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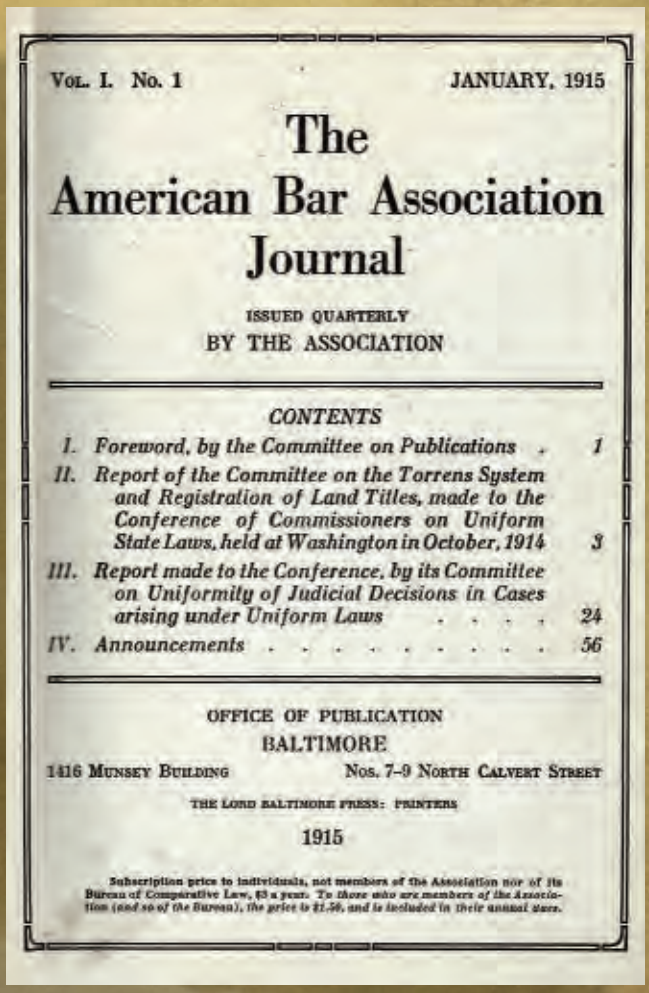
VOL. 101, NO. 1 JANUARY 2015



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The American Bar Association Journal

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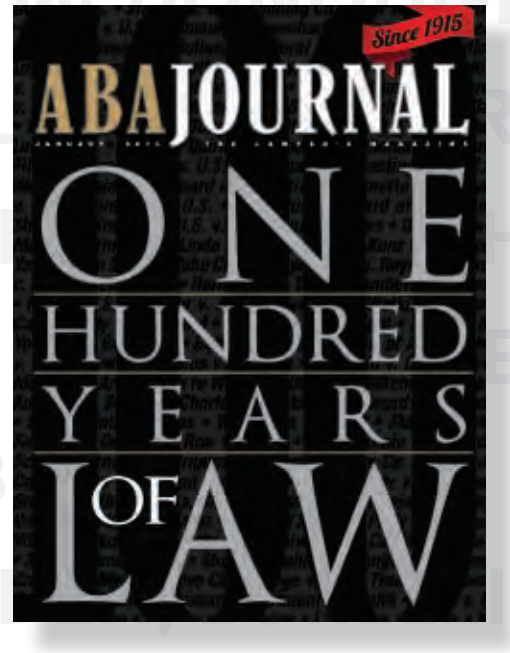
Editor's Note

Dear Readers,

When you picked up your January *ABA Journal*, you probably noticed the issue feels a little different.

That's because it is different, and special.

As you no doubt have realized, this month marks the *Journal*'s 100th anniversary. And to commemorate this centennial, we wanted our readers to review with us the staggering events and monumental changes that have transpired—in and around the law—since our first issue was published in 1915.



Back then, the *American Bar Association Journal* was a 6x9-inch quarterly, a new venture for the ABA that aimed to communicate with both its growing membership and a developing legal profession. And 100 years later the *ABA Journal* is still a respected, authoritative general interest legal magazine, not to mention a modern legal media operation with a thriving presence on the Web and social media.

But just as we were intrigued by the last 100 years, we find ourselves mindful of the next 100. And so for the benefit of *Journal* readers in another century, we've also continued our regular monthly discussion about what is happening in the profession and, perhaps, foreshadowed what may be coming in a not-so-distant future.

To do all that, we've added some extras. We've added space, expanding this issue to 100 pages. To the cover, we've added layers of color and texture and actual information. (Look closely and you'll see a list of important cases—all decided by the Supreme Court over the last 100 years.) And inside, along with our regular offering of news departments and features, you'll find a special section chronicling important facets of the law that distinguished each decade since the *Journal*'s debut.

Because the *Journal*'s first issue was published in the middle of a decade, we decided to reiterate our history by defining it the way we experienced it. Instead of looking at the '20s or the '60s in traditional fashion, we straddled the decades of the *ABA Journal* Century (1915-24, 1925-34 and so forth). In doing so, we discovered 10-year increments that could be seen not so much through wars or depressions or violence, but through transcendent changes wrought by the powerful dynamics of the rule of law. Here, a decade is defined not by World War I, but by the aspirations of women; another is distinguished by efforts to address unfathomable atrocities with Nuremberg precedent, yet another by the Supreme Court's still-controversial effect on social change.

In all of this, we've tried to connect the past to the present. And we continue to do so in the rest of the magazine. You'll find a look at alternative business structures in the United Kingdom and how they may influence debate over third-party investment in U.S. firms. Another article chronicles changes in the state of Washington that will allow nonlawyer specialists to assist clients with some of their legal needs. You'll even find a bit of fiction by Jason Bailey, winner of the 2014 *ABA Journal*/Ross Short Legal Fiction prize.

As you can see, we've been preparing a long time for this moment. And as proof, let me share with you a secret. For each of the 12 months in 2014, we've embedded one piece of a puzzle on the outside spine of the *Journal*. If you place the 12 issues of your 2014 *ABA Journal* cover-to-back in sequence, you'll discover "100th Anniversary" is spelled out along the spine. It's a small thing, but it reminded us each month of the importance of this moment.

A hundred years is a long time. There have been a great many changes in the ABA, in the *Journal*, in the law. But the one thing that doesn't change is the extraordinary human narrative that is the law—and the special relationship we share with it. Lawyers are not just our readers; they are our subjects and our sources and our heroes and our friends. And we look forward to spending another century together.

—Allen Pusey, Editor and Publisher

Crowding and Conflict

FROM "UNWANTED GUESTS," November, page 36, to "No Fracking Way," page 46, there is a common theme. It is a crowded world in which we live, and that reality is only going to get worse. As for the homeless, I agree that putting them in jail is not a good solution. However, those who own property in an area such as Venice Beach also have a right to the enjoyment of their property. Housing the homeless needs to come with a very clear mandate: Your smoking, drinking and doping days are over—end of discussion, no talk about "rights." Entry into housing for the homeless needs to have some give as well as take.

"Unwanted Guests" also demonstrates a severe weakness of our adversarial system of justice. Simply declaring that laws designed to keep the homeless off the streets are a violation of their rights is not a solution. These cases need to be referred to alternative dispute resolution for development of solutions with both parties playing a significant role. A "win" for one side and a "loss" for the other only exacerbates the problem and creates resentment on the losing side while giving the winning side an often unjustified sense of empowerment. Our judges need to get creative and go beyond the idea that they have to decide "for" one side and "against" the other side. That will not come easily given the prevalent judicial mindset. Black-and-white decisions often do not serve society well, particularly when they mean that one side's rights are upheld at the expense of the rights of the other side.

"Rights" seem to proliferate in today's modern legal world. However, rights are not necessarily equivalent to what "I want." As our world becomes ever more crowded, simple ascendancy of one person's or group's rights over those of another is going to become less and less tenable as a solution to conflict.

William R. Clarke
Richland, Washington

I think "Unwanted Guests" is mixing apples and oranges. There is a huge difference between trying to pass laws that church groups can't feed the poor and homeless versus trying to regulate people living in their cars on the street. Any municipality has a legitimate interest in regulating zoning, sanitation, building codes, etc. And keeping people from using public streets as toilets, so as to prevent the city from turning into 18th century London, is a legitimate thing for the city to do. What I don't understand is: Why don't they issue parking permits for residents, and anyone else who parks more than 24 hours is towed?

Bruce Brightwell
Louisville, Kentucky

As a Venice resident, I would like to expose a flaw of logic in the very premise of this article. When we invoke the term *homeless* on a wide swath of people, we are making assumptions that may or may not fit. The first assumption here is that all people being labeled homeless desire to change their living circumstances for something more traditional. While this may describe a number of the homeless, it does not—at least in Venice—describe the majority of these people residing on our streets, alleys, sidewalks and beaches. Every night, hundreds of beds in shelters go unused. While I believe that people who truly are homeless deserve every opportunity to get back to a more stable and productive lifestyle, the word *homeless* is inadequate to describe the majority of those occupying Venice.

Venice is inundated with vagrant criminals who choose an outlaw lifestyle. They violently refuse services offered. They rob, steal, vandalize, assault innocent victims as well as each other, and enjoy utter immunity from the law because they have no ties to this community. They disappear into the wind only to return when the heat has died down. For example, bicycle theft has become a criminal enterprise. These vagrant criminals have set up numerous

mobile bicycle chop shops on our streets and beaches. Moments after a bicycle is stolen, it is taken apart and joined with other stolen parts to create new bikes that are not as easily identifiable. These are sold on eBay, Craigslist and most blatantly our boardwalk and several corners around the neighborhood.

If we continue to refer to these vagrant criminals as homeless, we are doing ourselves a grave disservice. These are violent serial criminals who very much enjoy this idiotic veil of victimhood. Please stop calling them homeless and tell the story like it is.

Michael Leitao
Venice, California

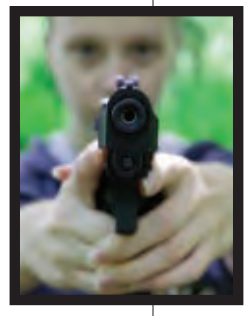
SECURITY AND ETHICS

Regarding November's "The Fundamentals," page 22, about lawyers reconciling new technology with traditional ethics rules: Jurisdictions using e-portals should be able to offer lawyers the ability to encrypt other documents not sent through the e-portal filing system. In addition, we need to enhance security to our computers and cellphones.

It is very easy and inexpensive to equip keyboards, cellphones and other information technology hardware and software programs with biometric entry applications. Apple and Samsung have fingerprint biometric applications on their new smartphones to turn on the phone and to secure the information stored in the device.

The journalist who broke the Edward Snowden story recently said in a televised interview that any lawyer or professional who has a duty to keep information confidential is foolish not to encrypt said data, as well as take extra security precautions beyond passwords, i.e. biometric security.

It is well-known in the cybersecurity field that passwords can be lifted even if one is using a cyber-protection software system. We all need to be proactive to protect our clients' electronically stored information. We are living in a new era, and we need to catch up to the methods available to protect our clients and ourselves.



Neal Taslitz
Loxahatchee, Florida

GOOD LAWYERS' SKILLS

Regarding "Building a Better Lawyer," November, page 12: I would just like to say, and I do not mean this disparagingly, that what differentiates a good lawyer is their ability to cope with the depression that goes along with dealing with difficult clients, bad results, frustrating courts.

We see it all the time and need to take a page from the psychiatric/psychology profession and have an ongoing relationship with a therapist to work through the depression.

Alexandra Castle
Raleigh, North Carolina

THE U.S. GUN CRISIS

Regarding "From Playgrounds to Battlegrounds," November, page 54: It is mind-boggling to read this article and contrast this true epidemic caused by guns in just one city of the United States with the near hysteria over Ebola caused by two deaths in the entire country.

Most telling is the chart comparing the homicide rate in Chicago (16.1) with a city of comparable size in Canada, Toronto (1.91).

A comparison to European cities, where guns are even more restricted, would be even more dramatic. When will we ever "get it?" How long will our politicians remain captive to the NRA and the Supreme Court's new interpretation of the Second Amendment?

Thomas H. Barnard
Cleveland

DOWNTIME PLEASURE

For me, poetry (Wendell Berry right now) has been a welcoming door back into reading for myself ("Regaining the Joy of Reading," November, page 24).

Read slowly, read multiple times, and memorize a few lines to take with you for the long days ahead. Yes, my daughters complain when we read a poem as a family right after dinner.

Andrew Park
Richmond, Virginia

MORE ON TYGART

I just read the feature article profiling Travis Tygart's work on the Lance Armstrong case ("Thou Shalt Not Cheat," October, page 46). As a former federal prosecutor, I loved the story behind how the case against Armstrong was put together. Even more, as a Christian, I was inspired and encouraged hearing about Tygart's faith in action. Thank you for reporting on Tygart's faith in a fair and objective manner.

Juan Castaneda
San Diego

As an attorney and a recreational triathlete, I read Mark Curriden's article with great interest. I was disheartened, however, when I came across the quoted comparison by *New York Times* sports reporter Juliet Macur that Armstrong is a symbol of all that is wrong in sports and in our society, followed by her assertion that he is an atheist while Tygart is a "faithful, churchgoing Christian." Curriden then follows this thread to extol Tygart's Christian background as the reason for his ethical upper hand.

Armstrong may have done unethical things, but his lack of Christian faith cannot fairly be pointed to as the root of those acts. As a proud humanist and atheist myself, I take offense at this assumption that a belief in the supernatural somehow equates to a higher sense of ethics. I did not expect the *ABA Journal* to alienate so many of its non-Christian readers by printing an article that serves to proclaim the moral superiority of Christians.

