colgan says. "They weren't people on the fringes who were making these comments."

Also joining the campaign was Jason Flom, record executive, longtime criminal justice reform advocate and podcast producer. He also hosts the popular podcast *Wrongful Conviction*. (See "Behind the Mic," page 28.)

"I mean, this is not a guy who did anything on purpose," Flom says. "The culpability lies more with the people who didn't train him and put a 23-year-old kid with limited training behind the wheel of a massive 18-wheeler."

Flom says those who second-guess the driver's actions could not possibly understand what it was like to be in his shoes.

"Here is someone in full panic. I think it's preposterous and disgusting for people to say, 'Here is what I would have done,'" Flom says. "I think the appropriate sentence for Rogel should be community service."

Pleas for mercy get heard

After Aguilera-Mederos was sentenced, Colgan began drafting a clemency petition to Colorado Gov. Jared Polis. Four days after the sentencing, and much to Colgan's surprise, the Jefferson County DA filed a request for a hearing to reconsider the sentence. She noted that her office would confer with the victims.

Some of the surviving family members agreed the sentence was too long, but they were bothered that Aguilera-Mederos was being portrayed as a victim in the news and on social media. Kathleen Harrison, whose husband, Doyle, a graphic designer, was among the four people killed, says the case was often mischaracterized and oversimplified on social media, which led to the extraordinary number of people signing the petition.

"Clearly, people were signing based on not knowing anything except here is this poor immigrant truck driver whose brakes failed," says Harrison, a mother of three who had been married to her husband for 26 years. "As if it was just a mechanical failure."

At the same time, Harrison says 110 years was too much. "Yes, he deserved jail time, but I didn't want his whole life to be gone," she says. "What he did was stupid. He was not well-trained."

Duane Bailey, whose brother William was killed in the crash, says the onslaught of publicity was almost too much to handle as the tragedy played out again on the national news. "It took me back to the day of the crash. I felt as bad as I did back then," he says.

He also resented how the case was presented on social media. "It was drawing in all these people who didn't know what was going on. They had no idea about the evidence that was put on, and all they see is this poor truck driver sentenced to 110 years without knowing there was direct evidence for everything he did that day," he says. "And while it was not intentional, he was extremely reckless and extremely careless and had no regard for anyone else on the road that day."

Gage Evans, William Bailey's widow, wrote a letter to the *Denver Post* that was published three days after Christmas. "Lost in the national conversation around the driver's sentence is any effort to understand the experience of the actual victims. I also received a life sentence that day. Rogel Lazaro Aguilera-

Criminal justice advocate and podcast host Jason Flom thinks Aguilera-Mederos deserved community service.

Photo courtesy of the Press House

Mederos is not a victim but a responsible party whose decisions caused avoidable deaths and injuries that fateful day."

Nonetheless, before the end of the year, Gov. Polis granted Colgan's petition to commute Aguilera-Mederos' sentence. "After learning about the highly atypical and unjust sentence in your case, I am commuting your sentence to 10 years and granting you parole eligibility on Dec. 30, 2026."

The governor described the crash as a "tragic but unintentional act" and wrote, "While you are not blameless, your sentence is disproportionate compared with many other inmates in our criminal justice system who committed intentional, premeditated or violent crimes."

Polis also noted that the sentence "was the result of a law

James Felman, chair of the ABA Sentencing Standards Task Force, works to eliminate mandatory minimum sentencing.

of Colorado passed by the legislature and signed by a prior governor and is not the fault of the judge who handed down the mandatory sentence required by the law in this case."

Colgan says he was surprised and pleased that the governor moved so quickly—more quickly than King's office. "It was a race to the courthouse," he says. King "was trying to take it out of the hands of the governor. It was a political contest. The governor beat her to it."

Duane Bailey, who favored a shorter sentence, thinks the governor was too hasty. "While the governor certainly had the right to do it, I think it was inappropriate because I think that he thinks he's restoring the faith in the justice system. I think he actually overrode the justice system."

Calls for sentencing law reform

James Felman, chair of the ABA Sentencing Standards Task Force, says the Aguilera-Mederos case has once again brought the issue of mandatory minimum sentencing to the forefront.

"It's another high-profile example of a sentence that was excessive as a result of mandatory minimums and a consensus among all the players that it was wrong and needs to be fixed," he says. "Things like that are powerful."

The ABA has opposed mandatory minimum sentences for more than 50 years. In 2017, the House of Delegates reaffirmed its opposition and went further by urging Congress, state and territorial legislatures "to repeal laws requiring minimum sentences, to refrain from enacting laws punishable by mandatory minimum sentences."

In August, the House of Delegates called for abolishing mandatory minimum sentencing in its adoption of the ABA Ten Principles on Reducing Mass Incarceration. The principles say: "Mandatory minimum sentences not only contribute to the mass incarceration problem in the United States; they are also inequitable and counterproductive."

"If you have a system of mandatory minimums, not only does it give the sentencing discretion to the prosecutor, but it hands the prosecutor all these hammers they can use to extract a plea," Felman says.

Colorado Sen. Bob Gardner, a Republican, is on the state's Sentencing Reform Task Force, which the governor created in 2020. "Mandatory minimums were themselves an attempt to address inequities, or some perceived inequity," he says. "They now seem to be the source of inequity, and I believe we will continue to have that debate ... as the culture develops, as times change."

Gardner notes that across the country, there's a sense that mandatory minimums tie the hands of judges and don't allow them to exercise discretion. "If you look back at historic times, there has always been this question of how much discretion to grant the courts and when we do, there will be outlier sentences, and when you have mandatory minimums, we will likewise have cases that are something of a one-off because of their particular facts and circumstances."

As a board member of FAMM, a nonpartisan advocacy organization for fair sentencing and prison policies also known as Families Against Mandatory Minimums, Flom says he has seen progress at the federal level.

"It's still obscene that we put people away for the rest of their lives for what is considered in other countries minor infractions," he says. "There has been progress, but it has not been fast enough for my liking and not for the people who have been suffering behind bars serving these crazy sentences."

Civil actions and culpability

Segura, owner of the trucking company that employed Aguilera-Mederos, was a witness against him during his trial,

Warped Vision Photography

and she was not charged in the case. However, three families who lost loved ones filed lawsuits against her company and shared a payout from the minimum required carrier insurance of $750,000.

After the crash, Segura dissolved Castellano 03 Trucking and started a new company with a different name, Volt Trucking. That company is inactive. Segura could not be reached for comment.

Michael McCormick, a Houston-based attorney, represents Harrison, who is suing Shipping Connections, the Arkansas-based broker that arranged the transport of the lumber with Castellano 03. McCormick says Shipping Connections failed to check the safety record of Castellano 03 and its driver.

"Our position is that they have a duty to put safe drivers on the road," he says. "It ought to be public policy."

Federal Department of Transportation records show that Aguilera-Mederos was not properly trained before taking the fatal journey. "The carrier did not ensure this entry-level driver received required training prior to operating in interstate commerce." He had been fired from his previous job because he did not know how to drive a stick shift.

"They should have never put that guy in a truck," McCormick says. "He was in way over his head driving a tractor-trailer. It would be like possessing a pilot's license for a Cessna and piloting the space shuttle."

McCormick says the case is symbolic of a larger problem. "It's not just the company but the entire industry and enterprise of shipping freight. When you're moving commerce for profit, every entity takes on the responsibility that the movement of the freight is safe."

The CEO of Shipping Connections did not respond to requests for comment. Colgan also is frustrated that Segura's company escaped criminal responsibility.

"It's obscene that they were not charged at all. But you can't force the prosecution to prosecute somebody," he says. "My client was the lowest-hanging fruit. He was the easiest guy to prosecute. He had the least amount of power, the least amount of resources, so he was the easiest guy to go after."

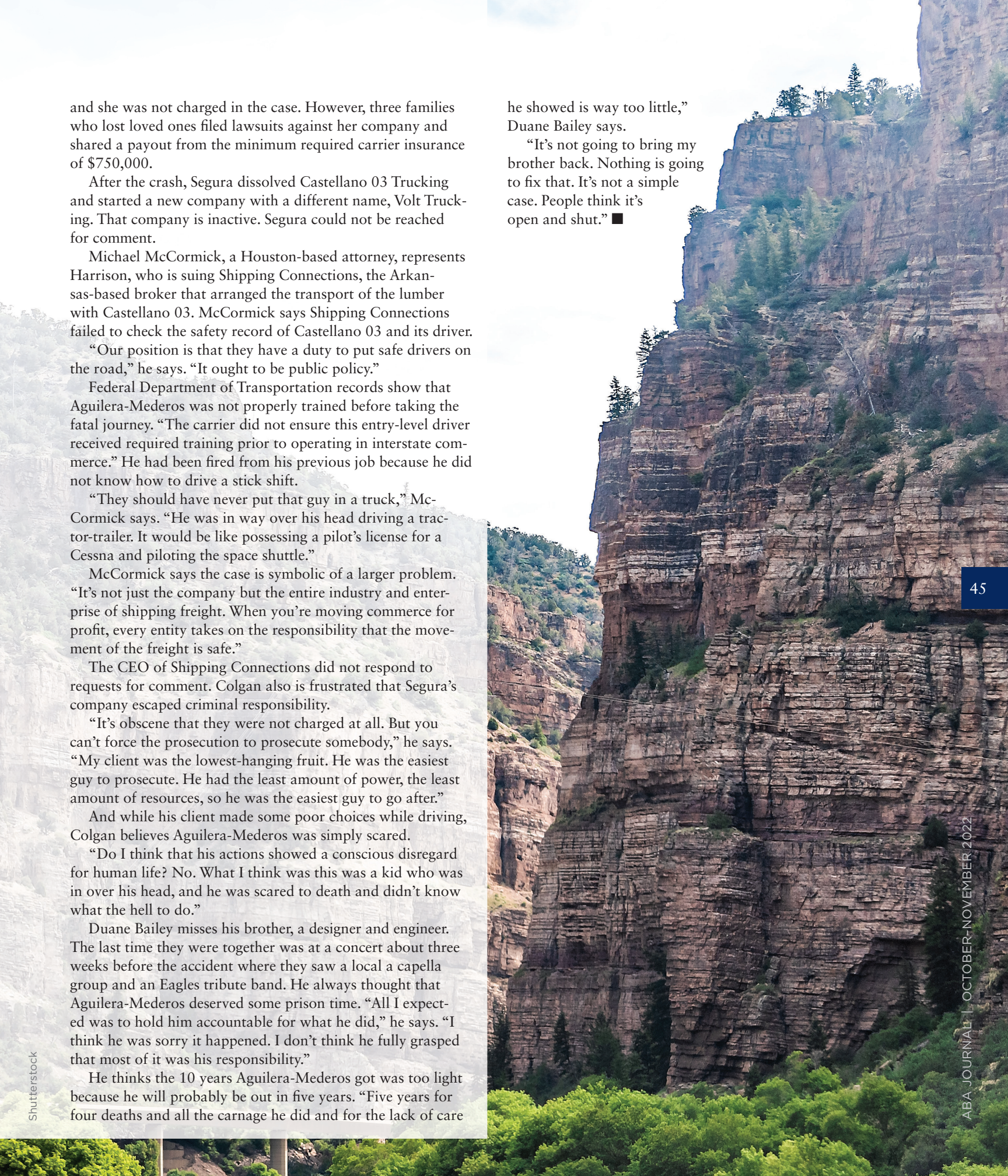
And while his client made some poor choices while driving, Colgan believes Aguilera-Mederos was simply scared.

