ABA JOURNAL

IS HYBRID WORK FINALLY KILLING EMAIL?

SLACKING ON DIVERSITY

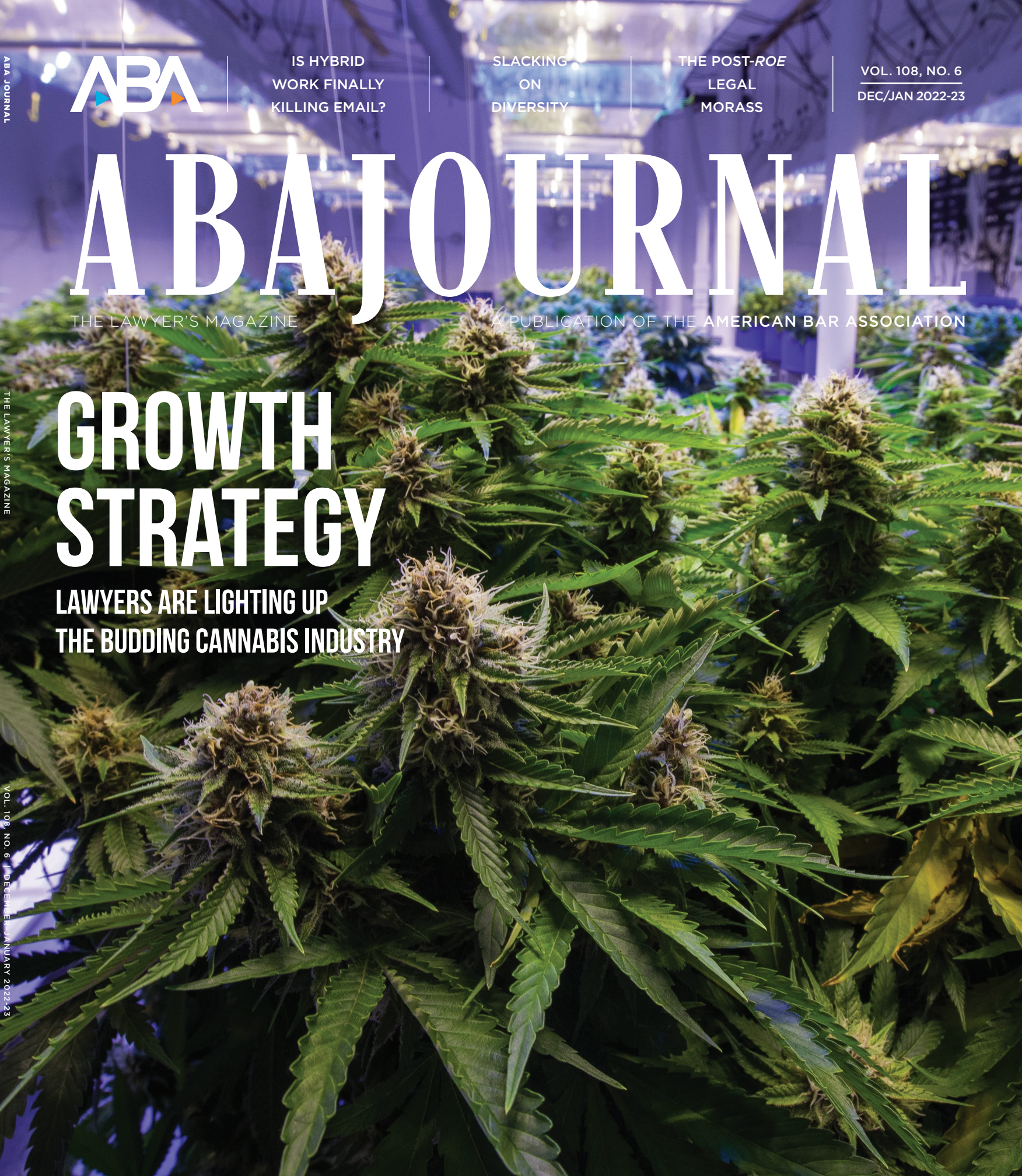
THE POST-*ROE* LEGAL MORASS

VOL. 108, NO. 6
DEC/JAN 2022-23

ABAJOURNAL

THE LAWYER'S MAGAZINE

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION



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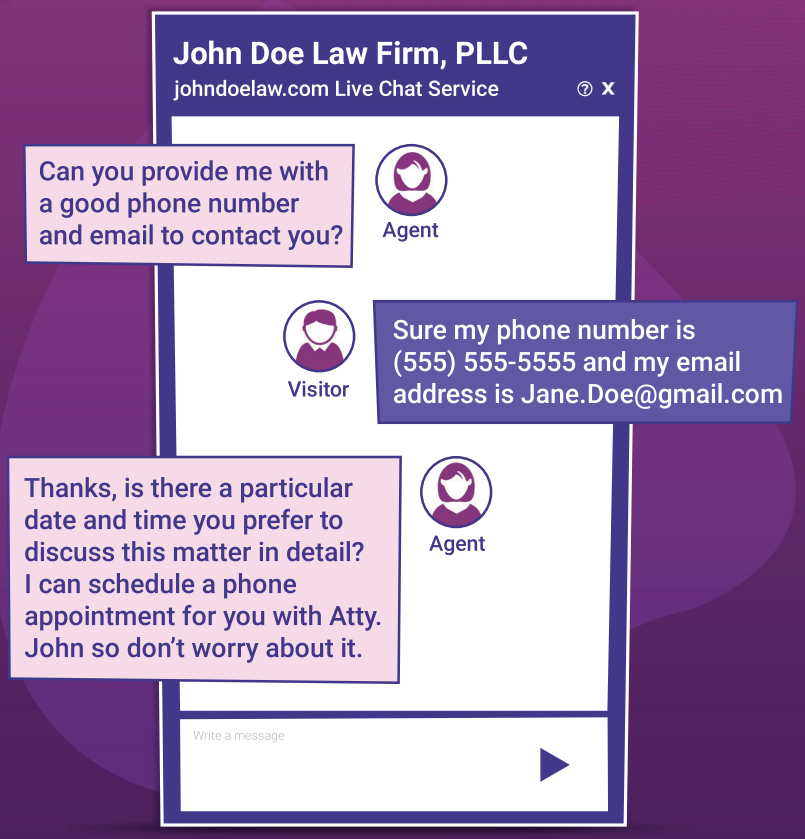

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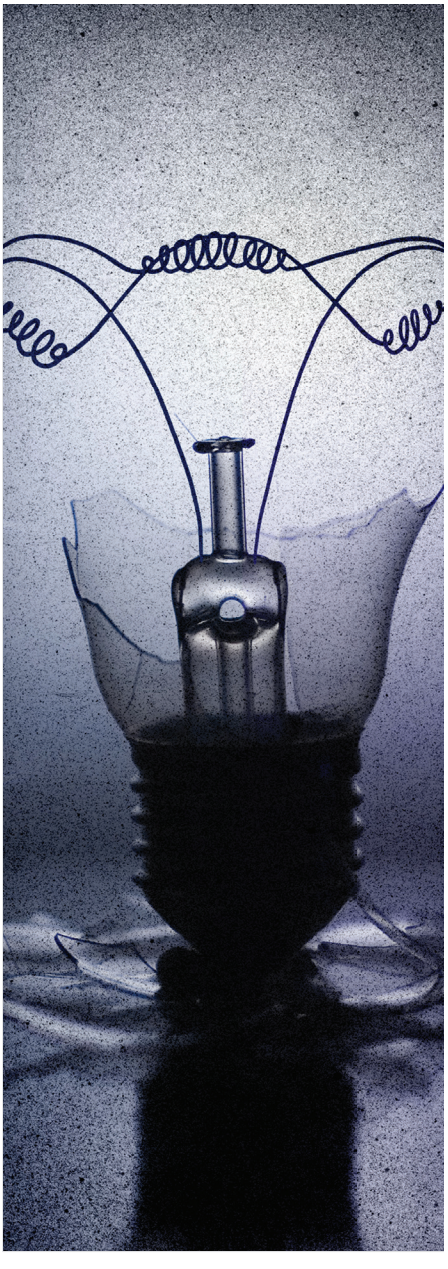

INSIDE

In This Issue

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AMERICAN BAR ENDOWMENT
More than 80 years of service

American Bar Endowment 2022 Annual Report

Insurance That Makes a Difference

Created by the ABA in 1942, the American Bar Endowment is an independent §501(c)(3) public charity. For more than 80 years we have fulfilled our mission of generating funds for the support of law-related research, educational, and public service projects through the sponsorship of insurance plans offered exclusively to ABA members.

ABE-sponsored insurance plans are:

- tailored to meet the needs of ABA lawyer members
- portable
- backed by one of America's most respected insurance companies, New York Life Insurance Company
- designed to give back through the nation's only built-in insurance charitable giving feature

Over ABE's history, our members who have contributed their available dividends have made it possible for ABE to make grants of over $316 million in grants to the ABA Fund for Justice and Education, the American Bar Foundation and other community-based legal service providers.

For more information on the law-related charitable and educational projects made possible with the support of member-donated insurance dividends, visit abendowment.org/charitable-mission.

ABE 2021-2022 Policy Dividends

The American Bar Endowment recently announced the amount of policy dividends available from its group insurance programs. For each program, the approximate amount of net policy dividends as a percentage of premium paid is reported below.

- **Life Insurance:** 20 percent of premiums due and paid for the period June 1, 2021, through May 31, 2022.
- **Disability Income:** Disability Income: 18 percent of premiums due and paid for the period November 1, 2020, through October 31, 2021.
- **Hospital Money:** Hospital Money: 51 percent of premiums due and paid for the period November 1, 2020, through October 31, 2021.
- **Accidental Death & Dismemberment:** Premiums due and paid for the period August 1, 2020, through July 31, 2021 were less than claims and expenses incurred, consequently there will be no dividend.
- **Excess Major Medical:** 45 percent of premiums due and paid for the period March 1, 2021, through February 28, 2022.
- **Office Overhead Expense:** 22 percent of premiums due and paid for the period July 1, 2021, through June 30, 2022.

To view the 2022 ABE Annual Report in its entirety, please visit: abendowment.org/abe-news

American Bar Endowment
Statement of Activities
FOR FISCAL YEARS 2022 AND 2021

	YEAR ENDED JUNE 30 2022	2021
Changes in unrestricted net assets:		
Revenues and gains:		
Contributions	**$ 5,772,001**	$ 6,804,521
Income on long term investments	**3,357,516**	2,442,483
Net unrealized and realized gains on investments	**(13,102,293)**	35,834,741
American Bar Insurance Plans	**39,038**	138,718
Other income	**14,113**	241,619
Release from restriction	**156,262**	151,177
Total unrestricted revenues and gains	**(3,763,363)**	45,613,259
Expenses:		
Life program	**2,404,944**	1,780,619
Disability program	**1,011,607**	771,422
Hospital Indemnity program	**90,894**	79,121
Excess Major Medical program	**273,255**	189,927
Accidental Death and Dismemberment program	**223,413**	195,701
Office Overhead Expense program	**27,856**	31,303
Other Programs	**27,209**	24,582
Management and general	**229,712**	196,946
Grants paid	**7,732,030**	7,358,296
Income taxes	**58,852**	34,907
Total expenses	**12,079,772**	10,662,824
Increase (decrease) in net assets before other items	**(15,843,135)**	34,950,435
Other items:		
Pension income (expense)	**(3,214)**	505,145
Increase (decrease) in net assets without donor restrictions	**(15,846,349)**	35,455,580
Changes in net assets with donor restrictions:		
Net unrealized and realized gains (losses) on investments	**(351,122)**	792,994
Release from restrictions	**(156,262)**	(151,177)
Increase in net assets with donor restrictions	**(507,384)**	641,817
Increase (decrease) in net assets	**(16,353,733)**	**36,097,397**
Net assets at beginning of year	**169,485,327**	**133,387,930**
Net assets at end of year	**$153,131,594**	**$169,485,327**

AMERICAN BAR ENDOWMENT GRANT PAYMENTS FOR 2022 AND 2021	**2022**	2021
American Bar Association Fund for Justice and Education for support of its public service programs	**$3,684,288**	$3,496,588
American Bar Foundation for support of its research programs and administration	**3,684,288**	3,496,588
Opportunity Grants	**298,600**	279,727
Total	**$7,667,176**	$7,272,903

Effective with the adoption of a required new accounting standard applicable to the fiscal year 2021 audit, insurance premium revenue and expense must be recorded for financial reporting purposes on a net basis, in effect offsetting each other and therefore no longer appear on the statement of activities. This has the effect of showing reduced revenues and expenses each by approximately 19,300,000 for fiscal year 2022 and 20,200,000 for fiscal year 2021.

Members may request a refund of the available dividends attributable to their participation by submitting a written request by mail to the American Bar Endowment, 321 N. Clark Street, 14th Floor, Chicago, IL 60654-7648, fax to 312 988-6401, or email to dividends @abendowment.org. (Please be sure your member number is on the request.) Requests for refunds can be sent starting January 1st 2022, but must be received no later than December 15th 2022. When a request for refund is received, a confirmation will be mailed to you acknowledging the request. If the confirmation is not received within three weeks, contact the ABE to confirm receipt. Members who leave their dividends with the ABE to support its charitable mission are eligible for a charitable contribution deduction on their individual income tax returns. Notice of the exact amount of contribution will be mailed in late January. Written requests for refunds must be submitted each year.

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Our Civic Sacrament

Voting and the people who make the process work must be protected and respected

BY DEBORAH ENIX-ROSS

The right to vote is one of the most cherished and important responsibilities of American citizens. Voting gives the people an opportunity to be heard and to hold lawmakers and officials accountable.

The longtime former president of the University of Notre Dame, the Rev. Theodore Hesburgh, called voting "a civic sacrament." When then-President Ronald Reagan signed an extension to the Voting Rights Act in June 1982, he said, "The right to vote is the crown jewel of American liberties."

But recently, our entire election system has been under attack. Both the 2020 elections and the recent 2022 midterm elections have been the target of fraud claims. While almost all of those claims have been discredited, they have sown the seeds of distrust in a large segment of the population.

A CNN poll conducted in June and July found that only 42% of respondents have some confidence that U.S. elections reflect the will of the people; 48% of respondents said they think it is at least somewhat likely that in the next few years, some elected officials will successfully overturn the results of an election because their party did not win.

The American Bar Association is committed to fixing this growing problem of the erosion of election confidence. Through its Standing Committee on Election Law, the ABA, in a nonpartisan fashion, examines ways to improve the federal electoral process to permit the broadest, least restrictive access for all eligible Americans to the ballot box and to ensure all votes are counted.

The ABA again has partnered with the National Association of Secretaries of State and the National Association of State Election Directors to mobilize lawyers, law students and other legal professionals to serve as nonpartisan government poll workers for the midterm elections through our Poll Worker, Esq. program.

Like many ABA members around the country, I joined the effort on Election Day, volunteering as a poll worker in New Jersey. Poll workers help people vote, check credentials, direct voters through the process and help local officials ensure elections are free, fair and accurate. Depending on the state, tasks may range from staffing polling places to processing returned ballot envelopes.

Lawyers and law students understand the need for due process and equal protection as a part of the electoral process and thus are well-suited to serve as Election Day officials. But in my precinct, people from all occupations, young and old, rich and poor, volunteered to help make the election process work. It was civic engagement at its best.

Threats to officials

Election administrators do not have easy jobs under normal circumstances, and today we see a disturbing trend of threats to the physical safety of officials and their families if the outcome of an election does not have a desired result.

According to Reuters, since the 2020 vote:

- In Pennsylvania, more than 50 county election directors or assistant directors have left in the state's 67 counties because of increased threats and intimidation.
- In South Carolina's 46 counties, 22 election directors have left office.
- In Nevada, 10 out of 17 counties have seen their top election official resign, retire or decline to seek reelection.
- In Texas, 30% of election officials have exited.

The ABA Section of State and Local Government Law created an initiative called Defending Democracy that focuses on state and local election administrators and their nonpartisan work. Defending Democracy works to instill public trust in our electoral process and educates the public about the importance of adequate protection for election workers who are on the front lines of our democracy.

Political differences have been with us since the birth of our country. Partisanship can be heightened during the heat of a campaign and election. After the votes are counted, though, we must come together and accept the will of the electorate. Lawyers need to be leaders in assuring people the results are fair. Voters must have faith in the electoral process for our democracy to succeed. ■

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!

Monitor all Video Inputs!

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!

ATEM Mini.....**$295**
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Letters From Our Readers

Bar discussion

I would like to say that I was surprised by Stephanie Francis Ward's article, "Examining the Bar," October-November, page 56, that questioned the need for the bar exam, but I am not at all surprised by it. This concept stems from the dumbing down of colleges and universities that have dispensed with SAT and ACT requirements, thereby making it a foregone conclusion that professional licensing exams would be the next requirement to fall. I am against that idea for one reason: The bar exam legitimatizes the profession of law.

I have seen this trend show up in other professional licensing contexts, namely social work. In New Jersey, the idea of dispensing with the social work licensing exam also is being touted. Where does this come from? It comes from people who are not able to pass these exams because universities are admitting unqualified people as students since the schools are just looking at the tuition money and not at who is capable of practicing social work. This same trend is happening with law schools.

I am a licensed attorney in two states, and I am also a licensed clinical social worker. To be able to practice law, I had to pass the bar exam. To be able to practice social work, I had to pass the licensed social worker exam, and then after two years of clinical practice, I had to pass a licensed clinical social worker exam. These exams weed out people from those who are not capable. I had to study very hard for all these exams, and I had to pass them for the privilege of practicing in the fields of law and social work. These exams create a standard, and without them, that standard is gone. Life is not fair; just because you want to be a lawyer or a social worker does not mean you should be.

What if the medical licensing boards and the engineering boards decided to do away with their exams? What would happen to patients and to society if ill-equipped doctors were permitted to practice medicine and if unqualified engineers were allowed to design bridges? The bar exam maintains standards that enhance the legal profession. Doing away with it risks weakening the legal profession.

Rachel Kristol
Trenton, New Jersey

Labor issues

I was disappointed in the story "Forced Labor?" August-September, page 52, because it fails to distinguish the values the public expects in publicly funded services from the effective and efficient delivery of those services.

The entity directly accountable to the public—the government agency—should be excoriated for failing to have ethical standards and/or for enforcing them by terminating contracts when they're not met. Government agencies have the power to establish the quality conditions that have to be met (how people should be treated, what they should be paid for work, e.g.), to vet companies applying to provide those services and to take corrective action against those companies when standards are not met—including termination of contracts. This article lets those agencies off the hook and suggests that specific private companies or private companies in general are to blame. Prisons operated by government agencies are just as capable of—and have a track record of—treating people inhumanely as private corporations.

"Getting private prison corporations out of the business of incarcerating human beings" won't solve the problem. Making the lives of all affected by incarceration better will. And that is done through lawmaking that establishes ethical treatment and by well-run government agencies holding themselves—if they're providing the service—or

Photo by Rachel Arnold; Kuba Luczkiewicz.

contracted corporations accountable for meeting those ethical standards.

Rich Haglund
Naperville, Illinois

Legal drama king

Regarding "Legal Sleaze," August-September, page 32: what an unjustified cheap shot at *Perry Mason*. Granted, the cases may not be as complex or as politically charged as those on some legal dramas today, and the portrayals of characters and dialogue reflect the prevailing mores of midcentury America. But to call Hamilton Burger not a hero, not sympathetic and not very competent is unfair.

Start with the plausible presumption that he won all his cases except against the clever Mason, who sometimes arguably crossed lines. Burger does not pursue defendants whom he is not really convinced are guilty; in almost all the episodes he produces sufficient evidence to bind the defendant over for trial, and only then does Mason pull a rabbit out of the hat and induce the real murderer to break down in court and confess.

Outside of court, Burger and the police detectives are almost always polite and genuinely friendly with their nemesis Mason in a way that seems oddly quaint today.

As an aside, watching *Perry Mason* and seeing what was considered a large sum of money back then is a sad reminder of the ensuing decades of inflation. But on the plus side, the producers assembled one of the best collections of the era's high-end automobiles that one can see on television today.

Robert Kantowitz
Lawrence, New York

Correction

"Passing the Gavel," October-November, page 66, should have stated that Mary Smith will be the first Native American woman to serve as ABA president when her term begins in 2023.

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.

Business of Law

edited by
VICTOR LI
victor.li@americanbar.org

TECHNOLOGY

Empty Inbox?

Could hybrid work and generational shifts finally kill email?

BY MATT REYNOLDS

Jason St. John, managing partner of Saul Ewing Arnstein & Lehr, says his children mostly use social media apps Discord, Snapchat and Instagram, as well as text messages to keep in touch with family and friends.

"I have to beg them to look at their email," observes St. John, who oversees the day-to-day operations of a law firm with over 375 attorneys in more than a dozen offices.

St. John sees similarities between the high schoolers in his home and the young lawyers at his firm.

"My sense is that the younger generation of lawyers use email less as a communication vehicle, and [they] have grown up in a world where their communication is done through social media apps," St. John says.