Jessica Horani
New York City

CORRECTION

The photo accompanying "Too Much Prison Time," December, page 70, is of Mathias H. Heck Jr., immediate-past chair of the Criminal Justice Section, not William N. Shepherd, 2012-13 chair.

The *ABA Journal* regrets the error.

Coming Soon

BOOKS FOR (And By) LAWYERS SUMMER READING List

The July 2015 ABA Journal will feature the Books for Lawyers Summer Reading List (the special advertising section for authors). Ads include: a full-color book jacket photo, 7 lines of text and will appear both in print and online at ABAJournal.com. For more information about pricing and ad specifications or to advertise your book, go to

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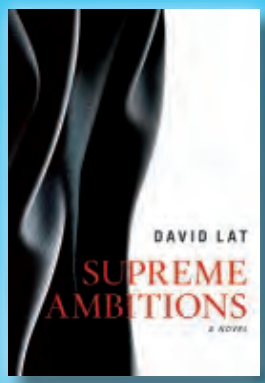
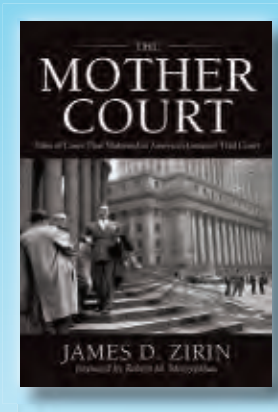
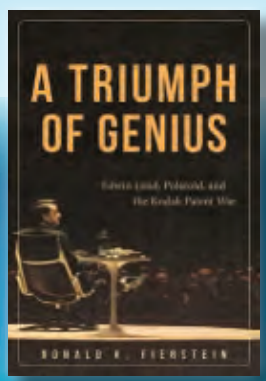
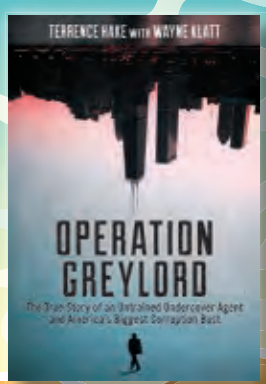


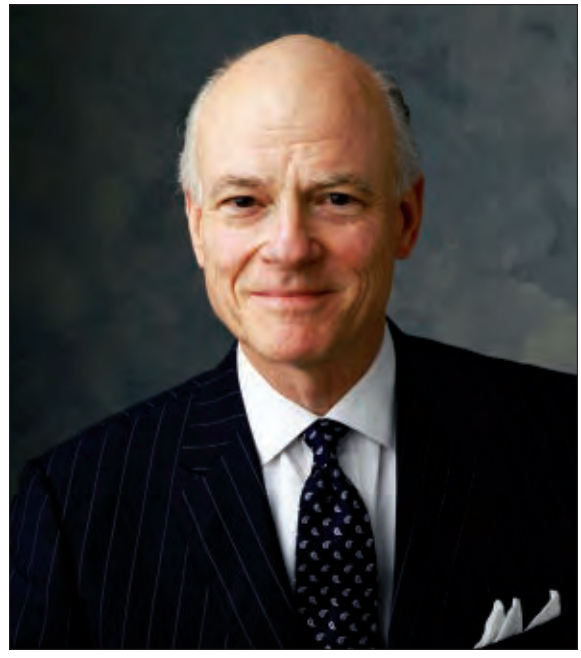






Changing Lives for the Better

ABA immigration initiatives bring hope to those who come here to begin anew



In July 2014, at a detention center near San Antonio, tears flowed from the eyes of the young children describing their journeys away from violence in Guatemala, Honduras and El Salvador. Despite this trauma, you could still see the hope in their eyes that America might protect them.

Between October 2013 and August 2014, more than 68,000 unaccompanied children were processed at the U.S.-Mexico border, nearly double the previous year's number. Whatever their reasons for coming to America, all should receive a fair hearing in our nation of laws.

The surge in unaccompanied minors has occurred against the backdrop of our under-resourced immigration court system. Courts are so severely backlogged that immigration judges often carry an annual docket exceeding 2,000 cases, and cases often last for years.

Last July, I was part of a delegation of ABA leaders who went to San Antonio to get a firsthand look at the immigration crisis. We visited Lackland Air Force Base, where 1,200 children who recently arrived at the border were being held and processed. We also visited shelters supported by faith-based organizations.

In November, I returned to the Rio Grande Valley with the ABA Commission on Immigration to observe a key part of the solution to the border crisis. While marking the 25th anniversary of the South Texas Pro Bono Asylum Representation Project sponsored by the ABA, the State Bar of Texas and the American Immigration Lawyers Association, we honored those who do so much to provide critical legal services. This signature program, along with the Immigration Justice Project in San Diego, trains volunteer lawyers and provides children and adults in immigration detention with "Know Your Rights" presentations, direct representation and other legal services.

The ABA has long worked to ensure access to counsel for asylum applicants and other detainees—and for good reason. When children and others are competently represented by counsel in adversarial proceedings, all parties benefit. Legal representation serves not only the clients, but also the court process, ensuring more fairness and efficiency. The immigration judges with whom I spoke emphatically stressed the need for trained counsel to develop the facts and evidence so the courts can make informed decisions.

Not everyone who crosses our border deserves to stay, but our country should provide the resources to allow for fair and just determinations. The lack of government resources compels the legal community to step in and meet these fundamental needs.

Last August, the ABA formed its Working Group on Unaccompanied Minor Immigrants, comprising a cross section of lawyers from various ABA practice groups and charged with responding to the critical need for additional pro bono lawyers. Under the leadership of ABA Commission on Immigration Chair Christina Fiflis and Standing Committee on Pro Bono and Public Service Chair Mary Ryan, the working group is recruiting, training and mentoring lawyers to increase capacity and complement the efforts of existing legal services programs.

The group has launched a comprehensive webpage, the Immigrant Child Advocacy Network, that provides information and resources for volunteer lawyers and advocates. We encourage lawyers to visit ambar.org/ican to learn about upcoming pro bono training programs and other initiatives to represent these children in need.

In a process that is unusually complex, unfamiliar and difficult to understand, access to accurate legal information and effective representation can change lives, as it did for a young boy from Honduras who escaped severe physical abuse at the hands of gangs and was granted asylum. And for the woman from El Salvador who fled horrific domestic violence and, because of a lawyer's volunteer service, can now raise her children without fear.

Working together, we can provide dignity and hope to the individuals whose cases meet the standard for protection in our country. ■

Follow President Hubbard on Twitter @WilliamCHubbard.

PHOTOGRAPH BY MARC HAUSER

Opening Statements

EDITED BY JILL SCHACHNER CHANEN
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Life Is a Cabaret, Old Chum (But First You Need a License)

NYC lawyer and bar owner sues over licensing requirement

To Brooklyn bar owner Andrew Muchmore, New York City's 89-year-old cabaret law—which prohibits dancing in a venue that does not have a specific cabaret license—shows shades of *Footloose*-style censorship.

Muchmore, who also happens to be an attorney, is challenging the law on the grounds that it violates the First and 14th amendments. "This stands out as the most absurd law in New York City," says the owner of the eponymous bar/coffeehouse that regularly hosts live music. Other city laws and codes address the noise, crowding and safety issues that the cabaret law also purports to address, he says.

PHOTOGRAPH BY LEN IRISH

"The only practical effect of the cabaret law is to prohibit dancing and render dancing by more than two persons simultaneously unlawful in more than 99.9 percent of the eating and drinking establishments in New York City," states Muchmore's complaint, filed in a Brooklyn federal court.

Obtaining a cabaret license is also unnecessarily cumbersome, Muchmore says, requiring community hearings and the installation of expensive surveillance equipment. Fines for unlicensed activity such as dancing are $100 a day.

Because the law has Muchmore worrying about crossing the line between swaying and dancing at his club, he's considered avoiding acts like deejays, and hip-hop and salsa artists because their music is inherently danceable, he says.

But Robert Bookman, general and legislative counsel for the New York City Hospitality Alliance, says the law is worthwhile. Licenses are not hard to get "once you meet the zoning and safety requirements," he says. "Dance clubs have a different land use than restaurants or small bars do, so they're zoned more strictly. People's attention to their surroundings is different in a restaurant than it is in a nightclub. It makes sense."

Muchmore is not the first to challenge the cabaret license on First Amendment grounds. Bookman says others have failed because the U.S. Supreme Court does not consider patron dancing a constitutional right. "You can disagree, but that is the law," he says.

Muchmore hopes he'll be more successful by arguing that it's performing musicians whose rights are being violated. "This law prohibits the expression of musicians and of the venues by prohibiting certain types of danceable music," he says.

—Judy Sutton Taylor

Diva Power!

California judge empowers others to become fit and healthy

EIGHT YEARS AGO, San Jose, California, Judge Sharon Chatman weighed 255 pounds and had high blood pressure. During a medical exam, her doctor explained that if she didn't do something, she had "a good chance of dying," Chatman recalls.

Immediately, she embarked on a weight loss quest that included limiting her food intake and starting an exercise program. "My first goal was to walk to the corner and back. I did that for one week. The next week, I walked two blocks and back." Soon, the blocks turned into miles, and eventually Chatman was walking 10 miles a day.

The onetime basketball coach was so thrilled after completing her first 10K, she wore her medal on a date that night. (It now has pride of place in her chambers.) She has since shed more than 100 pounds and completed several marathons.

"I wanted other women to have that same elated feeling," Chatman explains about her motivation for forming the Red Power Divas fitness group. To eliminate as many barriers to fitness as possible, the group requires no fees, no fundraising and no pressure to run fast or to show up every day.

Founded in 2007 with 60 members, the Red Power Divas group today boasts more than 1,400 nationwide, including women (Divas), men (Divos) and children (FitKidz) of all ages, shapes, sizes and fitness levels. With the help of peer coaches, members enjoy weekly training sessions and monthly race events they enter as a team. Chatman's local group includes judges, probation officers, court staff, lawyers, clerks and Google employees, among others.

A 14-year court veteran who handles felony trials in the criminal division, Chatman says her work with the Red Power Divas has made her a better judge. "Most of what we do at the court is highly stressful. For me, this is the best stress relief."

—Leslie A. Gordon

Sharon Chatman

PHOTOGRAPH BY TONY AVELAR

Mommy, What's a Patent?

New website explains IP to kids

Officials at the U.S. Patent and Trademark Office are trying to convince children that learning about intellectual property protection is as hip as playing Minecraft. As part of its effort, the agency has redesigned its USPTO Kids website.

"The old kid pages were done a really long time ago. They had been a labor of love on the part of the people at USPTO who put them together, but they were very dated," says Joyce Ward, director of the office of education and outreach. "We've done an overhaul and brought [the pages] as close as we can to the 21st century."

The new webpages feature a variety of educational material, including videos, activities and coloring pages for kids and lesson plans for parents and teachers. Students can also learn about young innovators, such as Marissa Streng, who invented a device for drying pets.

The USPTO Kids website also features the office's collectible inventor cards. Kids can gather, collect and trade cards depicting patent holders, including Forrest Bird, inventor of the first mass-produced medical ventilator, and Sir Alec John Jeffreys, who is responsible for DNA fingerprinting.

Ward hopes the new pages will not only teach students about the importance of intellectual property creation and protection but also excite them about becoming inventors themselves.

"We want students to realize how cool and exciting it is to be an inventor, author, artist or a maker of things," Ward says. "When they have that deep-seated appreciation, then they are better able to appreciate the protected property of others and to realize the value in protecting their own inventions."

—Anna Stolley Persky

FIGHTING OVER FIDO

UK lawyer creates online prenup for pets

WHILE MANY PEOPLE TREAT PETS LIKE family members, courts take a different view. Pets are considered personal property, meaning Fido has the same status as a household appliance. So when a relationship sours, custody disputes involving pets can turn particularly contentious.

"There's no precedent," says Aleksandra Nejman, a Chicago-based animal custody mediator. "Even if you go to litigation, judges don't take it seriously and you're throwing money away arguing over a pet."

In an effort to avoid just this sort of problem, one U.K. family law attorney has created a prenuptial agreement for pet purchases. Pet Nup is a free download that covers ownership, responsibilities and rights in the event of a relationship breakdown, with the goal of keeping pet welfare at its heart.

"I took the law of contract, deeds of agreement, divorce settlements and consent orders and put that into the mix," says London lawyer Vanessa Lloyd Platt, who created Pet Nup. "The idea behind it was to make it as contractually binding as possible."

Nejman wishes she'd had a Pet Nup when she became caretaker of a boyfriend's dog in 2005. When they broke up six years later, he took off with her beloved Frankie. Despite demand letters and hopes for resolution, she never saw the dog again.

"I felt entitled to at least visitation," Nejman says. "But usually the person who has the pet is the person who ends up with [legal] possession. I would like to see the law changed—where animals are not property."

Valparaiso University law professor Rebecca Huss, a former chair of an ABA animal law committee, says Pet Nup-style agreements are a great idea, although it remains to be seen whether they would be enforced in court, particularly regarding issues of visitation or shared custody. Huss also cautions owners to consider the best interests of their animal, even if the courts don't utilize that standard.

"Is [joint custody] really a practical result, given the conflict between the humans?" Huss asks. "It may be that the pet will enjoy going back and forth between two houses, but on the other hand, it's just as likely to be disruptive to that animal."