"Do I think that his actions showed a conscious disregard for human life? No. What I think was this was a kid who was in over his head, and he was scared to death and didn't know what the hell to do."

Duane Bailey misses his brother, a designer and engineer. The last time they were together was at a concert about three weeks before the accident where they saw a local a capella group and an Eagles tribute band. He always thought that Aguilera-Mederos deserved some prison time. "All I expected was to hold him accountable for what he did," he says. "I think he was sorry it happened. I don't think he fully grasped that most of it was his responsibility."

He thinks the 10 years Aguilera-Mederos got was too light because he will probably be out in five years. "Five years for four deaths and all the carnage he did and for the lack of care he showed is way too little," Duane Bailey says.

"It's not going to bring my brother back. Nothing is going to fix that. It's not a simple case. People think it's open and shut." ■



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Tulsa Reckoning

An ongoing lawsuit seeks justice for massacre victims

BY MATT REYNOLDS

Civil rights attorney Damario Solomon-Simmons has faced his share of setbacks in the fight for justice for survivors of the 1921 Tulsa Race Massacre, one of the worst racial terror attacks in U.S. history.

Nearly two decades ago, the Oklahoma attorney was part of a legal team that lost a lawsuit in federal court for more than 200 survivors of the attack and their descendants after a judge ruled the claims were time-barred.

Solomon-Simmons then advocated for a bill for survivors in Congress. But that effort also failed.

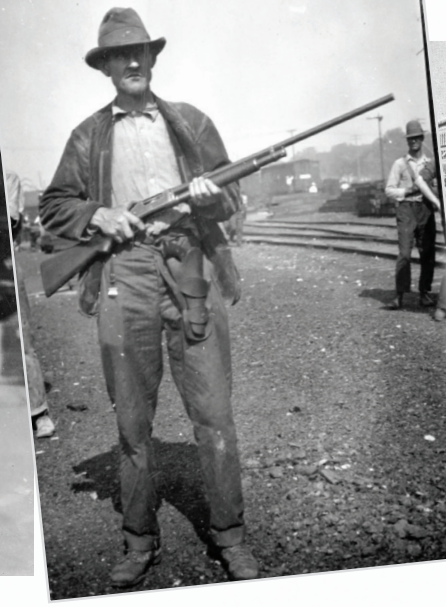
Year after year, the number of known survivors of the attack dwindled. Solomon-Simmons knew he would have to act fast if the remaining living witnesses were going to see justice and have their day in court.

"All around, we were losing survivors. In about 2016 or 2017, I was filled with despair. Every avenue was closed," he says.

But he never gave up hope. It took Solomon-Simmons a few more years to come up with a legal theory to get around the statute of limitations. In September 2020, he filed a public nuisance and unjust enrichment complaint against the city of Tulsa, other governmental entities and the Tulsa Regional

Photo by Nathan Harmon/ABA Journal

Lawyer Damario Solomon-Simmons stands in front of a mural depicting the Tulsa Race Massacre.



Chamber in Tulsa County District Court, seeking reparations for survivor Lessie Benningfield Randle and eight other plaintiffs.

In May, Solomon-Simmons had one of his first victories when Judge Caroline Wall denied in part a motion to dismiss filed by the defendants. But Wall's written order, filed in August, gave only direct survivors legal standing to make a public nuisance claim, dismissing as plaintiffs descendants who had joined the lawsuit.

Wall gave the only three known living witnesses to the massacre—108-year old Viola Fletcher; Randle, 107; and Hughes Van Ellis, 101—an opportunity to amend their petition to cure what she said were defects in their claim of unjust enrichment and in their claim for reparations.

With the clock ticking, the stakes are high. Solomon-Simmons says the case could be the "last best hope" for the survivors to see some form of justice before they die.

"This massacre impacted Black people around this nation," Solomon-Simmons says. "This is a win that we need as a people."

Black Wall Street destroyed

The Tulsa Race Massacre took place May 31 and June 1, 1921, and was sparked by news reports claiming a 19-year-old Black man and shoe shiner named Dick Rowland had assaulted a white woman.

According to some accounts, Rowland was arrested on assault charges after tripping in an elevator in the Drexel Building in Tulsa and grabbing on to the arm of white elevator operator Sarah Page. Unfounded rumors of an attempted rape began to spread among whites in Tulsa, and tensions reached a boiling point.

There was a standoff between Black men—including World War I veterans who offered to help the sheriff protect Rowland, who was detained in jail—and those who wanted to lynch Rowland. A white mob of more than 1,000 had gathered outside the courthouse. A shot was fired. And with that, said a 2001 report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921, "America's worst race riot had begun."

The vengeful mob, some armed and deputized by city officials, destroyed 35 square blocks of the prosperous Black district in north Tulsa known as Greenwood, or Black Wall Street. They torched and firebombed dozens of businesses, a school, a public library, churches and more than 1,000 homes. In less than 24 hours, the wealth the community had built vanished into ashes.

Up to 300 people were killed, according to the American Red Cross, and thousands were injured, but historians estimate that number could be greater. About 9,000 people were left homeless and 6,000 were forced into temporary internment camps, many living there well into the winter, where they were exposed to disease and suffered malnutrition. Some Black Greenwood residents were blamed and indicted for inciting a riot.

Benningfield, Fletcher and Van Ellis, who were children at the time, saw the mayhem firsthand, Solomon-Simmons says. They smelled the gunpowder and kerosene. They saw the smoke and fire. They heard the screams. They saw the corpses piling up in the streets.

Sara E. Solfanelli, special counsel for pro bono initiatives at Schulte Roth & Zabel, which is co-counsel with Solomon-Simmons, says the Black community in north Tulsa still feels the impact of the attack today. She adds that the mob destroyed

The intersection of South Main Avenue and First Street during the 1921 Tulsa Race Massacre.

Tulsa Historical Society and Museum

Left: Armed white rioters during the 1921 Tulsa Race Massacre. Above: Black Wall Street before the mob destruction.

the community hospital. It was never rebuilt, and "simple access to health care for the Black community around Greenwood has never come back."

In her August order, Wall allowed the plaintiffs to go forward with claims that the massacre itself constituted a public nuisance, letting them proceed to the discovery phase. But Wall rejected the allegation that the destruction constituted an "ongoing" public nuisance that over decades resulted in redlining and unjust policing, for example.

In early September, the plaintiffs filed an amended complaint seeking the replacement of buildings, homes and businesses destroyed during the massacre, among other damages and remedies. They also revived a claim of unjust enrichment, alleging the city had exploited "the historic reputation and legacy of the massacre and the ongoing nuisance to their benefit" without benefiting survivors.

In a press conference after the ruling, attorneys for the plaintiffs struck an optimistic tone.

"I just want to think about that we have this victory," Solomon-Simmons said. "And we have the ability to move forward if the judge allows us to do it, and I know we can prove that this was a nuisance."

The team praised Wall's finding that the survivors have legal standing, while expressing disappointment that descendants did not. They said they're exploring all legal options but want to seize the opportunity to move forward.

"This order is the first time that ... three survivors have managed to move to the merits stage of holding the city, the county, the sheriff and the chamber of commerce accountable for the Tulsa Race Massacre," says Eric Miller, a professor at Loyola Marymount University's Loyola Law School in Los Angeles.

"And Uncle Red [Van Ellis] has pledged to live till 130 if it takes that long to win this case," added Schulte Roth & Zabel

Left: Detained Black men are taken to a holding center at Convention Hall during the 1921 Tulsa Race Massacre. Below: National Guard troops escort unarmed Black men to the detention center at Convention Hall after the Tulsa Race Massacre.

Photos by Universal History Archive/Universal Images Group via Getty Images; by Oklahoma Historical Society/Getty Images; Tulsa Historical Society and Museum

A boy stands outside an American Red Cross tent erected for displaced Black residents following the massacre.

attorney Michael Swartz. "So there's always that."

Generational loss

Solomon-Simmons was sitting in an introduction to African American studies class taught by a "big, intimidating" University of Oklahoma professor when he first learned about the attack. Solomon-Simmons usually kept his thoughts to himself. But when the professor started describing the massacre, his hand shot up.

"That's not true," Solomon-Simmons told the professor. "I'm from Tulsa. I don't know what you're talking about."

Solomon-Simmons was born and raised in Tulsa. He attended Carver Middle School and Booker T. Washington High School in the heart of north Tulsa. He had never heard of the massacre.

It didn't seem possible he had missed this. Now his professor was telling him it happened right on his doorstep?

"Of course, I was completely wrong," Solomon-Simmons says with a chuckle. "Once I realized I was wrong, I had a great sense of shame, embarrassment—just disbelief."

It's no accident that Solomon-Simmons was kept in the dark. In the decades after the attack, Tulsa's officials did everything they could to erase the memory of it and scatter Black Wall Street's ashes to the wind. For decades, local newspapers and media were complicit, refusing to investigate or revisit the massacre.

But while the events of 1921 were a mystery to many, memories of the attack were seared into survivors' minds and passed down to their relatives.

Seth Bryant, a corporate lawyer at the New York City law firm Bryant Rabbino, is among those who heard about the attack when he was a young child. He is the great-grandson of A.J. Smitherman, a civil rights attorney and newsman who published the *Tulsa Star*, a Greenwood-based newspaper.

Bryant's grandmother Guelda was only a toddler when her older sister, Carol, swept her up into her arms and fled from the basement of their burning house.

As a kid growing up in the Cold Springs neighborhood of Buffalo, New York, Bryant remembers hearing bits and pieces about Smitherman, or "Big Daddy," as the family calls him. But he could never be sure whether the stories he heard about him had taken on a life of their own. "Sometimes stories get bigger over time," Bryant says.

It wasn't until he visited Tulsa for the centennial of the massacre in 2021 and saw Smitherman memorialized that Bryant realized his great-grandfather was the hero he'd heard about back in Buffalo. "That stuff became true to me and a point of pride."