All that comes with a big caveat, however. For years, tech and business experts have predicted the death of email. But it has never come to pass. And St. John isn't about to make any bold statements about its demise, either. He says email is still the primary form of communication at his firm, especially with clients, and "for the foreseeable future is here to stay."

All the same, with pandemic-era workplace changes and rising email fatigue among his attorneys, St. John has tried to foster personal connections that aren't always possible with email, which is often unwieldy and impersonal. Anticipating a return to the office, the firm unveiled in January an app called Seal2Go that's exclusive to his firm but has features familiar to users of other social media apps, including "likes" and marketing and educational resources.

Shutterstock

"We're getting people to be more engaged in thinking about reading about our wins, our investment in the community and our clients, as opposed to sending email after email. After a bit of time, you get all those emails, and you start to tune out," St. John says, noting lawyers like using the app as a "one-stop shop for information."

Slow death?

Of course, law firms' desire to offer other forms of digital communication is not limited to St. John's firm or its app. There are many tech solutions for lawyers and firms who want other options, including Slack, billed as an email killer; Microsoft Teams and Zoom, which soared in popularity during the pandemic; and practice management software such as MyCase and Clio.

On the other hand, when it comes to embracing new tech, the legal profession has been branded, perhaps unfairly, as slow on the uptake.

Sharon Nelson, the president of digital forensics and cybersecurity company Sensei Enterprises, notes lawyers "hate change," and she doesn't see other forms of digital communication eclipsing email just yet. Nelson says many lawyers find using multiple apps for communicating too burdensome.

"Despite the fact that people have predicted the death of email for some time, we're not seeing it in the legal industry," Nelson says.

But Frank Gillman, a legal tech expert and principal of the professional services firm consultancy Vertex Advisors, contends the future of email looks bleak, even if it never completely disappears from law firms.

"Email is the next facsimile," Gillman says. "I believe we're at the tipping point where email starts to fade out over the next five to 10 years."

From a cybersecurity standpoint, changes in workplace culture mean more and more people are working remotely or in a hybrid model. Those shifts have exposed email's vulnerabilities, "increasing the risk of phishing attacks and impersonation as more and more sensitive documents and links are transferred by remote workers," Gillman says.

Other encrypted forms of digital communication, such as chat rooms or practice management software, are more secure, he says, and discussion threads are easier than email to parse and read.

"If you're not moving all that information back and forth and having copies at the client site, at your site and everywhere else, it certainly lends itself to stronger confidentiality and information governance," Gillman says.

Gillman believes three things will drive law firms to other platforms: client demand, the next generation of executive leadership attuned to newer technologies, and a desire to attract and retain new talent with the latest digital platforms.

"If you're a hotshot lawyer deciding where [you're] going to work and where [you're] going to build up your practice, you're going to do it at a place that provides you the most efficiency," Gillman says.

And it could be the next crop of Gen Z lawyers who determine email's fate. A 2022 Deloitte study found that mental health in the workplace is a consistent challenge for Gen Zers and millennials, with 46% of Gen Zers and 45% of millennials saying they "felt burned out due to the intensity and demands of their work environments." (See also "Fighting Burnout" on page 13.)

Another survey by Wakefield Research for email client Superhuman found that nearly one-third of remote workers wanted a break from emails; that 1 in 3 remote workers 40 and younger checked work email less than a minute after waking up; and that 22% of remote workers wanted to quit their jobs because of email burnout and fatigue.

Furthermore, a 2020 study by the consulting group Creative Strategies found people ages 30 and older were more likely to say they use email over other platforms to collaborate in the workplace. But workers under 30 were more likely to use Google Docs, iMessage or Zoom than email.

Jason St. John, managing partner of Saul Ewing, unveiled a social media-like app for email-wary lawyers.

Photo by Gittings Photography

Ben Bajarin, CEO and principal analyst at Creative Strategies, says those findings stayed consistent when the company did a similar study in 2022. He says younger people are influenced by consumer products they used in college, including Google Docs or text messaging. That influence has bled into workplaces. And he believes the collision of a younger generation of workers with a hybrid work environment is accelerating the changes the company's survey revealed.

"When it comes to younger workers, every organization wants to get the next crop of talent. And to do that, you have to be more flexible. You have to be willing to support them in the ways that they want to work, or they're not going to work there," Bajarin says.

But email isn't just the scourge of younger generations. The feeling of existential dread that accompanies an inbox full of unread messages is familiar to anyone with an email account, even if the format still has its fans. Nelson says tech tips on how to keep email

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Insights with Jack Newton

How To Create A Flexible Work Environment That Lawyers Want

By Jack Newton

Like many businesses, finding and keeping good people is a major concern for any law firm. Case and point: According to a survey of lawyers included in this year's *Legal Trends Report*, nearly 1 in 5 lawyers left a job in the 12 months prior, and nearly 1 in 10 still planned to leave a role. This confirms that law firms were not spared from the job turbulence that businesses faced across North America in 2022.

As we turn to a new year, it's important that law firms take a coordinated approach to understand what today's legal professionals are looking for in an employer.

Data from the 2022 report indicates that work-life-balance was one of the most significant factors (reported among 37% of lawyers who moved jobs) that drove firm members to leave a role.

There is no question that the practice of law is a busy and demanding profession. But one of the more recent confounding factors for legal professionals is that in the last few years, the boundaries between work and life have begun to blur, threatening to take over more time and space in the personal realms of many.

One complication many lawyers face is the fact that they are spending fewer days in the office—roughly 12 working days in a given month. In fact, 49% of lawyers say they prefer to work from home, and 45% say they prefer to meet clients virtually.

We see similar preferences among clients: 35% say they prefer to meet virtually, compared to 28% who prefer in-person, and the remainder have no strong preference either way.

While the complexities of work and life can often feel like trying to put two square pegs into a round hole, it's time that lawyers stop thinking about work-life balance as a binary. The goal will always be to find balance, but for many, this will mean less of a separation between the personal and professional, and instead, more of coexistence between the two.

There's evidence that lawyers may already be thinking in this way. Three out of four lawyers say they want the flexibility to choose which hours of the day they work—no doubt to make room for other priorities in life. The question is, how are law firms providing this flexibility for their lawyers? Flexibility should come from a company's culture, but needs to be supported through technical capabilities.

One way that law firms can ensure they're set up to meet the needs of both their lawyers and their clients is to adopt a cloud-based approach to how they work. The data here is significant.

Lawyers using cloud software are 29% more likely to report being happy with their professional life, 60% more likely to report positive relationships with clients, and 44% more likely to have positive relationships with colleagues.

Cloud technology lets lawyers work wherever they want. It keeps them in touch with the firm and their clients, and makes them more responsive. Lawyers have always worked out of office, whether in court or visiting clients where they are—now they have a way to keep connected, no matter where they are.

If firms *don't* find ways to create the type of space and flexibility that lawyers are looking for, those lawyers will seek out and find other firms that do. All firms should be taking stock of what their people want in a workplace, and finding ways to make their work environments better for everyone.

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.

boxes under control are still popular among lawyers, and "just anecdotally, they complain nonstop about emails, and now texts. Because texts have been forced on them by their clients."

'Siloed, disorganized'

Mark Pike, who is product counsel at Slack, says some lawyers and law firms have been resistant to adopting the software. But email is an ineffective and outdated way for legal teams to work and is "siloed, disorganized and often overwhelming," he argues.

"I think they find as soon as they start using the software, their clients are happier," Pike says. "You can securely collaborate together in Slack as easily and productively as you can internally."

Besides mainstream apps like Slack and Teams, there are a whole host of apps aimed at lawyers that promise to streamline communication on a secure cloud-based platform. It will come as no surprise that executives at some of these legal tech companies believe their platforms could knock email off its perch.

Jim McGinnis, who is president at AffiniPay, the parent of legal tech companies LawPay and MyCase, says the goal of MyCase is to transition law firms away from a reliance on email and toward MyCase, an encrypted platform that allow firms to protect client confidentiality, organize and track digital files, and bill for their time.

Sharon Nelson of Sensei Enterprises expects online client portals to overtake email—but not yet.

"Change is always hard," McGinnis says. "When they get a single platform, it's just faster and easier for them to communicate with their clients in more secure, encrypted ways than it is to drop an email."

Nelson agrees that cloud-based solutions and client portals are the future. Patients in the health care sector and clients in the financial sector are used to using online portals to chat with their doctors or advisers or access their data, Nelson says. She expects the legal industry to follow suit.

Adopting the tech is a win for lawyers who are often inundated with emails and texts from clients, Nelson says.

"If it's 3 o'clock in the morning, [clients] don't have to bother you. They can go to their client portal and review something, or pay their bill," she says.

Ultimately, though, email's sheer pervasiveness means that it's likely to endure, even if lawyers only use it for certain things.

"The reality is that the world is not in a ubiquitous Slack channel," Sensei Enterprises vice president John Simek says. "But we can all communicate with email."

Bajarin notes that while other platforms are better for real-time communication, there is still a place for email for less-urgent tasks like sending training policies and procedures and for preserving executive communications. He says different platforms will continue to exist side by side, depending on the task. And despite email's bad rap, he says every platform has its downsides.

"I think you could also argue that there's Slack-and-Teams-chat fatigue," says Bajarin, adding that workers have complained that "those channels become distracting." ■

LAW FIRMS

Fighting Burnout

Some law firms are employing burnout advisers to keep their attorneys from getting overwhelmed

BY DANIELLE BRAFF

It's no secret that attorneys are burned out—but the surprising news is that firms are finally taking action to combat it.

Some legal teams are hiring burnout advisers to address attorney mental health in the hope that this will tackle attorney fatigue, detachment and other issues stemming from the competitive environment, long working hours and perfectionism that comes with the job.

"A lot of our work is emotionally draining, and the long hours and tight deadlines make it very difficult to take care of your well-being," says Jonathan Brockman, a personal injury attorney in Georgia. "We lose a lot of good lawyers because of burnout." That's why he hired a part-time burnout adviser in January 2022.

Burnout advisers are not tracked across firms, so it's unknown how prevalent they are. But they appear to be a relatively new concept, as several of the firms interviewed for this story reported hiring them after the pandemic began. According to those firms, there is no official licensing to become a burnout adviser, and these professionals can be anything from social workers to psychiatrists to holistic therapists and everything in between.

But they are all joining law firms with one common goal: Helping law-

Photo courtesy of Sharon D. Nelson

yers contend with the overwhelming burnout and stress that targets them specifically.

A whopping 71% of lawyers say they are experiencing anxiety, and 37% are depressed, according to a 2021 American Lawyer Media mental health survey.

And Bloomberg Law's Attorney Workload and Hours Survey said lawyers felt burnout in their jobs 52% of the time. Nearly half of those surveyed say their well-being worsened in the fourth quarter of 2021, compared with just 30% in the second quarter.

While burnout is a significant issue across the board in many careers, there's something particularly difficult about working in the legal sector, says Anastasia Allmon Riley, an attorney with Farris, Riley & Pitt in Birmingham, Alabama. "It's often incredibly draining emotionally and physically," Riley says. "We're always working long hours, and often bringing work home with us as well. Burnout advisers don't just cheer us up; [our burnout adviser] helps us build healthy habits and mindsets that can help us all a lot." Her firm hired a full-time burnout adviser last year after the legal team returned to the office. The burnout adviser has weekly meetings with each employee and is available to chat outside those meetings as well. She offers techniques and strategies to avoid burnout and to recover from it—such as meditation, unplugging completely and knowing when to take time off work.

Mental health coach Kara Hardin says preventing burnout and supporting burnout recovery is fundamental.

Best for business

Not all burnout advisers are full time—nor do they need to be to achieve their goals. Hach & Rose, a personal injury firm in New York City, hired its burnout adviser about halfway through the pandemic, and she pops in for an afternoon weekly to speak with the staff. The burnout adviser is a counselor who makes recommendations based on her staff evaluations and charges about $300 for each afternoon session.

Photo courtesy of Kara Hardin; illustration by Sara Wadford/Shutterstock

She steps in when needed to help employees who feel burned out and to prevent others from approaching that point, says Michael Rose, one of the founding partners of the firm. "It's always better to do everything you can to prevent a fire from happening instead of trying to put it out once it's started," Rose says. "And I'd do whatever I could and can to ensure that none of our employees ever have to endure or suffer from burnout due to work-related pressure, stress and anxiety."

Law firms tend to be staffed with high achievers—people who are most comfortable when they exceed expectations and are terrified of letting people down or making a mistake, explains Kara Hardin, the principal and founder of Kara Hardin Mental Health Consulting.

Hardin, who is based in Toronto, is a former practicing corporate and securities lawyer. She did a coaching certification about a decade ago and then returned to school to pursue a master's in counseling psychology before closing her legal practice to focus on psychotherapy and mental health consulting. She works with law firm leadership to lead with mental health in mind, ranging from individual coaching to board strategy sessions to leadership retreats.

"From a business perspective, preventing burnout from happening and supporting burnout recovery ensures you have the talent and people necessary to stay in business," Hardin says. "It's fundamental." ■

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MIND YOUR BUSINESS

Choose Wisely

Your law firm's fee structure can affect financial planning

BY OMAR OCHOA

When starting a law firm, there are many considerations you must make to ensure its success. Two essential focus points include choosing a fee structure and organizing financial planning systems.

The fee structure a firm chooses can have a tremendous effect on that firm's finances.

While not every lawyer is a financial expert, attention must be paid to these money matters from the outset. A firm's chosen fee structure and how its finances are handled can lay the foundation for the entire life of the business and sometimes provides early indicators in determining whether it will grow and thrive or eventually crumble.

There are two separate models that firms can choose from when developing a fee structure. Each structure has its positives and negatives, but firms will want to be diligent in researching what option will best serve the goals of their business.

Hourly or flat-rate billing

This highly structured model allows a firm to have a solid idea of what revenue it can expect from each client or case it accepts. Under an hourly or flat-rate billing structure, clients know what costs they will incur and may sometimes pay money upfront. Traditional defense-side law firms typically utilize this approach to billing, making it familiar for clients and a straightforward way to organize finances for the firm.

An hourly or flat-rate billing structure also makes growing one's business easier. By knowing what to expect in terms of revenue, a firm can make projections on everything from office space to hiring decisions.

Firms that are just starting can also build their financial plans for the entirety of their business around this consistent structure. It is a very upfront way of practicing law and may be the more appealing choice for firms that are just getting started.

Contingency fees

The contingency fee approach may be most associated with personal injury firms. We have all seen the advertisements that make promises like, "We don't charge unless we win your case!" The lack of an upfront charge is a key element of any contingency structure, as there are no fees billed to the client until the firm can win a settlement for them.

Contingency fees can apply in all kinds of litigation, however, not just personal injury. There are plenty of commercial cases—such as class actions and breach of contract actions—in which contingency fees can apply.

Choosing this approach can be a positive in terms of marketing and endearing your firm to the public. Many clients will be more apt to give your firm a chance if they know their out-of-pocket cost hinges on you doing your job well and winning their case.

On the other hand, this fee structure can be nearly untenable for a new firm with few resources. Firms need to pay for overhead and staff costs, and partners also need to pay themselves. Along the way, lawyers still need to work on their cases. The cost of doing so—and all other expenses—come directly from the capital reserves of the firm. The firm

does not get paid until that "win" is earned. It's a gamble, and it is one that new firms may not be able to make if their capital reserves are low.

Managing money

Once a new firm decides on its fee structure and goes all in on making that structure work, it must then focus on organizing its financial management system.

One of the biggest mistakes new firms make is not investing in growth from the onset. At the beginning of any business, you're running lean. You're pinching pennies to get your firm off the ground, and it can be very easy to get stuck in a pattern of frugal behavior. Many businesses miss shifting to a growth mindset, even when they begin to bring in revenue.

Those striking out and opening their own firms should be laser-focused on growing (and sustaining growth) from the beginning. It's also integral to the initial and future success of the firm that dedication to excellent service is woven into the growth mindset.

To achieve this growth, I highly encourage law firm owners to be focused on increasing their caseload over time. That increase can come either from the number of cases they take on or the size of those cases. In either instance, focusing on that growth is going to keep that law firm sharp rather than stagnant. Lawyers should always be focused on client satisfaction by providing the best services possible. All of these are highly influenced by a focus on growth.

Ultimately, it's up to the firm to decide whether it wants to grow. If the firm doesn't want to grow, this will influence the choices that it makes. Conversely, if the firm wishes to grow by expanding the number of clients it serves or the number of attorneys that work within the firm, the firm must be capable of investing in growth.

Nevertheless, there is nothing wrong with stabilizing your firm before considering ways to grow. In fact, when you first start out—especially if you're a contingency fee firm—you're essentially working off reserves. You'll want to establish that steady revenue, or at least the ability to project revenues, before you make investments that you're unsure you can cover or will create a return. It is important to know that you have a business model that works before you can start investing in growth.

Yes, there are all kinds of alternative fee arrangements lawyers should consider, including mixed fee arrangements.

For instance, a typical contingency fee arrangement might be 33%, or one-third of whatever is recovered minus expenses.

In a mixed-fee arrangement, you might charge a flat fee at the outset, which serves as guaranteed revenue, and then take a lesser contingency fee on the back end instead of the usual one-third—perhaps 15% to 20%, depending on the arrangements.

Things can rapidly go south if a firm's financial management is not secure. Adverse effects of bad financial management include the inability to pay staff, a lack of resources to move cases forward—resulting in bad service to clients—and eventually an inability to operate. ■

Omar Ochoa: Contingency fees are not limited to the realm of personal injury.

Omar Ochoa is the founder of Omar Ochoa Law Firm.

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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Year-End Law Firm Accounting: How to Get Money in the Door And Start Q1 Off Strong

LawPay
AN AFFINIPAY SOLUTION

By: John Lehman

Compared to other businesses and industries, law firm accounting can be more complicated due to unique requirements, such as the necessity to maintain compliance with their state bars. Law firms and law partners can help reduce some of the headaches associated with closing out the books at the end of the fiscal year by utilizing processes and tools that ensure the money your firm has earned gets through the door by the end of the year.

Conducting Yearly Financials

For the end-of-year financials to be completed, the last month of the fiscal year must be closed, a firm's bank accounts must be reconciled, all adjustments must be entered, and financial statements must be compared. Some important steps on an end-of-year law firm accounting checklist include:

- Conducting a final client billing and review outstanding accounts receivable
- Finalizing reconciliation of all accounts, including client trust accounts and firm operating accounts
- Checking retainer balances and ensuring the accuracy of client trust account records
- Making entries for any end-of-year client payments or costs
- Reviewing profit/loss statements and ensuring that write-offs are correctly handled
- Making any needed adjustments and officially closing out your books to ensure no further edits are made

Law firms have a number of tools at their disposal to help them with their finances, including practice management software, accounting software, and online payment solutions, many of which can integrate with one another to help firm managers avoid having to transfer data from one platform to another and avoid information accidentally being left off.

Main components of law firm accounting

Law firms and practices typically conduct accounting taking into account three primary considerations: business account, retainer account, and matter cost accounting.

- Business accounting – includes anything involving accounts payable and bills; managing bills often includes keeping track of bill amounts and due dates along with monitoring check and credit card activity for the firm.
- Retainer accounting – involves trust and IOLTA account management; regular reconciliation of trust and client accounts with the firm's operating accounts must be performed to ensure that all client funds are accounted for and to avoid trust accounts from being over-drafted.
- Matter cost accounting – involves accounting between the two types of client costs, hard costs and soft costs; hard costs include expenses directly attributable to a client matter, like court filing fees or expert witness costs, while soft costs include expenses related to firm operations, like mailing and photocopying.

How online payments help firms keep their books in order and money coming through the door

For over a decade, LawPay has helped law firms manage their cash flow and get more client payments through the door by giving firms the freedom to take their payments online, from credit cards to eChecks. LawPay offers firms the ability to create custom payment pages on their firm websites and the ability to set up payment plans for clients. No technical experience is needed either by the firm or the client to utilize LawPay's services.

We also know that you are running a business, which is why LawPay offers you powerful reporting tools so that you can quickly review key metrics of your firm's financial performance, conduct reconciliation, and complete your end-of-year finances as smoothly as possible so that you can get back to the practice of law.

John Lehman is the Content Team Manager at LawPay. He currently lives in Austin, Texas, where he enjoys eating plenty of Tex-Mex, brisket, and breakfast tacos while hiking through the Barton Creek Greenbelt.

Practice Matters

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YOUR VOICE

Strategies for Success

8 types of clients you must manage in your legal practice

BY NADINE C. ATKINSON-FLOWERS

Early in my legal career, while practicing in Jamaica, a client kept me on my toes with a criminal law matter. It was clear I had not been given any written instructions about a specific part of the defense's case as I addressed the judge, and that the client was growing increasingly upset as I spoke. A very senior lawyer sitting beside me passed me a note that simply said, "Get that in writing. You must always protect yourself."

A YourABA newsletter in February shared a blog post from the Center for Professional Responsibility titled "8 signs of a potentially untrustworthy client."

It brought me back to that experience and reminded me of the different types of clients I have encountered throughout my career.

How a client behaves may not only negatively impact a firm and its lawyers: Untrustworthy clients may also pose a professional responsibility risk. I've developed some tips to manage the untrustworthy client as well as other difficult clients.