—L.J. Jackson

USPTO.GOV, ISTOCKPHOTO

10 QUESTIONS

The Blue Blood's Lawyer

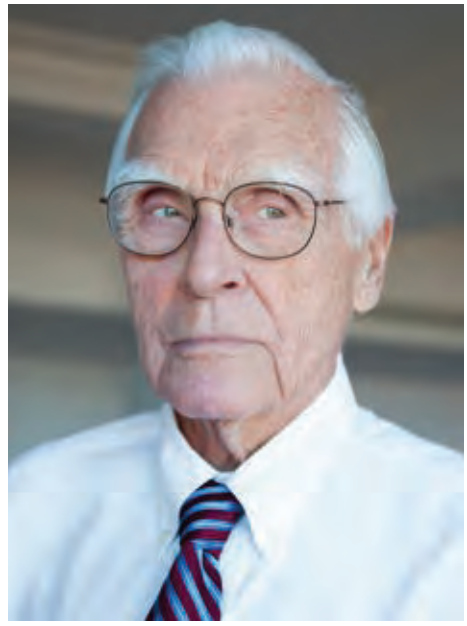
Have a $100 million estate to liquidate? Then you might want to talk to this lawyer

ALEXANDER FORGER has had one of those careers that make you wonder: How in the world did he do that?

A World War II veteran and Yale Law School graduate, the 91-year-old probate lawyer has a roster of distinguished clients, including the estates of Jacqueline Kennedy Onassis and the recently departed Rachel "Bunny" Mellon.

After more than 40 years practicing family law at the New York City firm Milbank, Tweed, Hadley & McCloy, Forger retired in 1992 and went on to serve as president of the Legal Services Corp. in Washington, D.C.

We asked him to reflect upon his career and dish about some of those estates.



How did you get started in your career? My education was interrupted by three years in the infantry in World War II. Then there was the GI Bill, and when one is discharged from the Army they give you a "military occupation specialty," and mine was working with machine tools because I had spent my time in the service as a machine gunner. I thought that was not likely a good lifetime career and machine guns were going out of style, so I thought: Well, there's no harm in going to law school.

What did you do after law school? Around 1950, I wandered down to Wall Street and met a fine group of people in the firm Milbank. In law school I was particularly pleased with a course in probate, trusts and estates. Then the partner in charge of that in the law firm was an exceptionally fine person, so I thought: Well, why don't I work in his area?

What about probate law attracted you? I found it to be the most diverse practice of all. You're dealing with individuals mostly concerned with their own issues and you have the ability of getting to know personally the clients and the clients' families.

How did Jackie O and Bunny Mellon come to be your clients? There was an older partner at the firm doing some things for Mrs. Onassis, and he passed that representation along to me back in 1970 or 1971. I became her lawyer and her good friend, I hope, for some 21 or 22 years. Mrs. Mellon? Mrs. Onassis recommended me to her.

What was Jackie O like as a client? From a lawyer's point of view she was a superb client. She was very articulate and understanding of the many issues that she faced. She was just a fascinating personality, and needless to say had many experiences—both happy and sad.

What was Bunny Mellon like? At 103, having had a great career, she had a very full life and no regrets. Mrs. Mellon was a woman with an extraordinarily sharp eye for beauty and nature, conservation, biology, botany and horticulture. She has a horticulture library that now will become an educational institute, and she probably has the finest collection of books, manuscripts and prints on horticulture and garden design. She designed the Rose Garden for President Kennedy.

What constitutes a good will? If it does what it wants to do. It's only the client and maybe the beneficiaries that are concerned with it being good or not good.

What other types of clients have you had over the years? I'm happy to serve a variety of clients, and they weren't all in the high-profile news. They were various achievers in their own rights, whether in finance or the arts. One received an Oscar—Martin "Marty" Richards, for producing the film of the musical *Chicago*. I had the Johnson family too—the J&J Johnson [family], representing the six children in a will contest. I had another client who was a caretaker for an estate in Long Island. He came from one of the Balkan countries and he learned English and learned about plants and gardens. I forget the reason why he ended up at my doorstep, but he came in and he wanted to do a will, for which he paid in cash $300. He saved his money, invested it and died not wealthy. He left his entire estate to the New York Public Library because he felt indebted to it for the opportunity of learning, reading books and having access to materials that helped him through his life.

Is it true that Mrs. Onassis left you a copy of John F. Kennedy's inaugural address signed by Robert Frost in her estate? Yes. She earlier on had said that she wanted me to have that. To me just the thought was sufficient, but it was a wonderful gesture on her part for which I will be eternally grateful.

What would you have been if not a lawyer? I would have chosen law. I can't think of a better life and a better way to spend your time. It is a great profession—learned, interesting, satisfying, enjoyable. And what else: It provides a wonderful life. And there's more to come. I'm only 91.

—Lauren Etter

PHOTOGRAPH BY LEN IRISH

Hearsay

By the time the *ABA Journal* was established 100 years ago this month, the country and its legal system were well-established. But you might be surprised by what wasn't around when we were first published:

THE 19TH AMENDMENT
Three-fourths of the states ratified it by August 1920.

PAKISTAN The country did not exist until August 1947.

PENICILLIN Alexander Fleming discovered the bacteria's healing properties in September 1928.

POP-UP TOASTERS
Charles Strite invented the first pop-up toaster in 1919.

PROHIBITION The 18th Amendment was ratified in January 1919.

AND ITS REPEAL The 21st Amendment was ratified in December 1933.

BLENDERS Wisconsin inventor Stephen Poplawski is credited with creating the first electric blender in 1922.

THE FIRST MOONWALK
Neil Armstrong took that famed step for mankind in July 1969.

THE NATIONAL PARK SERVICE
President Woodrow Wilson signed the National Park Service Act into law in August 1916.

THE SPACE SHUTTLE
The first one was launched in April 1981.

Cartoon Caption Contest

WINNER! Congratulations to Mickey Schmitt for garnering the most online votes in the *Journal*'s monthly cartoon caption-writing contest.

WINNING CAPTION

"Objection overruled. I want to hear whether he gets his truck and dog back."

—Mickey Schmitt of Nashville, Tennessee

JOIN THE FUN

Send us the best caption for this legal-themed cartoon. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, Jan. 11, with "January Caption Contest" in the subject line.

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

The Docket

EDITED BY RICHARD BRUST/RICHARD.BRUST@AMERICANBAR.ORG

Lipan Apache religious leader Robert Soto prepares to perform at a June 2013 powwow in Monroe, Michigan.

COURTESY TOM HAWLEY AND THE MONROE NEWS

Fuss and Feathers

American Indians challenging eagle feather rules get a boost from *Hobby Lobby*

by Lorelei Laird

National Pulse

In many American Indian religions, the eagle is considered a link to the creator and the spirit world. Its feathers are an important part of rituals, facilitating spiritual or physical purification.

But in the 21st century, acquiring eagle feathers is more a bureaucratic than a spiritual matter. Because the Bald and Golden Eagle Protection Act outlaws killing eagles, or even picking feathers off the ground, new feathers may be acquired only through the National Eagle Repository. At its facility, located near Denver and run by the U.S. Fish and Wildlife Service, workers fill orders using eagles found dead in the wild.

Native religious practitioners have long complained about this system. It's slow, they say. The

repository's website says it takes three to six months to fill an order for loose feathers and two to five years for a whole bird. And whole eagles have limited usefulness because they often arrive partly decomposed, critics say.

But the biggest criticism of the repository is perhaps that not everyone can use it. Fish and Wildlife Service regulations say only members of federally recognized tribes may apply for permits, which are required to place an order. And federal recognition is notoriously slow, taking decades in some cases.

That leaves more than 200 unrecognized tribes and a handful of non-Indian practitioners without a legal way to get new feathers, says Milo Lone-Eagle Colton, a lawyer and professor at St. Mary's University in San Antonio.

Practitioners ineligible to use the repository have challenged this system, arguing that the distinction between members of federally recognized tribes and other Americans violates the First Amendment's free exercise clause and the Religious Freedom Restoration Act, the 1993 statute aimed at preventing laws that substantially burden free exercise.

But the U.S. Court of Appeals has rejected RFRA-based challenges to eagle feather laws in the 9th Circuit at San Francisco, the 11th Circuit at Atlanta and, to some extent, the Denver-based 10th. The courts never questioned the sincerity of practitioners' beliefs, but found the government's interests in protecting eagles or meeting its responsibilities to federally recognized tribes sufficiently compelling; the courts also found that existing law was the least restrictive means to achieve this.

DEMANDING STANDARD

But that was before the U.S. Supreme Court's June ruling in *Burwell v. Hobby Lobby Stores*. Among other issues, the court required that the law be crafted to protect religious liberty more broadly, thus making it more difficult for the government to pass the RFRA's least-restrictive-means test.

Calling that standard "exceptionally demanding," the *Hobby Lobby* court said that a federal department must show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases."

In the most recent eagle feather case, *McAllen Grace Brethren Church v. Salazar*, the 5th Circuit at New Orleans cited *Hobby Lobby* 18 times. The court sent an RFRA challenge back to Texas district court, asking the government for stronger arguments supporting its restrictions on who may own eagle feathers.

Colton, who represented the plaintiffs in *McAllen*, says he expects the issue will go to the Supreme Court.

"We're the only people that I know of in the U.S. in which the federal government tells us who can be members of our congregations," says Colton, who is of Cherokee and Scotch-Irish descent.

McAllen grew out of the seizure of eagle feathers belonging to Robert Soto and Michael Russell. The men were performing devotional dances at a South Texas powwow; Soto is the pastor of McAllen Grace Brethren Church.

Their feathers were spotted by an FWS agent, who determined that Soto was a member of the unrecognized Lipan Apache tribe, and that Russell was not a tribe member. (Colton says he's Muscogee Creek by birth and married to Soto's sister.) The agent confiscated their feathers under the Bald and Golden Eagle Protection Act and a related law, the Migratory Bird Treaty Act. Russell was also required to pay a fine. In exchange, the federal government agreed to decline further criminal investigation.

After exhausting Soto's administrative remedies for getting the feathers back, the men sued, joined by Soto's church, several co-religionists and other native groups. A federal district court granted summary judgment to the federal government, rejecting the plaintiffs' First Amendment and RFRA claims.

In August, the 5th Circuit said the federal government provided insufficient evidence that its current restrictions on eagle feathers were the least restrictive way to meet its goals. The government relied on arguments that other courts had accepted, but the 5th said those cases were decided before *Hobby Lobby* "clarified how heavy the burden is on the [Interior] Department." The government did not petition for an en banc hearing or Supreme Court review, so the case will go back to the South Texas district court.

Robert Clinton, who teaches American Indian law at Arizona State University, says *McAllen* is important—not only because it was favorable to Indian religious rights but also because it raises the topic of Indians who are not part of federally recognized tribes. Census data (drawn from self-identification) suggest this includes more than half of the American Indian population.

This matters because the eagle protection act creates an exemption for "the religious purposes of Indian tribes." The implementing regulations are what narrowed eligibility to federally recognized tribes. In court, the government argued that this helps FWS agents determine who is permitted to own feathers.

But the limitation creates problems for practitioners who, like Soto, belong to unrecognized tribes. It also creates problems for the growing number of children from intertribal marriages, who often can't meet tribal "blood quantum" requirements to join a recognized tribe, Clinton says, "though they're clearly Indians and participate in the religious ceremonies."

Luke Goodrich, deputy general counsel to the Becket Fund for Religious Liberty, believes there's a "very serious constitutional issue" in this disparity. The fund plans to help defend *McAllen*.

"There's a lot of dispute about

what the establishment clause means these days, but one thing it clearly means is that the government doesn't get to give licenses to the Episcopal Church to preach but not to the Baptist Church," Goodrich says. "That's basically what's happening here."

Though the fund also handled *Hobby Lobby*, Goodrich doesn't believe that case was the key in *McAllen*. He notes that the 5th Circuit made favorable RFRA rulings before *Hobby Lobby* on issues such as animal sacrifices in Santeria and Sikhs carrying knives to work.

Similarly, Goodrich believes the existence of secular exceptions to the acts covering eagles and birds —for scientists, power plants and farmers—could be fatal to the government in *McAllen*. Indeed, the Interior Department recently allowed wind farms to obtain 30-year permits to kill eagles accidentally.

NEED FOR A 'CLEAN' EAGLE

Though the 5th Circuit expressly didn't reach the issue of killing eagles, Clinton feels *McAllen* could help tribes obtain permits to "take" eagles for religious purposes. Though the law allows such permits, the federal government has granted very few. A pending lawsuit in Wyoming charges that the government is illegally denying such a permit to the Northern Arapaho tribe. The tribe argued in late August that *McAllen* sets standards too high for the government to overcome.

Court records say the Northern Arapaho prefer not to use the repository because they need a "clean" eagle. This echoes long-standing complaints about the repository. The 5th Circuit drew attention to some of them in dismissing an argument that expanding eligibility would worsen wait times.

"The department cannot infringe on Soto's rights by creating and maintaining an inefficient system and then blaming those inefficiencies for its inability to accommodate Soto," the court wrote. ■

PHOTOGRAPH BY SONYA REVELL

Eduardo Palmer: "On a pure sound-bite basis," restricting foreign law "can seem persuasive and logical and appropriate."

Shepherding Shariah

International law bar takes aim at overbroad bans on Islamic law

by William C. Smith

National Pulse

The story of Florida's anti-Shariah law movement began three years ago with a courtroom bang, but it ended last May in a legislative whimper.

It started when a state judge ruled in March 2011 that a dispute between the Islamic Education Center of Tampa and its ousted trustees should be resolved among the parties "under ecclesiastical Islamic law, pursuant to the Quran." The two sides were sparring over control of a $2.2 million eminent domain award after some of the center's land was used in a road project. Circuit Judge Richard Nielsen found in *Mansour v. Islamic Education Center of Tampa* that the parties, all Muslims, had previously referred their dispute to a religious arbitrator, who ruled in favor of the trustees.