In June 1921, a grand jury indicted Smitherman on rioting charges. He spent the rest of his life as a fugitive and never returned to Tulsa, Bryant says.

His great-grandfather fled to Massachusetts, from which prosecutors tried unsuccessfully to extradite him. He eventually settled in Buffalo so he could escape to Canada if authorities came looking for him again.

"He died a wanted man," Bryant says.

Smitherman died in 1961. And it wasn't until 2007 that the indictment was dismissed after historian Barbara Seals Nev-

Left and below: Views of burned areas of the Greenwood district. Far right: The Rev. Robert A. Whitaker, whose Mt. Zion Baptist Church was burned to the ground, distributes relief goods with his family to refugees after the massacre.

Photos by GHI/Universal History Archive/Universal Images Group via Getty Images; Tulsa Historical Society and Museum

Only the outer walls of the Mt. Zion Baptist Church remained standing in the wake of the race riot destruction.

ergold fought to show he shouldn't have been charged.

Bryant first visited Greenwood in the late 1990s when he was still a young lawyer, jumping into the back seat of a cab and asking the driver to show him around.

When he saw that a highway had been built over this once-thriving Black community, it was like a punch to the gut. Only half a block of what was once Black Wall Street remained.

"You couldn't even picture it," Bryant says. "The gentleman wasn't able to show me much, in part because there wasn't much left that you could see."

Greenwood enjoyed a renaissance in the 1930s and '40s. But systemic racism, redlining, "urban renewal" policies and a lack of restitution or reparations for the massacre ultimately left Black people in north Tulsa with "a lower quality of life and fewer opportunities,"according to *The Case for Reparations in Tulsa, Oklahoma*, a 2020 Human Rights Watch report.

The long-term impact plays on the mind of Nate Calloway, the great-grandson of J.B. Stradford, then one of the richest men in Greenwood, who lost his hotel, the Stradford, during the attack.

Stradford was also a civil rights attorney who, like Smitherman, fought for Greenwood residents amid Jim Crow-era laws in a state where lynching was common.

Stradford was determined to defend his hotel, and even after rioters riddled it with machine gun fire, he stayed there throughout the night. Calloway says his great-grandfather left the hotel only after martial law was declared June 1, and National Guard troops arrived. They told Stradford they would guard it; instead, they stood by as rioters burned it to the ground.

"He could have become the next J.W. Marriott," Calloway says. "He could have held on to that compound wealth. But he was robbed of that. We were robbed of that."

Stradford was charged with inciting a riot. He became a fugitive and fled to Chicago, where he tried in vain to rebuild his empire. His name was finally cleared in 1996, six decades after his death. His son, C. Francis Stradford, went on to co-found the National Bar Association and the Cook County Bar Association.

Calloway felt a mix of emotions when he visited the Greenwood district for the first time in 2018. He was saddened. But as he imagined his great-grandfather standing on the stoop of his hotel and looking out over the neighborhood, he swelled with pride.

"It made it all very tangible. You hear about this stuff your whole life, but [when] you are standing where his hotel stood, it brings it full circle. It makes it that much more real," Calloway says. "You think about what was lost and what could have been."

The case for reparations

Bryant and Calloway say a victory in the lawsuit is important not just for the survivors and their descendants but also so the city and state are held accountable for what happened.

"The only way we're going to live up to the ideals of our founding mothers and fathers is if we make amends," Calloway says. "It might be a symbolic gesture, but symbolic gestures go a long way towards healing old wounds."

Bryant says the lawsuit is the last shot at real justice for the survivors and other people impacted.

"If we are to be a country that is about the rule of law, then there's just no way that you can ignore what happened in Tulsa without really understanding how it happened," Bryant

Photos by GHI/Universal History Archive/Universal Images Group via Getty Images; Tulsa Historical Society and Museum

says. "You can't allow people to try to cover up a crime by running out the clock and ensuring that justice will never be seen."

After the attack, a grand jury report claimed the Black community was responsible. The only white person held accountable was Tulsa Police Chief John Gustafson, who was convicted on one count of dereliction of duty, fined and fired. No one in the mob was prosecuted for the killings, arson or looting.

According to the Tulsa Race Riot commission's 2001 report, Black Tulsans filed at least 190 lawsuits after the attack to rebuild and redevelop the community and recover damages from insurance companies. But not one of the suits succeeded.

In 2018, Tulsa Mayor G.T. Bynum said the city would investigate potential mass graves in the Oaklawn Cemetery and other sites that could hold victims of the massacre.

In June, the city said it was working with forensic experts to complete a DNA analysis of remains found at Oaklawn in summer 2021.

After Solomon-Simmons learned about the massacre as a university student, he made it his mission to get justice for Black Wall Street survivors.

He was 23 years old and a law clerk when he joined a legal team led by famed Harvard Law School professor and civil rights attorney Charles J. Ogletree Jr. and Johnnie L. Cochran Jr., who was best known for winning an acquittal for O.J. Simpson in his 1995 murder trial. The team filed a lawsuit for survivors in 2003. After losing in the trial and appeals courts, they took the case to the U.S. Supreme Court, which declined to hear an appeal in 2005.

Solomon-Simmons says he and other advocates sought reparations through proposed federal legislation called the Tulsa-Greenwood Race Riots Claims Accountability Act of 2007. The act was introduced in every Congress through 2013. But the lawyer says the legislation never got much further than one subcommittee hearing in April 2007.

Another bill introduced by Rep. Hank Johnson, D-Ga., in 2021 also has stalled, Solomon-Simmons says.

Determined to find a claim that could survive a dispositive motion, Solomon-Simmons spent 18 months with Miller and Tulsa attorney Spencer Bryan developing the public nuisance theory for the 2020 lawsuit.

Because the public nuisance statute in Oklahoma can bypass statutes of limitations, it seemed like the perfect vehicle for a new complaint.

"I relive this every time I tell this story, but it's like when you see a movie scientist. He's done 300 experiments, and they all don't work, and there's that one time when he's like, 'This could work,'" Solomon-Simmons says of the process of coming up with the fresh legal angle. "That's the type of moment we had."

Under public nuisance law, a "triggering act" creates the nuisance, such as when oil spilled from the Deepwater Horizon rig in the Gulf of Mexico in 2010. The nuisance the spill created led to a slew of environmental litigation seeking to abate it, Solomon-Simmons says. As framed in his lawsuit, the triggering act that created the nuisance in north Tulsa was the massacre.

"That's the equivalent of that oil spilling out into the ocean. They stopped the bombing, burning, looting, killing [and] destroying, [but] they've done nothing to repair the nuisance that was created," the lawyer says.

Plaintiffs argued the nuisance was ongoing because north Tulsans still "face racially disparate treatment and city-created barriers to basic human needs, including jobs, financial security, education, housing, justice and health."

Among the defendants named in the lawsuit were the City of Tulsa, the Tulsa County Sheriff, the Oklahoma Military Department and the Tulsa Regional Chamber. Chamber attorney John Tucker declined to comment for this story, but Tucker has previously said the plaintiffs do not have legal standing to bring their claims.

In a March 7 brief, Tucker wrote that courts cannot address societal ills and the policy problems arising from the massacre. He argued that it's up to government officials rather than the judiciary to solve those problems and decide whether to grant reparations. In her order, Wall agreed in part, rejecting the idea of an "ongoing" public nuisance, holding the claims "present political questions and therefore dismissal is proper."

"This court declines to engage in management of public policy matters that should be dealt with by the legislative and executive branches," Wall wrote.

Next phase

Author and attorney Hannibal Johnson, who is one of the foremost experts on the massacre, says the very existence of the

Above, from left: Survivors Lessie Benningfield Randle, Viola Fletcher and Hughes Van Ellis sing at the end of a rally commemorating the 100th anniversary of the Tulsa Race Massacre, on June 1, 2021. Right: Solomon-Simmons stands in front of Vernon AME Church, one of the original lawsuit plaintiffs.

lawsuit should be celebrated for drawing attention to a once-forgotten part of history.

But he is also skeptical that the continuing problem of systemic racism fits into the framework typically used to support a nuisance claim.

"I see courts being wary of opening up a Pandora's box whereby the judiciary would be asked to provide some sort of resolution for this historical racial trauma that spans the entirety of the United States," Johnson says.

Still, Johnson points out that the lawsuit won't be the end of the fight for justice. He notes his work on the Tulsa Race Massacre Centennial Commission, which he said pushed for schools to include the history of the attack in their curricula, and the building of the Greenwood Rising history center, where Johnson serves as curator.

"Should this lawsuit fail, it just forecloses one avenue," Johnson says. "But there are many other avenues that we need to be pursuing anyway."

And going forward, a public nuisance theory could prove a "powerful legal tool," Miller says, offering a model for other civil rights attorneys who want to bring reparations claims barred by statues of limitations.