1. The helicopter client

I faced this type of client early in my practice, and my inexperience made it difficult to set boundaries. These clients seemed to want to monopolize my time, but that would mean ignoring many other clients. They usually called or showed up at the office without an appointment or at very inconvenient times, like when I was rushing into court, during another client appointment or late in the evening, remarking they were just passing by, saw my car in the parking lot and wanted to update me on something. Technology has drawn everyone closer and made it difficult to draw a clear line between professional and personal time.

Tips: This client requires boundaries from the get-go, which means having some difficult conversations. Advise this client that appointments are the rule, but of course emergencies and life challenges are the exceptions.

2. The laissez-faire client

These clients never meet deadlines, don't show up for meetings, never contact you before a court date and rarely respond to your communications. Are these avoidant clients simply bracing themselves for possible bad case outcomes?

A colleague recounted to me that they had a client who did not respond to letters, emails or phone calls. All of this was documented in the lawyer's records.

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The client made a bar complaint stating the lawyer had not provided enough information about the case, and the lawyer was now refusing to refund fees.

The lawyer provided the bar with significant proof about all the communications sent to the client as well as information about work done on the client's behalf. The lawyer was cleared of any wrongdoing.

Tips: Document all your efforts with these clients. Keep track of all correspondence sent to them by every means; record your efforts to meet court-stipulated deadlines; chronicle all steps to meet statute-of-limitation deadlines; and make sure your efforts to respond to requests for evidence are logged (a grim reality for immigration lawyers).

3. The lying client

What do you do when a client denies allegations in a criminal case—or any other type of case—despite the proverbial smoking gun (that wasn't planted)? As a junior lawyer, I was initially unsure of how to handle this.

I had a client who vehemently denied allegations. We even agreed to a DNA sample, and when it came back, it proved the prosecution's case. A quick guilty plea and a strenuous plea in mitigation had to follow.

Tips: One of my mentors in Jamaica suggested asking the client why the prosecution would have those specific allegations against them. Sometimes their version helps only in mitigation, sometimes it gives a fuller picture, and sometimes the evidence is insurmountable. At that point, our clients must be advised that our job is not to lie for them, but we can do a great mitigation plea.

4. The 'help with a single area' client

I learned this one the hard way in my immigration practice. The client came in asking about a specific family member benefit. The work was done. Soon after, U.S. Citizenship and Immigration Services asked questions about other family members, but I had not asked to see copies of those documents. If I had asked more probing questions, I would have been able to try to resolve issues earlier, which would have meant that their benefit would not have been delayed.

Tips: When the client declares you "only need to sign off as the lawyer," you must advise the client that because you are signing off as their lawyer, you must check everything and ask questions, even uncomfortable questions. You also need to see any document that they have previously submitted.

5. The 'I read all your documents' client

Many clients are not going to check through all the documents you provide to them. Sometimes we do not check as thoroughly as we should. I have had the experience of asking my clients to check the documents I drafted, and they respond that they have and all are correct. Because I am a sucker for pain and suffering, I sometimes recheck those same documents one more time and find basic errors on my part.

Tips: Double- and triple-check your documents, and don't rely on your client's review of them.

6. The 'great expectations' client

There is an adage: "The client doesn't want to know which law school you went to; they only want to hear if they are going to win." Even if victory is near, a lawyer shouldn't guarantee a win. Such assurances can expose the lawyer to various ethical issues and violations.

Tips: Instead, highlight the positives in their case and encourage them to find additional evidence to shore up weak areas to help promote their chances of success.

Nadine Atkinson-Flowers

Photo courtesy of Nadine Atkinson-Flowers

7. The manners client

In Jamaica, it is a tradition to call the opposing lawyer in any matter—civil or criminal—"my learned friend," a mark of respect and civility. A client advised me he was firing me because I had called his soon-to-be ex-wife's lawyer "my learned friend." Despite my explanation and assurances that I could represent him with vigor, I was fired.

Tips: We must advise our clients that civility is crucial to the practice of law. Strive to advise clients that open hostility or rudeness toward the other side might backfire. And after those clients go, you still will have to work with the same lawyers, judges and—potentially—witnesses!

8. The best type of client

They have everything in order, are reasonable people and appreciate your efforts on their behalf, win or lose. We could all use more of these, and so we can but dream.

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WORDS

4 Dogmas Debunked

How to frame a legal issue: Part I

BY BRYAN A. GARNER

During my first week of law school in August 1981, we were put through a legal-methods course taught by senior faculty. My small section was led by a respected professor who taught us "four essentials" for stating legal issues:

(1) Do it in a single sentence.
(2) Start with the word *whether*.
(3) Omit particulars about the problem.
(4) Always elicit *yes* for an answer, not *no*.

Although I've always been fond of clear guidance, I objected.

"Professor, I don't understand. *Whether* at the beginning of a direct question isn't grammatically correct. It creates a sentence fragment. Why are we to do it this way?"

"Mr. Garner, that's just the way it's done in law," the professor said.

He gave examples:

- Whether the two-year statute of limitations bars plaintiff's contract claim given the inapplicability of the discovery rule?
- Whether common-law marriage takes place when the "holding out" is only to certain select friends but not to members of the extended families?
- Whether applicant's request submitted to the city breaches a contractual covenant of quiet enjoyment?

Perhaps this was what sparked my becoming a dissident law student. Perhaps many found these sentence fragments impressively intimidating. I found them intimidating but unimpressive. What rankled me was the incomprehensibility of the statements themselves. You could never understand what they were really saying without further effort.

In any event, I suppressed further questions but began a course of independent study in which I confirmed that most authorities agreed with the four dogmas laid down by my professor. Most of our law school reading seemed as if it took place through a glass darkly: You'd always encounter early sentences that were incomprehensible until you read much more—until finally the issue stated in the first paragraph would come into focus. This practice, it seemed to me, violated all the rules of good expository writing. And so I came to detest most of my legal reading.

'Whether' ... or not

My loathing of the standard method of stating a legal problem intensified during my clerkship at the 5th U.S. Circuit Court of Appeals. The issue statements in briefs would almost uniformly resemble these:

- Whether there was a transfer or delivery of the equipment pursuant to the JSA? (What's the JSA? You'd have to read further.)
- Whether there was sufficient evidence to support jury finding No. 4?
- Whether the trial court improperly refused a judgment non obstante veredicto that would award plaintiff zero damages for physical impairment other than loss of vision despite the jury's verdict?

Day in and day out, judges and their law clerks were expected to excavate meaning from such things.

Meanwhile, I steeped myself in the literature on advocacy. The historical lawyers and the scholars I most admired said that the paramount concern in advocacy is identifying the precise issue to be decided. Rufus Choate (1799–1859),

Photo illustration by Sara Wadford/Shutterstock

the greatest American advocate of his time, said that "the best argument on a question of law is to state the question clearly."

In a majority opinion for the U.S. Supreme Court, Justice Felix Frankfurter wrote that "in law ... the right answer usually depends on putting the right question."

And Frederick B. Wiener, author of a major treatise on advocacy, insisted that "the question presented in any case can be clearly and appealingly stated—or, contrariwise, unclearly and unappealingly."

As a law clerk for a federal appellate court, I was finding that the *performance* of lawyers deviated wildly from those statements. The issues were uniformly unclear and unappealing. The problems seemed traceable to the four dogmas I'd been taught that first week of law school, especially the insistence on cramming the whole issue into one sentence fragment beginning with the word *whether*.

Clearly stated issues

I talked with judges about the problem: We were all spending many hours per brief, reading 50 pages for the purpose of understanding one or two murky issues. The legendary Judge John Minor Wisdom, for whom the 5th Circuit courthouse in New Orleans is now named, told me that the true art of judging involved discovering the real issues in a case. "Rarely do the briefs really help on that," he said.

Another hero of mine, Judge Thomas Gibbs Gee, called the briefing generally "execrable" because of its failure to elucidate the issues. The lawyers' approach, in his view, essentially involved an obscure variation on "Who wins?"

Seeing a challenge, I wondered whether it might be possible to devise a technique to yield legal issues that would be universally comprehensible on a first reading. That would revolutionize legal writing. It might then be possible to read the issues first, fully understanding them, and then to read the rest of the brief with greater eagerness for specifics.

For the next five years, I continued to read everything I could find on how to state a legal issue. The complaints about lawyerly habits were age-old. As far back as 1894, the authors of a treatise on appellate advocacy wrote, rather incisively: "Obscurity in stating the questions will cloud the whole argument, for, as the discussion progresses in a case where the start is made from an obscurely stated question, the darkness will increase with each step of the argument." For me, that statement seemed to sum up my decade's worth of legal reading.

Everything changed in 1991, when I discovered a 1953 article by Frank E. Cooper of the University of Michigan. It had appeared, remarkably as it now seems, in the pages of the *ABA Journal*. Cooper bristled at the idea of omitting particulars (dogma No. 3), insisting that abstract statements give "only the faintest glimmer of light." He wanted concreteness, and he gave this example as a model, still accepting the single-sentence dogma (No. 1):

> Whether an alien, born in Bohemia, then a part of the Austro-Hungarian Empire, in 1905, who later became a Czechoslovakian citizen when the place of his birth was included in that country after World War I, and who, after the Munich Pact of 1938, while in the United States, petitioned to be and was recognized as a German citizen, is now a citizen or subject of an enemy country within the meaning of the Alien Enemy Act of 1798, despite the reoccupation of the territory of his birth and former residence by Czechoslovakia?

It struck me that while the specific content of the issue statement is sound, the syntax is convoluted. There are 56 words between the subject (*alien*) and the verb (*is*). Why not reorder the information in several shorter sentences? I rewrote it by starting with the rule and then briefly explaining the situation. The case was decided in 1946:

> Today, German citizens are considered enemy aliens under the Alien Enemy Act of 1798. Reichel was born in 1905 in Bohemia, then part of the Austro-Hungarian Empire. After World War I, when his birthplace became known as Czechoslovakia, he became a Czech citizen. After the Munich Pact of 1938, while Reichel was in the United States, he petitioned to be and was recognized as a German citizen. Should he now be considered an enemy alien?

This 75-word issue statement, down from 93 in the original, was in my view a major breakthrough in technique. By happenstance, the revised issue elicits a *yes* answer. Often the question can more powerfully elicit a *no* answer. The fourth dogma should be cheerfully ignored.

In part 2, we'll explore how this technique plays out in modern practice—in a variety of fields. Can it be successfully replicated in all sorts of scenarios? Stay tuned.

Bryan A. Garner is the president of LawProse Inc., Distinguished Research Professor of Law at Southern Methodist University, the author of The Winning Brief *(3d ed. 2014), the co-author of* Making Your Case: The Art of Persuading Judges *(2008) and the longtime chief editor of* Black's Law Dictionary.

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

Bryan A. Garner

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Houston's 2021 Astroworld Festival sold out—100,000 tickets—in less than one hour. Tragedy later struck the packed venue.

Photo by Erika Goldring/WireImage

TORT LAW

Lessons From the Astroworld Disaster

Laws are needed to prevent crowd crush, expert says

BY JENNY B. DAVIS

Astroworld 2021 was hyped as more than just a concert.

Multiplatinum-selling rapper Travis Scott founded the annual music festival in his hometown of Houston in 2018, and this latest iteration promised to be the best yet.

The star-studded lineup included iconic R&B group Earth, Wind & Fire, rap impresario Master P and reggaetón phenom Bad Bunny. When ticket sales opened in May 2021, they sold out within 30 minutes.

The two-day festival kicked off Friday, Nov. 5, with tens of thousands of people filling the sprawling parking lot-turned-festival venue of NRG Park. Bands had played throughout the day on a secondary stage, and Scott was set to perform on the main stage at 9 p.m.

Fans started claiming prime spots in the standing room-only space surrounding the main stage hours in advance; by showtime, the crowd had become a seemingly endless, undulating mass of raised arms and glowing phones. Scott took the stage with a video of a giant volcano erupting behind him, launching into his first song of the night, "Escape Plan." By the third song, the crowd was engulfed in chaos.

In all, 10 people in the audience died from injuries they sustained in the pressure-packed crowd that

night. The youngest was a 9-year-old boy. According to the Harris County Institute of Forensic Sciences, they all died from compression asphyxia when the pressure of the crowd against their chests prevented them from breathing. Approximately 300 people were treated at the scene for injuries, and 25 were transported to hospitals, according to news reports. Astroworld 2021 had become one of the deadliest concerts in U.S. history.

Litigation fallout

Not surprisingly, lawsuits ensued against Scott, concert promoter Live Nation and others. By May 10, hundreds of lawsuits brought by nearly 5,000 plaintiffs had been consolidated under a single docket number to streamline pretrial proceedings.

Lawyers refer to this type of personal injury lawsuit as a "crowd crush" case, filed to recover for injuries sustained in crowds at concerts, sporting events, nightclubs, religious ceremonies, store openings and doorbuster sales.

Crowd crush cases are grounded in basic tort law and are almost exclusively brought as negligence claims.

The reason for relying on negligence, says law professor Tracy Hresko Pearl of the University of Oklahoma College of Law, is that there are virtually no state or federal laws that address crowd crush. Pearl has written extensively on the issue, including a 2015 *Kentucky Law Journal* article, "Crowd Crush: How the Law Leaves American Crowds Unprotected," and a 2021 op-ed in the *Houston Chronicle* specifically about Astroworld.

"Neither common law nor statutory law have required or incentivized event organizers or venue owners to take any action to manage crowds efficiently," Pearl says. "It's not that we don't have laws pertaining to concerts—we have restrictions on trash and regulations that determine how many ambulances need to be on-site—there's just nothing requiring any advance thought with regard to crowd crush."

In crowd crush cases where negligence is at issue, a duty to the plaintiff must first be established. Pearl says courts then will often look to the artist's behavior or the crowd's behavior to determine reasonable foreseeability. But this type of analysis, she says, is wrong.

"We see lawyers relying on faulty or even racist conventional wisdom like, 'It was a rap concert, what do you expect?' or 'If you hadn't behaved like that, you wouldn't have been injured,'" she says.

Indeed, there's ample fodder for such analysis in the Astroworld cases. Scott is, after all, a rap superstar who spits profanity-laced lyrics and encourages his concert crowds to "rage"—his term for the level of physical commitment he (and his fans, called "ragers") believe necessary for an ideal experience. He once said he wanted his concerts to feel like a World Wrestling Federation event, and he's been in legal trouble for encouraging dangerous crowd behavior during his shows, most recently in 2017 when he was charged with three misdemeanors including inciting a riot and disorderly conduct (he pleaded guilty to disorderly conduct).

But instead of a rush to judgment, Pearl believes foreseeability in crowd crush cases should rely on crowd science, a field of study based in physics that determines how large groups of people behave in a physical space.

Bryanna Morales sits near a makeshift memorial at the NRG Park grounds, where she was injured during the Astroworld crowd surge.

Photo by Thomas Shea/AFP via Getty Images

A scientific approach

Beginning in the 1980s, experts started studying crowd crush incidents around the world, and they have determined that the risk of crowd crush is connected to crowd density, meaning the number of people per square meter in a given crowd.

If density is five people per square meter, Pearl says, the likelihood of injury increases, and if it reaches roughly seven people per square meter, "it's not a question of what will trigger a crowd crush, it's a question of when it will happen."

At this density, people lose the ability to control their movement "almost completely" and the crowd begins to be randomly displaced en masse according to principles of fluid dynamics, she explains. According to research, she says, crowds at this density can exert forces of more than 1,000 pounds—strong enough to bend metal barriers and also to crush people.

"Scientifically, it doesn't matter what the demographics of the crowd are—there have been crowd crushes at

church picnics and Christmas performances at Radio City Music Hall," she says. "It also doesn't matter whether an artist is trying to exacerbate a dangerous situation or not, because if you were thoughtful about how the crowd was oriented in the space, no amount of rowdiness is going to result in a crowd crush."

Further, determining a crowd crush case based on details about the artist or the audience might be more than just misguided. It also might be unfair, says Jack I. Lerner, clinical professor of law at University of California, Irvine School of Law and co-author of *Rap on Trial: A Legal Guide for Attorneys*.

"There is 25 years of social science research showing that as soon as you tell a jury that something is rap, you create an incredibly strong risk of bias," he says.

Lerner points to studies that show violent and sexually explicit lyrics are more likely to be considered literal and offensive when they're characterized as rap music rather than if the genre is called country, heavy metal or folk.

But Pearl points out that bias isn't just an issue with rap. For example, in a 2008 crowd crush case at Walmart, shoppers injured during a Thanksgiving doorbuster sale were described as animals stampeding for a discount, she says, "when the reality is, you could have looked at the density of the crowd that had gathered outside and then had to navigate a bottleneck in entering the store and predicted it was going to happen."

Ultimately, trial tactics might not matter in the Astroworld case if it, like similar cases, settles before trial.

"Nothing good happens for [Live Nation] if they go to trial," says Southern California personal injury lawyer John J. Perlstein, who wrote a January 2022 Forbes.com article on a crowd crush injury at a 2019 Harry Styles concert and represented plaintiffs in the 2017 Las Vegas concert shooting.

Whatever happens, it will forever remain a tragedy. "There's no joy, no happiness," he says. "The family gets money, but the loss never goes away." ■

10 QUESTIONS

Full Court Press

Former NBA lawyer is changing the game with holistic legal consulting for athletes

BY JENNY B. DAVIS

Being a sports star has never been more demanding. In addition to athletic achievements, these high performers also must excel in business, building personal brands that lead to lucrative endorsements, collaborations and content deals—that is, if they play the game right.

That's where Los Angeles lawyer Nicole Duckett is there for the assist. In July, she founded Nikki Duckett Collective, a full-service legal consulting firm that provides holistic representation to ambitious elite athletes. It's about global branding, savvy deal-making and long-term success—things Duckett already has spent decades achieving for her clients.

She did it as a managing partner at Milberg, where she practiced securities and business litigation. As a city commissioner, Duckett oversaw the Los Angeles Convention Center. Most recently, as vice president and general counsel of the Los Angeles Clippers, she negotiated one of the most lucrative regional television deals in NBA history and spearheaded deals involving Fortune 500 companies such as American Airlines. When she joined the Clippers in 2015, Duckett was the first Black woman to serve as a chief legal officer for any NBA team.

The idea of providing holistic representation to top-tier athletes seems so timely. How did you develop the approach?

Over so many years working directly with athletes, I started to identify the fact that they work so hard, and several of them were very serious about their business outside of the court or the field, yet there seemed to be this gap—they were missing what was needed to take their businesses and brands to the next level. I could see that top-tier athletes have great agents, and some of them even have business managers. The agents and managers play a critical role, but what I wasn't seeing was conscientious legal representation. I identified this as the missing piece to take these athletes as far as they could go. I had a wonderful experience at the Clippers, but I had reached the point in my career where I felt like I was the person to do this. I had decades of business law experience and almost a decade of sports law experience. Plus, I had the creativity and intuition that I knew was important to long-term success.

I'm glad you mentioned creativity and intuition. It's far more common for lawyers to want to talk about how they're tough or hard-hitting. Do you have any hesitancy about stressing "softer" skills—or feel they could make you seem less "lawyerly," especially as a woman?

I don't because I know that I have the legal acumen and the hard-line experience to back it up. I was a partner in private practice, I worked at three of the most reputable law firms and went to court regularly and never lost a case. To know that I had all of that in my pedigree before I even went to the NBA, where I was able to not just survive but thrive as a woman—and a woman of color—for eight years, I knew I had already proven myself enough and had the track record to be able to then mention these other skills. I think these skills are important, and I want my clients to know that I think these skills are important. There are a lot of smart lawyers out there, but I don't think they're aware of the importance of creativity and intuition.

They help you get the most of out any business deal.

It seems like these deals are just getting more creative now that social media allows everyone to become their own content creators and really their own brands.

Athletes are becoming the CEOs of their own brands, and they all know that this is an option for them now. You have to be creative and think outside of the box. What kinds of brands is my athlete interested in? What kinds of brands will partner with my athletes to support their brand and stay true to who they are? And on the back end, you need the legal acumen to make sure we get the most out of every deal. You're seeing athletes getting equity out of their endorsement deals now, and I really feel that the narrative is changing. I am excited to be working with athletes in other sports, and I am also excited about the ability to work with women, which was something I wasn't able to do previously.

Well, I hope that you are able to get them a level of equity equal to what the men get! I have been following the pay equity issues in soccer, and it's been really eye-opening.

That's really my goal. I want to see people invest more in women's sports, and I think the way to do that is to help women athletes get more out of their deals.

I would think you would be an inspiration to your women clients because you know what it's like to operate—and excel—in two male-dominated arenas: BigLaw and sports law.

Becoming a partner at a large law firm and securing and then succeeding in the position of a chief legal officer at a sports team would be difficult for anyone, but even more so for a woman and a woman of color. I knew early on that it wasn't going to be an easy ride. I knew that I'd have to work a little bit harder, so I did. From the very beginning, I just grinded it out. I insisted on excellence from myself, and I continued to push to achieve my career goals. I didn't know initially I would end up in sports. When Steve Ballmer bought the Clippers and was looking for a new lawyer, I didn't know that was happening. In fact, I may have been the only lawyer in Los Angeles who didn't throw their hat in the ring for that job. I found out later that around 1,000 lawyers applied.