Nielsen, an appointee of former Gov. Jeb Bush, clarified in a written opinion that he was applying well-settled First Amendment case law requiring courts to respect religious organizations' decisions on internal governance matters, whether involving "a church, synagogue, temple or mosque."

RULING STRIKES A CHORD

The judge's deference to Islamic law drew a swift, vehement reaction from bloggers and activists already wrung out about the threat of Shariah law in the United States. Based on the Quran and other Islamic teachings, Shariah undergirds or influences the systems of many predominantly Muslim countries in the Mideast, Africa and Asia.

"Florida judge orders Muslims to follow Shariah law, against their will," announced the Creeping Sharia blog. The website Right Speak accused Nielsen of "knowingly violat[ing] our separation of church and state, thus giving legitimacy to Shariah as a way to settle civil disputes between Muslims."

Attorney and anti-Shariah activist David Yerushalmi cited *Mansour* in *Shariah Law and*

American Courts, a survey of 50 court rulings in 23 states, which concluded that "Shariah law has entered into state court decisions, in conflict with the Constitution and state public policy." Yerushalmi of Chandler, Arizona, drafted the American Laws for American Courts model legislation to counter this trend. Known as ALAC, the measure does not single out Shariah, but bars courts from applying "any law, legal code or system" that does not grant affected parties "the same fundamental liberties, rights and privileges" under U.S. and state constitutions.

ALAC bills have been introduced in several states, and versions are on the books in Arizona, Kansas, Louisiana, Oklahoma and Tennessee. Florida looked likely to join the list. Anti-Shariah advocates, encouraged by reactions to *Mansour*, lobbied for an ALAC bill, which was introduced by Republican legislators. By spring, the bill was poised for legislative passage and signature by Gov. Rick Scott.

However, a coalition of lawyers, civil rights groups, and business and religious leaders opposed the bill's perceived anti-foreigner impetus and anti-business impact. The state's international law bar was particularly alarmed, says Miami solo practitioner Eduardo Palmer, chair-elect of the International Law Section of the Florida Bar.

"On a pure sound-bite basis," Palmer says, restricting foreign laws "can seem persuasive and logical and appropriate." But existing legal doctrines already prohibit application of foreign laws that would violate federal or state constitutions, he says. "There has not been a case in the history of Florida where a foreign law was applied to limit fundamental rights."

With passage of ALAC looming, the Florida Bar's International Law Section proposed a last-minute compromise to state legislators. The new bill limited Shariah to family law and codified existing case law barring "unjust and unreasonable" foreign laws. With the support of moderate Republicans, and consent of the original bill's sponsors, the legislature approved the compromise language. Gov. Scott signed the bill into law May 12.

Markus Wagner, an international law professor at the University of Miami, agrees that the original Florida bill represented a "solution in search of a problem." Under well-settled case law, Florida courts do not apply laws of other states or nations that violate state public policy. In applying Shariah-based or other foreign laws, Wagner says, "the results that we don't want can be staved off by the public policy exception."

According to Palmer, uncertainties about a ban on foreign laws limiting "fundamental" rights would pose an "enormous problem" in international disputes. "Because even well-developed Western democracies protect rights in different ways, [ALAC] could have effectively crippled, or at the very least greatly complicated, the ability of Florida courts to apply foreign law," says Palmer.

Their concerns echo those of international law practitioners and professors nationwide. In August 2011, the American Bar Association's House of Delegates approved a resolution, proposed by its Section of International Law, opposing "blanket prohibitions" on "foreign or international law" or "the entire body of law or doctrine of a particular religion." The section's report warned that broad restrictions on foreign laws could have "an unanticipated and widespread negative impact on business" by placing U.S. companies at a disadvantage with international competitors.

Glenn Hendrix of Atlanta, a past chair of the ABA section, worries about "unintended consequences" of overbroad restrictions on international law, including ALAC. For example, many state constitutions guarantee the right to a jury trial in civil cases, but most nations do not have jury systems. Is the civil jury right so fundamental, Hendrix wonders, that an American court could not enforce a German judgment against a U.S. tourist found liable for a hit-and-run in Berlin?

SOONER STATE SETBACK

In one state, a prohibition on Shariah law was ruled unconstitutional. In November 2010, more than 70 percent of Oklahoma voters approved a proposed constitutional amendment to prohibit state judges from applying "the legal precepts of other nations or cultures," and specifically prohibiting "international law or Shariah law."

Days after winning at the ballot box, Oklahoma's anti-Shariah referendum lost in the courthouse. Ruling in a lawsuit filed by Muneer Awad, an Oklahoma City Muslim man, the federal district court enjoined the state from certifying the election results. U.S. District Judge Vicki Miles-LaGrange ruled that banning the laws of one religion violated the First Amendment.

In January 2012, the 10th U.S. Circuit Court of Appeals at Denver affirmed the injunction, noting that the state could not identify "even a single instance" when Oklahoma courts have used "the legal precepts of other nations or cultures."

Proponents of Oklahoma's anti-Shariah initiative did not admit defeat; they simply changed tactics and text. In April 2013, Gov. Mary Fallin signed a new law based on ALAC. State Rep. Sally Kern, the bill's main sponsor, says the legislation "assures Oklahoma citizens' rights will be constitutionally protected," and it has not been challenged in court.

ALAC attorney Yerushalmi says that, unlike the language in Oklahoma's ill-fated referendum, his model legislation is "constitutionally sound" and impervious to legal attack.

Yerushalmi notes that his efforts are promoting discussion, in Florida and elsewhere, about the dangers of "transnationalism" in American law. Even when it doesn't pass, he says, the model legislation "allows for a reasoned and open debate." ■

Signs of the Times

Justices consider whether a town code is bad news for the Good News congregation

by Mark Walsh

Supreme Court Report

The Good News Community Church in Gilbert, Arizona, would never be mistaken for a Christian mega-congregation.

The church has 25 to 30 regular adult congregants, plus about 10 children, and no permanent home. It has borrowed space in elementary schools and senior centers for Sunday services for the past several years. Still, Pastor Clyde Reed and his flock seek to observe a biblical command by Jesus to "go and make disciples of all nations" by inviting anyone in their community to attend.

To that end, the church has placed small signs in the public right of way to direct traffic to the services, putting the signs up early Saturday and removing them after services are over on Sunday.

The church's signs are now figuratively pointing to the U.S. Supreme Court, where the case of *Reed v. Town of Gilbert* is a potentially significant test of the First Amendment and government regulation of speech. It will be argued Jan. 12.

As early as 2005, Gilbert enforcement officers cited Good News for violations of the town's sign code, which at that time regulated "religious assembly temporary directional signs." In 2007, Reed and the church sued the 30,000-resident Phoenix suburb, alleging that the code targeted them.

The suit led to an injunction, and the town adopted a new ordinance in 2008 with multiple categories for noncommercial signs. (Commercial signs generally must have a permit.) Among the categories are those for political signs (supporting candidates or ballot measures), ideological signs (promoting noncommercial messages or ideas), and "qualifying event" signs—a "temporary sign intended to direct pedestrians, motorists and other passersby to … any assembly, gathering, activity or meeting sponsored, arranged or promoted by a religious, charitable, community service, educational or other similar nonprofit organization."

The church's directional signs fall under the qualifying event category. The problem, as the church sees it, is that such signs must be smaller than political or ideological signs and may only be displayed from 12 hours before the event until two hours after, in contrast to unlimited duration for ideological signs and more than four months before an election for political signs.

9TH: 'MAKES ONE'S HEAD SPIN'

The town is making content-based distinctions in its sign code, in violation of the First Amendment, the church contends.

"You can't treat certain speech as better or worse than other speech," says David A. Cortman, an Atlanta-based lawyer with the Alliance Defending Freedom, a religious legal organization representing Reed and the church. He adds that the town "has treated the church's speech worse than other types of speech, and that's what has created the constitutional violation here."

Michael Hamblin, the town attorney of Gilbert, says the town never targeted the Good News Community Church (which also refers to itself as the Good News Presbyterian Church) with its sign regulations. The qualifying event category is meant to allow groups holding a temporary event, be it a church service or a 5K race, to help the public get to the event.

"Organizers can put up signs 12 hours before the event," Hamblin says. "It's a temporary directional sign, and that serves a town function. We don't want those signs up for long periods of time."

A federal district judge in Arizona and the 9th U.S. Circuit Court of Appeals at San Francisco sought to make sense of Gilbert's sign regulations in light of precedent on content-based speech limitations generally and municipal sign rules specifically.

In its first look at the case, in 2009, the 9th Circuit remanded the case to the district court, concluding that "Gilbert has adopted a sign ordinance that makes one's head spin to figure out the bounds of its restrictions and exemptions."

The district court then upheld Gilbert's 2008 rules, and the 9th Circuit affirmed in 2013. The appeals court panel ruled 2-1 to uphold the town's distinctions among temporary signs, saying that the town "did not adopt its regulation of speech because it disagreed with the message conveyed."

The panel majority also accepted the town's argument that political and ideological signs have more First Amendment value than the church's invitation signs.

The church asked the Supreme Court to resolve a circuit split over

Reed v. Town of Gilbert

Does a municipality's claim that its sign code lacks bias justify its different treatment of religious signs?

FLICKR CREATIVE COMMONS

the role of a governmental motive or purpose in weighing whether a sign code is content-neutral. The church argues that Gilbert's sign regulations fail the content-neutrality test because the town grants favorable treatment to political and ideological signs.

In its brief, Good News displays a photo of political signs sprouting on lawns, which it argues undercuts the town's safety and aesthetic justifications for its rules.

"How does the directional message on the [church's] sign affect safety or aesthetics in any way?" Cortman wonders. "It doesn't."

"How does the directional message on the [church's] sign affect safety or aesthetics in any way?" attorney David Cortman wonders. "It doesn't."

The town argues that intermediate scrutiny applies to sign regulations that do not favor or censor particular viewpoints or ideas. And under intermediate scrutiny, the regulations should be upheld, the town contends.

DECODING CONTENT NEUTRALITY

"These are not regulations that target viewpoints," says Philip W. Savrin, an Atlanta lawyer who is representing the town in the high court. "If Gilbert doesn't prevail—if all these restrictions are subject to strict scrutiny—many jurisdictions are going to have their sign regulations declared unconstitutional."

Lisa Soronen, the executive director of the State and Local Legal Center, a Washington, D.C., group that advocates for local governmental interests, says the town of Gilbert's sign regulations are not uncommon across the country.

"Every city has a sign code," says Soronen, whose group is part of an amicus brief on Gilbert's side joined by several organizations, including the National League of Cities, the U.S. Conference of Mayors and the National Association of Counties. Those groups would like to see Gilbert's approach upheld, though they would also settle for more First Amendment clarity from the justices, she says.

Brian J. Connolly, a former city planner who is now a private lawyer in Denver, agrees that a ruling against the town of Gilbert's regulations would throw many other municipalities' sign codes into constitutional limbo.

Connolly says it's well-settled that aesthetic regulation of signs by local governments is necessary. But even he believes that Gilbert's rationale for the distinctions in its sign code "is a hard one to articulate."

"This case is getting at a real division among the courts of appeals on the meaning of content neutrality," Connolly says.

The Good News Community Church has attracted amicus briefs from the nation's top conservative and religious legal organizations, which—like the Alliance Defending Freedom—are concerned with sign regulations that may harm a church but are also battling content-based regulations in other situations and venues, such as children's schoolwork and private religious memorials.

Leslie Kendrick, a law professor at the University of Virginia, notes that some scholars have criticized what they perceive as a lack of coherence in the Supreme Court's larger jurisprudence on content- and viewpoint-based neutrality and discrimination.

"I think the court has been more coherent in this area than it has been given credit for," says Kendrick, who has studied the area. "The Roberts court has made a concerted effort to formalize these rules."

"The court has found subject-matter regulations to be suspect," adds Kendrick, who isn't involved in the case and says that Gilbert's rules appear to be subject-matter classifications.

"The town may have reasons for doing this that aren't invidious," she says. "The court could say we really mean it when we suggest subject-matter regulation is a constitutional problem."

But if the justices find that "this is something special going on here, and [Gilbert's code] isn't content discrimination, then what they will have created is a special rule about signs—and that would undermine their formalistic approach in other areas."

"Local governments are caught between a rock and a hard place" when it comes to regulating signs, Kendrick says.

"They can't regulate with a blunt instrument," but when they try to regulate signs "with a scalpel," as Gilbert did in its code, she says, "it looks suspicious." ■

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PHOTOGRAPH BY STACY ZARIN GOLDBERG

Stop Sign

Prosecutors who allow debt collectors to use official letterhead sound an ethics alarm, ABA opinion says by David L. Hudson Jr.

Ethics

The ABA's most recent ethics opinion pulls no punches in stating emphatically that it is a clear violation of the Model Rules of Professional Conduct for prosecutors to provide official letterhead to debt-collection companies that then create demand letters threatening prosecution to scare individuals into paying their debts.

The problem, states ABA Formal Ethics Opinion 469, is that the letters purport to come from a prosecutor's office "when no lawyer from the prosecutor's office reviews the case file to determine whether a crime has been committed and prosecution is warranted or reviews the letter to ensure it complies with the rules of professional conduct."

Such conduct "gives the impression that the machinery of the criminal justice system has been mobilized against the debtor, and that unless the debtor pays the debt, the debtor faces criminal prosecution and possible incarceration," states the opinion, which was issued Nov. 12, 2014, by the Standing Committee on Ethics and Professional Responsibility.