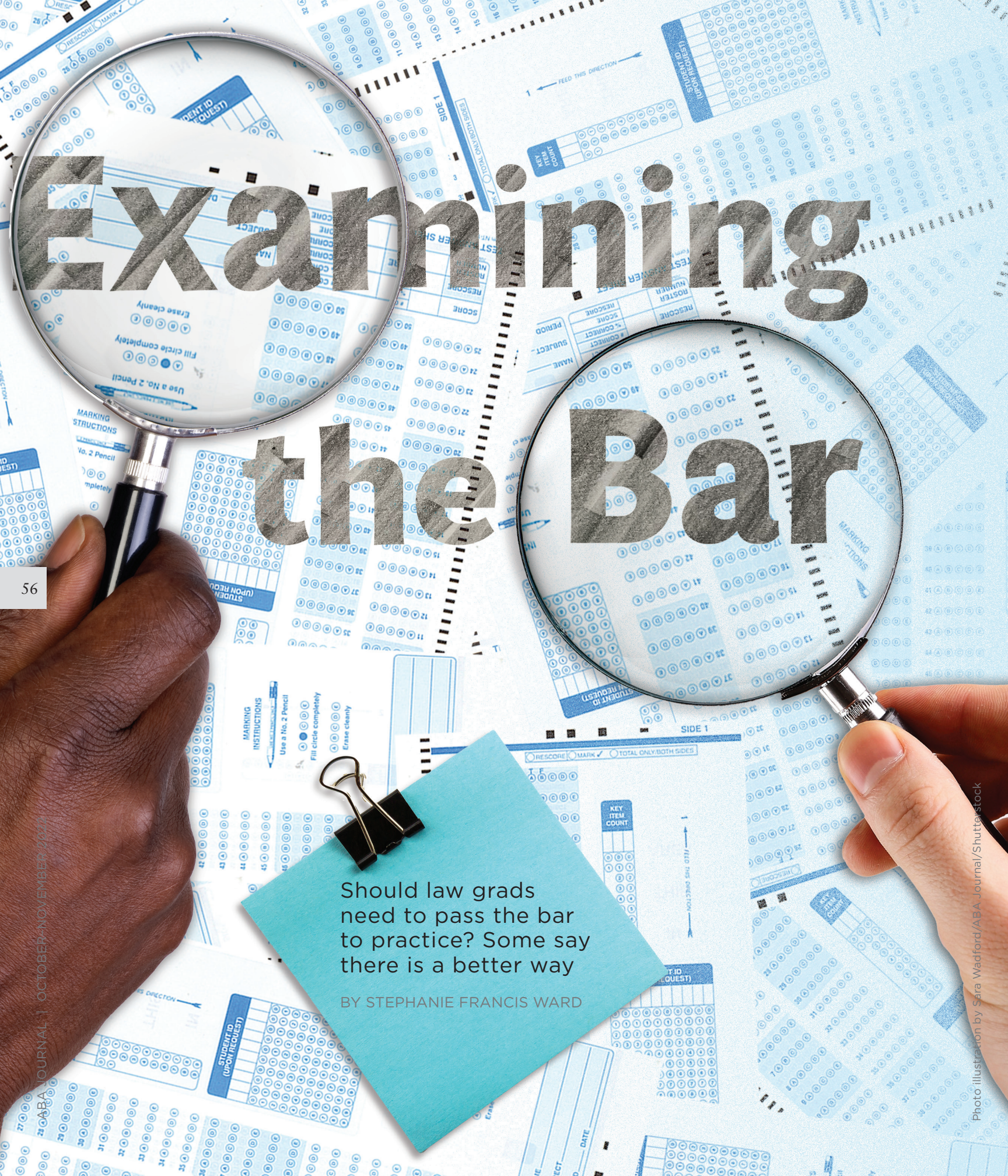
"I'm already fielding phone calls from communities around the country and lawyers who are looking at this," Solomon-Simmons says.

But there is a long, heavy pause as he ponders the next stage of the case, knowing that time is of the essence.

Solomon-Simmons has persevered for this long, and so have the Tulsa massacre survivors. He notes that racism and white supremacy have prevented justice for 101 years, but he believes the wind is at their back to achieve some form of equity: "I don't think we're going to fail." ■

Photos by Nathan Harmon/ABA Journal; by Brandon Bell/Getty Images

Examining the Bar



Should law grads need to pass the bar to practice? Some say there is a better way

BY STEPHANIE FRANCIS WARD

Photo illustration by Sara Wadford/ABA Journal/Shutterstock

Brian Gallini, dean of Willamette University College of Law, supports keeping the bar exam—as well as adding two alternative paths to attorney licensure. But he admits it's not a popular position among his school's alumni.

It's not because they loved studying nonstop for two months to take an exam filled with subject matter they would forget about the moment their pencils hit the table and never use in their professional careers.

It's certainly not because the bar exam prepared them for practicing law. Gallini says most alumni tell him when they first started practicing law, they didn't know how to do things and often received instructions from paralegals.

It's not because the test is equitable. Based on statistics, the first-time pass rate for white candidates in 2021 was 85%, compared with numbers below 79% for test-takers of color, according to ABA data.

It's not even that the score means much as far as setting baseline qualifications for bar admission. Gallini points out the Uniform Bar Exam and its portable score, emphasizing that since each jurisdiction sets its own cut score, a candidate can fail in one place but pass in another.

Once he cuts through those various arguments, he estimates that it takes him about 15 minutes to persuade someone of the need to reform the bar examination process.

"I have found this conversation does not work well in a group; it has to be one-on-one. It's letting the person vent and articulate their concerns. I think people are changing their minds organically," adds Gallini, who served on the Oregon Supreme Court's Alternatives to the Bar Exam Task Force. The group came about after the state granted emergency diploma privilege—thanks to the COVID-19 pandemic—to 2020 graduates of Oregon law schools slated to take the bar exam that July.

At a January 2022 public meeting, the Oregon Supreme Court unanimously approved in concept two new attorney licensure plans, and the state is now working on implementation. One plan involves obtaining a license after completing a law school experiential learning program focused on skills including legal research, issue spotting and argument development. The other plan supports licensure after completing between 1,000 and 1,500 hours of supervised practice after graduation. There would still be a bar exam option.

California, Massachusetts, Minnesota, Nevada,

Photo courtesy of Willamette University College of Law

Brian Gallini, dean of Willamette University College of Law

New York, Utah and Washington also have groups studying attorney licensure. Like Oregon, most are considering admissions alternatives in addition to the bar exam.

Lawyers involved with these working groups say two primary factors led to the profession being more open to admissions alternatives: that there's scant if any data to show a connection between cut scores and competence to practice law; and that the pandemic altered the country's notions about how things should be done.

"I think it just woke people up. It's easy to say, 'We've been through this, you can learn this stuff,' to then have your vision shifted to think, 'Really, did I learn anything from taking the bar exam that mattered?'" says Carol Chomsky, a University of Minnesota Law School professor.

She's one of 11 law professors who wrote an often-cited March 2020 white paper, "The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action." Chomsky also was involved in working groups that prepared reports focused on the bar exam for the Minnesota Board of Law Examiners. The groups support three pathways to licensure—a National Conference of Bar Examiners bar exam; a law school program with licensure through completion; and supervised practice, completed after graduation. After a public comment period, the agency will prepare a report for the state supreme court.

But don't burn your bar study aids just yet. "We should pause and understand that the traditional bar, right now, is not going away. I'm super proud of our bar pass outcomes," Gallini says.

After all, the profession often has a hard time with change, and some have said there's a sense that keeping a bar exam will likely assure people in power that wealthy clients won't be harmed by admissions alternatives. It's also unlikely to hurt profits for large law firms. Nevertheless, lawyers interviewed by the *ABA Journal* say it's important that states are even considering changes at all.

Technical difficulties

Even if it's been years since a lawyer passed the bar exam, there's a good chance that lawyer will still complain about the experience.

In 2020, candidates got even more than they bargained for as they faced the stress not only of studying for the bar but also uncertainty about when the test would be given and whether it would be in person or online.

Many candidates in states with July 2020 in-person exams feared they'd catch COVID-19 at testing sites. Meanwhile, examinees in jurisdictions using the NCBE's remote exam, which was given that fall, worried about software problems, and for good reason.

Facial recognition identity verification and proctoring videos were required for use of NCBE remote testing materials, and there were accusations that both led to significant computer problems for some during the test. Additionally, hundreds of candidates, mostly in California, faced allegations of cheating

Photo courtesy of University of Minnesota Law School

from the state bar based on the video footage. Many of those allegations were unfounded.

The bar exams created so many problems that they prompted the social media hashtag #barpocolypse.

After the July 2021 bar exam, the NCBE ended its remote testing option. It also has plans for what it calls the "NextGen" bar exam, which is expected to be implemented in 2026. A testing task force was appointed by the NCBE in January 2018 to research the idea. Various factors, including technology and globalization, led to the upcoming changes, according to Judith Gundersen, president and CEO of the NCBE.

The new exam won't have the traditional stand-alone sections—known as the Multistate Bar Exam, the Multistate Essay Exam and the Multistate Performance Test—but will instead use integrated sets of questions, which likely will include short-answer questions, writing and drafting prompts, and multiple-choice questions. Pretesting began this summer, Gundersen says.

The current bar exam is "highly scalable," and that also will be true for the next exam, according to Gundersen.

"For the alternative pathways under discussion, the number of schools in a jurisdiction or the number of supervised practice positions may serve to limit how many people can participate; continuing to offer a bar exam ensures access for those candidates that can't or don't wish to become licensed through one of those programs," she wrote in an email to the *ABA Journal*.

Richard M. Trachok II, who has chaired the Nevada Board of Bar Examiners since 2000, describes the MBE, which is a series of 200 multiple-choice questions, as a "concrete life preserver."

In August 2020, Nevada used an open-book test with questions written by the state board of bar examiners rather than NCBE testing materials. Since then, the state has used its own exam, with the exception of July 2021, when it used NCBE materials. Nevada's August 2020 and February 2022 bar exams were remote.

"We did not want to take the risk of having the exam crash while examinees were taking the test," says Trachok, a Reno, Nevada, lawyer who handles gaming and administrative law matters. He also chairs a Supreme Court of Nevada commission appointed to study the bar exam and attorney licensing.

"I know states are not happy with the National Conference of Bar Examiners, and that's why they're looking at this," Trachok says. "In Nevada, the board of bar examiners has been very open, and we've continued to change through the years because we know this is not a perfect process."

Everyone hates the bar exam, according to Pete Wentz, a former associate dean at Northwestern University Pritzker School of Law. But he says at "elite schools," where many graduates go into private practice, people will continue to see the test as a necessity. He suspects that will be true at law firms too. "They want a common standard that all of their lawyers have been able to meet. It's one more hurdle they believe their lawyers should get past. And there's some old-school thinking involved: 'If I went through the bar exam, you have to too,'" says Wentz, who's now an executive director with APCO Worldwide, where he handles crisis and litigation communications.

Courts may be more open to different admissions paths if they are convinced that only "the lower end of the market will be affected," depending on how justices weigh different decisions, says Nan Jia, a professor at the University of Southern California Marshall School of Business whose academic research includes corporate political strategy and business-governance relationships.

"Behind closed doors, you can make highly technical arguments about who will be affected, and what does it mean for the rest of the market. Another critical part, which is not observed, will be deal-making," says Jia, adding that negotiations will be easier if wealthy people are not affected.

According to a September 2020 NCBE survey of U.S. adults, 60% favored keeping a supervised in-person bar exam with masking and social distancing.

"Admittedly, this survey didn't look into attitudes about alternative pathways, but I do think that the overwhelming public support for an exam is telling," Gundersen wrote.

Judith Gundersen, president and CEO of the NCBE, says technology and globalization are among the factors that led to upcoming changes in its bar exam.

Photo courtesy of NCBE

Richard M. Trachok II, chair of the Nevada Board of Bar Examiners, says states are not happy with the National Conference of Bar Examiners.

Practice makes perfect?

In New Hampshire, the state supreme court in 2005 approved an honors program at the University of New Hampshire Franklin Pierce School of Law in which completion allows graduates to be admitted to the state bar.

"I don't think the consuming public had any idea the New Hampshire Supreme Court was even considering anything," says Linda Stewart Dalianis, a retired chief justice of the court.

Experience as a trial judge influenced her decision to support the idea. At the time, many University of New Hampshire law graduates were starting their own law firms, and she frequently saw them make mistakes in court.