Nicole Duckett

What made the Clippers execs look at your experience in securities and business and think, "That's the perfect fit for our basketball team"?

It was really about Steve's vision for the team. He wanted the Clippers to be a good team on the court, and his main goal was and has always been to win a championship. But he had a real interest in rebranding the organization beyond Los Angeles. For example, NBA teams were becoming huge brands in China, and he wanted to expand that international reach. They were looking for a general counsel who would be a business adviser as much as a lawyer, and the background that I had was a little different than the straight-sports lawyers. They were intrigued, and that's what got me the job. They wanted a GC with business, litigation, commercial, securities and courtroom experience who could handle the magnitude of the things that came across the desk of the GC.

As general counsel of the Clippers, you were involved in headline-making matters on a regular basis. What would you say to people who asked you about your job? I imagine you were the most popular person at cocktail parties—more so than when you were involved in securities litigation.

You're right! I've never been accosted at a cocktail party to talk about securities litigation. A lot of times, people would say, "What's the scoop?" Then I very nicely would say, "I can't disclose any insider information." At the end of the day, the Clippers were my client, and protecting them and their interests was always my priority. No matter how much the person at the cocktail party wants to hear inside information, I am not going to be able to share—I just deflect. On the flip side, I enjoy the fact that there's a common joy that people are excited to talk about. One time I was walking my dog, and my neighbor came up to me and asked, "What do you think is going to happen at the game tonight? You have the best players and the best owner—it's so exciting!" I remember that was a great moment for me, being able to share with a neighbor the excitement over the team. People get really excited about the NBA.

Photo by Justine Ungaro Studios

Your father was an oil executive, and you grew up living all over the world. Do you think this diverse background and just the fact that you moved a lot helped you develop your creativity?

Absolutely. I feel like having to move every few years and adapt to foreign cultures expanded my creativity and my ability to think in an innovative manner. I also think it helped me develop my intuition. When people look differently than you, they speak differently than you, it's intuition that I called upon to help me thrive in different cultures. It's a skill that's served me well through my entire career. I might be having a meeting with the owner of the Clippers, and that's a very different conversation than meeting with someone who's an athlete in their 20s who doesn't have a lot of business background. I am able to make everyone feel seen and heard, and I believe my background helped me develop those communication skills.

What do you do for fun outside work?

I am an avid hiker and yogi, and I meditate every morning. I use the time to create a quiet space in my mind for at least a few minutes before I start my day—before the thoughts come rumbling in. I also just wrote a children's book, and I am in the process of getting that published. It's a story about a young girl who has an experience that is jarring and sort of tragic at first, but ultimately, it teaches her a life lesson about evolving and the importance of embracing others. I haven't found an illustrator yet, but I am working on that right now.

I feel like your life could be a book—or a movie or a TV series. Seriously, someone needs to call Shonda Rhimes. Has anyone said that to you before?

A couple years ago, I was in Paris having coffee with a friend, and I don't remember what story I was telling him, and he said, "Your life could be a Netflix series." But if you could get Shonda Rhimes to make a series out of my children's book, I'd love that! ■

Illustration by Sara Wadford/Shutterstock

CHARACTER WITNESS

Pursuing Pet Health Equity

A lawyer's passion for pets prompts career switch

Character Witness *explores legal and societal issues through the first-person lens of attorneys in the trenches who are, inter alia, on a mission to defend liberty and pursue justice.*

BY STACEY EVANS

A few months before the beginning of the COVID-19 pandemic, I left federal government service as an attorney for a maritime regulatory agency to honor my life's mission to work in the pet health equity space. Pet health equity is a growing field dedicated to providing access to veterinary care and veterinary products for companion animals, regardless of their owner's resources and location.

I joined ElleVet Sciences, an animal supplement company, as vice president and general counsel, which meant moving from the hustle and bustle of the Baltimore-Washington, D.C., area to its headquarters in the serene beauty of South Portland, Maine. It was a 180-degree change, but

one that I'd been preparing for most of my life.

My journey helping dogs and other companion animals began well before I joined ElleVet. Growing up, I always had an affinity for pets, particularly canines. My family had dogs from shelters and breeders. The first dog I adopted when I became an adult, Louis Luigi, inspired me to use my experience practicing law to help companion animals. After he passed from cancer, I adopted two dogs that had been difficult to place: Rudi, an Alaskan malamute that came from an animal hoarder in North Carolina; and Yeong-Mi—a malamute/American Eskimo mix that was rescued from the dogmeat trade in South Korea.

Growing need

During my service on the Maryland State Bar Association Animal Law Section board, I learned about terms like "economic euthanasia," which is when a pet is euthanized because its owner cannot afford to pay for necessary treatment. This is unfortunately not an uncommon scenario. Many people suffer loss of income that can drain financial resources and impair the ability to afford veterinary care to save their pet. The current rising inflation, from which vet costs are not immune, combined with a growing shortage of veterinarians in general, can make it difficult to access needed treatment. This is an even more dire challenge for people who are homeless or those with limited means.

Shortly after starting with ElleVet, the CEO called me with a proposal: The company wanted to provide free veterinary care to pets of the unhoused in California and to people who had lost their jobs due to the pandemic. ElleVet planned to recruit and hire veterinarians to provide free care, including vaccinations and wellness exams, outside of a roving RV that would be called the ElleVan. The company would provide supplies, medication, food and supplements for the pet patients.

My initial thoughts were: What an amazing and insane idea. Amazing because of the need; insane because we were starting from scratch and had one month to plan. We were at the beginning of the pandemic, and cities had restrictions for public gatherings. Would veterinarians want to risk interacting with strangers and their pets? Would the people who are homeless and others with limited means even show up given the COVID-19 risk? How would I make this happen given the time frame, pandemic restrictions and my other legal responsibilities with the company?

At ElleVet Sciences, Stacey Evans specializes in building veterinarians' and pet owners' access to hemp CBD products for cats and dogs.

Photo by Maine Headshots

Despite the tough time frame, we found and secured veterinarians and locations throughout California for the ElleVan to provide free veterinary care. We were able to form partnerships with nonprofits and government organizations, convincing them that vaccinating and treating pets was imperative, even during the pandemic, to protect pet health as well as humans from rabies and other zoonotic diseases.

The result of the hard work and collaboration was that more than 1,200 pets of people with limited financial means were vaccinated and treated from May to July 2020. But our campaign exposed the extraordinary need for free veterinary care for pets of the unhoused and other folks with limited means. As a result, we created the ElleVet Project, a 501(c)(3), and have been able to expand the program across the country to states including Florida, Montana, Nevada and Washington.

Lifelong commitment

Increasing access to veterinary care and access to products that help pets is deeply fulfilling work for me. Before joining ElleVet full time, I worked as a consultant developing legal strategies and ways to promote access to veterinary care for the Program for Pet Health Equity at the University of Tennessee Knoxville Veterinary School of Medicine. I also developed and executed strategies that created access to hemp CBD products for pet owners and veterinarians as a consultant for ElleVet. I served as the first member of the U.S. Department of Agriculture Secretary's Advisory Committee on Animal Health appointed solely to represent animal welfare issues. And during my time as the chair of the ABA Tort Trial and Insurance Practice Section Animal Law Committee, I participated in pet vaccination clinics and helped socialize dogs rescued from the Korean dogmeat trade that were at an animal shelter in New York. I also served on the Baltimore Animal Rescue and Care Shelter board. I did all of this while working full time as a federal attorney because it was my true passion.

I rarely see other Black attorneys—let alone Black women—working in animal law, and I am hoping to forge a path and set an example for others to engage in this field. I initially worried that I would experience the sort of discrimination and hostility I often encountered in the mostly white and male maritime industry. But I'm grateful that I made the leap despite these fears, and what's proved most fulfilling has been dedicating my time and efforts to a career I love. ■

Stacey Evans is vice president and general counsel at ElleVet Sciences, where she develops legal strategies around the use and sale of hemp-derived CBD products to veterinary practices. She is a past chair of the ABA TIPS Animal Law Committee.

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

National Pulse

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LAWYER DISCIPLINE

Back After Disbarment?

Some jurisdictions are weighing whether to give lawyers second chances

BY WENDY N. DAVIS

In 2017, New Jersey attorney Dionne Larrel Wade was one of more than 600 lawyers in the state subjected to a random audit by the Office of Attorney Ethics.

Wade, a solo practitioner who was admitted to the bar in 2002, had devoted her career to representing underserved clients in matters ranging from bankruptcy to criminal proceedings to personal injury lawsuits. She also did pro bono work for Northeast New Jersey Legal Services, conducted free legal seminars and volunteered.

"Everything I've done in my life was to become an attorney and to help people," Wade says.

The audit uncovered discrepancies in her books, and Wade acknowledged that she sometimes borrowed money from client trust funds to pay bills. She always repaid the money, and she had never previously been the subject of a disciplinary proceeding.

The Office of Attorney Ethics, an investigative and prosecutorial arm of the Supreme Court of New Jersey, began disbarment proceedings. At her hearing, character witnesses—including one of the clients whose money Wade borrowed—testified on her behalf.

In New Jersey, a knowing misappropriation of client funds results in permanent disbarment. Accordingly, in June, the supreme court ordered Wade stricken from the roll of attorneys.

"When clients place money in an attorney's hands, they have the right to expect the funds will not be used intentionally for an unauthorized purpose," Chief Justice Stuart Rabner wrote.

But in a first, the court left open the possibility that Wade and other disbarred attorneys might resume practicing law. As part of the ruling, Rabner convened a committee tasked with evaluating whether disbarment should be permanent in every case involving knowing misappropriation of client funds. He also invited the committee's comments on whether attorneys disbarred for reasons other than misappropriation of funds should be able to apply for reinstatement.

Currently, disbarment is always permanent in New Jersey and a minority of other states—including Indiana, Kentucky, Nevada, New Mexico, Ohio, Oregon and Tennessee. In some other states, including Louisiana, disbarment can either be permanent or temporary.

But in the majority of states and in the District of Columbia, disbarred lawyers may apply for readmission after a period of time—often at least five years. Similarly, Rule 25 of the ABA Model Rules for Lawyer Disciplinary Enforcement says lawyers who have been disbarred should not be able to apply for reinstatement for at least five years after the effective date of the disbarment.

The New Jersey court's move to revisit its stance comes after decades of criticism by the organized bar.

While disbarment always has been permanent in New Jersey, it wasn't inevitably imposed on all attorneys who knowingly misappropriated funds until a 1979 decision involving Wendell Wilson. He was the subject of eight complaints filed with the local ethics committee, including two that involved misappropriation.

The state's highest court not only stripped Wilson of his license but also said disbarment was "the only appropriate discipline" in misappropriation cases.

"Maintenance of public confidence in this court and in the bar as a whole re-

Illustration by Sara Wadford/Shutterstock

quires the strictest discipline in misappropriation cases," then-Chief Justice Robert Nathan Wilentz wrote.

Before that decision, the court sometimes merely suspended lawyers who misappropriated funds, depending on whether there were mitigating factors—such as whether lawyers made restitution.

After *Wilson*, the state supreme court invariably disbarred lawyers who knowingly misappropriated client funds—though the court imposed lesser sanctions when the misappropriation was negligent, meaning the lawyer was careless or sloppy with bookkeeping.

Some lawyers in New Jersey have long argued the state's disbarment approach is too inflexible. "There are a tremendous amount of talented people who have been disbarred permanently," says Wade's attorney, Donald Lomurro.

Ronald Chen, a law professor at Rutgers Law School, says the current rigid standard is somewhat anomalous for the Supreme Court of New Jersey.

"This court generally is not known for adopting bright-line rules in any of its jurisprudence," he says.

The New Jersey State Bar Association filed an amicus brief in Wade's case urging the supreme court to rule that disbarment in misappropriation cases should be required only when the lawyer committed fraud or theft.

Disbarment in other states

Louisiana changed its rules in 2001 to allow the option of permanent disbarment in some cases where lawyers engaged in "egregious misconduct"—including insurance fraud, intentional homicide, armed robbery and "repeated or multiple instances of intentional conversion of client funds with substantial harm," among other examples.

Louisiana courts can only impose permanent disbarment after finding both that the lawyer's conduct is "so egregious as to demonstrate a convincing lack of ethical and moral fitness to practice law," and that "there is no reasonable expectation of significant rehabilitation in the lawyer's character in the future."

Wisconsin mulled a rule change that would have allowed for permanent disbarment but rejected it in 2019. Justice Annette Kingsland Ziegler (who is now chief justice) authored a dissent in that case joined by Justices Rebecca Grassl Bradley and Brian Hagedorn.

"We continue to use the term 'revocation,' but in reality we just suspend lawyers, call it revocation and allow these most heinous offenders to petition for readmittance after a period of five years," Ziegler wrote. "This creates false perceptions both to the public and to the lawyer seeking to practice law again."

Legal ethics experts offer varying opinions on permanent disbarment.

"I believe it is appropriate to provide an opportunity for redemption," says Kathleen Clark, a Washington University in St. Louis School of Law professor who has served on the District of Columbia Bar's Rules of Professional Conduct Review Committee.

"There are some really remarkable redemption stories I have seen of lawyers who have been either disbarred or suspended, and then essentially have a revelation or epiphany about their past conduct and become absolutely upstanding members of the bar—and of society," Clark adds.

Seton Hall University School of Law professor Michael Ambrosio, who has written about legal ethics, says he favors maintaining New Jersey's current standard of permanent disbarment for lawyers who raid client accounts.

"A client trust account is sacrosanct," he says. It's better for the court "to err on the side of disbarment," he adds, than risk losing the public's confidence in the legal system.

Second chances

Another New Jersey lawyer seeking reinstatement is John Koufos, who is recovering from alcoholism. He was disbarred after pleading guilty to leaving the scene of an accident, hindering apprehension or prosecution, and witness tampering.

His guilty plea stemmed from a crash on June 17, 2011, in which Koufos, then a criminal defense attorney, struck and seriously injured a 17-year-old pedestrian. Koufos fled the scene. The next day, he persuaded a friend who had worked with him off and on for five years to confess to the police, according to an opinion by the Disciplinary Review Board of the Supreme Court of New Jersey.

Several days after the crash, Koufos turned himself in. He pleaded guilty in March 2012, was sentenced to six years and served approximately 17 months.

The Disciplinary Review Board voted 6-2 to suspend Koufos from practice for three years, but the New Jersey Supreme Court disbarred him in 2015 by a 4-2 vote.

Since leaving prison, Koufos has advocated for former prisoners, including serving as executive director of the nonprofit New Jersey Reentry Corp. and as national director of reentry initiatives for Right on Crime, which says it supports conservative approaches to "reducing crime, restoring victims, reforming offenders and lowering taxpayer costs."

Koufos also was temporarily suspended from practice in the U.S. District Court for the District of New Jersey in 2013 and is fighting disbarment proceedings in that court. Koufos' lawyer in the federal matter, Lawrence Lustberg, says his client "really should be able to have the benefit of a second chance." He adds that Koufos is trying to get his record in New Jersey expunged.

"There are legal service programs I would like to create and lead, which I can't do as a disbarred person," Koufos says.

The committee to reexamine disbarment will be headed by former New Jersey Supreme Court Justice Virginia Long and will include lawyers and nonlawyers. The group will examine issues such as how long disbarred attorneys should have to wait before seeking reinstatement, what factors should be considered, and whether disbarred attorneys should have to retake the bar exam or classes on ethics and record-keeping.

Wade, for one, she says she would do anything to regain her license.

"It was everything I worked so hard for, and I put so much into," she says. ■

SOCIAL MEDIA

Make No Law?

State laws targeting social media platforms face First Amendment challenges

BY DAVID HUDSON JR.

Social media platforms say they have a First Amendment right to curate content and should not be compelled to host content that they don't want. But supporters of laws in Florida and Texas regulating social media platforms say the measures are necessary to avoid what they term "Big Tech" or "Silicon Valley" censorship.

Litigation continues over these state laws that regulate social media platforms' ability to moderate content. Supporters of these laws contend that at least some larger social media platforms have engaged in invidious censorship of conservative viewpoints, depriving the public of the full panoply of perspectives.

The social media platforms counter that the laws are a clumsy attempt to regulate the protected speech and expression choices of private companies—including their First Amendment right to engage in editorial discretion. They also say that these laws are preempted by Section 230 of the Communications Decency Act, which provides a great deal of immunity to online service providers, often insulating them from liability for third-party posts.

The Florida law—called the Stop Social Media Censorship Act—was proposed by legislators after former President Donald Trump was banned from social media outlets, most prominently Twitter. "This session, we took action to ensure that 'We the People'—real Floridians across the Sunshine State—are guaranteed protection against the Silicon Valley elites," Gov. Ron DeSantis said upon his signing of the measure into law in May 2021. "Many in our state have experienced censorship and other tyrannical behavior firsthand in Cuba and Venezuela. If Big Tech censors enforce rules inconsistently to discriminate in favor of the dominant Silicon Valley ideology, they will now be held accountable."

A similar measure passed in Texas with support from Gov. Greg Abbott, who penned a September 2021 piece in the *Washington Post* about it. "The need for this law has been apparent for years, as our country's public square has become increasingly controlled by a few powerful companies that have proved to be flawed arbiters of constructive dialogue."

NetChoice and Computer & Communications Industry Association, trade associations with many social media platforms as members, filed lawsuits challenging both the Florida and Texas

Illustration by Sara Wadford/ABA Journal

laws. They press the point that the legislation empowers the government to regulate the content moderation decisions of private companies—something usually viewed as forbidden under the First Amendment.

For example, in their lawsuit against the Texas law, the complaint reads that the law "will impose operational mandates and disclosure requirements designed to prescriptively manage—and therefore interfere with and chill—platforms' exercise of editorial discretion."

The cases present the interesting question of whether the government can regulate the social media content moderation and curation decisions of these private companies that control much access to speech in the modern world.

Headed to SCOTUS?

So far, the courts are not uniform, and a circuit split has emerged.

Both a federal district court and a three-judge panel with the Atlanta-based 11th U.S. Circuit Court of Appeals, at least for now, have enjoined enforcement of much of the Florida law, ruling that several provisions likely violate the First Amendment.

"Social media platforms like Facebook, Twitter, YouTube and TikTok are private companies with First Amendment rights," the 11th Circuit wrote. "More particularly, when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users—a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site."

The 11th Circuit added that the U.S. Supreme Court "has repeatedly held that a private entity's choices about whether, to what extent, and in what manner it will disseminate speech—even speech created by others—constitute 'editorial judgments' protected by the First Amendment."

It favorably cited the Supreme Court's 1974 decision in *Miami Herald v. Tornillo*, which examined whether a Florida law requiring newspapers to give political candidates a right to reply to adverse editorials invaded the protected province of newspapers' editorial judgment.

"*Tornillo* made it clear nearly 50 years ago that when it comes to print newspapers, editing is for editors—not the government—no matter how biased their editorial choices may seem," says Clay Calvert, the Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida. "Print newspapers simply cannot be compelled to host content that the government demands. Print newspapers have an unenumerated First Amendment right not to speak."

The Texas law met a similar fate on Dec. 1, 2021, when a federal district court judge granted a preliminary injunction against enforcing it. The judge reasoned that the law violated the First Amendment and imposed "unduly burdensome disclosure requirements on social media platforms."

But the New Orleans-based 5th U.S. Circuit Court of Appeals reversed in its Sept. 16 decision in *NetChoice v. Paxton*.

"Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say," Judge Andrew S. Oldham wrote for a three-judge panel. "The platforms operate 'the modern public square' ... and it is they—not the government—who seek to defend viewpoint-based censorship in this litigation."

Calvert says the circuit split virtually guarantees the Supreme Court will hear at least one of the NetChoice cases. "Florida petitioned the court in September to consider the 11th Circuit's ruling against it, so the issue is teed up and ready to go."

These cases raise the question of whether and to what extent the government can regulate social media platforms when it comes to their speech and editing decisions. In April 2021, Justice Clarence Thomas in a concurring opinion in *Biden v. Knight First Amendment Institute* suggested that such platforms might be regulated similarly to how the government regulates common carriers like utilities.

"Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors," Thomas wrote. "Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms."

Thomas later explained that "there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers."

Legal experts are divided on whether social media platforms can be appropriately analogized to common carriers. For example, UCLA law professor and free speech expert Eugene Volokh writes in his law review article "Treating Social Media Platforms Like Common Carriers?" published in the *Journal of Free Speech Law*: "When 'dominant digital platforms' have the power 'to cut off speech,' we should be as concerned about that power as we are about, say, government power to exclude people from limited public forums."

But others reject the analogy. "Social media companies are not common carriers because they establish, revise and actively enforce policies about what speech will not be tolerated on their platforms," Calvert says. "Such content moderation and content banishment practices amount to social media companies exercising editorial control and discretion over speech."

Ari Cohn, Free Speech Counsel for the nonprofit think tank TechFreedom, agrees.