Many ethics experts and consumer rights lawyers welcome the opinion. "My first reaction was 'Hallelujah,' " says consumer rights attorney Deepak Gupta, who is founding principal at Gupta Beck in Washington, D.C. "It is about time that the organized bar condemn these schemes. I have been concerned for a long time that this isn't just a violation of consumer protection laws but also a basic violation of legal ethics."

The practice has become prevalent, especially as prosecutors' offices have felt the financial pinch of government budget cutbacks during the past several years. While prosecutors generally have recognized their ethical responsibilities, Formal Opinion 469 states, "occasionally practices have taken hold in prosecutors' offices that, while driven by budgetary exigencies, fall short of their higher calling."

"The problem is incredibly widespread," says Keith Swisher, a professor at Arizona Summit Law School in Phoenix. "Hundreds of district attorneys' offices are selling their prosecutorial authority to debt collectors and debt education providers," says Swisher, who teaches professional responsibility. "By misleading consumers with the threat of criminal prosecution and using ghostwritten letters laden with the district attorneys' seals and signatures, the debt collectors are engaging in an unfair debt-collection practice. But for this 'partnership,' no debt collector would be permitted to employ this unfairly effective tactic."

In Gupta's view, "this really is a pernicious practice that targets the most vulnerable consumers. These programs aim to take the last dollar from innocent people's pockets, using scare tactics and false threats of prosecution and jail time. This is a widespread problem that is occurring all over the country. In an era of shrinking prosecutorial budgets, I guess one can understand the impulse to do it, but it simply is not the right way to do things."

VARIATION ON A THEME

Actually, the ABA ethics committee has been addressing the relationship between attorneys and debt collectors since at least 1932. From the beginning, the committee has focused primarily on whether lawyers were helping debt collectors engage in the unauthorized practice of law and whether certain relationships with debt collectors amounted to lawyer misconduct. In 1943, with the ABA Canons of Professional Ethics still in effect, the ethics committee issued Formal Opinion 253, which concluded it would be unethical for a lawyer to allow a client to use the lawyer's stationery to deceive a debtor into believing that the debt had been referred to the lawyer, and that the lawyer had written the collection letter.

The Model Rules were adopted by the ABA House of Delegates in 1983. They are the basis for binding professional conduct rules in every state, although California follows a different format.

Misconduct and UPL still are the committee's primary concerns in Opinion 469, but its earlier opinions involved debt collectors using the stationery of lawyers in private practice. "Such letters written on prosecutors' letterhead are even more deceptive," the opinion states, "because they misuse the criminal justice system by deploying the apparent authority of a prosecutor to intimidate an individual." Accordingly, prosecutors who engage in these arrangements violate ABA Model Rule 8.4, which states that "it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Michael P. Ambrosio, a law professor at Seton Hall University School of Law in Newark, New Jersey, says the ethics committee also could have found a violation of Model Rule 8.4(d), which prohibits engaging in conduct prejudicial to the administration of justice, "because this conduct would be an abuse of the prosecutor's authority and, as such, would undermine public confidence in the prosecutor's office and the administration of the justice."

MESSAGE FOR YOU, SIR

On the issue of UPL, Opinion 469 concludes that a prosecutor who provides official letterhead to a debt-collection company without conducting any review of the letter drafted by the company or making any determination of whether a crime was committed by the debtor violates Model Rule 5.5(a), which states that "a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."

The opinion states that, in the collection area, "a nonlawyer may negotiate, adjust and settle a debt on behalf of a creditor, but a nonlawyer cannot give legal advice, institute litigation or threaten to sue on behalf of another."

"I'm pleased with the analysis of the ABA ethics opinion overall," Gupta says, "because it gets to the heart of the problem: deception and misuse of prosecutorial authority. I hope that prosecutors realize that they need to pay attention to what is being done under their names. The opinion is significant because it sends a message that prosecuting attorneys are not free from accountability for participating in this type of arrangement."

The ABA opinion cites a 2013 Oregon law that prohibits prosecutors from allowing debt collection companies to use their letterhead. "The Oregon law is hopefully trendsetting," says Swisher. "Many were understandably upset when these programs came to light a couple of years ago, and Oregon has taken a lead in eradicating this abusive tactic. The ethics opinion—highlighting the abuse and Oregon's example—could only help to spur further scrutiny."

Gupta concurs. "It's encouraging that Oregon has passed a law banning prosecutors from renting out their letterhead to debt collectors," he says. "I hope and expect that more states will follow Oregon's example, and I hope the ABA's sensible opinion helps guide them in the right direction. I'm also optimistic that the courts and consumer protection regulators will put an end to the practice." ■

FOR MORE Read ABA Formal Ethics Opinion 469 at ABAJournal.com/magazine.

A Magna Carta Style Guide

From *Charta* to *Carta* and which king should get credit for the Great Charter

by Bryan A. Garner

Bryan Garner on Words

The Library of Congress has staged a magnificent exhibit on Magna Carta and its history. It is, after all, the 800th anniversary of the Great Charter of 1215. To commemorate the event, Justice Randy J. Holland of the Delaware Supreme Court has edited a book to accompany the exhibit: *Magna Carta: Muse and Mentor*, for which Chief Justice John G. Roberts Jr. has written a foreword.

When Justice Holland asked me to contribute one of the 15 essays in the book, I decided to take a lexicographic look at the phrase. There are many curiosities about both the phrase *Magna Carta* and the document it denotes. Very little about Magna Carta is simple or straightforward.

WHAT IS THE PREDOMINANT SPELLING?

Originally, the predominant form was *Magna Charta*, which long held sway. At its height, *Magna Charta* was nearly 10 times as common as *Magna Carta*. But the two spellings had a significant reversal of fortune in the late 20th century.

In 1926, when H.W. Fowler wrote the first edition of his *A Dictionary of Modern English Usage*, he said: "*Magna C(h)arta*. Authority seems to be for spelling *charta* and pronouncing /kar´ta/, which is hard on the plain man. But outside of histories and lecture rooms the spelling and pronunciation *charta* will take a great deal of killing yet." In his 1965 revision of that book, Sir Ernest Gowers introduced an excellent update: "In a bill introduced in 1946 authorizing the trustees of the British Museum to lend a copy to the Library of Congress, *Charta* was the spelling used. But when the bill reached committee stage in the House of Lords, the lord chancellor (Lord Jowitt) moved to substitute *Carta* and produced conclusive evidence that that was traditionally the correct spelling. The amendment was carried without a division, so *Carta* has now unimpeachable authority."

Though *Charta* vastly predominated before the mid-20th century, it now seems archaic. What an astonishingly swift reversal of linguistic fortune.

HOW ARE THE VARIANT FORMS PRONOUNCED?

The phrase is pronounced the same regardless of spelling: /kahr´-tuh/. All the dictionaries that give a pronunciation record the *Charta* spelling as having a hard -k- sound, not a -ch- sound. The modern trend to spell the phrase *Carta*, not *Charta*, may have been in part because the cognoscenti realized that English speakers had started mispronouncing the term. (As Fowler said in 1926, the exceptional pronunciation was "hard on the plain man.") After all, English speakers are notoriously prone to mistaken "spelling pronunciations," as with *comptroller* and *schism*, so the reversion to the spelling *Carta* after a long period of *Charta* made sense if English speakers hoped to keep the traditional pronunciation intact. The frequent listing of the phrase in pronunciation books reinforces the idea that mispronunciations had become common during the mid-20th century.

IS IT BETTER TO SAY *MAGNA CARTA* OR *THE MAGNA CARTA*?

All the usage guides [see editor's note, below] prefer omitting the definite article before *Magna Carta*. The traditional reason for omitting the article is twofold: (1) the name is being used as a proper noun, and (2) in Latin the phrase doesn't take an article, and early anglicizations followed the Latinate word pattern.

TO WHICH KING SHOULD MAGNA CARTA BE CREDITED?

To the nonhistorian, this is really odd. Most of the early dictionaries give the year 1225—the ninth year of King Henry III—as the year for Magna Carta. Dozens of English dictionaries say this, beginning with John Cowell in his law dictionary of 1607. How can this be?

The answer is that the 1225 version of Magna Carta is the one that became incorporated into British statute law. Here's how the thorough 19th-century lexicographer Alexander Burrill explained it: "This charter of Henry III is the Great Charter—which is always referred to as the basis of the English constitution—the charter of John being only remembered as a monument of antiquity. ... The charter of Henry is the oldest printed statute now extant in England. ... The original charter of John is still preserved in the British Museum." King John's Magna Carta was declared a nullity by the pope just a little over two months after it was sealed.

So the early legal lexicographers had reason to prefer citing the third reissue and crediting Henry III. But historians and schoolchildren alike care more today about the original 1215 date than 1225. That was the momentous year.

EDITOR'S NOTE: Although the *ABA Journal* prefers "the Magna Carta," in keeping with American popular usage and the *Associated Press Stylebook*, for the purposes of this month's Bryan Garner on Words, we are publishing his preferred version of the term.

WHAT IS THE PRECISE DATE OF KING JOHN'S MAGNA CARTA?
Some dictionaries give the date as June 15, 1215. Others give June 19, 1215. This contradictory information counsels in favor of having lexicographers and encyclopedists avoid undue specificity. The *Oxford English Dictionary*, for example, says Magna Carta was "obtained from King John in 1215" and leaves it at that. This may be a wise solution, since "the chroniclers give various dates to the settlement, ranging from 18 to 23 June." Only one major dictionary—the now-defunct *Funk & Wagnalls New Standard Dictionary of the English Language* (1943)—gives an account that seems to reflect the most reliable modern research: "dated June 15, 1215, but actually sealed (not signed) and delivered June 19, 1215, by King John at Runnymede." Except John probably did not seal the document either: That responsibility fell to a member of the Chancery staff. But June 19 seems to be the best guess for the document's taking effect.

WHAT DID WILLIAM SHAKESPEARE AND SAMUEL JOHNSON HAVE TO SAY ABOUT MAGNA CARTA?
Nothing. Absolutely nothing. The various Shakespeare concordances have no listing of *Magna Carta*. Somehow Shakespeare's play *King John* (1596) deals with baronial rebellion all the way through John's death without a whisper about Magna Carta. As the variorum edition notes, the play contains "not the faintest allusion ... to the constitutional struggle which ended in the grant of the Great Charter," adding: "Startling as it sounds to modern ears, it is almost certain that Shakespeare had small knowledge of that document, and a very inadequate sense of its importance." This despite the playwright's extensive legal knowledge. Perhaps this paradox can be explained partly by the low ebb that Magna Carta had reached in the 15th and 16th centuries. Or the omission may have resulted from Shakespeare's dramaturgical strategy, although some have suggested that *King John* is more subject to criticism by lawyers than any other play for precisely this reason. One historian of the English Renaissance doubts that Shakespeare had even heard of Magna Carta.

As for Samuel Johnson, his 1755 *A Dictionary of the English Language* has no entry for the phrase. Nor is there any reference to it in the entry for *charter*, although Johnson does say this: "*Charters* are divided into charters of the king, and charters of private persons." Not until the Rev. H.J. Todd's revision of 1818, more than 30 years after Johnson's death, did an entry appear in an edition of Johnson's dictionary. It read in full: "*Magna Charta*. *n. s.* [Latin.] The great charter of liberties granted to the people of England in the ninth year of Henry III, and confirmed by Edward I."

Did Johnson discuss Magna Carta in any of the copious conversations recorded by his biographer James Boswell? Apparently not. No reference appears even in his voluminous letters.

WHICH LEXICOGRAPHER MOST VIVIDLY DEPICTED THE SCENE AT WHICH MAGNA CARTA TOOK EFFECT?
Giles Jacob in 1729, but the description wasn't of King John at Runnymede; it was of Henry III late in life. It was the reaffirmation of Magna Carta in the 37th year of Henry III's reign—a down-the-line reissue of the charter. The scene took place at "Westminster Hall. And in the presence of the nobility and bishops, with lighted candles in their hands, Magna Charta was read —the king all that while laying his hand on his breast, and at last solemnly swearing faithfully and inviolably to observe all the things therein contained, as he was a man, a Christian, a soldier and a king. Then the bishops extinguished the candles and threw them on the ground; and everyone said, 'Thus let him be extinguished, and slink in hell, who violates this charter.' " ■

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PHOTOGRAPH BY TERRI GLANGER

"If it doesn't fit, you must acquit" was a key part of Johnnie Cochran's famous closing argument in the O.J. Simpson case.

Telling Unfinished Stories

How lawyers can craft a case narrative to spark jurists' and jurors' interest in writing the ending By Philip N. Meyer

Crafting Stories

Peter Brooks, the esteemed narrative theorist, tells an anecdote about a brilliant graduate student in his advanced narrative theory seminar at Yale.

This young woman was so imbued with narrative prescience that by reading the opening chapter of a novel she could decode the entire text—accurately predicting the trajectory of the plot, the ending of the book, and even the coda of meaning the story's ending conveyed. Brooks' point is that the beginnings of stories imply their plot trajectories and contain their endings; events come into stories only when they push the plot forward toward a climax and resolution that may initially appear surprising but, in retrospect, seem inevitable.

From the first words of the story, every movement of the plot works in anticipation of the story's ending. This is why, as a practical matter, storytellers are taught to know their endings and even to structure plots by working backward from the ending. As Michael Roemer, a literary theorist and filmmaker, puts it: "Every story is over before it begins."

The plots of lawyers' litigation stories, however, differ structurally from the stories told by popular storytellers. First, lawyers present fragmented or broken narratives. Competing stories introduced by the other party interrupt plots. Procedural rules and trial structures fracture narrative into evidentiary pieces that must be reassembled by fact-finders in their deliberations—and narrative instructions are not included with instructions of law. Evidence is admitted piecemeal, and cross-examinations interrupt narrative flow, or "profluence." Further, lawyers are not permitted to speak directly to juries and judges to connect up the evidence, and may not provide crucial interlineations and summary commentaries, except in their opening statements and closing arguments.