Students can apply to the Daniel Webster Scholar Honors Program in their first year after completing second-semester midterms, and grades are considered.

"I wanted a program that wouldn't be aimed at people who would pass a bar anyway and be opened up to those who might not have had the right training. But in the early days, the only way to sell it to people whose opinions mattered was to say it was an honors program," Dalianis says.

James Duggan, another retired justice who had been a law professor at the University of New Hampshire, also supported the idea.

The court has five members, and Dalianis says getting all to support the plan was difficult.

"Largely, I think, because it was such a radical idea, and they hadn't been entirely sure we'd be able to turn it into reality," Dalianis says. There was a three-year limit, but after the time period ended, the program easily got full approval from the court, Dalianis says.

"It was obvious this was showing results and attracting people to the law school. The fact was, we created an alternative means to be admitted to the bar that wasn't hurting anybody," Dalianis says.

According to the law school, out of the more than 700 applicants in the past two years, over 500 indicated the program was a reason why they were interested in the law school.

In Utah, a state supreme court-appointed working group is examining attorney licensing. Discussions gravitated toward supervised practice, coupled with adding specific law school courses.

"We're talking about an alternative path that would sit alongside the bar. If you didn't want to take the bar and just practice in Utah, this could create a path for you," says Utah Supreme Court Justice John Pearce, a member of the working group.

Members of the court have various reasons why they wanted a working group to examine alternative licensure, he says. Alternative licensure could make things easier for new graduates, and such a plan has the potential to help meet the legal needs of communities that are traditionally underserved.

"I think that each of my colleagues came at this question from slightly different directions and with divergent expectations for what changing bar admissions might mean for Utah. We all shared the belief that the question was ripe for exploration," he says.

According to Pearce, working group tasks have included meeting with the NCBE, talking to other jurisdictions and having discussions with retired law professor Deborah Merritt, who wrote the often-cited 2020 article "Building a Better Bar: The 12 Building Blocks of Minimum Competence." That article calls for replacing essay questions with performance tests and requiring supervised clinical work for licensure.

Utah was the first state to grant emergency diploma privilege during the pandemic in an April 2020 state supreme court order. It applied to first-time test-takers scheduled to take the state's July 2020 bar and had graduated from ABA-accredited law schools with first-time bar passage rates of at least 86% in 2019; lawyers already admitted to other state bars who had applied to take the test also were eligible. The order also required candidates to complete 360 hours of supervised practice by licensed Utah lawyers.

By December 2020, the Utah Supreme Court announced it would be using the NCBE's remote bar exam for its February

Photo by Eric Jamison

"We created an alternative means to be admitted to the bar that wasn't hurting anybody."

—Linda Stewart Dalianis

Photo by George Peet

2021 administration. It also created the bar exam working group to study the issue further.

Some attorneys told the court they would not hire lawyers who didn't pass a bar, Pearce says.

"I've also heard attorneys say, 'Not passing a bar is fine for the associates we hire because we only hire the highest-quality associates,'" he adds.

Pearce hasn't heard complaints from trial judges about lawyers admitted through diploma privilege lacking knowledge.

"My guess is judges don't know who has been admitted which way," Pearce says.

A benefit of Utah's July 2020 emergency diploma privilege: Brigham Young University J. Ruben Clark Law School went from No. 29 last year to No. 23 in this year's *U.S. News & World Report* law school rankings; and the University of Utah S.J. Quinney College of Law is now at No. 37, compared with No. 43 last year.

The most recent rankings were based on data from 2020 graduates, including first-time test-taker pass rates and employment outcomes. The Utah schools saw increases in both categories.

So did Oregon's Willamette Law, and the school went from the Nos. 147-193 range last year to No. 129 in the rankings this year.

Like Gallini, many law school deans support bar exam alternatives, but for now it appears their position may not line up with that of the council of the ABA Section of Legal Education and Admissions to the Bar. The preface section of the ABA Standards and Rules of Procedure for Approval of Law Schools states that it believes every bar candidate should be "examined by public authority to determine fitness for admission."

There are questions of how jurisdiction changes would comport with an ABA bar passage standard. In August, the section's council approved a standards committee suggestion that the committee review existing language in Standard 316 to ensure it doesn't "unduly dissuade" law schools and attorney licensing authorities from exploring alternative licensure pathways.

Under current ABA rules, law school graduates admitted to practice law outside of bar passage are counted as having passed the bar.

Also, there are questions about how experiential learning programs would be implemented. Socratic-type teaching, which includes lectures given to large classes, is more cost-effective than experiential learning, Gallini says, and some tenured faculty have no interest in shifting from podium lectures.

"In a shared governance model, faculty owns two things: curriculum and hiring. So don't assume that because I'm energized by these things the faculty will be as well," he adds.

Experiential learning could be taught by faculty or adjuncts and through existing clinics. But it will have additional costs.

"This would be a very intentional shift in resources. That's why we can't do all this overnight," Gallini says. ■

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edited by
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Photo courtesy of Foley & Lardner

MEMBERS WHO INSPIRE

Big Goals for BigLaw

Lauren Champaign helped formulate Foley's action plan for taking on racial inequity

BY AMANDA ROBERT

Lauren Champaign's roots extend deep into the Gullah Geechee culture, which evolved from Africans who were enslaved on rice, indigo and cotton plantations on the lower Atlantic coast and nearby barrier islands.

She was born in Charleston and later lived in Beaufort, South Carolina, where she saw members of her community lose the land their families lived on for generations. They inherited land from their ancestors, but it became heirs' property with no clear title. (See also: "Fractured," February-March 2021, page 52.) They couldn't prevent developers from taking what was considered desirable waterfront real estate.

Champaign also witnessed racist incidents involving her father, a U.S. Marine who retired as a master gunnery sergeant. In one incident, after he received an award for his service, his commanding officer took their family to dinner. But they were refused service at the restaurant, which Champaign says was later sued for discriminating against African Americans.

"You see stuff like that as a young kid, and you also start to see how lawyers can make a difference," says Champaign, who also lived in several other states because of her father's military service. "That is what motivated me to be a lawyer."

Now senior counsel in Foley & Lardner's Washington, D.C., office, Champaign focuses on commercial litigation and counseling clients in securities, product liability defense, antitrust and consumer finance matters. Her desire to help her community and eradicate institutional racism remains central to her practice.

Amid a national reckoning over violence against Black Americans in summer 2020, Champaign and two colleagues proposed to Foley a three-part action plan for addressing racial injustice and inequality. They suggested adjustments the firm could make internally but also outlined ways attorneys and staff could engage in more pro bono and charitable work to help Black and brown communities.

"We took it very seriously and talked about how it felt to be in this moment as African American lawyers and what we wanted to see changed," Champaign

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.

says. "Sometimes people think about organizational change, and that's something, but with our three-part action plan, we were like, 'No, we are intelligent, corporate attorneys doing really creative things. Here is a massive problem that has gone on for centuries. We can do more than just internal work.'"

Building relationships

Champaign went to the University of South Carolina thinking she would be a civil rights lawyer.

She took a slight detour after graduating with a bachelor's degree in political science and history in 2007. She was working as an executive assistant for three state senators when she attended a South Carolina Legislative Black Caucus dinner and heard Barack Obama, then a U.S. senator from Illinois, speak.

"I was so moved," Champaign says. "I turned to someone at the table and said, 'How do I work with that guy?' It turned out to be the field director who was about to start working with him in Charleston."

She served as a field organizer and regional field director during Obama's presidential primary campaign. Some family members were disappointed she didn't go directly to law school, but Champaign feels she made the right decision.

"The people I met along the way, the perspective, I think all of that informs who I am now and how I'm able to engage with people from different backgrounds and really tackle tough issues," says Champaign, who started at Georgetown University Law Center in 2008.

Champaign received a scholarship from the Minority Scholarship Program that Foley had at the time. During law school, she was an extern at the U.S. Department of Justice, and she thought she might work at the DOJ after graduation. But after working as a summer associate at Foley, she found she enjoyed commercial litigation.

She joined Foley—and the American Bar Association—after she graduated in 2011. She has spent her entire career at the firm aside from three months in 2012, when she took a leave of absence

to work as the deputy Get Out the Vote director for Obama's reelection campaign in Philadelphia.

Kevin Puleo, the Get Out the Vote director for Pennsylvania, worked with Champaign on Obama's first campaign and immediately thought of her as he began building his new team. He trusted her and valued her instincts and work ethic, he says.

"The Philadelphia team needed someone who was experienced and had some maturity that they could bring to the room to really get the ship moving in the right direction," Puleo says. "It helped to say, 'Here's a veteran of the Obama campaign who is now a professional, working as a lawyer at a firm.' That carried a lot of prestige."

Taking action

Champaign has pursued her passion for civil rights even as a corporate lawyer.

She began handling pro bono cases, including two for African American men in Alabama who were convicted of murder and sentenced to death in the 1990s. But after the death of George Floyd in May 2020 and the mass protests against racism, she saw an opportunity to advocate for systemic change.

Champaign talked with Foley partner Senayt Rahwa, senior counsel Olivia Singelmann and other members of the firm's Black Attorneys Affinity Group about their experiences and how the firm could help create a culture of equity. After they presented their action plan, Rahwa remembers Champaign using her deft skills as an organizer to get their colleagues involved.

"Everybody has so much to do in their regular workday, but I feel like she goes above and beyond to do the things that matter," Rahwa says. "We'll have big ideas, and she'll find a way to tackle them and make them happen. And she's just very good at getting large groups of people to also be invested."

In response to their plan, Foley committed to improving the recruitment, retention and promotion of Black lawyers. In July 2020, the firm also launched a Racial Justice and Equity Practice Group, now its largest pro bono group with more than 300 members. It has since billed more than 3,000 hours of work.

Champaign, who co-founded the group with Rahwa and Singelmann, says this work includes partnering with Black churches and think tanks to address disparities in health care; assisting with research for a criminal justice reform bill in Illinois; and helping Howard University School of Law increase its outreach to potential students.

"What I've found most impactful about this group is it gives a space," Champaign says. "It's not like we created this group and suddenly Foley was doing all this work. There were already things going on.

"But now we have this great national structure where we can combine all the work we're doing, new and old."

The plan also included charitable engagement, which led to Foley's national partnership with the Boys & Girls Clubs of America. Since July 2021, employees in each of the firm's domestic offices have volunteered with their local clubs.

Champaign—who lives in Washington, D.C., with her in-house attorney husband, Schevon Salmon, and their 4-year-old daughter and newborn son—also helps other people close to home.

She serves on the leadership council at Miriam's Kitchen, a nonprofit organization working to end chronic homelessness. She also volunteers with College Bound, which provides academic enrichment and resources to public and private charter school students.