"Social media platforms aren't 'carriage.' They do not simply transport interchangeable things from point A to point B. They are fundamentally expressive and differing modes of presenting and arranging broadcasted information—which makes them different than a telegraph or telephone in every meaningful way." ■

SLOW

Photo illustration by Elmarie Jara/ABA Journal

GOING

DESPITE DIVERSITY GAINS, SOME LAW FIRM LEADERS BEMOAN LACK OF PROGRESS

BY **MATT REYNOLDS**

Percentage of law firm partners who are people of color

Source: National Association for Law Placement

SHEILA BOSTON wasn't the first Black woman to make partner at Arnold & Porter—now Arnold & Porter Kaye Scholer. But she still recalls the impact her promotion in 2004 had on other people of color working at the firm.

"They expressed to me how proud they were and that it was a victory for all of us and a great sign of racial progress," says Boston, who joined the firm as a summer associate in 1992.

Since then, the rate of diversification among law firm leaders has been slow. And for Black women like Boston, who make up less than 1% of law firm partners, it's been glacial.

"It's kind of abysmal. We really should be doing better," Boston says. "Representation is so important. If you can see it, then you think you can be it."

A series of recent studies have revealed the lack of diversity in law firm partnerships—even after the May 2020 murder of George Floyd spurred the profession to respond to calls for racial justice by launching in-house diversity programs and hiring more chief diversity officers. (See "Inclusion & Equity," December-January 2021-22, page 44.)

And diversity is front and center of the *ABA Profile of the Legal Profession 2022*.

The annual report, released in July, offers a snapshot of demographics among the nation's 1.3 million lawyers.

The report suggests that while there have been modest gains in the last couple of years for women, people of color, LGBTQ attorneys and people with disabilities—particularly at the associate level—the legal profession far from reflects the nation it serves.

ABA President Deborah Enix-Ross says the profession has "come a long way." She believes the confirmation of Ketanji Brown Jackson to the U.S. Supreme Court "should give us the energy to keep pressing forward." But she says there is still much more work to do.

"We need our bar associations to be focused in this area. We all need to do what we can both individually and collectively to make sure that the bar is more representative of our communities," says Enix-Ross, senior advisor to Debevoise & Plimpton's International Dispute Resolution Group.

Patricia Brown Holmes, the Chicago-based managing partner of Riley Safer Holmes & Cancila, says she's encouraged that awareness of diversity, equity and inclusion has grown in the last two years.

"The discouraging thing is that we're moving so slow," says Holmes, who is also a former prosecutor, defense attorney and judge. "Like, come on people. Let's do this."

GLACIAL PACE

The ABA report states the number of law firm partners who are people of color has grown for 28 consecutive years. In 1993, 2.55% of partners were lawyers of color. In 2021, they made up 10.75%, says the report, relying on data from the National Association for Law Placement, which follows legal hiring and pay.

"Viewed year by year, the change is almost imperceptible," the 124-page ABA report states. "But viewed over the span of decades, it is easier to see, and it is accelerating."

Asian Americans appear to have made some of the largest gains—an increase the ABA report attributes to California starting to report the race

and ethnicity of its lawyers in 2022. Asian Americans also make up a plurality of partners of color, accounting for 46%; Hispanics make up 31%; and Blacks make up 24%.

James Leipold, who retired as NALP's executive director in October, believes the call to action in summer 2020 accelerated change, and he says there are other reasons to be encouraged.

The 2021 class of summer associates was the most diverse ever, Leipold says. According to NALP's *2021 Report on Diversity in U.S. Law Firms*, the percentage of summer associates of color grew by almost 5 percentage points in one year, which is the largest gain in the 29 years it has tracked the data.

But at the partnership level, there are sharp disparities by gender, race and ethnicity, Leipold says.

In 2021, Black women and Latinas still represent less than 1% of all partners in American law firms, Leipold notes. And women make up only 25.92% of all partners, while women of color make up just over 4% of all partners.

"The overlap of race and gender is the worst because it's like a double whammy. We see women of color least well represented," Leipold says.

The ABA report, relying on NALP data, states that the percentage of LGBTQ lawyers at law firms is also growing slowly, going from 1.9% in 2011 to 3.7% in 2021. But the ABA report cautions that "no reliable statistics are available on the total number of lawyers who identify as LGBTQ in the legal profession overall." As for lawyers with disabilities, the number is so small (just over 1% of lawyers at law firms) that NALP cautions it is "difficult to draw any conclusions about trends."

RETAINING TALENT

Kent Zimmermann, a law firm consultant with the Zeughauser Group, says many firms are coming around to the idea that having diverse talent can lead to better results and give them a competitive advantage.

He adds that there have been great strides in the recruitment and hiring of diverse lawyers. But when it comes to retaining talent, many law firm leaders would admit they are falling short.

Particularly in law firms struggling with diversity, it can be challenging for a minority lawyer to be a "trailblazer and be highly successful in a firm," Zimmermann says.

"Lawyers who are in a position to include other lawyers in the firm on their matters or share credit often are more likely to do that with people who they know and trust," Zimmermann says. "And often lawyers build trust with people like them, rather than people who aren't like them."

To foster diversity from top to bottom, law firms need to do a better job of making firms more inclusive and retaining female attorneys and lawyers of color, Boston says.

Although she credits Arnold & Porter with helping her get to where she is today, she says at the beginning of her career, she sometimes struggled to feel like she belonged. And she says other lawyers' conscious and unconscious biases can prevent attorneys of color from advancing, including perceptions that they are not as competent and do not write as well as white attorneys.

"When you're an attorney of color, especially a woman of color, you can be treated as 'the other,'" Boston says. "That can be damaging as you progress in your profession. But it also can

Partners of color in 2022

Source: National Association for Law Placement

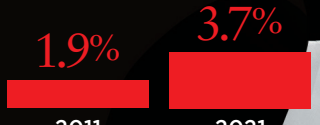
Asian Americans 46%

Hispanics 31%

Blacks 24%

Percentage of LGBTQ lawyers at law firms

Source: National Association for Law Placement



Percentage of lawyers who think law firms are succeeding in promoting women to equity partnership

Source: Walking Out the Door

Percentage of lawyers who think firms are succeeding at retaining experienced women

Source: Walking Out the Door

wreak some havoc on you emotionally and psychologically."

Boston says impostor syndrome can be acute for women and lawyers of color, and there is an added pressure piled on them to do well. Despite the plaudits that came her way when she made partner, Boston remembers a colleague questioning why she moved up. And it stung.

"I hate to admit it, but when I look back and reflect on that time, it really bothered me, and it adversely affected me for a couple of years," Boston says.

According to Holmes, there also are barriers that women, people of color and others from underrepresented communities face as they build books of business.

"To make partner in a firm, it's simple: You learn how to do the work, you get clients to hire you to do the work, and you bring in profit that can be shared among the partnership," Holmes says. "The difficulty comes when women and minorities can't get the clients."

Paulette Brown—who in 2015 became the ABA's first African-American female president and was a senior partner and chief diversity and inclusion officer at Locke Lord before retiring in 2021—says there are often fewer sponsorship and mentorship opportunities for women and women of color.

Traditionally, she says, it was less likely that white male partners would take women of color under their wings and help them become rainmakers. Instead, diverse lawyers are more reliant on outside professional associations and groups.

"It's not like it's never happened," Brown says. "But it's not something that is standard practice."

Jeanine Conley Daves, office managing shareholder of Littler Mendelson's New York City office, says the biggest rainmakers in a firm are often those who have had business handed down to them.

She says women and women of color can find themselves "closed out of the system," so they can't collaborate with other shareholders to develop their own books of business or get credit for working on client matters originated by other attorneys—key factors firms look at when considering compensation or promotions.

Boston suggests firms should consider other metrics when deciding who will make partner, such as an attorney's leadership qualities and nonbillable activities like mentoring and associate training.

"I understand books of business are a major criteria, but it certainly shouldn't be the only one," Boston says.

INSTITUTIONAL BARRIERS

The ABA report dedicates an entire chapter to women in the legal profession and notes that since 2016, women have outnumbered men in ABA-accredited law schools.

"Although more than half of all law school graduates are women, the number of women in senior leadership roles at U.S. law firms is far less than half—even with the number slowly edging up in recent years," the report states.

The percentage of female partners has risen every year since 2012. Roughly 22% of all equity partners were women in 2020, up 7 percentage points from 2012, and 32% of nonequity partners were women. But only 12% of managing partners were women.

Perkins Coie's chief diversity and inclusion officer, Genhi Givings Bailey, says there are many institutional barriers preventing women and people of color from feeling "like they are a part of the fabric of the organization."

Those barriers include inequities in pay and biases in how women are evaluated and considered for promotion and succession planning, according to the *2021 National Association of Women Lawyers Survey on the Promotion and Retention of Women in Law Firms*.

"The discouraging thing is that we're moving so slow."
—Patricia Brown Holmes

There also can be a lack of transparency about how compensation is decided, Bailey adds.

"In some firms, it's a closed black box. You don't even know what goes into the process—and if there is bias in that system or in that process, what the impact is on women and people of color," Bailey says.

Although women have almost achieved parity in pay at the associate and nonequity partner levels, there is still a big gap at the equity partnership level, where women on average received 78% of the compensation of their male counterparts, the NAWL report states.

A 2019 ABA study cited in the report, *Walking Out the Door,* also offers a few clues as to why a majority of women in law schools is not reflected in the profession.

The survey of more than 1,200 lawyers found that while an overwhelming majority of men agreed that female lawyers were being treated fairly, women disagreed.

Although 79% of men agreed that their law firms had succeeded in promoting women into equity partnership, only 48% of women did. When asked if their firms had successfully retained experienced women, 74% of men agreed, but only 47% of women agreed. Additionally, the study found that 63% of women felt they had been perceived as being "less committed to career" compared with only 2% of men, while 67% of women said they experienced a lack of access to business development opportunities as opposed to 10% of men. Women also reported being subject to a hostile work environment: 75% said they had experienced demeaning jokes or stories compared with only 8% of men.

MANDATING DIVERSITY

J. Danielle Carr, chief officer of inclusion at the law firm Lowenstein Sandler, says making equity partner is the "holy grail." But she also says that women and people of color, LGBTQ attorneys and people with disabilities still face an uphill task getting there.

Carr says clients should apply pressure on law firms and insist they place minorities in leadership positions.

Big business has reckoned with its own diversity problems. But in recent years, Novartis, HP Inc., Meta Platforms Inc. and other corporate clients have warned they would take their business elsewhere or even cut fees if they did not see firms taking action on gender and racial diversity.

As far back as 2017, HP said it would temporarily dock fees for firms that did not meet its diversity benchmarks.

63%
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Source: Walking Out the Door

75%
of women experienced demeaning jokes or stories compared to only
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of men

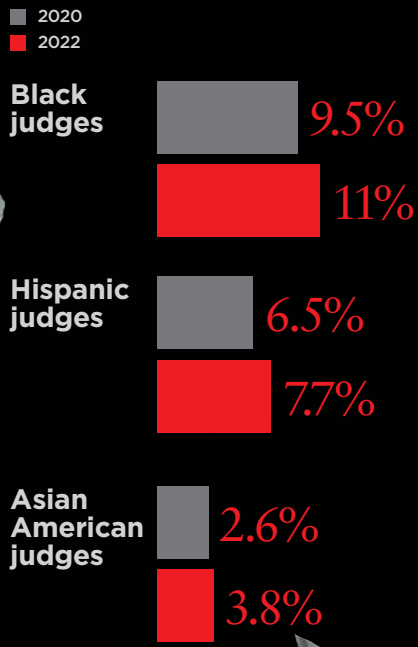
Source: Walking Out the Door

States without any female Article III judges

Source: ABA Profile of the Legal Profession 2022

Percentage of Black, Hispanic and Asian American federal judges increased slightly from 2020 to 2022

Source: ABA Profile of the Legal Profession 2022



Meta, the parent company of Facebook, Instagram and WhatsApp, uses diversity data to rank law firms, using benchmarks on staffing, opportunities given to diverse attorneys, initiatives at the firm and the makeup of a firm's incoming partner class.

"Those diversity scores do matter because if we know the law firms are equally committed to it the way that our legal department is, that's just going to be even more reason for us to invest in a deeper relationship with those law firms," says Jeremiah Chan, director and associate general counsel at Meta.

Microsoft launched a law firm diversity program in 2008. In 2020, the tech company increased its focus on demographics of law firm leadership, stressing the need to include more Black and Hispanic lawyers in partnerships.

According to Microsoft, the initiative stems from its "commitment as a signatory" to ABA Resolution 113, passed in 2016 to encourage legal service providers and buyers of legal services to expand diversity.

Perkins Coie is one of the law firms that has partnered with Microsoft. And Bailey says the tech company recognizes that "moving the needle on these issues can be challenging, and it takes time."

Bailey's firm has also committed to the Mansfield Rule, which was named after Arabella Mansfield, the first woman admitted to practice law in the United States. Advanced by Diversity Lab, the rule takes its lead from the NFL's Rooney Rule. The Mansfield Rule says 30% to 50% of candidates applying for leadership positions or programs promoting leadership roles in firms should come from underrepresented groups. According to Diversity Lab, more than 270 law firms in the U.S. and Canada, 15 U.K. law firms and 75 legal departments have signed on.

To advance diversity in the profession, law firms have launched in-house initiatives. Boston says her firm partnered with the National Bar Association on a program aimed at retaining and advancing Black lawyers. Two other programs at her firm advance opportunities by increasing the pipeline of students of color who want to work in the profession and promoting equity in education.

"We haven't had consistent leadership on diversity. We haven't had consistent expectation of results."

—Robert Grey

Thrive Scholars' Law Pathway, another pipeline program, extends the profession's reach into high schools to identify the lawyers of the future. The pipeline initiative, created with the help of the Zeughauser Group, identifies high school juniors of color who want to pursue careers in law and then helps them progress from college to top law schools. The program also offers lawyer mentorship from the likes of Holland & Knight; Kirkland & Ellis; Pillsbury; and Shearman & Sterling.

But despite these initiatives, former ABA President Robert Grey, president of the Leadership Council on Legal Diversity, says diversity efforts have sometimes been sporadic and inconsistent.

"We haven't had consistent leadership on diversity. We haven't had

consistent expectation of results. We haven't had consistent application of principles and processes. Sometimes we excel in this area. Sometimes we don't," Grey says.

Bailey says changing people's behaviors is the hardest part. "We can do research, we can crunch the data, we can share the feedback. But at the end of the day, the most important thing that's going to move the needle is if we all change our behaviors."

VIEW FROM THE BENCH

The ABA report also notes the lack of diversity among the more than 1,400 Article III judges on the federal bench, which the report notes are "overwhelmingly male and overwhelmingly white" but finds "times are slowly changing." According to the report, 91% of all federal judges in 1980 were white, compared to 78% as of July 1, 2022. In that same period, women have gone from 5% of the federal bench to nearly 30%.

The picture is similar in state courts. A May 2022 Brennan Center for Justice study found men make up the majority of judges in state supreme courts. According to the study, 18% of state supreme court justices were minorities, and 41% of them were women.

The ABA report found that from 2020 to 2022, the percentage of Black, Hispanic and Asian American federal judges increased slightly, going from 9.5% to 11% for Black judges; 6.5% to 7% for Hispanics; and 2.6% to 3.8% for Asians. But according to the ABA report, 15 states have no federal trial judges of color, and in three states—Nebraska, North Dakota and Idaho—there are no female federal trial judges. There are only 59 Black women serving as Article III federal judges in the entire country, the report adds.

But the federal bench has become slightly "less homogeneous," according to the report, because of new appointments of women and people of color. From Jan. 1, 2021 to July 1, 2022, the Senate confirmed 68 judges. Only three of those were white men.

Another group that dominates the federal bench? Ivy Leaguers. Eight of the nine justices on the Supreme Court came from Harvard and Yale. And the ABA report notes that 232 judges, or 18%, have Ivy League law degrees.

"Public institutions produce judges who have a different experience coming from a public education," National Judicial College President Benes Z. Aldana says. "To promote greater public confidence and trust in our judiciary, we need to look at that."

In the past, BigLaw's reliance on elite schools for recruiting and hiring lawyers and the impact that can have on diversity has been in the spotlight. Holmes says there are great lawyers "who were middle of the class" and "even great lawyers who may have been bottom of the class."

She says firms need to be less judgmental and give lawyers with different educational backgrounds a chance to "show what they can do."

Still, Bailey is cautiously optimistic. She says that more than two years after calls for racial justice, she sees no evidence that law firms are scaling back their efforts on diversity.

"I think it's only a matter of time before we start to see better numbers in representation of attorneys of color among the partnership ranks," Bailey says. ■

From Jan. 1, 2021 to July 1, 2022, the Senate confirmed 68 judges: Only three were white men

Source: ABA Profile of the Legal Profession 2022

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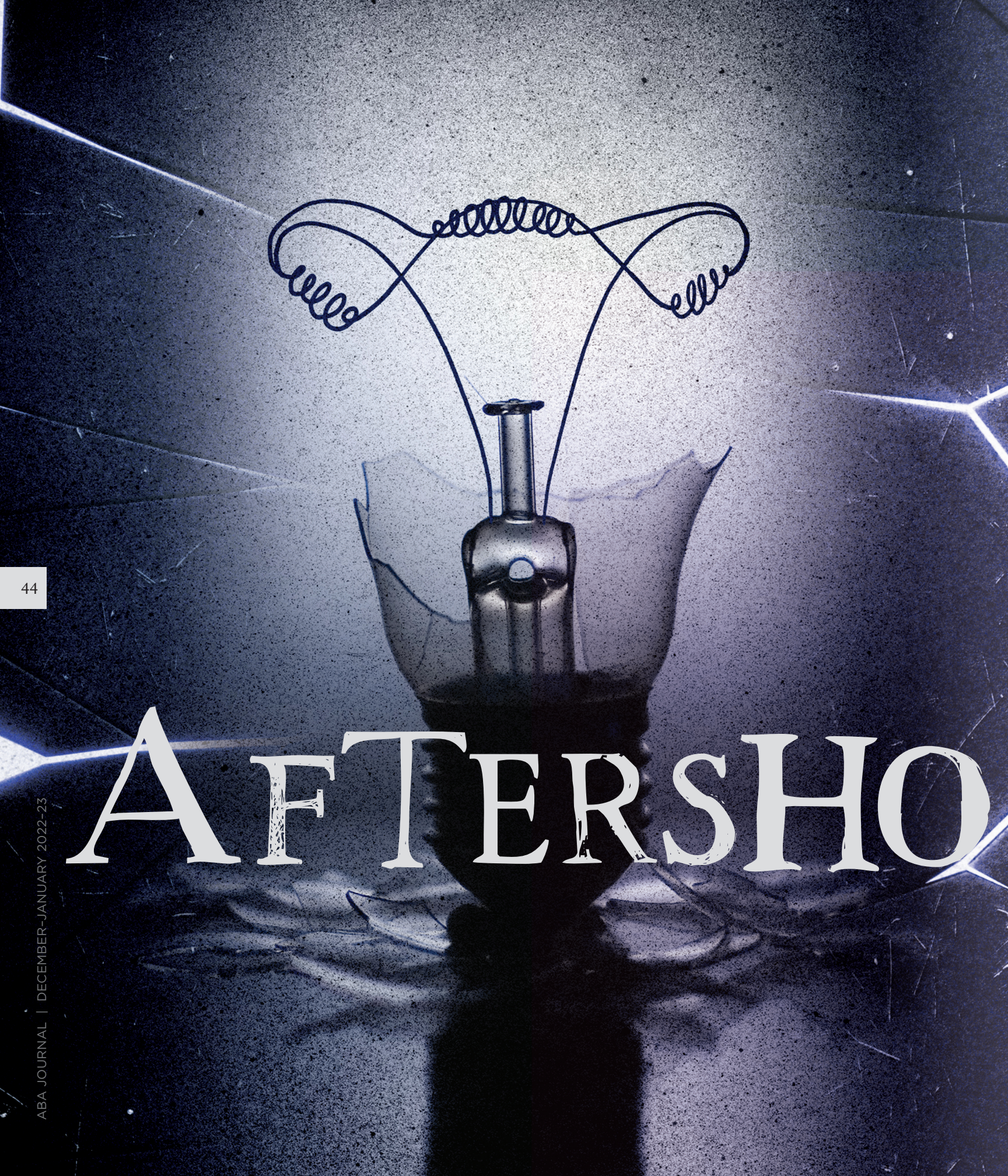

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Navigating the morass of state abortion laws post-*Roe*

BY SHIRLEY HENDERSON

Photo illustration by Sara Wadford/ABA Journal

Loretta J. Ross recalls when she was 14 years old and being babysat by a family member. But instead of looking out for his young charge, the 27-year-old relative plied the teenager with alcohol and had sex with her. As a result, Ross became pregnant.

Ross, who was in 10th grade, grew up in San Antonio with her parents and seven siblings. She describes them as being "uber-Christians" who did not believe in abortion, which was illegal then in pre-*Roe* Texas. A decision was made: Loretta would give birth and put the baby up for adoption.