Second, legal storytellers at trial must constantly negotiate or zigzag between narrative themes and their legal theories of the case. These two are discrete and irreducible.

How so? Simply put, a narrative theme is the controlling idea or core insight of any story; it is the fundamental understanding or truth about the meaning of human affairs depicted in the story. Narrative themes are seldom, if ever, made explicit; yet themes are the narrative glue binding together the events of the plot.

As novelist John Gardner observed, "theme is not imposed on the story but evoked from within it—initially an intuitive but finally an intellectual act on the part of the [storyteller]."

ATTORNEYS AS ALCHEMISTS

The analytical theory of the case, however, is always explicit and is organized around readily identified and foregrounded principles, typically the elements of explicit legal rules. Facts are presented in analytical arguments to invoke specifically, rather than evoke metaphorically, the normative principles and legal

AP PHOTO/VINCE BUCCI, POOL, FILE

rules upon which the litigator relies to win. Effective trial attorneys are adept at matching narrative themes with analytical theories, alchemically making the two appear as one.

The third obvious way that story structure in the plots of stories lawyers present at trial differs from that of other popular storytellers is this: Lawyers' trial stories as told are incomplete or unfinished. In its simplest form, classical plot structure includes a beginning, a middle and an ending. A story is obviously incomplete or unfinished without all three parts. As the novelist David Lodge economically describes Aristotle's definition: "A beginning requires nothing to precede it, and an end is what requires nothing to follow it, and a middle requires something both before and after it."

Alternatively, think of screenwriting guru Syd Field's Hollywood version of classical three-act narrative structure for movies: the set-up, the confrontation and the resolution. In Hollywood parlance, a movie's ending should have a big narrative payoff providing a compelling climax and resolution—a morally satisfying yet unanticipated ending completing the causal logic of the plot. Field also adds, without irony: "If you're ever in doubt about how to end your screenplay, think in terms of an 'up' ending. There are better ways to end your screenplay than have your character caught, shot, captured, die or be murdered." This is probably good advice for trial lawyers as well.

At best, lawyer-storytellers propose implicit endings in their battles of competing stories in the courtroom. But, as the master narratologist Yogi Berra presciently observed: "It ain't over till it's over."

Now here's the rub for lawyers: The stories that litigation lawyers tell do not present the structural unity of the completed narrative arc characteristic of a close-ended plot. As Brooks puts it, litigation stories, as told, lack the "narrative closure" of a completed plot structure characterized by "the idea of boundedness, demarcation, and the drawing of lines to mark off and order."

Most especially, the plots of the stories that lawyers typically present in litigation are unfinished stories lacking endings. This is because trial lawyers simply do not have the power to write the endings of their clients' stories. And lawyers cannot fully anticipate which events the jury or judge will credit and incorporate into their plots during deliberations. Consequently, while lawyers struggle to control the ending of a trial story, it is up for grabs—and so is the coda of meaning that will be inscribed upon the tale by jury and judge.

At best, lawyer-storytellers propose implicit endings in their battles of competing stories in the courtroom. But, as the master narratologist Yogi Berra presciently observed: "It ain't over till it's over."

Consequently, trial lawyers must braid together two discrete narrative strands. First, there is a past-tense evidentiary storytelling of what happened before trial. Second, there is a present-tense story being performed at and about the trial itself. In this second strand, the jury and judge are side-participants cast into an active role as characters, called upon to complete the telling and write the ending and coda.

In terms of language theory, the jury thus performs a perlocutionary function, matching the ending of the performative trial story with the past-tense evidentiary narrative in their verdict. The narrative theme (or themes) provides the DNA-like glue that binds together these two discrete yet interlocking stories.

THE INTERSECTION OF PAST AND PRESENT

Johnnie Cochran's famous closing argument on behalf of O.J. Simpson provides an illustration of how the two strands of narrative DNA (the past-tense evidentiary story and present-tense trial story) are twisted together and tightened around the glue of a coherent theme, strongly suggesting an implied ending to an unfinished story. Cochran's legal theory of the case is that incompetent cops botched the murder investigation, and perhaps planted evidence at the crime scene; the elements of murder and Simpson's guilt simply cannot be proved beyond a reasonable doubt.

But Cochran's narrative theme, as is often the case in criminal trials, is based upon a complex betrayal story—about conspiracy and a defendant betrayed by powerful state actors: corrupt cops and a racist police department. It is a story that goes far back into historical time and will go forward into the future unless the jurors act heroically in their deliberations to put an end to it.

These two discrete narrative strands—the past-tense evidentiary story and the present-tense trial story—intersect. Injustice and racial prejudice have morphed into tyranny, resulting in the prosecution of Simpson; systemic corruption and governmental betrayal must be stopped by the heroic jury writing the final ending—a big narrative payoff, an "up" ending—acquittal:

"Things happen for a reason in your life. Maybe there is a reason why you were selected. There is something in your character that helps you understand this is wrong. Maybe you are the right people at the right time at the right place to say, 'No more. We are not going to have this.' What they've done to our client is wrong. O.J. Simpson is entitled to an acquittal. You can't trust the message." ■

PHILIP N. MEYER, a professor at Vermont Law School, is the author of *Storytelling for Lawyers*.

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Pretrial Pros

Jury consultants are changing with the times 20 years after the O.J. verdict

by Marc Davis and Kevin Davis

Legal Services

The nearly 20 years since a jury found O.J. Simpson not guilty of murder have left numerous marks on the national psyche and the legal profession. And for at least one area of legal services—jury consultation—that mark is a measurement of rapid growth.

Jo-Ellan Dimitrius: "Jury consultants are now part of the legal culture for civil, criminal and corporate cases."

PHOTOGRAPH BY ELLEN BARNES

Jo-Ellan Dimitrius, who rose to national prominence as a jury consultant for Simpson's criminal defense team, has seen the number of consultants rise significantly.

"A multiplicity of people have entered the profession," says Dimitrius, founder, president and CEO of Dimitrius & Associates in Henderson, Nevada. "Jury consultants are now part of the legal culture for civil, criminal and corporate cases."

NUMBERS TELL THE STORY

That growth is reflected in the membership of the American Society of Trial Consultants, which has expanded from fewer than 20 members in 1983 to around 300 today and publishes a magazine featuring social science research for jury consultants.

Dimitrius says her client list also has expanded since the O.J. trial. "In my practice, I've worked for both the plaintiff and defense sides of a trial. In corporate cases I've worked on everything—product liability, patent infringement, breach of contract, you name it."

Says John O'Malley, a partner at the Los Angeles office of Fulbright & Jaworski, "I can't imagine at this point not using jury consultants or focus groups." He started hiring jury consultants in the 1990s.

Richard Gabriel, president of Decision Analysis in Los Angeles, worked with Dimitrius on the O.J. trial. "Certainly, the O.J. Simpson trial created a lot of awareness of what we do—and also created myths that we're only jury pickers," says Gabriel, author of *Acquittal*, a book about some of his famous cases. "Hiring consultants is also about risk evaluation."

Gabriel studies what juries want to see, what their biases are, and how they absorb and evaluate information. "How do I make a complex case more clear and more compelling?"

Rich Matthews, a senior trial consultant with Juryology in San Francisco, agrees that the term *jury consultant* is a misnomer.

"What we do is so much broader than what happens with a jury. The jury selection process is the least important thing we do, but the most public," he says. "The bigger things we do really happen before that. It's really trying to resolve the dispute before trial."

That's where focus groups and mock trials come in, which have elements of jury selection. Gathering data on how people view cases, Matthews says, helps lawyers to frame those cases and build the narratives they need to make better arguments.

TECH FOOTPRINTS

A big shift since the Simpson trial is how technology has changed the nature of jury research. "What we have now that we didn't have 20 years ago to research jurors is social media, the Internet, Facebook, LinkedIn—a prospective juror's entire social media footprint," Dimitrius says. "We can now also conduct online focus groups. We can do an Internet search for information on prospective jurors."

Mark Calzaretta, director of litigation consulting with Magna Legal Services in Philadelphia, says online technology helps in the selection of jurors who'd be most sympathetic to a litigant's case.

One new and effective method of developing a potential juror's profile—psychological, social, economic, political, educational, religious—is the online focus group, which can be done virtually anywhere instead of having to gather people in one location.

While jury consultants are working smarter, so are potential jurors. "The average juror has changed since the O.J. case," Dimitrius says. "The average juror is more sophisticated now, more familiar with legal terms and procedures.

"Because of TV shows, jurors are now more knowledgeable," she says. "There are also websites that tell prospective jurors how to get out of jury duty." ■


Darren Kavinoky

PHOTOGRAPH BY KYLE MONK

NoCuffs, Big Bills

Firm spends millions on marketing

by David L. Hudson Jr.

Advertising

The Los Angeles-based Kavinoky Law Firm is better known by its other, catchier monicker: NoCuffs. Darren Kavinoky has already invested millions of dollars in advertising to increase his market share and further his legal business, which focuses heavily on DUI defense. He registered the domain name NoCuffs.com in 2001 and acquired the phone number 1-800-NO-CUFFS in 2008.

But this summer he took the marketing and advertising to a much higher—and more expensive—level. And Kavinoky, who is also the co-creator and host of the television show *Deadly Sins*, says it is already paying dividends.

"The advertising campaign with InterMedia began in July 2014 and is vital for brand expansion," Kavinoky says. "I have already seen an increase in the number of calls and clients. It has been readily apparent that the broadcast medium is a great vehicle for 1-800-NO-CUFFS."

And things won't stop there. He says this "advertising campaign ... currently is at $2 million, but that will increase as we advertise out of California."

'NOT UNPRECEDENTED'

Richard S. Levick, chairman and CEO of the global communications and brand protection group Levick, says that, for this type of law firm, the advertising purchase by Kavinoky is "significant but not unprecedented."

The InterMedia campaign features targeted radio and television advertising.

"To cement the 1-800-NO-CUFFS option as top-of-mind with potential clients," says Robert B. Yallen, president and CEO of InterMedia, "we created several mnemonics to reinforce and bolster the toll-free phone number and law firm name. This includes having attorney Darren Kavinoky, the firm's founder and spokesperson, toss a set of handcuffs toward the camera so they form the zeros in the on-screen 1-800-NO-CUFFS logo."

Kavinoky, who has been practicing law since 1994, finds advertising essential for lawyers in this day and age.

"Advertising is a matter of survival for lawyers in today's marketplace," he says. "In the world of criminal law, unlike many other areas of law, personal referrals are less frequent simply because people don't like to share that they've been arrested."

GREAT IS NOT ENOUGH

In an age of digital marketing, it's not enough to be a great lawyer, Kavinoky explains. "It used to be the case that being great in your legal craft was enough to get people knocking on your door. Younger lawyers with marketing savvy have taken market share away from older, more experienced lawyers."

"Each firm has to make its own decision as to how advertising fits within its overall marketing strategy," says Betsi Roach, executive director at the Legal Marketing Association.

"At LMA we often see our 3,500 members and their firms make an investment of this type as part of their marketing and business development mix," Roach says. "Results vary, of course, and an individual law firm's return on its investment is influenced by numerous factors such as the nature of the client, the level of competition, and general awareness of the legal issues for which the firm offers advice. But some of our members have certainly seen success in this arena."

The bottom line, Kavinoky says, is "the world has changed. And if lawyers cannot change to meet consumer expectations, then they are not serving the needs of the people who need them." ■

Managing Millennials

Bridging this generation gap takes time, talking

by Susan A. Berson

Law Practice

All people are different, but the millennial generation can sometimes seem like a whole different animal.

Millennials are as accustomed to texting as talking, and they rely on the Internet for research. They are less motivated by money than by keeping their personal time. And though they know technology, they shouldn't be confused with techies.

To explore management issues with this demographic—usually defined by birthdates from about 1980 through the mid-'90s—we reached out to those from both sides of the generational divide, and they offered seven tips for keeping workplaces productive.

"There are distinctions among the generations of baby boomers, Generation X and millennials that employers ought to understand for better workplace integration," says Lauren Stiller Rikleen, a lawyer in Wayland, Massachusetts, and a parent of two millennials.

>>**Keep scheduling flexible.** "Boomers tend toward thinking: 'Oh, once they get the mortgage, the millennials will be just like us,' but the data shows that millennials will give up money for time," says Rikleen, author of *You Raised Us, Now Work With Us* and a member of the *ABA Journal* Board of Editors. "Work is about tasks to be completed, not hours to be spent."

Global data about millennials surveyed on their views of work and personal life integration shows that even though millennials graduate with great debt, that alone isn't an effective motivation to instill employer loyalty.

"We want work, but we want a family life, too," says millennial Kirsten Blume, who is president of the student bar association at Northeastern University School of Law.

"Among my peers, ... we're questioning whether being workaholics can offer sustainable careers. We hear from graduates who appear to already be burned out when they've just started their careers."

>>**Use coaching to combat attrition.** "An open learning environment where we can ask questions and have explanations about why things are done a certain way for a project is helpful," Blume says.

Revamp firm orientation as another guidance opportunity for minimizing millennial associates' attrition rates. "Helping associates understand the firm culture, as in explaining what it takes to succeed here, creates a better fit for moving forward," Rikleen says.

Instead of orientation being mostly a one- or two-day process to learn about the firm's computer system, use it as a long-term opportunity, she says.

>>**Use their tech skills.** Millennials are comfortable with digesting data, "but don't make the mistake of turning them into tech support," Rikleen says.