When asked what inspires all this work, Champaign thinks of her daughter.

"I really want her to grow up in a world where she won't have to deal with the things I do," she says. "It's constantly about, 'How do I make this world better for her and for other little Black and brown kids like her?'" ■

ABA ANNUAL MEETING

Together Again
























Photos by Matt Marton/ABA Journal

ABA President Deborah Enix-Ross (center) began her term after the first in-person annual meeting since COVID-19.

ABA ANNUAL MEETING

Passing the Gavel

ABA leaders spoke of hope, civility and tenacity

BY AMANDA ROBERT AND STEPHANIE FRANCIS WARD

Reginald Turner is not giving up hope.

"After a year of continued and seemingly insurmountable division in our country, the increasing embrace of the notion that violence is an acceptable way to resolve differences and government actions that many experience as attacks on life and liberty, I have not wavered in my belief of a rising sun on the rule of law in America," he told the House of Delegates at the 2022 ABA Annual Meeting in Chicago, his last event as president of the association.

Turner, an executive committee member of Clark Hill in Detroit, said various ABA offerings affirm hope. His remarks acknowledged the Coordinating Group on Practice Forward, which provides practical tools and resources to help navigate the legal profession as it transitions beyond COVID-19, as well as the Standing Committee on the Federal Judiciary.

He also spoke of the ABA's engagement with partners in Ukraine and work to help Afghan refugees.

Additionally, Turner spoke about ABA diversity pipeline offerings, including a judicial clerkship program. He noted that he served as a judicial clerk for former Michigan Supreme Court Justice Dennis Archer, who in 2003 became the first Black president of the ABA. Turner still considers Archer a mentor today.

"I ask you to reflect on the mentors who have brought you to this point, along with those you have mentored. I ask you to reflect your own commitment to welcoming new, diverse generations of lawyers—smart, eager and dedicated individuals who see a career in law as a higher calling to achieve justice for all under the rule of law," Turner said.

And as he did when his term as president started, Turner spoke of Focus: Hope, a cultural exchange program between city and suburban residents that started shortly after the 1967 Detroit riots. Turner, the child of a Detroit police officer and a library aide, said his parents signed the family up for Focus: Hope because they were looking for ways to heal from the unrest.

"Please hold fast to that 7-year-old boy from Detroit as you see the sun rise on the rule of law," said Turner, pausing briefly as his voice cracked. "And focus, always focus, on hope."

Bringing civility back

After accepting the gavel from Turner to serve as president of the ABA for the 2022-2023 term, Deborah Enix-Ross told the audience she plans to focus on the "three Cs": civics, civility and collaboration.

"You know that song 'I'm Bringing Sexy Back'? Well, I'm bringing civility back," Enix-Ross told the House to laughter and applause.

People's differences are aggravated by incivility in public discourse and a lack of understanding of civics, she added.

"We, of all professions, appreciate that though our differences may be stark, we know how to work together and resolve them. We know how to agree to disagree," said Enix-Ross, senior adviser to the International Dispute Resolution Group at Debevoise & Plimpton. "Lawyers can model the behavior we wish to see, and the ABA has the resources and ability to embrace this role."

Enix-Ross' recent work with the ABA includes establishing the Law, Society and the Judiciary Task Force with Turner. The group will recommend ways to educate the public about the judiciary and the importance of protecting the branch's integrity, she said.

Additionally, Enix-Ross plans to continue the ABA's work in fostering

Photo by Matt Marton/ABA Journal

diversity and inclusion. Also noted was the Poll Worker, Esq., initiative, which was created by the ABA Standing Committee on Election Law to encourage lawyers and law students to serve as poll workers.

"We are at our best when we demonstrate goodwill, tolerance for differing viewpoints and a deep, shared concern for the rule of law," she added.

Enix-Ross ended her speech with "a blessing and a challenge," with words often attributed to John Wesley, founder of the Methodist church.

"Do all the good you can, by all the means you can, in all the ways you can, in all the places you can, at all the times you can, to all the people you can, as long as ever you can," Enix-Ross said.

Barbara Howard (top), one of Enix-Ross' successors as chair of the ABA House of Delegates, applauds as Reginald Turner passes the gavel to Enix-Ross.

'We lift lawyers up'

Mary Smith, vice chair of the VENG Group, a national government relations and public affairs firm in Chicago, officially became the president-elect at the close of the annual meeting. Enix-Ross will pass the gavel to Smith at the 2023 ABA Annual Meeting in Denver.

"We are at an inflection point for our country and our association," Smith told House members.

She recalled a story about Benjamin Franklin being asked after a session of the Constitutional Convention in 1787, "What kind of a government have you given us?" He replied, "A republic, if you can keep it."

"Our republic is founded on core principles that include the rule of law, faith in our system of justice, and free and fair elections," said Smith, who added that lawyers have unique skills and a special role to play in keeping democracy alive.

"As lawyers, we must counter the notion that the threats to our democracy are a political issue," she said. "Let me be clear: They are not. The rule of law, the integrity of a fundamental right to vote and protecting the independence of the judiciary will always be our special responsibility. So, too, is the importance of civil discourse."

It is believed that Smith, an enrolled member of the Cherokee Nation, will be the first female Native American president of the association.

She served as ABA secretary from 2017 to 2020 and on the ABA Board of Governors for seven years. She was also a member of the House of Delegates and has been active in the Section of Litigation, the Commission on Women in the Profession and what is now the Section of Civil Rights and Social Justice.

Enix-Ross' oath of office was administered by retired U.S. Supreme Court Justice Stephen Breyer.

Smith told House members she is inspired every day by the work of her colleagues to support the ABA's four goals.

"We lift people up," Smith said. "We lift lawyers up. We lift the legal profession up. And we cannot let ourselves be distracted by detractors. We can and must do more."

Smith, who is also a past president of the National Native American Bar Association and founder of the National Native American Bar Association Foundation, closed her speech by invoking the words of Wilma Mankiller, who is recognized as the first female principal chief of the Cherokee Nation.

"She said, 'The secret of our success is that we never, never give up,'" Smith said. "So we must not give up. We must not give in. We must do what is right. We must lead." ■

Photos by Mitch Higgins/ABA Media Relations

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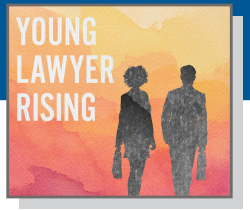

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Protests took place outside the White House and around the country after the June 24 decision in *Dobbs v. Jackson Women's Health Organization*.

ABA ANNUAL MEETING

Dealing with *Dobbs*

ABA responds to the overruling of *Roe* with 6 resolutions

BY AMANDA ROBERT

Past ABA President Laurel Bellows stood before the House of Delegates in the final hours of the association's annual meeting to implore her colleagues to adopt the first of six resolutions related to the U.S. Supreme Court's decision in June that overturned *Roe v. Wade*.

Resolution 804 opposes establishing criminal and civil liabilities for individuals or groups that assist or support someone who is considering or seeking an abortion; procuring reproductive health care; or experiencing a miscarriage, stillbirth or adverse outcome during pregnancy. The measure also urges the repeal of existing statutes that impose criminal or civil liabilities for those actions.

"We are setting policy on which the ABA can build to assure that ordinary acts of daily life are not criminalized," Bellows said. "This is criminalizing talking to your friend about her options. This is criminalizing and delaying very important medical response when a woman has suffered a miscarriage or is in a threat of harm or life because the people who would need to touch her at that moment don't need to be worried about whether they, in fact, will be subjected to criminal charges."

In September 2021, a law took effect in Texas that prevented abortions once a doctor detects a fetal heartbeat, typically at about six weeks of pregnancy. The measure also permitted private citizens inside or outside Texas to sue abortion providers and anyone else who helps a woman obtain an abortion. These citizens could potentially be awarded $10,000 plus court costs per illegal abortion if they are successful.

"How many of you have a cellphone with an Uber or Lyft app?" asked Juan Thomas, then chair-elect of the Section of Civil Rights and Social Justice, which filed all six resolutions shortly before the House met on Aug. 8 and 9. "Under certain interpretations of these laws, if you pay for an Uber for someone to go to a clinic to get advice or information about an abortion or reproductive choice, you could be aiding or abetting."

The House overwhelmingly passed this resolution as well as its companion

Photo by Bryan Olin Dozier/NurPhoto via AP

measures. No one spoke in opposition to any of them.

Right to contraceptives

The Supreme Court ruled June 24 that there is no constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*, a challenge to Mississippi's ban on most abortions after 15 weeks of pregnancy.

Justice Samuel Alito, who wrote the opinion, also contended that "no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the due process clause of the 14th Amendment."

Roe, decided in 1973, held that states can't ban abortions before viability, the point at which a fetus can survive outside the womb.

In 1992, the Supreme Court reaffirmed this holding in *Planned Parenthood v. Casey*.

In the wake of *Dobbs*, many members of the legal profession have expressed concerns that the same reasoning that eliminates the right to abortion could put other constitutional rights at risk.

Resolution 805 responds to this by opposing legislation and regulations that restrict the right of individuals to access contraceptives or contraceptive care. It also urges governments to enact new measures that protect these rights.

Justice Clarence Thomas joined Alito's opinion in *Dobbs*, but he wrote a concurrence "to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the due process clause"—there is no basis in the Constitution for the concept of substantive due process.

Thomas called on the Supreme Court to reconsider all its substantive due process precedents, including *Griswold v. Connecticut*, its 1965 decision that the Constitution protected the right of marital privacy against state restrictions on contraception.

"Who would have imagined that we would have to sit here and defend a woman's right to get a contraceptive or to cross state lines in order to do that?" asked Mark Schickman, a CRSJ delegate to the House. "But as a result of the *Dobbs* decision, as a result of what's happening in statehouses and governor's mansions across the country ... it is exceptionally necessary to do."

Indiana further restricted abortion after the *Dobbs* decision, despite protests like this one in Bloomington.

Marriage protection

Resolution 806 supports the passage of the Respect for Marriage Act or other federal legislation that codifies marriage equality for same-sex and interracial couples.

Thomas, in his concurrence in *Dobbs*, also urged the Supreme Court to reconsider *Obergefell v. Hodges*, its 2015 decision that the 14th Amendment protects the right to marriage between same-sex couples.

Same-sex marriages are not protected by federal law, and according to the resolution's report, at least 25 states still have marriage bans that could go into effect if the Supreme Court overruled *Obergefell*.

Proponents of the resolution contend interracial marriages could also face risks in the future.

Resolution 806 additionally rescinds a 2004 ABA resolution supporting states and territories' ability to regulate marriage.