"The day after I delivered my son, the child was supposed to be whisked away and handed over to the adoption agency," says Ross, who is now an associate professor of the study of women and gender at Smith College in Northampton, Massachusetts. "I had actually signed the preliminary papers to make that happen. But the day after he was born, whether it was a mistake or done intentionally, the nurses brought my son to me. And I looked at him, and all I could say was, 'Oh, my God! He's got my face!' And then the mother bonding thing happened. I can't explain it. I didn't plan on it. But I couldn't go through with the adoption."

Ross had been on track to attend Radcliffe College on a scholarship, which she lost after she became a teen mom. Little did she know that parenthood would be the first of many battles that she would end up fighting as a teenage mother. Shortly after giving birth in 1969, she and her parents threatened to sue her school district when administrators refused to readmit her after her pregnancy.

"They told me that they felt that other girls might get pregnant," she recalls. "I said to myself, 'Wait a minute. I don't know how all of this works, but I am sure I can't get anyone pregnant.'"

Lasting repercussions

On June 24, the U.S. Supreme Court ruled "the Constitution does not confer a right to abortion" and overturned *Roe v. Wade*. Allowing individual states to determine the legality of abortion has resulted in a confounding landscape of laws, bans and restrictions, creating a maze of hurdles for those seeking medical assistance and doctors performing the procedure—as well as a backlog for clinics in states without bans.

Not long after the Supreme Court's conservative majority in *Dobbs v. Jackson Women's Health Organization* ruled 6-3 in favor of restricting abortion, the world watched a horrifying case unfold involving a 10-year-old girl from Ohio who was raped and became pregnant. She had to travel to Indiana to have an abortion since Ohio's "heartbeat bill," which bans abortion after six weeks, was in effect. Already on the books since 2019 but blocked in federal court, it became effective after the court granted Ohio Attorney General Dave Yost's motion to dissolve the injunction that had impeded it. In September, a judge temporarily blocked the Ohio ban pending a state constitutional challenge.

The Washington Post reports that since the landmark case was overturned, more than two dozen states have banned or mostly banned abortion. Seven states have bans that have been blocked in the courts. According to Planned Parenthood, 1 in 3 women—not to mention transgender, nonbinary and nonconforming people who can become pregnant—"have lost all access to most or all abortion care."

"In states with bans, access to abortion was already very limited," says Mary Ziegler, a legal historian and professor at the University of California at Davis School of Law. "But an absolute ban, as we see in this growing list of states, makes a difference—first, by eliminating what had been limited access very early in pregnancy; and second, by dramatically increasing the penalties faced for abortion (in Texas, for example, someone who performs an abortion can face up to life in prison)."

Texas is listed among the states with the "most restrictive" abortion laws, according to the Guttmacher Institute, which supports reproductive rights. The state has multiple abortion bans in place, including a trigger law that "creates harsh criminal penalties for providers and doctors, without exception for rape or incest," according to information provided by the American Civil Liberties Union of Texas. Abortion-related telehealth has been banned, so a medication abortion, which uses prescription drugs to end a pregnancy during earlier stages, requires an in-person visit. And abortions can be performed only if a patient has "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy."

A 2020 survey showed that medication abortions accounted for more than half (54%) of all pregnancy terminations in the U.S. Guttmacher also reported in 2020 that there were 930,160 abortions nationwide, up from 916,460 in 2019. Only a small fraction of abortions are performed because of rape or incest.

Ziegler, author of *Abortion and the Law in America: Roe v. Wade to the Present*, also points out that the *Dobbs* decision was not an indication that the country's views on reproductive rights have shifted.

"Instead, there have been changes in how the Republican Party has handled the abortion issue—catering to primary voters with the most passionate views rather than to the largest number of voters—and in how the Supreme Court operates, especially in areas where precedent is established and public opinion is clear," Ziegler says. "*Dobbs* was a product of changes to our political system and our democracy, not our basic ideas about abortion."

According to a July 2022 Pew Research Center survey taken after the Supreme Court overturned *Roe*, 62% of adults support legal abortion in all or most cases; 36% said it should be illegal in all or most circumstances. The public's views on the issue changed little from a survey taken before the *Dobbs* decision was leaked to the press.

The Centers for Disease Control and Prevention reports nearly 3 million women in the U.S. have experienced a rape-related pregnancy. Still, abortion opponents are making it increasingly difficult for women who are victimized by rape or incest and who may

ALLOWING INDIVIDUAL STATES TO DETERMINE THE LEGALITY OF ABORTION HAS RESULTED IN A CONFOUNDING LANDSCAPE OF LAWS, BANS AND RESTRICTIONS, CREATING A MAZE OF HURDLES FOR THOSE SEEKING MEDICAL ASSISTANCE AND DOCTORS PERFORMING THE PROCEDURE.

Photo illustration Sara Wadford/ABA Journal

Photo by Heath Robbins/ABA Journal

"For Jews, this is not just a difference of opinion. ... If you are taking a right away from me that my religion gives me, you don't get to say your [religion] takes precedent over mine in the country you want to be a Christian country."

—Rabbi Tamar Manasseh

Photo Matt Marton/ABA Journal

become pregnant as a result to access the medical care they need, when they need it.

In the case of the Ohio victim who had to travel to Indiana, a 27-year-old man was arrested and charged. That is not the usual outcome for most rape cases, according to the Rape, Abuse & Incest National Network, also known as RAINN. The agency reports that of every 1,000 sexual assaults, only 310 will be reported to police and just 50 will lead to arrest; 28 cases will lead to conviction; and 25 rape offenders will be incarcerated. Most perpetrators—975 of the 1,000—in all likelihood will not face charges. Some abortion laws require rape victims to complete a police report.

Ross says the relative who raped her left the country to evade the wrath of her father. In the early 1970s, she was in her first year at Howard University when she became pregnant again by her boyfriend, who also was in school. They both decided to end the pregnancy, and they were able to do so in Washington, D.C., where abortion was legal. Ross graduated from Agnes Scott College and later became the national coordinator of the SisterSong Women of Color Reproductive Collective. She also co-authored *Radical Reproductive Justice: Foundations, Theory, Practice, Critique*.

"I'm still that pissed off 14-year-old girl who couldn't decide on if and when I had sex, if and when I had a baby," Ross says. "The lack of self-determination still animates me. I remember how hard it was to become a teen parent."

Dobbs, meet the Janes

That early fight for reproductive rights was the subject of *The Janes*, a documentary shown at the 2022 Sundance Film Festival that premiered on HBO in June. From 1969 to 1973, the Jane Collective, an underground network of women, provided thousands of illegal abortions in Chicago in defiance of the many dangers they faced—such as being arrested or running afoul of the mob, which profited from performing illegal abortions. A film about Chicago's abortion operation, *Call Jane*, was released in theaters in October.

Rabbi Tamar Manasseh is a Chicago activist who founded the nonprofit group Mothers/Men Against Senseless Killings in 2015, after a mother was murdered on a street corner. In 2021, she became the first Black woman to be ordained to the rabbinate at Beth Shalom B'nai Zaken Ethiopian Hebrew Congregation.

In much the same way she felt it necessary to interrupt the violence perpetrated on Chicago's residents, when the *Dobbs* ruling came down, Manasseh was once again spurred into action. This time, she partnered with the Chicago Abortion Fund to create a new initiative called We Are Jane, based on the Jane Collective.

"*Roe* being overturned, it's terrifying. As a Black woman in this country, it's terrifying," Manasseh says. "Every right Black people have in this country has been given to us with the stroke of a pen. … Once you start taking things back, what's next? For me, it's such a slippery slope."

Religious freedom was the basis of a lawsuit filed in June by a synagogue in Boynton Beach, Florida, challenging a state law that bans abortion after 15 weeks of pregnancy. Complete prohibition of abortion is not consistent with traditional Jewish dogma.

"For Jews, this is not just a difference of opinion," Manasseh says. "It's not a matter of, 'Oh, I'm pro-choice and you are pro-life, and we have to agree to disagree.' So if you are taking a right away from me that my religion gives me, you don't get to say your [religion] takes precedent over mine in the country you want to be a Christian country. That is not what America is about. That is not what the Constitution says. It becomes a legal issue when you are talking about Jews."

Manasseh says the newest incarnation of the Janes will not be as clandestine as their earlier counterparts, nor will they be performing abortions. The Janes will visit college campuses in states that ban abortion to hand out care packages that contain Plan B pills, female and male condoms and birth control pills. They also will offer QR codes with information on how to get transportation to a state where abortion is legal, where to stay and how to get money for a bus or plane ticket.

Ross and Manasseh both feel that the lack of abortion access will disproportionately affect low-income and women of color. Manasseh points out that over the years, Black women have become one of the most college-educated groups in the U.S.

"How do you derail that? You tell them they can't get an abortion if they need one when they are a

Photo illustrations by Sara Wadford/ABA Journal

freshman in college, or you lock them up because they did get one. That is the quickest way to completely derail some of the brightest futures that this country may see."

Missouri lawmakers considered legislation that would limit or prevent travel to other states to get an abortion, aware that women can circumvent bans by traveling to another state. Others have enacted bounty hunter provisions, testing the limits of state power to regulate abortion. In September, Sen. Lindsey Graham, R-S.C., proposed a bill that would ban abortion nationwide after 15 weeks of pregnancy.

"Some conservative states have hinted at the broad use of criminal prohibitions on aiding and abetting, which could easily be applied to groups that perform abortions—or even those that provide referrals or basic information," Zeigler says. "The tricky question is when or whether states will be able to enforce their laws outside of state lines. We don't have much precedent in recent decades to know how courts will address that question."

Navigating rocky terrain

During its annual meeting in August, the ABA's House of Delegates adopted six resolutions, including one that upholds access to contraceptives and another that "opposes the criminal prosecution of any physician or medical or health care provider who provides or attempts to provide an abortion, or who encourages, helps, advises, gives information to, aids, assists or supports a patient with having an abortion."

Also in August, the ABA Health Law Section announced the creation of a *Dobbs*-related task force, which was formed to provide information to members "whose clients are impacted by the complex health law issues related to *Dobbs*."

The Section of Civil Rights and Social Justice and the Standing Committee on Pro Bono & Public Service will be collaborating with other ABA entities to develop a clearinghouse of resources for both attorneys and people seeking updates and legal information.

The ABA-led endeavors will help lawyers as they represent clients in different states with varying laws. For example, Oklahoma Gov. Kevin Stitt signed five abortion bans into law in 13 months, including two "bounty-hunting" laws.

The idea of prosecuting individuals who help a woman obtain medical services in a state where abortion is legal doesn't make sense to Rabia Muqaddam, senior staff attorney at the Center for Reproductive Rights. "However, we know that these states are just chomping at the bit to find ways to restrict abortion access, and they are not going to be content with merely banning it within their state borders."

Oklahoma's bans have created legal confusion, for instance, in how they define a medical emergency. They also have conflicting information on issues such as ectopic pregnancies and exceptions for survivors of rape and abuse.

"The most recent ban that took effect has an exception to preserve a person's life in a medical emergency. But the pre-*Roe* ban, which is also in effect, only has an exception to preserve a patient's life," says Muqaddam, who is hoping that the Oklaho-

Elizabeth Banks stars as a suburban housewife seeking an abortion in *Call Jane*, which dramatizes the real-life Chicago underground network that operated during the 1960s and '70s.

Photo by Roadside Attractions

ma Supreme Court will interpret its own constitution to protect the right to abortion.

'Great bodily injury'

In 1978, a 17-year-old rape victim became pregnant in California. In *People v. Sargent* (1978), California's 4th District Court of Appeal held that "a victim of forcible rape who becomes pregnant as a result of that rape suffers great bodily injury."

According to rape and incest survivors, the mental trauma associated with the experience is one that many cannot escape without outside help. "I didn't get any help for many, many years," Ross says. "I self-medicated with drugs. I did a lot of destructive stuff."

Ross also says it wasn't easy being a young single mom. "It was very complicated to try and raise my son and try not to take my dysfunction out on him at the same time. It was a battle, she recalls. "As my son got older, we talked about this. I had to apologize to him because I was never able to give him unconditional love. Every child deserves unconditional love from their mother."

According to Indiana lawyer Jim Bopp, the Ohio adolescent who was raped should have carried her baby to term instead of having an abortion. Bopp, general counsel for National Right to Life, an anti-abortion organization with over 3,000 local chapters, authored a model law that promotes abortion restrictions.

"She would have had the baby, and as many women who have had babies as a result of rape, we would hope that she would understand the reason and ultimately the benefit of having the child," Bopp said in an interview with Politico.

In May, National Right to Life sent an open letter to state lawmakers from anti-abortion organizations containing the following: "The mother who aborts her child is also *Roe*'s victim. She is the victim of a callous industry created to take lives; an industry that claims to provide for 'women's health' but denies the reality that far too many American women suffer devastating physical and psychological damage following abortion."

National Right to Life did not respond to requests for comment.

Regardless of the debates around abortion, some victims of rape feel revictimized by flaws in the legal system that leave them without necessary resources, even when they make the choice to keep their babies.

At 14, Kaitlyn Urenda was on the swim team at her El Paso, Texas, high school. During a time when she should have been racking up medals and enjoying the exuberance of youth, Urenda was instead groomed and sexually assaulted by a gymnastics coach at her school. She became pregnant at 16 and eventually gave birth to a baby girl. "I didn't tell anyone it was sexual assault," Urenda says.

That's because she didn't realize it herself until receiving therapy years later. Urenda also was forced into a shared custody arrangement with her daughter's father, a fight she says amassed $40,000 in attorney fees by the time she was 19. Years later, her abuser was accused and convicted of sexual assault involving three other students.

Urenda, now 30, is a single mom raising her 13-year-old daughter. She eventually graduated from college, and now she has a new dream: becoming a lawyer. She feels lawmakers who restrict abortion access don't comprehend the amount of support women need, especially in cases of rape or incest.

"We cannot continue to make laws that don't reflect our country's morality," says Urenda, who is a RAINN spokesperson and activist. "Until our morality is as high as that expectation, you cannot make laws forcing women to have children. … It's a woman's choice to have a say-so over her body and what happens to it."

No doubt women voters had a say during the midterm elections in California, Michigan and Vermont, where measures enshrining abortion rights into state constitutions were approved. In Kentucky, voters rejected a bid to put an abortion ban into its state constitution. And early numbers indicated a "born alive" ballot measure in Montana would fail.

The fight for reproductive justice continues, and Ross, who is now a proud grandmother, says what we are seeing after the *Dobbs* decision is essentially the same battle she faced in the '70s: "One of the reasons I still fight is that young girls today have a harder time getting an abortion now than I did 50 years ago." ■

> "The mother who aborts her child is also *Roe*'s victim. She is the victim of a callous industry created to take lives."
>
> —National Right to Life

Photo illustration by Sara Wadford/ABA Journal

Lawyers are lighting up the budding cannabis industry

BY ZACK NAUTH

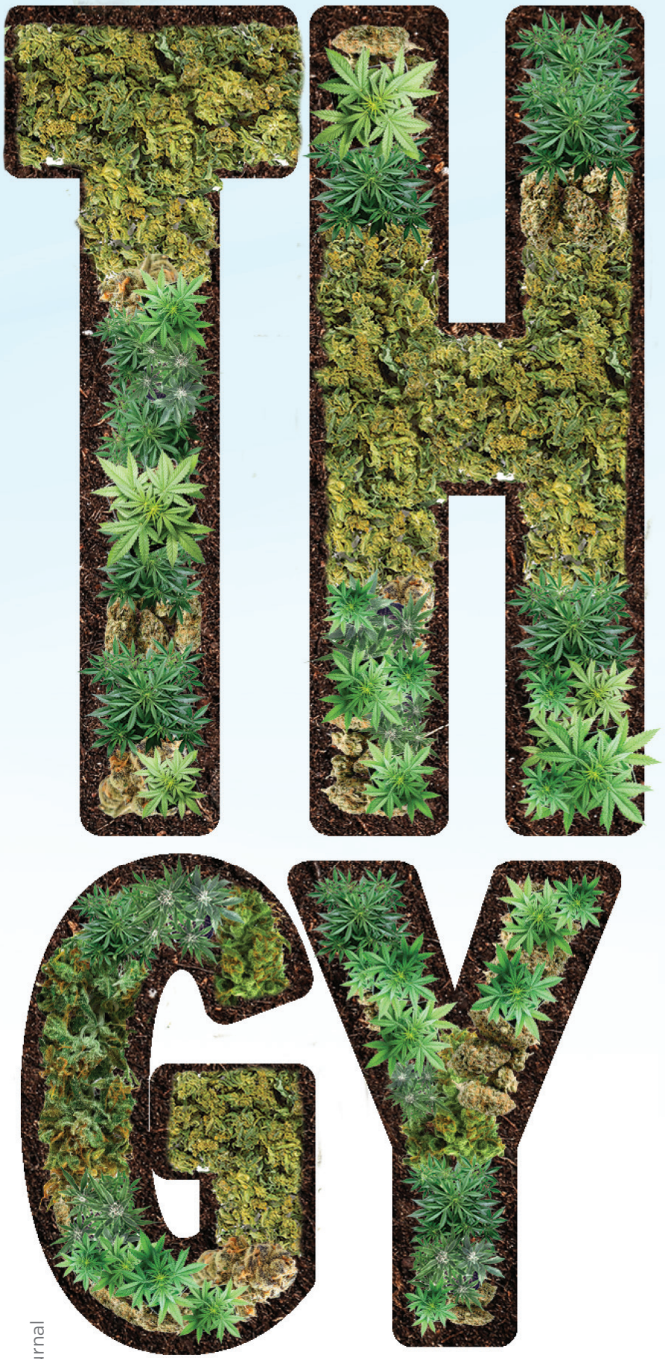

Photo illustration by Sara Wadford/ABA Journal

Jon Loevy's phone was ringing often in 2014, and it wasn't just new clients. Every week, he was getting calls from people wanting to open a cannabis dispensary in his law firm's building in the red-hot West Loop neighborhood of Chicago.

Loevy, 54, a civil rights attorney, already had enjoyed enormous success winning tough cases and multimillion-dollar verdicts and settlements for clients. Yet he'd been mulling another challenge. He had the resources, and he had the conviction to create another enterprise—using the same model of a driven, highly educated and skilled workforce that would accomplish something few had. His plan? To open Key, a charter school to educate disadvantaged children in low-income neighborhoods. But Loevy says the Chicago Board of Education wasn't approving new schools.

Loevy thought about the cannabis dispensary callers. He talked to his old high school classmate, debate team member and partner with whom he runs the law firm, Michael Kanovitz. The light bulb went on. They decided to put up the money to start their own cannabis business, Justice Grown.

Today, the renamed Justice Cannabis Co. is one of the biggest of the little guys in the rough-and-tumble, fast-paced and legally treacherous world of marijuana growing and selling.

Around the office, Loevy calls it "the pot farm." He makes it sound like a hobby, a backyard plot of land carved into a field of corn and soybeans. It sounds quaint.

"Mike and I decided to fund our own factory in downstate Illinois and just see how it would go," Loevy says. "You know, we weren't trying to take over the world. We built a very small factory, and we just proceeded to try to lose as little money as possible."

Now it's anything but quaint.

Civil rights powerhouse

Don't let the baseball cap, loose gray hoodie, casual manner and chair-slouching mislead you. Jon Loevy is a master practitioner in the courtroom. He built a large law practice from nothing, starting at his kitchen table with the help of his wife, Danielle, in 1997. He is one of the country's most successful civil rights attorneys, having won—by his own count—"more multimillion-dollar jury verdicts over the past decade than any other civil rights firm in the country." Loevy estimates that the firm, since its launch, has won $500 million in verdicts and settlements for clients, not including a mammoth $228 million judgment in October in a privacy class action.

He has mined a rich vein in Chicago, where the city's police department has long harbored more than its share of bad apples, winning justice for clients who were beaten or tortured by Chicago police and sent to prison on wrongful convictions.

Loevy & Loevy (LOW'-vee) and its team of 50 attorneys has been on the leading edge of civil rights law at a time when Americans have become increasingly aware of police misconduct through videos and through social movements such as Black Lives Matter. Attorneys for the firm also have handled litigation relating to Guantanamo Bay detainees and whis-

Civil rights lawyer Jon Loevy decided to get into the cannabis business after fielding numerous calls from people asking about opening a dispensary in his law office building.

Photo by Matt Marton/ABA Journal

tleblowers claiming they were tortured by U.S. officials in Iraq; and they went to Chicago O'Hare International Airport to offer legal help after then-President Donald Trump suspended refugee admissions. And a successful Freedom of Information Act suit they filed forced the city of Chicago to release a police video of the shooting of Laquan McDonald. That video was a crucial piece of evidence in a case that resulted in the first Chicago police officer being convicted of murder for an on-duty shooting in nearly 50 years.

Loevy was still hungry when he and Kanovitz put up their own cash eight years ago to start the pot farm. To get their start, they created a limited liability company and took over a small indoor growing operation in tiny Edgewood, Illinois, about 225 miles south of Chicago, producing about 150 pounds of marijuana a month.

Today, Justice Cannabis is a national player in one of the country's fastest-growing and perhaps most interesting business sectors. Legal in some states now, it is also a business that is illegal under federal law.