Workplaces usually have varying levels of computer literacy across the worker generations. "If you have a nontechnology-oriented partner in the habit of always asking the millennial associate in the nearby office for help with a device or troubleshooting every little computer problem that comes up, that's a drain on their actual work time," Rikleen says.

Also emphasize these business basics:

>>**Clients come first.** "The reality is that in a firm workplace, there's an imperative to bring in business. To make partner, it's not enough to be smart," says Marguerite Willis, co-chair of Nexsen Pruet's antitrust and unfair competition practice in Columbia, South Carolina. "Sometimes millennials have to learn clients are why we exist, and that involves millennials choosing to change their behaviors to serve them, if necessary."

>>**De-bias evaluations.** Millennials perform better with feedback and structure. "Unconscious bias is a general workplace issue," Rikleen says. "It's a part of how assignments are given and how workers are evaluated. ... Once you understand the science of unconscious bias, you can implement measures to minimize its impact."

>>**Discuss issues; don't avoid them.** "Millennials are used to adults having an interest in their lives," Rikleen says. They are used to problem-solving support from their elders, she says, which speaks to how quickly millennials may adjust to independent problem-solving work assignments.

"When employing millennials, bosses need to spend time getting to know their staff to know what motivates each of them," she says.

>>**Millennials understand pressure.** "Among my peers, there's a pressure already on us to achieve," Blume says—the feeling of having to work harder and do things better, and that they should have success now. "Then there's an added layer of job market pressure. Some of my peers have a kind of doomsday mentality about the current job market, but I think we're resilient."

Should an employer experience a millennial behaving as though he's ready to be managing partner, evaluate whether he's showing entitled bravado or survivalist resiliency in trying to seize an opportunity in a job-scarce environment. ■

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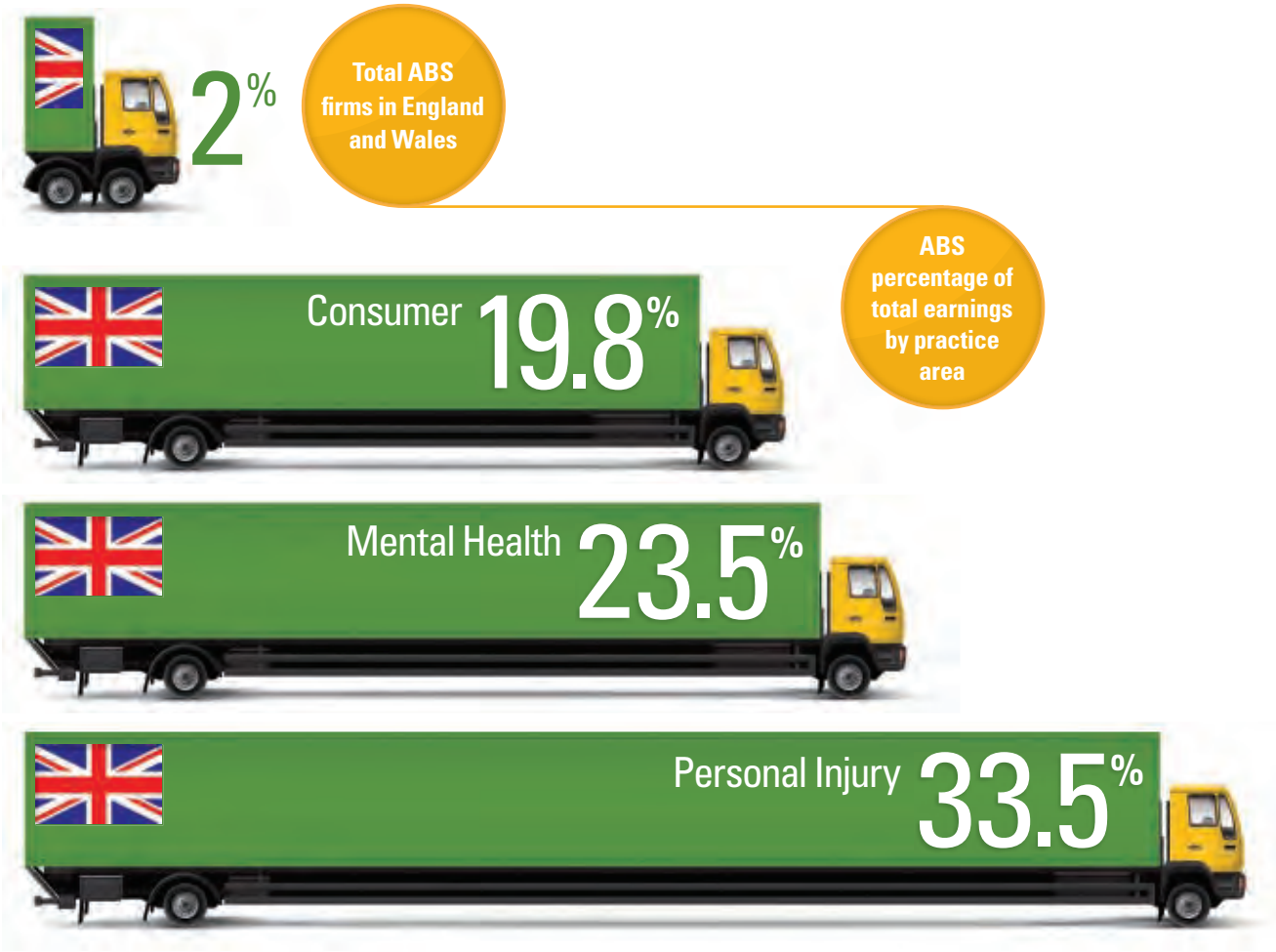
The UK's alternative firms are reshaping legal services



THE UNITED KINGDOM just started issuing licenses for alternative business structure firms—which enable nonlawyers to own a law firm and combine it with other nonlaw businesses—in March 2012. But according to a 2014 study by the Solicitors Regulation Authority, ABSs in certain practice areas are taking a considerable portion of the earnings, though ABS firms represent just over 2 percent of legal entities in England and Wales.

The study reached out to 186 of the 190 ABS firms between October and December 2013. Response was about 22 percent, or 41 firms.

For more, see "Flexing ABS," page 62

SEE MORE PRACTICE STATS ONLINE
ABAJournal.com/lawbythenumbers

DATA EXCERPTS FROM: *Research on Alternative Business Structures* by the Solicitors Regulation Authority. Link to the full report at ABAJournal.com/lawbythenumbers.

GRAPHICS BY JAMIE GANNON


Stacey Burke

Search for SEO

What's working for lawyers seeking higher results

by Joe Dysart

Marketing

Staying current about what Google Search is favoring—and adjusting the design and content of your website—can be critical for getting your name at the top of search engine returns. (Not an easy task, since the search goliath often changes its algorithm to combat those who try to game its system.)

These days, that means ensuring your website offers text and longer articles that reflect quality writing about a specific topic, according to experts in search engine optimization. And it means the person generating articles and text for your site ideally needs to be a recognizable, respected and prolific Web author.

Here's how to get from here to there:

»GO WITH A FREQUENTLY UPDATED BLOG OFFERING TRULY USEFUL CONTENT. Google has gotten much better at sniffing out sites that post reams of robotic text, punishing those sites accordingly.

"I think that all websites should integrate a blogging platform," says Stacey Burke, an attorney and law firm consultant based in Houston. Adds Robert Algeri, a partner at Great Jakes Marketing Co., a Web design firm that does work for lawyers: "Write content that gets shared, and Google success will follow."

One note for extremely busy lawyers is that, generally, search engines only re-index your website every two weeks. So if you only have time to update your blog every two weeks, you'll still enjoy higher search engine returns as a result, according to Bob Hendrix, CEO of the Web design firm Elegant Image Studios.

»HELP GOOGLE TRACK YOU AS AN AUTHOR. Google is giving preferential treatment to posts from authors it knows, tracks and monitors. Get on the good side of the goliath by creating a Google Plus page for yourself. Then make a stop at Google's authorship page to establish your author credentials.

»USE KEYWORDS JUDICIOUSLY, BUT USE THEM. While Google is punishing websites that engage in obvious keyword stuffing (repeating the same word or phrase over and over again throughout a post), it does still rely on keywords to identify content.

Essentially, that means you should plug a keyword or phrase into your headline, subhead and opening sentence of your text, and in the captions for your multimedia, says Sarah Skerik, vice president of social media for PR Newswire.

»GO WITH DEEP CONTENT. Aim for pieces that are 1,000 words minimum. And ensure your text is not blatantly generic or easily found on any number of other law firm sites.

»PRACTICE GOOD WEBSITE ADDRESS/TAG HYGIENE. In the end, much about working with Google's algorithm means getting your machine to make nice with its machines. That means getting the technical side right in the following ways:

- Choose page title tags carefully. The title tag—the word or phrase that describes your page to the search engine—is one of the most important choices you can make to attract Web traffic. Your title tag is going to be the text people click on when Google returns the search engine results for your page. Keep title tags to about 60 characters, and include an appropriate keyword or two if possible.
- Be equally choosy with page header tags. Header tags, the H1 tags that are included behind all the pretty colors and images on your webpage, are also major guides Google and other search engines use. Usually your H1 tag and title tag should be the same keyword or phrase.

Don't forget image tags. Too many websites are littered with cryptic tags that frustrate the search engines and offer no clue as to what the visual is. When naming your image, use your tags to finely describe what your image is about—and reap the reward of an overall higher ranking in the search engines. ■

JULIE SOEFER

Armchair Marketing

Lawyers, students use tactics they can deploy from their desks

by G.M. Filisko

Branding

Raise your hand if you have great ideas (or skills) to promote, but just haven't found the time to get them off the ground.

"One of the biggest problems lawyers have, whether it's with marketing or succession planning, is implementation," says John Olmstead, president of Olmstead and Associates, a legal management consultancy in St. Louis.

Ari Kaplan couldn't agree more, and he believes it's because there's no accountability.

The principal of Ari Kaplan Advisors, a professional services consultancy in New York City, has launched Lawcountability—software that about 200 lawyers in some 30 cities have purchased to build accountability in their business and professional development activities. Kaplan has also introduced Lawcountability JD, which helps law students do the same in their job search and career development efforts.

"The idea is to get you to execute what you know you need to do to be successful," says Kaplan. "That includes networking, outreach initiatives, content creation and distribution, which are all techniques for raising your profile."

That's something Kaplan has done personally. In 2006, after practicing for nine years, he struck out on his own to become a writer. Since then, he's published articles, books, white papers, case studies and client profiles. He then created a program to teach lawyers how to get published, and followed that with a training program on networking and other ways to get noticed.

"I'm always interested in what other people are doing, interesting exercises they're involved in, challenges and solutions to their challenges," Kaplan says. "And I try to share those."

Ari Kaplan

PHOTOGRAPH BY LEN IRSIH

VIDEO LESSONS

Through Lawcountability, lawyers watch a live, 10-minute online video feed each week (also available on demand) featuring Kaplan walking them through a tactic to market themselves. He also assigns three follow-up tasks, each of which they'll get an email reminder to do. Firms pay $39 per user per month for up to 12 users; 13 or more users pay a group fee starting at $499 monthly.

The lawyers at Sutherland Asbill & Brennan signed up, says Lewis Wiener, a partner in the firm's Washington, D.C., office. "Ari will say, 'Go to LinkedIn. You have on LinkedIn the ability to send updates. While we're talking, click on this button; and while we're here, type something in the update bubble that lets people in your network know what you're up to,' " he explains.

Wiener had just written a case update for clients. So during that video session, he posted it to LinkedIn. That day, Wiener adds, about a dozen of his LinkedIn contacts responded to his post.

The lawyers at Mirick, O'Connell, DeMallie & Lougee in Boston also find value in Lawcountability, says Diane Power, executive director. However, they've asked Kaplan to dial back the notifications, which can feel like pestering. The program also allows users to compete against each other in completing tasks. Power says those gaming features also got panned because they made busy lawyers who couldn't get to them right away feel bad, like they were losing a competition.

STUDENT VERSION

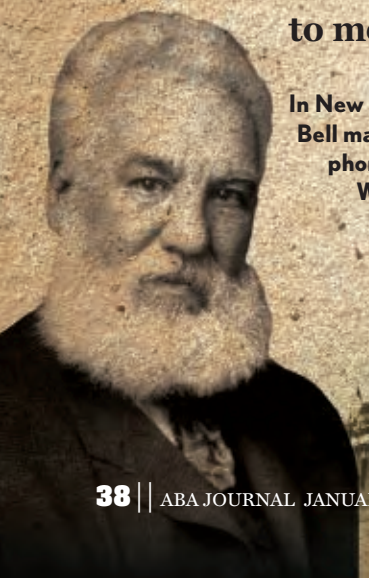
Lawcountability JD is similar but doesn't offer the live feed. Schools pay $1,500 per academic year to offer it to students.

Halley Tucker, a second-year student at St. Mary's University School of Law in San Antonio, says she's gained confidence from the sessions. Last year, Tucker was hesitant to introduce herself to, say, a speaker after a seminar. "I'm just a 1L," she thought. "Why would anybody want to talk to me?"

Turns out some people wanted to do just that. After tapping into the videos, Tucker had the pluck to network at a recent event and got two requests for information, one of which resulted in a fall semester job offer. ■

ONE HUNDRED YEARS OF LAW

Since January 1915, the *ABA Journal* has borne witness to monumental developments in the law and the profession



In New York City, Alexander Graham Bell makes the first transcontinental phone call to assistant Thomas Watson in San Francisco.

German U-boats sink the *Lusitania*.

Oliver Wendell Holmes Jr., "the Great Dissenter," is almost halfway through his 30-year term.