Health care providers

Resolution 807—which complements Resolution 804—opposes the criminal prosecution of physicians and health care providers who provide or attempt to provide abortions or who advise, help or support someone who is having an abortion.

The resolution asks governments to repeal and oppose laws that criminalize conduct by physicians and health care providers in connection with an individual's decision to terminate a pregnancy or receive care for pregnancy complications. It also urges them to clarify that existing laws cannot be used to prosecute physicians and providers for alleged crimes related to abortions.

In recent months, several states have either already banned or plan to soon ban abortion in most cases. Of these states, 13 had so-called trigger laws—laws that were implemented in anticipation of the fall of *Roe*. Bans took effect immediately in some states, including Arkansas, Missouri and South Dakota.

These laws target health care providers by making abortion a felony. Some allow exceptions in cases involving rape or incest, while others permit the procedure only when necessary to prevent serious injury or death to the mother.

Stop use of citizen lawsuits

Resolution 808 also responds to the potential harms of statutes such as Texas' 2021 law, urging governments to repeal and oppose laws that provide enforcement authority and bounties to private citizens to "evade federal court review of the constitutionality of a law."

Since the Texas law took effect, legislators have introduced at least 17 similar bills in 14 states and Puerto Rico, according to the resolution's report.

"Another danger of this unprecedented enforcement structure is that it can be used in legislation concerning a wide range of substantive matters," said Beth Whittenbury, who was then chair of CRSJ.

In July, California Gov. Gavin Newsom signed a bill that allows private parties to sue anyone who imports, makes, sells or distributes weapons banned for sale in the state.

The new law is reportedly the first in the nation to apply Texas' citizen lawsuit model for abortions to gun sales.

"These laws invite a flood of claims that will overwhelm the judicial system," Whittenbury said. "There is no limit on how many people can bring claims against a single defendant or how many claims can be brought. Private citizens may be encouraged to bring claims to obtain monetary awards, especially if the law criminalizes something they dislike."

Reproductive health info

The final measure, **Resolution 809**, asks governmental bodies to adopt laws that prevent the disclosure of personal reproductive and sexual health information.

It suggests the laws require several provisions, including the completion of a privacy impact assessment before information is collected and the deletion of information when it is requested by the individual or no longer needed.

The resolution also urges these laws to prohibit data brokers from buying, selling or disclosing personal reproductive and sexual health information and prevents government officials or law enforcement from collecting it without a judicial order.

Next steps

A number of ABA entities, including the Health Law Section, have launched initiatives to examine the legal implications of the *Dobbs* decision. In remarks to the House, outgoing ABA President Reginald Turner also mentioned the ABA's new Law, Society and the Judiciary Task Force, which will address several legal issues, including those related to *Dobbs*, and will evaluate other developments involving the state of the judiciary in the United States. Past ABA President Linda Klein is chairing the task force.

The House considered and approved a number of other resolutions during their session, including resolutions geared toward gun control; opposing sharing of legal fees with nonlawyers; repudiating Russia's invasion of Ukraine; and urging election security measures. Go to ABAJournal.com/Annual for full coverage. ■

The ABA is committed to ensuring voting rights, including by recruiting lawyers to become poll workers.

REPORT FROM GOVERNMENTAL AFFAIRS

Ensuring Voting Rights

ABA works to provide nonpartisan information and protect access to the ballot box

In a democracy, there is no more fundamental right than the right to vote. The ABA is dedicated to ensuring that all eligible citizens have the opportunity to help choose their elected leaders and make decisions on laws that will impact their communities.

As the nation engages in another high-stakes election season, the Governmental Affairs Office's Election Center serves as a central location for substantive, nonpartisan information for all voters. The site at ambar.org/electioncenter was developed in partnership with the ABA Standing Committee on Election Law, the Section of Civil Rights and Social Justice, and the Young Lawyers Division, and it was launched in 2020.

The Election Center website is updated regularly and helps citizens find everything needed for Election Day. The election tools can help someone register to vote, check and update existing registration, and locate their nearest polling place. The site also offers state-by-state information on early and absentee voting, voting laws and key election dates.

Poll workers are integral to assuring free and fair elections, and lawyers are especially suited to help. The ABA's Poll Worker, Esq. initiative was developed by the Standing Committee on Election Law in collaboration with the National Association of Secretaries of State and the National Association of State Election Directors. It encourages lawyers, law students and other legal professionals to assist in elections by serving as poll workers. Tasks may range from staffing polling places to processing returned ballot envelopes and more. Learn more at ambar.org/vote. Training for lawyers may be eligible for continuing legal education credit in some states.

To encourage and prepare lawyers and law students to promote voters' rights and voting protection, CRSJ has launched the initiative Lawyers as Changemakers: Perfecting Democracy in collaboration with major national and voting rights groups. It provides lawyers and law students with resources and programming to help them get involved in efforts promoting voting rights and election protection—with a particular focus on Black people, Indigenous people,

other people of color and other historically underrepresented communities.

The ABA Section of State and Local Government Law's initiative, Defending Democracy, focuses on state and local election administrators and their work as they ensure the democratic process. Through programming at ABA meetings, webinars and publications, Defending Democracy educates the public about the important role election workers play on the front lines of our democracy.

The ABA is also continually updating its Election Administration Guidelines and Commentary, which describes best practices for election officials who seek to ensure the integrity of the election process. At the 2022 ABA Annual Meeting, the House of Delegates passed revisions that urge authorities to ensure the personal security of election administrators and voters during the voting process; and encourage election administrators to respond to election-related misinformation.

On the legislative front, the ABA is advocating on bills addressing voting rights and election reforms. This includes supporting amendments to the Voting Rights Act that restore Section 5 preclearance provisions and strengthen the litigation remedy under Section 2. The ABA also supports modernizing the Electoral Count Act by clarifying that the vice president's role is administrative and increasing the threshold number of congressional representatives required to raise or sustain an objection to a state's slate of electors.

The ABA is committed to enhancing the integrity and public perception of the electoral process and to ensuring the nation's election laws are legally sound and permit Americans the broadest, least restrictive access to the ballot box. Through education, advocacy and policies, the ABA will continue to lead in ensuring free and fair elections so that democracy can be protected and strengthened. ■

This report is written by the ABA's Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the U.S. government.

ABA Notices

For more official ABA notices, please visit ABAJournal.com in November.

2023 BOARD OF GOVERNORS ELECTION

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 one young lawyer member-at-large and members from the Business Law Section, the Infrastructure and Regulated Industries Section, and the Section of Intellectual Property Law to serve as section members-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.

2023 STATE DELEGATE ELECTION

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.

DELEGATE-AT-LARGE ELECTION RESULTS

The 2022 delegate-at-large election was contested. At the 2022 annual meeting, the following people were elected to three-year terms as delegates-at-large to the House of Delegates: Jose C. Feliciano Sr. (Ohio), Leslie Miller (Arizona), Darcee S. Siegel (Florida), James Holmes (California), Lynn Allingham (Alaska), and Kari Petrasek (Washington). Go to ambar.org/dalresults to view their biographies.

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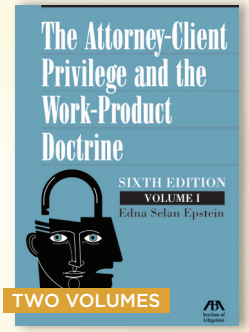

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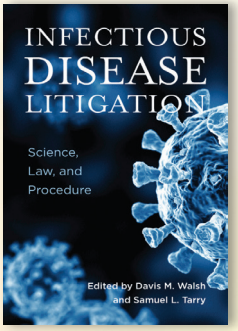

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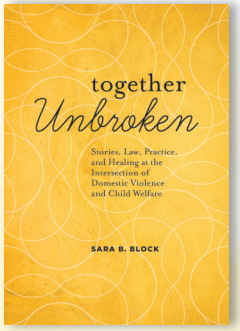

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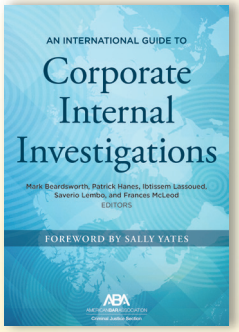

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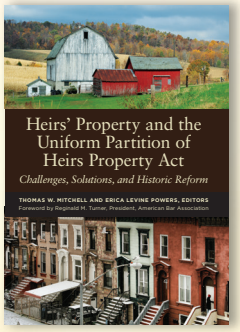

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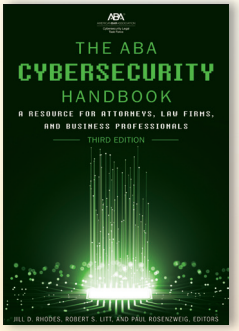

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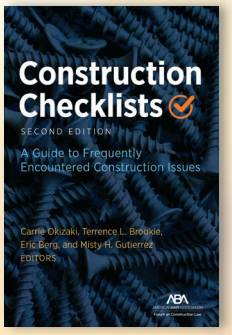

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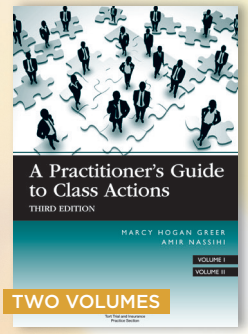

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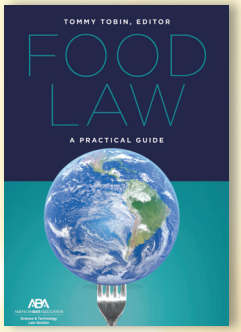

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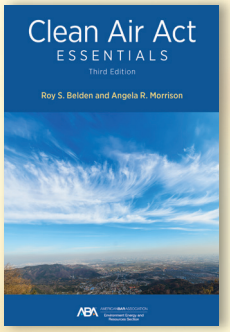

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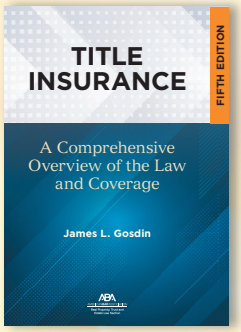

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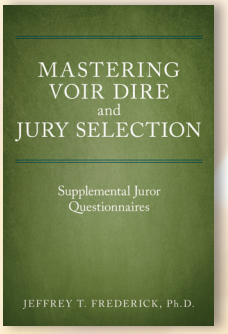

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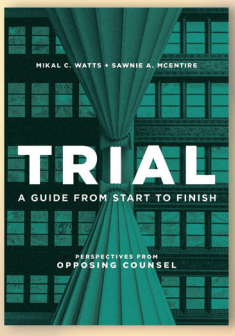

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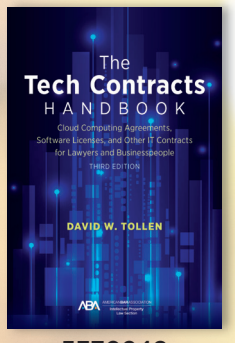