Justice Cannabis has 12 dispensaries in five states and pot farms in three states. Loevy expects revenues of $100 million in 2022, and triple or quadruple that in 2023. Justice Cannabis has more licenses for future retail and growing facilities, and it has helped many other companies obtain licenses in the hopes of selling its pot farm crop to them.

Loevy is not much of a pot devotee—he says he hasn't partaken for many years—but he always has been something of a gambler. He says he inherited that from his mother, Barbette Loevy—who Loevy says was one of the first female options traders in Chicago—and her poker-playing relatives in Kentucky. Without the risk-taker's gene, he never would have been taken seriously in his law practice, where he became known for his willingness to go to trial with difficult cases and his ability to win them.

In the early days, no one bothered to return his calls. He didn't have any clients and didn't know how to litigate, so he started contracting with other firms to take small personal injury cases to trial. If you don't go to trial and win, he says, no one will settle. But if you lose, you've spent a lot of time and money to come up empty. It's a "bet on yourself" tactic that has paid off for the man who says he once had a streak of 23 consecutive trial wins.

Loevy's first big win in 1999, a case that launched his career, was one that another lawyer brought him into. His client Joseph Regalado was awarded $28 million for a police beating that left him paralyzed. It was the largest civil rights award in the city's history at the time. Loevy learned that civil rights litigation was a "good alignment with my values" and "an attractive business model" thanks to a federal law that states attorney fees can be awarded if plaintiffs prove they were deprived of their constitutional rights.

Loevy has now pushed his chips in on Justice Cannabis. His motivation? To make money, to help people, to take on the big boys and to feed his own competitive fires. All of the above are in evicence as well as by his own account. The jury is still

is still out on whether his all-in bet on a multistate cannabis business will hit.

Wild, wild west of cannabis law

Few law firms will likely make the leap into the cannabis business that Loevy has, but as new states legalize marijuana and the business goes mainstream, more attorneys are taking on cannabis-related issues in their practices.

As of early February, 37 states, three territories and the District of Columbia permitted the medical use of cannabis products. And as of November, 21 states, two territories and D.C. had approved cannabis for adult nonmedical use.

The cannabis industry generated $25 billion in revenues from legal sales in 2021 and employs more than 400,000 people nationwide. It was expected to reach $32 billion in annual sales in 2022 and could exceed $50 billion by 2030.

It can be a lucrative and fascinating area of practice, according to attorneys such as William Bogot of Fox Rothschild, who left the Illinois Gaming Board to take on cannabis work.

It also can be frightening, says Lisa Dickinson of the Dickinson Law Firm in Spokane, Washington, who is chair of the ABA Tort Trial and Insurance Practice Section's Cannabis Law and Policy Committee. "It's still the wild, wild west," she says.

The federal Controlled Substances Act prohibits the production, distribution, sale, use or possession of cannabis—which is classified alongside heroin and LSD as a Schedule I drug with a high likelihood of addiction and no safe dose. The federal statute provides no exception for medical or other uses authorized or regulated by state law. The penalties for some offenses are severe. The rapid bifurcation of state and federal law has woven deep contradictions into the legal system and American society, and it has created a thorny dilemma for cannabis businesses and the attorneys they need to help them.

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For attorneys, there are two issues that have a chilling effect on their participation: The first is whether by representing a business that is breaking federal law they are violating the ethics of the profession, which could cost them their license to practice; the second is they could be charged with engaging in criminal activity, resulting in fines and prison.

In one case, for example, a San Diego attorney was charged by the district attorney in 2017 with multiple felonies in connection with her representation of a marijuana products manufacturer. The felony charges were dropped in 2018, but this apparently singular case was a reminder of the trapdoors.

To enforce or not to enforce?

The conundrum for those caught in the regulatory web around marijuana—and for the businesses trying to legally ply their wares—is the unpredictable and ad hoc nature of federal enforcement. As the movement to legalize medical marijuana in the early 2000s gained steam, followed by the later push for its recreational use, President Barack Obama's administration tried to head off a train wreck of contradictory prosecutions. In October 2009, the Department of Justice sent a memo to federal prosecutors encouraging them not to prosecute people who distribute cannabis for medical purposes in accordance with state law. In 2013, after Colorado and Washington became the first two states to legalize recreational marijuana, the DOJ went further with the so-called Cole memorandum, stating that it would defer "the right to challenge their legalization laws at this time" in states that strictly regulated marijuana.

But in a sign of just how tenuous the balance is, the rug was pulled out in 2018 when Trump's Attorney General Jeff Sessions tore up the Cole memo and decreed that the federal marijuana laws would be enforced. The script was flipped again after Sessions resigned, and the DOJ went back to benign neglect—where it stands today under President Joe Biden. This series of events has not exactly inspired confidence in owners, operators and their attorneys, who still do business with a high degree of uncertainty and know there is a chance that a future DOJ will change its priorities again.

The hopes of resolving these contradictions are dim. Bills to decriminalize marijuana and allow banks to service cannabis businesses have repeatedly passed the Democratic-majority House of Representatives, but not the 50-50 Senate. (Complete Election Day results determining party majorities for the next Congress were not available at press time.)

Despite the indecision, federal prosecutions are slowing. In 2021, more than 98% of all federal drug charges resulted in guilty pleas without trial. The number of federal prosecutions of marijuana trafficking has plummeted over the past decade, falling under 1,000 last year. Fewer than a hundred people were sentenced in 2021 to the 10-year mandatory minimum.

Lending a hand

Helping what he calls victims of the war on drugs, those who were convicted of marijuana offenses and others who were "justice-involved" is a part of Loevy's interest in cannabis. He

Photo courtesy of Justice Cannabis

says he and others have donated money for application fees; helped write and give application trainings for free; and even sued Illinois to change its process of awarding "social equity" licenses to improve some applicants' chances of winning them.

Under the Illinois program, one of the first of its kind in the country—designed to "remedy the harms resulting from the disproportionate enforcement of cannabis-related laws"—at least 51% of a license-holder's ownership had to be social equity applicants (generally defined as people with past low-level marijuana charges or those from areas harmed by the war on drugs, marked by poverty or high arrest rates for marijuana). The program's guidelines have been contentious and highly contested by the many parties seeking what are considered to be lucrative licenses to dispense or grow marijuana.

In Illinois, Loevy felt he had an advantage—even though he was getting out of the gate late. The firm became skilled at writing applications and navigating the complicated process. He also could draw on 25 years of relationships with people who might qualify as social equity applicants and needed help getting into the cannabis business. So he looked for suitable candidates and then paired them with "a capitalist," as he put it, or someone who had or could raise the money needed to start a new business. After a series of delays lasting about two years to resolve court and other challenges, Illinois awarded 193 new such dispensary and 48 growing licenses in 2022.

Justice Cannabis began with a small farm about 225 miles south of Chicago and continues to expand.

While Justice Cannabis' own application for a dispensary did not score high enough on the social equity scale to be included in the lottery, Loevy says more than a dozen of the applicants his firm assisted were approved, and some even won multiple licenses. One key was scoring an extra five points and a perfect score for having a veteran owner on board.

Many of Loevy's capitalist partners—or minority share owners—are colleagues and Loevy family members. (The state cannabis licensing agencies do not release ownership information, but the Illinois Secretary of State's office maintains public data on ownership of the company entities, which are mostly limited liability companies.)

Debra Loevy, Jon's sister and an attorney at the firm, is part-owner in an affiliated cannabis business, Green Star Equity, that won a dispensary license in Illinois. Another sister, Karen Horowitz, who doesn't work for the law firm, is a partner in license-winning cannabis business Botavi Wellness, which netted a total of seven dispensary licenses in Illinois. The dispensary licenses are considered quite valuable; a recent purchase agreement put the total value of one license at $6 million.

Other friends and family members have won growing licenses, including Debra Loevy with Deblop Craft. Loevy partner Russell Ainsworth is part owner of Tynnsworth; and a relative of Kanovitz, Robert Kanovitz of Kentucky, also is part owner of a licensed craft grow company MarqKano.

All of those social equity craft growing licensees and two others have as their business address the Justice Cannabis licensed pot farm in Edgewood, Illinois, which has an expansion plan in place.

Loevy's motivation, he says, always has been to uplift others and promote social justice.

"I grew up in a privileged background with really good schools and was given every opportunity," Loevy says, talking about his motivations to start a charter school and now a cannabis business. "This was a big advantage. Yet I've got some clients who are every bit as smart as me and my friends, and they don't have a chance because they were dealt a bad hand. I am using this as a means to an end."

Marketing justice

Social justice also is a big part of the marketing and branding pitch of Justice Cannabis. The company "does good to make you feel good," its website promises.

Ashley Peterson, executive vice president at Justice Cannabis Co., said in an interview with professional association CannaBizIL that the company employs "those who have been incarcerated and work to bring those who have been disproportionately affected by the criminalization of cannabis into the industry."

It is difficult to determine how well Justice Cannabis lives up to such pledges. Peterson did not respond to a request to

Bloc, the brand name for most of Justice Cannabis' dispensaries, describes itself as a business with a community spirit.

Photo courtesy of Justice Cannabis

provide the number of formerly incarcerated employees or to interview any of them. She did provide the example of one pre-pandemic expungement event at which Loevy & Loevy attorneys filled out paperwork for 60 people and also mentioned the licensing help provided by the firm.

Jon Loevy provided the name of one formerly incarcerated person he helped to bring into the cannabis business: Marvin Reeves.

Reeves, 63, was exonerated after 20 years in prison for a murder conviction in which he was implicated by another man who confessed to committing the crime with Reeves. That man had been tortured by a detective who worked in a Chicago police unit notorious for abusive tactics. Reeves, sentenced to life, also was beaten by police. Loevy won Reeves two settlements totaling more than $6 million.

Reeves is now in the cannabis business, although he wasn't clear on all of the details, saying he trusts Loevy to look out for him. Loevy explained to the *ABA Journal* that Reeves loaned money to Justice Cannabis and earns interest on it. Reeves also is a partner in a separate cannabis business that received six dispensary licenses, an LLC called KAP-JG. Loevy says he has no ownership interest in KAP-JG ("JG" as in "Justice Grown") or in any of the other companies with social equity licenses.

Reeves, although he is "rich" in Loevy's telling, lives in Chicago's Englewood neighborhood, which is in a ZIP code that qualifies as a social equity zone. Reeves was given a 5% share of KAP-JG, which lists only one "manager" or owner: Edie M. Moore, a Black woman and the former executive director of Chicago NORML, a chapter of the national organization that supports legalizing marijuana.

About his loan and equity position, Reeves says Loevy told him: "'Look, this is a good opportunity for you.' When you understand business, you know anything can happen. My thing is, anything happens, I can walk away with a smile."

After his release in 2009, Reeves struggled to adapt to life outside. Today, he doesn't have any financial worries. He's a man who doesn't want to overspend on frivolity and tries to live his life by many of the aphorisms he offers to those he meets, such as: "You didn't make this money, so chances are you are not going to know how to keep it."

Loevy says Reeves is the only exoneree he knows who has more money now than he did the day he received his settlements. Reeves credits Loevy.

"Jon don't have a bad bone in his body," Reeves says. "He loves everybody. I don't know where I would be if it wasn't for Jon."

A Loevy colleague seconds Reeves' endorsement. Joshua Tepfer, 47, who spends long days working on wrongful conviction cases, is an attorney at the Exoneration Project, which is housed at and completely funded by Loevy & Loevy. The project is a clinic run in conjunction with the University of Chicago Law School that provides millions of dollars per year in free legal representation. Tepfer previously worked at

Northwestern's Center for Wrongful Convictions, the exoneration work of which helped end the death penalty in Illinois.

Tepfer says he doesn't know much about the pot farm, but he knows his boss.

"I trust Jon Loevy a ton, I really mean it," Tepfer says. "He's a lot smarter than I am. He is a brilliant visionary. Any financial benefit he gains he puts back into solving injustice and helps the people he cares about. I'm all for it. He's put in tons of resources. He's put his money where his mouth is."

ABA helps navigate the way

The ABA has helped pave the way for attorneys like Loevy, Bogot and Dickinson to practice their craft on behalf of cannabis businesses. In the beginning, big firms in particular wouldn't touch the work—the consequences were too great, and their insurance companies wouldn't cover them.

After Washington legalized adult use in late 2012, Dickinson began getting calls to help draft business documents for cannabis startups, but she couldn't do it. That means potential clients had poor or no legal representation and made a lot of mistakes, some of which still haunt them, she says.

In 2014, the Washington State Bar Association worked to have the state supreme court add a comment to the professional conduct rules to make cannabis work ethical. A few years later, the court formally amended the rule. Dickinson says she has represented more than 50 cannabis-related businesses since 2014.

More needs to be done, practitioners say. In 2020, the ABA House of Delegates adopted two resolutions urging federal legislation to shield lawyers and banks from criminal liability for providing services like Dickinson's.

"The ABA has been very helpful in helping to protect attorneys who are trying to practice lawfully," she says.

Bogot says he and his former firm were the first to formally ask the Illinois State Bar Association to issue an advisory opinion on cannabis—which it did in 2014—and to ask the Illinois Supreme Court to amend its rules of professional conduct. Before the amended rule went into effect in 2016, attorneys were prohibited from assisting any person or business engaged in illegal activity.

That seems like a long time ago, back when people looked at Bogot kind of funny when he mentioned weed.

"Personally, I felt OK about it. There was a stigma back in the day. At parties, family—they would look at me like I was representing some stoner. It's cutting-edge, fun stuff. It's the birth of an industry. There's an excitement around it."

Lawyers selling pot? Good for Loevy, Bogot says.

"That law firm is very well-respected. I know they do good work. It shouldn't be a problem."

He adds: "I'm just jealous."

Smoking the competition

Writing applications and winning licenses was the easy part for Loevy and Kanowitz. Now the two have to run a business. That's where Loevy's "all-star," Darin Carpenter, comes in.

Carpenter, 43, was drawn to the industry after serving four years as an Army combat paramedic in Iraq and Afghanistan. He learned about the value of cannabis for injured veterans. In 2019, Carpenter was consulting with another company that was interested in buying a stake in Justice Cannabis. Instead, Loevy persuaded Carpenter to quit and come work for him—and become CEO.

"The quality of the people you meet in the space aren't always what you hope to meet," Carpenter says."The cannabis industry is a dog-eat-dog world. There are a lot of bad operators out there. I thought he was a good person. I like working with good people."

He praises Loevy's patience and willingness to lose money. "He's unwavering. He hasn't gotten too upset. The relationship works extremely well."

Justice Cannabis had about 40 employees when Carpenter started. Today, there are 400, and next year there will be double that, he predicts, as the company opens the new dispensaries and farms that it holds licenses for.

Justice Cannabis is now in a "hypergrowth stage" while operating in a legal minefield. It has a $75 million high-interest credit line from a marijuana real estate investment firm, which it is using to build large modern pot farms.

User demand is strong and still growing, especially in states where cannabis is newly legalized. But the list of challenges is long: raising capital from uneasy banks; rising interest rates and inflation; a slowing economy, product oversupply and falling "flower" prices; the unavailability of standard expense write-offs on federal taxes; and elections for Congress and the president that could turn their business prospects upside down.

One measure of the regulatory concern still out there is that the stock prices of publicly traded cannabis companies plummeted 80% in the 20 months ending in late October—mostly because of the dwindling hopes of federal legalization and the failure of Congress to remove banking restrictions.

Some of the Justice Cannabis operations are profitable, Carpenter says, and some are not. Profitability is around the corner in 2023, he and Loevy feel, but they have been saying that for a few years now.

The business gets Loevy's competitive juices flowing, and he's excited about the David-and-Goliath struggle.

"Coming from the back of the pack—that's motivating" he says. "We'd like to, frankly, pass some of these guys. We're really just trying to get to the moon. We want to win."

He figures he and his partners turned a two-person, kitchen-table law firm into a civil rights juggernaut winning millions in high-profile verdicts, so why can't he build a cannabis business that makes money, takes on the big boys and does some good? Who knows, he might even make enough money to open that award-winning charter school he has always dreamed about.

"It's fun," Loevy says. "It's really fun." ■

Zack Nauth is a journalist who also writes for the digital desk at Chicago NPR affiliate WBEZ. He lives in Oak Park, Illinois.

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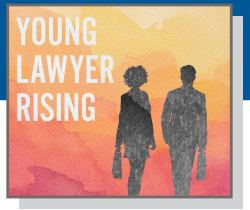

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Photo courtesy of Randall Kinnard

MEMBERS WHO INSPIRE

Full Service

Randall Kinnard carries combat skills and a desire to serve others into the courtroom

BY AMANDA ROBERT

For Randall Kinnard, going to law school seemed like a logical next step after fighting in the Vietnam War.

"I said, 'OK, I want to get out of the Army, but where can I transfer those combat skills that I had? What good could I do somebody?'" says Kinnard, the founder of Kinnard Law, a personal injury and medical malpractice firm in Nashville, Tennessee. "So I elected to focus my practice on injured people and wanting to use those skills I had to help them achieve some fairness back into their life."

Kinnard—who received the Republic of Vietnam Cross of Gallantry, Bronze Star Medal for valor, Purple Heart and Air Medal for 28 air assaults—says he learned a lot about pressure, stress and loss during the war. But he says he also realized he could transfer those tough lessons to the courtroom.

"One of the beautiful things about going to court is no one is going to die," he says. "And so I have an attitude as a result of my combat experience of, 'Well, the worst that's going to happen is a jury could rule against my client. While that's awful if it happens, it's not the end of the world.'

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.

Randall Kinnard (left) received heavy media attention while representing then-ESPN sportscaster Erin Andrews in a successful civil suit.

AP Photo/Mark Humphrey

"That has given me a reputation with my opponents of, 'Beware, because he doesn't mind going to court.' That's an advantage."

Early influences

As a kid growing up in Nashville, Kinnard loved sports and played golf, basketball and football and ran track in high school.

He also became inspired by an uncle who graduated from the U.S. Military Academy at West Point in 1942 and served under Gen. George Patton during World War II. Hearing his uncle's stories and those told in the popular TV series *West Point*, which ran from 1956 to 1957 and featured Clint Eastwood, influenced his decision to attend the military academy.

He graduated from West Point in 1967 and joined the 173rd Airborne Brigade—which earned the name "Sky Soldiers" in Vietnam—as a second lieutenant Airborne Ranger the following year. He served two tours, during which he became a first lieutenant and commanded 275 men in combat. He was later promoted to captain.

Kinnard was in his early 20s when he began leading men twice his age—as well as men who just graduated from high school—through Vietnam. He describes it as a "pretty big responsibility for somebody in combat, to be that young." He left Vietnam in December 1969, but had survivor's guilt that would stay with him until he sought counseling more than a decade later. He left military service in 1972.

After graduating from the University of Memphis Cecil C. Humphreys School of Law in 1976, Kinnard returned to Nashville and hung out his shingle. He remembers telling other lawyers around town that he would take any case to trial that they weren't interested in trying. He says the strategy worked.

"Back in those days, we were trying 20 cases a year, easy," says Kinnard, who founded personal injury firm Kinnard, Clayton & Beveridge. "They were two to three days long, so sometimes I tried two cases in a week to a jury. And I slowly started winning cases that people predicted my side would lose."

In his more than 40 years in practice, Kinnard has recovered millions of dollars for injury victims. One notable client was then-ESPN sportscaster Erin Andrews, who filed a civil lawsuit against both the owners and operators of a Nashville hotel and Michael David Barrett, a stalker who in 2008 tampered with her room's peephole so he could secretly record her. He released a nude video of her online and later served more than two years in prison.

Andrews alleged the hotel defendants' negligence caused her emotional distress and invasion of privacy. During her trial, Kinnard's expert showed the video had been viewed more than

16 million times. In March 2016, the jury awarded Andrews $55 million in damages, finding Barrett 51% at fault and the hotel companies 49% at fault.

After Kinnard requested a joint liability ruling that would have required the hotel companies to pay the full $55 million, Andrews and the companies settled the lawsuit for a confidential amount.

"Erin is such a wonderful person, and it was just an honor to represent her in that case," he says.

Sharing lessons learned

In March, Kinnard launched Kinnard Law, where he continues his commitment to serving others and mentoring the next generation of lawyers.

Kinnard has given a speech to young lawyers about respect more than 100 times around the country. As part of his message, he stresses the need for lawyers to control their anger and act civilly toward one another, the judge, the jury and their clients.

"Being mean not only is not necessary, it's counterproductive," Kinnard says. "It makes life hard for the other side and yourself in the end."

"A lot of lawyers lose sight of that in the heat of battle, especially when competition is stiff and the stakes are high," he adds. "Basic fears and anxieties start driving somebody to potentially turn angry and mean, and that's what you want to avoid."

Members who Inspire

Mary Ellen Morris began working with Kinnard in 2008, but she remembers meeting him shortly after she graduated from law school and joined Nashville defense lawyer Ward DeWitt's firm. During a medical malpractice trial, she says DeWitt and Kinnard showed how counsel on opposing sides could build a solid relationship based on respect for each other and their abilities.