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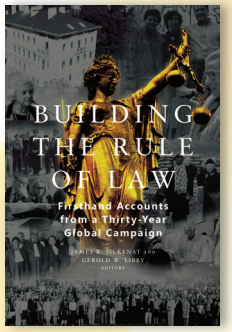

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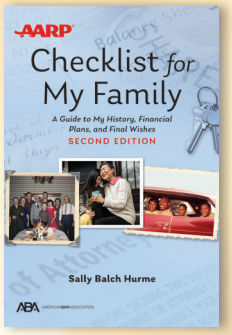

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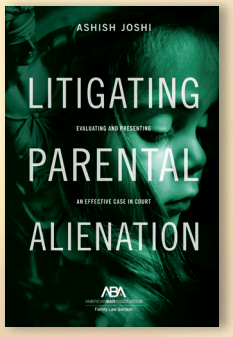

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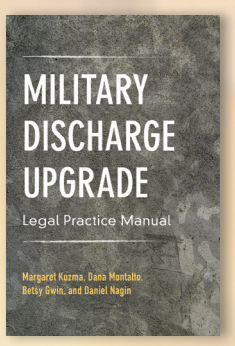

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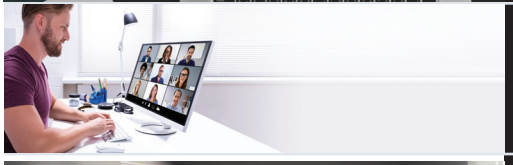
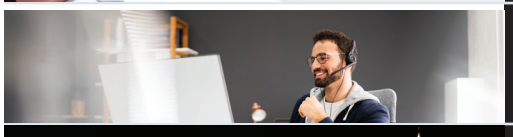
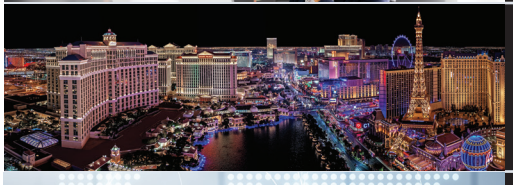
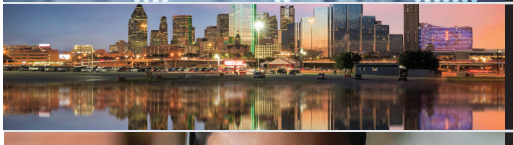
	Oct. 4	**Ethical Issues Concerning Metadata and Client Communications** Solo, Small Firm and General Practice Division · CLE · Webinar
	Oct. 6	**Bridging the Gap: How Generational Differences Affect Regulation, Risk & Resilience** Senior Lawyers Division · CLE · Webinar
	Oct. 6	**Allocating Expenses in Commercial Leases** Section of Real Property, Trust and Estate Law · CLE · Webinar
	Oct. 6-8	**44th Annual Entertainment & Sports Industries Conference** Location: **Las Vegas** Forum on the Entertainment and Sports Industries; Section of Intellectual Property Law · CLE
	Oct. 10-11	**2022 AI & Robotics National Institute** Section of Science & Technology Law · CLE · Virtual Conference
	Oct. 13-15	**2022 Fall Tax Meeting** Location: **Dallas** Section of Taxation · CLE
	Nov. 9-11	**2022 National Aging and Law Conference** ABA; Health Law Section; Section of Civil Rights and Social Justice; Senior Lawyers Division; Commission on Disability Rights; Commission on Law and Aging; Section of Real Property, Trust and Estate Law; Solo, Small Firm and General Practice Division · CLE · Webinar
	Nov. 10-11	**26th Annual National Institute on Class Actions** Location: **Scottsdale, Arizona** Section of Litigation · CLE
	Nov. 9-12	**16th Annual Section of Labor and Employment Law Conference** Location: **Washington, D.C.** Section of Labor and Employment Law · CLE
	Nov. 17	**Better Legal Writing** Government and Public Sector Lawyers Division, Young Lawyers Division · CLE · Webinar

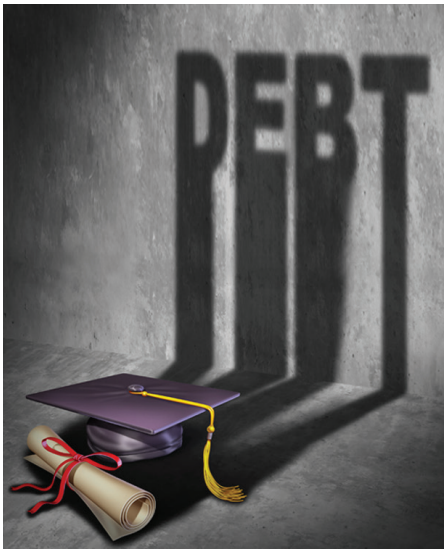
Student Debt Series

BY: ALEXANDRA KANE

Getting student loans is remarkably easy—but dealing with student loan repayment can be a nightmare. As the student loan crisis continues to grow and repayment programs get even more complicated, it's no wonder that many borrowers feel lost. With the many challenges unique to new lawyers, there is difficulty in creating an effective plan for managing student loans while studying for the bar exam, searching for a job and adjusting to a new work environment.

With few exceptions, all law school graduates become impacted by student loan debt. For many, that debt continues to grow after graduation, affecting personal lives, career paths and mental health. The American Bar Association's Young Lawyer Division (ABA YLD) advocates for those looking to have lower financial barriers in the legal profession. The ABA YLD helps borrowers to find low-interest rate loans, scholarships and awards that reduce law school costs and minimize student loan burden.

The ABA YLD also offers guidance for new lawyers by supplying resources for managing debt, refinancing options, and offering a community to those in the legal profession who need support. Let the ABA guide you through the possible result of climbing out of student loan debt with our helpful resources. Entitled: The Student Debt Series; join the ABA Journal in revealing beneficial tools offered to fight the student debt crisis through membership.



For updated resources please visit: ambar.org/debt.

Oct. 21, 1876

Bringing Case Law to Lawyers

John B. West launches the *Syllabi*

BY ALLEN PUSEY

John B. West was barely 18 when he began work in 1870 as a traveling salesman in Minnesota. Working for the D.D. Merrill Book Store of St. Paul, he visited the small towns along the banks of the Mississippi River, hawking furniture and office supplies along with a few specialized books for doctors and lawyers.

West had moved from Boston after his father had become paymaster for the Lake Superior & Mississippi Railroad. He was still living with his parents when he decided at age 20 to form his own company, John B. West Publisher and Bookseller, selling legal forms and reprints of specialized articles on the law.

The *Syllabi* is born

In sales chats with lawyers, West came to appreciate the dearth of timely legal reporting. And although his own education seems to have ended in the eighth grade, one of West's bestsellers was an edition of the Minnesota state statutes he had indexed himself.

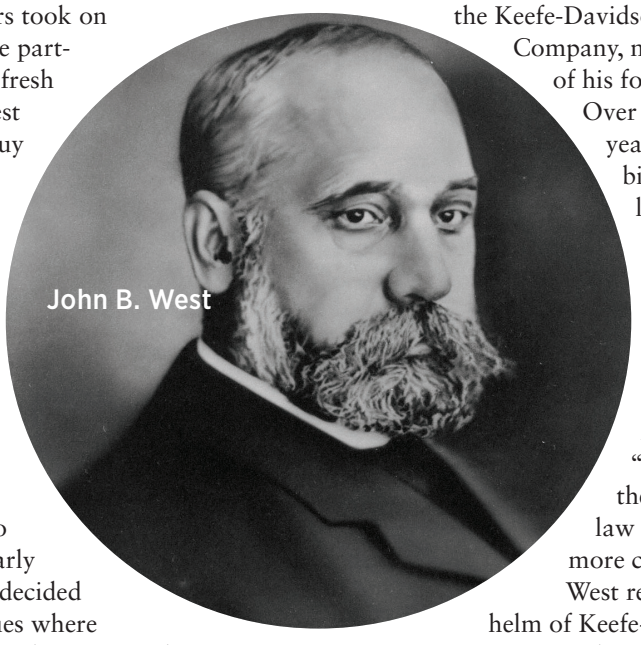
By 1876, his business was growing fast enough that he took on his brother Horatio as a partner. Together they began to produce the *Syllabi*, an eight-page weekly pamphlet summarizing cases decided by the Supreme Court of Minnesota—basically, the syllabus of each case—along with the complete text of select opinions as well as summaries of cases decided in local and federal courts across the state.

In their first edition of the *Syllabi*, published on Oct. 21, 1876, the Wests described their broader ambition:

"It is not our purpose to confine our attention exclusively to reports from our own state, but while making those first in importance, also to furnish digests or opinions in cases decided in other states, which may have a special importance here or be of more than general interest."

By the following year, the digest had proved so successful that its name was changed to the *North Western Reporter*, with coverage expanded into neighboring Wisconsin. And by 1879, the *North Western Reporter* had added cases from Iowa, Michigan, Nebraska and the Dakota Territory.

In 1882, the company was incorporated as West Publishing Co. when the brothers took on two outside partners. With fresh capital, West began to buy out several emerging competitors and, eschewing the curation favored by other digests, expanded coverage to include nearly every case decided in the venues where West operated. He wanted to provide all the cases available, but in a form that could be useful to the practice. So West focused not only on the collection and reporting of case decisions but also on upgrading the indexes that made them useful.



John B. West

In 1887, West announced the "American Digest Classification Scheme, "which allowed lawyers to quickly locate decisions related to virtually any legal issue they were researching. West later added even more utility with the creation of "key numbers," which assigned a unique identifier to each point of law. According to legal historian Robert Jarvis, West introduced the first bound volume of his keyed digests to rave reviews at the August 1897 meeting of the American Bar Association. A year later, the "American Classification Plan" was formally endorsed by the ABA as the standard for case reporting.

West steps down

But in 1899, for reasons that remain unclear, West abruptly left West Publishing, reportedly selling his stake in the company for $250,000 (nearly $9 million today). He resurfaced three weeks later behind a competing publisher, the Keefe-Davidson Law Book Company, named for two of his former employees. Over the next dozen years, perhaps in bitterness over leaving his company, West became a critic of the indexing system he had created, predicting that it would prove "inadequate in the future" as the law itself became more complex.

West remained at the helm of Keefe-Davidson until January 1912, when the affairs of the company were handed over to court-appointed receivers. More than a century later, the disposition of his company can be found just as West might have indexed it: *Bigelow v. Barnes*, 140 N.W. 1032, 1033 (Minn. 1913).

After the failure of his company, West moved to Southern California, where he died in 1922. ■

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