"It was a very hard-fought case," Morris says. "Mr. DeWitt believed strongly that the doctor had not committed malpractice. Randy believed strongly that he had. And yet, the real takeaway for me as a very young lawyer was that disputes are not personal, and they should not get in the way of collegiality and professionalism."

Kinnard, a longtime member of the ABA, received the Tort Trial and Insurance Practice Section's Pursuit of Justice Award in April 2021. It recognizes those "who have shown outstanding merit and who excel in providing justice for all," according to the announcement.

In addition to his work advancing the legal profession, Kinnard is a firm believer in giving back to his local community.

He has served as a volunteer for Alive, a nonprofit, community-based hospice in Middle Tennessee. He has been on the boards of Centerstone, a nonprofit health care organization that provides mental health and substance abuse treatment; and Prevent Child Abuse Tennessee, a chapter of Prevent Child Abuse America, the nation's oldest organization working to stop child abuse and neglect.

He is also a past board member and current advisory council member of Friends of Warner Parks, a nonprofit that helps preserve and protect parks in Nashville.

Kinnard points to two reasons why supporting these causes and others, including being involved in his church, has been so important to him.

"A, life's been good to me, and you need to give something back. Period. The Bible talks about it, and you need to do it," he says. "And B, it makes you feel good, and it's just nice to help other people." ■

ABA LEADERSHIP

Core Values

ABA President Deborah Enix-Ross focuses on civics, civility and collaboration

BY AMANDA ROBERT

Deborah Enix-Ross talks often about her determination to join the ABA.

After graduating from the University of Miami School of Law in 1981 and passing the bar exam, the native New Yorker spent her graduation money on a flight to San Francisco to attend the association's 1982 annual meeting. She didn't know any other members but quickly found her home in the International Law Section.

Since then, Enix-Ross, senior advisor to the International Dispute Resolution Group at Debevoise & Plimpton in New York City, has been chair of the International Law Section, the House of Delegates and the ABA Center for Human Rights.

She became president of the ABA at the close of the annual meeting in August and spoke with the *ABA Journal* a few weeks later about her plans for her term. The conversation, which has been edited for length, appears below.

What are some of the first things you did after becoming president?

Immediately after leaving Chicago, I went on what I call the "West Coast tour." I started in Seattle to celebrate Llew Pritchard. Llew has been a longtime member of the ABA and certainly a longtime active member of the Cen-

Deborah Enix-Ross (fifth from left) spent most of her first week in office volunteering with the ABA South Texas Pro Bono Asylum Representation Project in Harlingen, Texas.

ter for Human Rights. It was really an honor to be there, especially as I was a former chair of the center.

Then I went to New Mexico. I was with members of the New Mexico state bar association. They had their annual meeting, and I spoke on civics and civility, the cornerstones of democracy. I also met with the Antitrust Law Section, which was also [meeting] in New Mexico.

Then I went to Los Angeles for the International Legal Ethics Conference. There were representatives from around the world talking about legal ethics, and this is an especially good time to be having that discussion.

I left LA and went down to ProBAR in Texas for four days, looking at our work representing migrants and touring a children's facility in Harlingen, Texas. And then I finally came home.

For me what was the common thread in all those trips was the depth and breadth of the ABA's work and the dedication of our volunteers and staff. Because at every stop, you got an insight into the different types of work that we do. It was really a wonderful way to get started.

When you spoke to the House of Delegates, you mentioned that you plan to focus on civics, civility and collaboration. How would you like to do that?

For me, what will be paramount is engaging both within the legal profession and across other professions. I truly believe that for us to advance our knowledge and understanding of civics and civility and why it's so important as a cornerstone of democracy, we need that collaboration between professions.

For example, within the legal profession it will be paramount to have our state and local and specialty bars all engaged with the ABA. We can use the convening power of the ABA to help promote civics and civility, but it will be those lawyers who are on the ground every day in their communities that will help us have an impact. I have been in touch with a number of state and local bars that have said they want to engage in this work.

And then across professions, I was pleased to kick off the Cornerstones of Democracy project with my alma mater, the University of Miami.

I went to the School of Communication, and there we engaged with the journalism students as well as some prominent UM alums who work in the communications field, including at CNN.

Why do you think those conversations are so important?

The lack of understanding of civics and the lack of civility affects all aspects of our lives. We can see it showing up in the workplace or the school board or courtrooms or in attacks on the judiciary—and not just verbal attacks, but now we see physical attacks and threats on judges.

All of this has an impact on our daily lives, whether you're a lawyer or not. And unless we can manage to have people understand there are ways to engage that don't require devolving into some of the chaos we've seen, we really are at an inflection point in our society.

Photo courtesy of ABA Commission on Immigration

You have also mentioned establishing the Law, Society and the Judiciary Task Force with immediate-past ABA President Reginald Turner. What are your goals for the task force?

The task force ties in also to civics and civility, because the task force was created after recent U.S. Supreme Court decisions in *New York State Rifle & Pistol Association v. Bruen* and *Dobbs [v. Jackson Women's Health Organization]*. It came out of the need for the ABA to determine what it could do about these decisions that have this broader impact on society, decisions where it seems like all the world is watching.

Right now, the task force is very new. It's just gotten started. But in thinking about how to create it, we wanted to be sure there was balance in the members of the task force between Democrats and Republicans, because this is not a political issue. This is a societal issue. The task force needs to be doing its work to make sure we are maintaining a sense of the independence of the judiciary. It needs to educate our nation on what courts do and why judicial independence is critical to the protection of our rights and our institutions and government.

Which of your past experiences with the ABA do you expect to help guide and support you?

It's the collective experience. I started as a member of a committee in the International Law Section and over time rose to chair the section. Being a section chair, I think, gives you some skills that certainly help when you are president, including the ability to work with people from different backgrounds—and especially in the international section, where our members were not only U.S. lawyers but lawyers from other countries.

Chairing the Center for Human Rights gave me a real grounding in the impact of the ABA's work, not only in the U.S. but around the world. Between chairing the Center for Human Rights and being involved in [the Rule of Law Initiative], you see the real impact and the respect, frankly, that people have for the American Bar Association.

And lastly, chairing the House of Delegates, working with [the delegates] and making sure they felt each resolution was thoroughly discussed, debated and the vote in the end was a fair vote. The other part of being chair of the House of Delegates, of course, was it gave me access to being on the Board of Governors. That obviously is important in becoming president.

Deborah Enix-Ross assumed the presidency at the end of the ABA Annual Meeting in Chicago. She previously served as the chair of the House of Delegates.

How would you like to see the association grow and evolve?

I like to think of this in three parts. … We need young lawyers. We need them engaged. We need their perspectives because it's very different practicing law today than when I started 40 years ago.

Photo by Matt Marton/ABA Journal

We need our senior lawyers. There are a lot of lawyers with tremendous experience who may be at the end of their careers, who may not be practicing full-time, but they still have a lot they can contribute. It's important that we maintain our senior lawyers, and in fact I think we can go ahead and try to attract new senior lawyers.

The third piece is often overlooked, I believe, and that's lawyers in their middle careers. These may be lawyers who didn't start out in the Young Lawyers [Division], so they haven't grown up in the ABA. I don't know that we've been effective in reaching out to them, but they are a valuable group for us. They've been out in their legal careers for a while, and we need their perspective.

If you combine those groups, that's how we grow, and that's how we evolve.

So I said three, but actually now that I reflect, there are probably four. The fourth group are what I would call lawyers who may look at the ABA and think we're too liberal. I don't think that's accurate, but I know that's a perception. What I would do is invite those lawyers to join us to help shape our work and our messaging, and I guarantee what they find is not an association that's liberal or conservative, but an association that is dedicated to core values and principles, which I would daresay they share as well.

You haven't been president for that long, but what has been the most fun part of the job so far?

Meeting people is by far the most fun. When I talk about meeting people, it's lawyers and nonlawyers alike. It is wonderful when you're introduced as the president of the American Bar Association to see the tremendous respect that people have for the ABA. I also get people who say to me, "You don't look like a lawyer." I think that's especially younger people who are not lawyers who must think of lawyers as stuffy or in other ways. But it's the reaction. It's the tremendous opportunity to meet and engage with people that is only afforded to me because of the position and because of the respect for the ABA.

Speaking of fun, what is one thing that most people don't know about you?

Most people don't know I love to sing. I love to sing all types of music. I love pop music. I love jazz. I love showtunes. I love gospel music. Now you didn't hear me say I am a good singer, I just said I love to sing. What I always say is what I lack in talent, I make up for in enthusiasm. ■

REPORT FROM GOVERNMENTAL AFFAIRS

We Need You

Member input will help set ABA legislative priorities

The 118th Congress is scheduled to open Jan. 3. New and returning senators and representatives will likely confront significant challenges of interest to the legal profession, including some that could impact how attorneys serve their clients throughout the country.

The Governmental Affairs Office partners with ABA leadership, entities and grassroots advocates to advance the ABA's positions on policy issues affecting access to justice, the rule of law and the profession. To help the ABA decide which advocacy issues to prioritize in Washington, D.C., we survey members for input prior to the beginning of each new Congress. GAO has emailed this year's survey to members; it is also accessible at ambar.org/priorities and will remain open until Dec. 14.

This input is critical to informing the ABA's legislative priorities process and will be included with other information presented to the Board of Governors for approval at the 2023 ABA Midyear Meeting in February.

When following this process two years ago, the board approved 10 priorities for the current Congress:

- Access to legal services
- Cybersecurity
- Criminal justice system improvements
- Election integrity and civic education
- Elimination of discrimination
- Immigration reform
- Independence of the judiciary
- Judicial oversight of the legal profession
- International rule of law
- Legal education

Perennial priorities

Progress was made in several of these areas during the 117th Congress, but other issues remain unaddressed or unresolved. Once the new congressional session begins, the ABA will continue championing federal legislation and regulations that align with our current core priorities while also monitoring governmental proposals of interest to the ABA for potential action.

To help increase access to justice, the ABA will continue advocating for robust federal funding for civil legal aid to ensure more low-income Americans receive the help they desperately deserve, especially in the wake of the pandemic, natural disasters, increasing inflation and unemployment. We will also urge increased federal support for quality state public defense programs.

To preserve traditional court oversight of the legal profession, the ABA will continue to oppose federal legislation or proposed rules that would impose excessive new regulations on the practice of law; undermine the attorney-client privilege; interfere with the confidential lawyer-client relationship; or otherwise weaken the authority of the state supreme courts.

The ABA will also maintain its steadfast advocacy to protect the inde-

pendence of the judiciary, enhance security for our federal judges and improve our nation's immigration court system.

Additionally, we expect criminal justice reforms to remain a top priority, especially as they relate to eliminating racial and ethnic bias in the criminal justice system and promoting sentencing, corrections and reentry reforms.

Adding to our advocacy

What other issues will make ABA's legislative priorities list for the 118th Congress? Time—and members' input—will tell.

As the ABA and GAO look ahead to 2023, we are thankful for our steadfast and loyal members, grassroots advocates and bar association colleagues for their significant support throughout the 117th Congress. We look forward to responding to new legislative challenges and opportunities during the 118th Congress.

Major challenges lie ahead on Capitol Hill and within the White House. But our legislative priorities will guide us through what will be another turbulent Congress in the lead up to the 2024 elections.

The ABA will continue to serve in Washington, D.C., as the voice of the legal profession and our members. If you would like to take the legislative priorities survey and have your voice heard, go to ambar.org/priorities or scan the QR code below.

Join the ABA's Grassroots Action Team at ambar.org/grassroots to have a direct role in ABA advocacy. ■

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 January.

2023 BOARD OF GOVERNORS ELECTION

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

AMENDMENTS TO THE ABA CONSTITUTION AND BYLAWS

The Constitution and Bylaws of the American Bar Association may be amended only at the ABA Annual Meeting upon action of the House of Delegates. The next annual meeting will be Aug. 7-8 in Denver.

Proposals to amend either the constitution or bylaws may be submitted by any ABA member. In order to be considered at the 2023 ABA Annual Meeting, a proposed amendment must be received by the Policy and Planning Division at the American Bar Association on or before Friday, March 10. Visit ambar.org/cbamendments for the procedural guidelines. —Pauline A. Weaver, ABA Secretary

2023 STATE DELEGATE ELECTION

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

2023 MIDYEAR NOMINATING COMMITTEE BUSINESS SESSION, CANDIDATES FORUM AND VOTING SESSION

The Nominating Committee will meet in conjunction with the 2023 ABA Midyear Meeting at 9 a.m. CT on Sunday, Feb. 5. The meeting will begin with the business session and be immediately followed by the Candidates Forum, at which the Nominating Committee and members will hear from candidates seeking nomination at the 2024 ABA Midyear Meeting for an association office. This portion of the meeting is open to association members. In addition, immediately following the Candidates Forum, the Nominating Committee will hold its voting session to announce nominations for district and at-large positions on the ABA Board of Governors (2023-2026 term). Visit ambar.org/boardelection for a list of the district and at-large positions that apply.

GOAL III MEMBERS-AT-LARGE ON THE NOMINATING COMMITTEE FOR THE 2023-2026 TERM

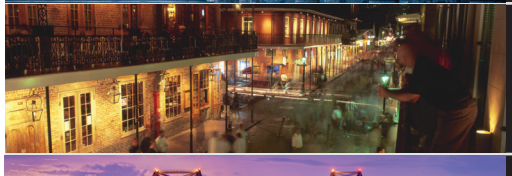
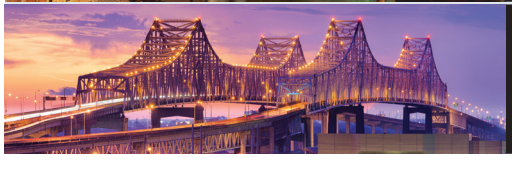
The ABA president will appoint one Goal III Minority Member-at-Large, one Goal III Woman Member-at-Large and one Goal III Disability Member-at-Large to the Nominating Committee for the 2023-2026 term. These appointments will be made from broadly solicited nominations from the diversity commissions, sections, divisions and forums, state and local bar associations, and the membership at large. Submit a letter of interest and a resumé to goal3m-a-lnomcom@americanbar.org if you are interested in serving. The deadline for submission of credentials is Friday, May 12.

ABA Events

SAVE THE DATE

Winter 2022-23

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

	Dec. 1	**Getting Straight to the Point: Drafting Effective Motions & Briefs** Young Lawyers Division • Section of Litigation • Section of State and Local Government Law • Webinar • CLE
	Dec. 1-3	**19th Annual Advanced Mediation and Advocacy Skills Institute** Dispute Resolution Section • Virtual Meeting • CLE
	Dec. 2	**Forum on Construction Law** Locations: **Dallas**, **Indianapolis**, **San Francisco**, **Washington, D.C.** Forum on Construction Law • CLE
	Dec. 7	**The EU Digital Markets Act: The State of Play** International Comments and Policy Committee • Antitrust Law Section • Webinar
	Dec. 8-9	**2022 Antitrust in Asia Conference** Location: **Singapore** Antitrust Law Section • CLE
	Dec. 12-13	**Washington Health Law Summit** Location: **Washington, D.C.** Health Law • CLE
	Dec. 12-14	**39th Annual National Institute on Criminal Tax Fraud and the 12th Annual National Institute on Tax Controversy** Location: **Las Vegas** Tax Section • CLE
	Jan. 18-20	**Fidelity & Surety Law Midwinter Conference** Location: **Washington, D.C.** Tort Trial and Insurance Practice Section
	Feb. 2-4	**Forum on Communications Law 2023 Annual Conference** Location: **New Orleans** Forum on Communications Law • CLE
	Feb. 1-6	**ABA 2023 Midyear Meeting** Location: **New Orleans** ABA • CLE

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

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9. The purpose, function and nonprofit status of this organization and the exempt status for federal income tax purposes have not changed during the preceding 12 months.

10. Extent and nature of circulation:

A. Total number copies (net press run): average number copies each issue during preceding 12 months—141,916; number copies of single issue published nearest to filing date—145,518.

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2. Return from news agents – 0.

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11. I certify that the statements made by me above are correct and complete.

JOHN O'BRIEN
Editor and Publisher

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JAN. 29, 1912

Clarence Darrow Indicted

BY ALLEN PUSEY

On Nov. 28, 1911, Clarence Darrow was walking in downtown Los Angeles a few blocks from his office in the Higgins Building when he glimpsed Bert Franklin, one of his investigators. Franklin had emerged from a saloon to meet with two other men, C.E. White and George Lockwood, when he noticed Darrow as well as several other men he recognized as local detectives. As Darrow watched in dismay, the detectives swooped in and arrested Franklin, who had been carrying $4,000 in cash, on charges that he and the two men—one a prospective juror—had been arranging a bribe.

Darrow was representing brothers J.B. and J.J. McNamara, two union officials on trial for the murders of at least 20 people in the October 1910 bombing of the *Los Angeles Times*.

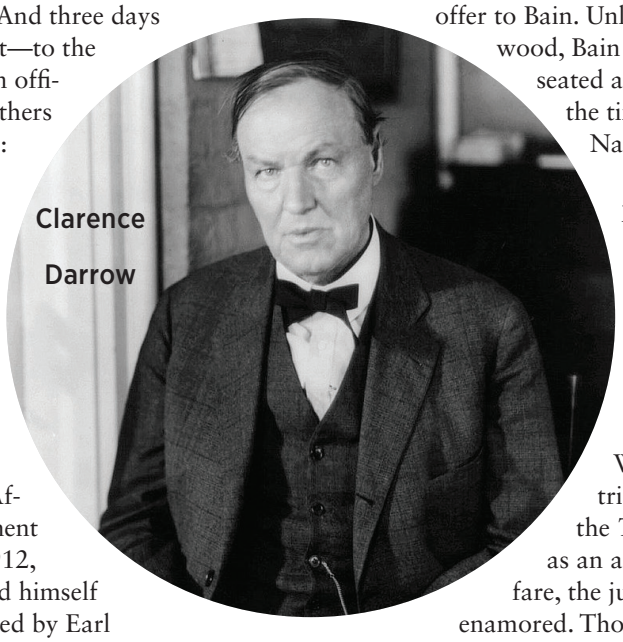
The McNamaras had been picked up in union sweeps in Detroit and Indianapolis, then whisked to Los Angeles. Prior to that, a third union official had implicated the brothers. Their union, alarmed by the charges, recruited Darrow with a $200,000 defense fund.

With the evidence and potential testimony weighing heavily against the McNamaras, Darrow was worried about their prospects. He hired Franklin, a former Los Angeles County sheriff's deputy, to investigate prospective jurors. Franklin discovered that he knew two of them: Lockwood and another man, George Bain, both former law enforcement officers.

In early October 1911, weeks before jury selection, Franklin visited Bain's home, and after a discussion with Bain's wife returned with $500 and an offer of $3,500 more should Bain be seated as a juror and vote for acquittal.

Franklin later met Lockwood with the same proposition. But Lockwood reported the offer to prosecutor John Fredericks—leading to the downtown arrest.

At 54, Darrow was already widely known for his populist politics and his defense of union officials Eugene Debs and "Big Bill" Haywood. But by the time of Franklin's arrest, Darrow was entertaining a plea deal for the McNamaras. And three days after the arrest—to the anger of union officials—the brothers pleaded guilty: J.B. received life in prison; J.J. was sentenced to 15 years.



Clarence Darrow

As Darrow feared, Franklin struck a plea deal to testify against him. After his indictment on Jan. 29, 1912, Darrow turned himself in, accompanied by Earl Rogers, a 42-year-old Los Angeles attorney whose courtroom prowess in a series of spectacular murder trials had made him as famous as Darrow.

Having clients among local business interests, Rogers was no union sympathizer. One of his friends at the *Times* had died in the fire that followed the bombing. Moreover, Rogers had lent a hand in the investigation that led authorities to the McNamaras. Still, Rogers believed Darrow to be innocent, and Darrow believed in Rogers.

Bribery trials

Darrow proved to be a problematic client. His trial for the alleged Lockwood bribe was a 13-week marathon during which Rogers and Darrow sparred with each other as much as with prosecutors. The case hinged narrowly on Darrow's knowledge and his inexplicable presence at Franklin's arrest. But in the hands of Rogers, the law enforcement ties of Bain and Lockwood were made to look like a setup to force a plea by the McNamaras, and their plea made the necessity of bribery moot.

When Darrow's first trial ended in acquittal, the prosecution answered with a second—this time for Franklin's offer to Bain. Unlike Lockwood, Bain had been seated as a juror by the time of the McNamara plea. Rogers, plagued by alcoholism, was less involved in the second trial, and Darrow was less restrained. When Darrow tried to justify the *Times* bombing as an act of class warfare, the jurors were less enamored. Though they failed to reach a verdict, their final vote was 8-4 for conviction. But Darrow was never again tried in the case.

Over the next two decades, Darrow answered the stain of the bribery charges with some of his best-known cases, including those of John Scopes and Nathan Leopold and Richard Loeb. Rogers, however, died penniless 10 years later from the effects of alcohol. ■

ABA Midyear Meeting 2023

SAVE THE DATE

February 1 – 6, 2023
New Orleans, LA

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