It goes without saying that the world was a vastly different place in 1915 than it is today. But while the events of that year now carry the echoes of history, they also predicted some of the upheaval of the coming century.

A year earlier, the outbreak of war in Europe, which quickly spread to the Middle East, Africa and parts of Asia, had shattered the last lingering vestiges of innocence that characterized the Victorian Age. But in 1915, World War I—called the Great War because no one imagined such a conflagration could happen again—unleashed the horrors of modern warfare. During that year, Germany introduced poison gas as a weapon, and 1,198 passengers died when the Lusitania was sunk on May 7 by a German submarine. By the end of the year, the British Army had begun testing the first prototype tanks.


The American Bar Association Journal

January 1915: The first issue of the *ABA Journal*.

In the United States, meanwhile, President Woodrow Wilson continued to assert his commitment to keep the country out of the war. In many ways, the nation still inhabited the spirit and values of a predominantly rural 19th century society rather than the urban industrial landscape that would come to characterize the 20th. The Civil War, for instance, was still vivid in the American mind: Even one of the U.S. Supreme Court's most distinguished members, Oliver Wendell Holmes Jr., had been wounded—three times—during his service in the Union Army.

In January 1915, the House of Representatives rejected a proposal to give women the right to vote. And in February, *The Birth of a Nation* became one of the earliest film blockbusters but also raised controversy for its negative portrayal of blacks and its glorification of the Ku Klux Klan.

But 1915 carried hints of change, as well. In January, the first coast-to-coast telephone call was made by Alexander Graham Bell in New York City and his assistant Thomas Watson in San Francisco. In February, the first stone of the Lincoln Memorial was put into place.

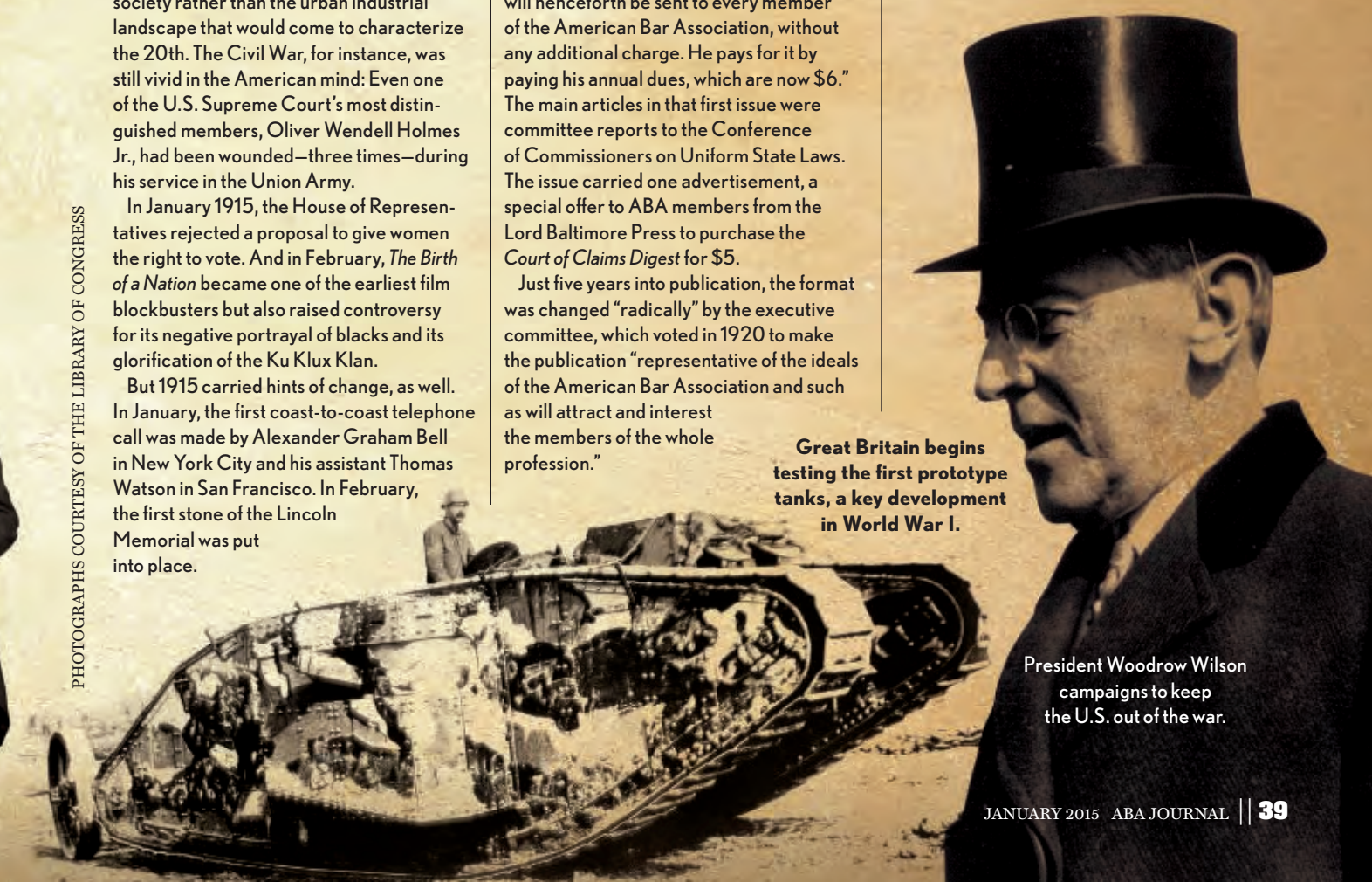
Babe Ruth hit his first major league home run. Ford rolled the millionth car off its assembly line at the River Rouge plant in Detroit. And on Oct. 25, Lyda Conley became the first Native American woman to be admitted to practice before the Supreme Court.

The American Bar Association was perhaps thinking about the future as well at its 1914 annual meeting when the executive committee was authorized to provide for the publication of a journal with announcements and transactions of the association, including the work of various affiliated bodies. The committee "took favorable action, and the establishment of the quarterly, of which this constitutes the first number, is the result," states the foreword to the *ABA Journal*'s first issue, which was published in January 1915. "The *Journal* will henceforth be sent to every member of the American Bar Association, without any additional charge. He pays for it by paying his annual dues, which are now $6." The main articles in that first issue were committee reports to the Conference of Commissioners on Uniform State Laws. The issue carried one advertisement, a special offer to ABA members from the Lord Baltimore Press to purchase the *Court of Claims Digest* for $5.

Just five years into publication, the format was changed "radically" by the executive committee, which voted in 1920 to make the publication "representative of the ideals of the American Bar Association and such as will attract and interest the members of the whole profession."

Much has changed about the *Journal*—along with the law, society and the world—since that first issue. "The *ABA Journal*'s development as the nation's leading legal news source reflects the broadening scope and evolving needs of our changing profession during the past century," says ABA President William C. Hubbard. "Looking forward, the legal profession must continue to implement new ways to improve our service to clients and expand access to justice for all. As the profession continues to evolve, lawyers worldwide will learn from the *ABA Journal* about innovations in the law and the delivery of legal services. The profession depends on the magazine's enduring commitment to reporting about the practice of law in print and online."

In this special issue, the *Journal* marks its centennial by highlighting what the editors have chosen as the key legal developments of each decade of the magazine's existence. If you don't agree with our choices, we're counting on you to tell us so in your letters and online comments. —*James Podgers*



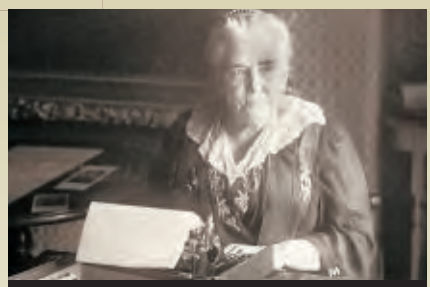
Great Britain begins testing the first prototype tanks, a key development in World War I.

President Woodrow Wilson campaigns to keep the U.S. out of the war.

PHOTOGRAPHS COURTESY OF THE LIBRARY OF CONGRESS

WILSON, WOMEN AND WAR

Against what was happening elsewhere in early 1915, a mid-January meeting in Washington seemed inconsequential, even if it was at the White House. France was losing ground against the Germans at Soissons; Italy had suffered a massive earthquake; and the rebel forces of Pancho Villa in Mexico were threatening the ruling Carranza regime. Still, President Woodrow Wilson met with Dr. Anna Howard Shaw and a small group of suffragists—and for the first time, he was not politely dismissive.

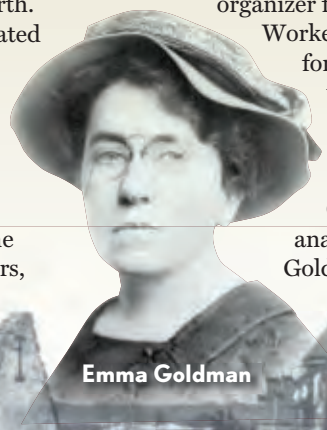


Suffragist Dr. Anna Howard Shaw

The National American Woman Suffrage Association was conducting a state-by-state campaign to win the vote for women, and Shaw was soliciting presidential support for suffrage in New Jersey, where Wilson had been governor. Just a year earlier, Wilson had rebuffed the women—this after 5,000 members of the National Woman's Party caused a near-riot when they marched on Washington the day before his inauguration. But women were gaining notoriety and power on a number of political fronts; and even with a European war on the American horizon, Wilson had to notice that women were already prominent in the social movements that would govern the coming decade: labor, suffrage and Prohibition.

Women had been involved in the labor movement since the Civil War. A shortage of male workers created opportunities for women with the industrialization of the North. But their presence also created new sources of pressure for equal treatment in and out of the workplace and new voices demanding better working conditions for workers of all kinds. Whether the demands came from feminists, labor leaders, Progressives, anarchists or birth control activists, the core message was the same: Women wanted more say about the conduct of their lives. And the demand wasn't always peaceful.

Just two years before Shaw's meeting with Wilson, union activist Mary Harris "Mother" Jones—known by some as "the most dangerous woman in America"—had been convicted and sentenced in a military court for her part in an armed conflict involving coal miners in West Virginia. As a key organizer for the United Mine Workers, she became an iconic force in a series of labor uprisings throughout the nation's mines and mills, from Pennsylvania to Colorado. Likewise, anarchist firebrand Emma Goldman embodied the



Emma Goldman

LAW BY THE DECADE

A political push by women in the labor, suffrage and Prohibition movements combined to define a decade.

1915-1924

Nearly four years of war laid waste to Soissons, France, shown here in 1919.

Transcontinental phone service starts from New York City to San Francisco.

1915

Congress bans child labor with passage of the Keating-Owen Act.

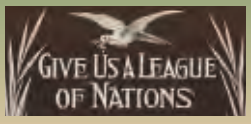
1916

The United States enters World War I.

1917

Congress passes the Sedition Act, orchestrated by A. Mitchell Palmer.

1918



The Senate rejects the League of Nations.

1919

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angry opposition to capitalistic concentrations of power. Before her imprisonment—and subsequent deportation in 1919—for encouraging draft resistance during the Great War, Goldman had been at the center of a violent steel mill strike, an attack on a steel industry executive, and she was even questioned about involvement in the assassination of President William McKinley.

Some of the voices were determined but peaceful. Florence Kelley, daughter of a prominent abolitionist, had become a leading advocate for the eight-hour workday and a pioneer in the use of social science in court cases such as *Bunting v. Oregon* (1917), which upheld the power of states to regulate the health and safety of workers. Working from a minor post in the YWCA in Richmond, Virginia, Lucy Randolph Mason was becoming a force in the drive against child labor. And through her stewardship of the New York Consumer League, Frances Perkins grew close enough to New York Gov. Franklin Roosevelt to become secretary of labor—the first woman ever named to a Cabinet post—when he became president.

Although the Woman's Christian Temperance Union was primarily associated with Prohibition, the group's political ambitions were closely allied with the drive for suffrage. Frances Willard, the WCTU's second president, had turned the organization toward a wide variety of social injustices, including suffrage; and gaining the vote would provide a vital tool in all phases of the movement. After her death in 1898, Anna Adams Gordon, Willard's longtime companion, made sure the organization would continue its work on women's rights in the workplace and child labor.

The political role of women and Prohibition was not lost on the beer and liquor interests, who saw the rise of female voters as a threat to the viability of their businesses. Shortly before passage of the 18th Amendment, a lobbyist for the United States Brewers Association boasted before Congress: "We have defeated women's suffrage at three different times."

Shaw, a physician and a Methodist minister, had begun her activism with the WCTU, but had been guided toward suffrage by Susan B. Anthony. By 1917, as the National Woman's Party continued its "Silent Sentinel" protests in front of the White House, Wilson readied Congress for entry into the war in Europe; and Shaw urged Wilson to include suffrage as part of his war plans. By October 1918, Wilson was ready to do so. In an extraordinary speech to Congress, he maintained that suffrage was "vital to the winning of the war." Congress rejected a constitutional amendment, but approved one a year later. By January 1920, the 18th and 19th amendments had been ratified—women's suffrage and Prohibition were in place.

—Allen Pusey

Florence Kelley

Frances Willard

At Shaw's urging, President Wilson used the war to pass the 18th Amendment.

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1920 The American Civil Liberties Union is founded in the midst of anti-communist hysteria.

1921 A race riot breaks out in Tulsa, Oklahoma, leaving as many as 300 dead.

1922 The Supreme Court rules baseball is a sport and exempt from anti-trust laws.

1923 The first presidential address is broadcast on the radio by Calvin Coolidge.

1924 Leopold and Loeb are convicted of murder in the "Trial of the Century."

ON TRIAL: *SCIENCE V. RELIGION*

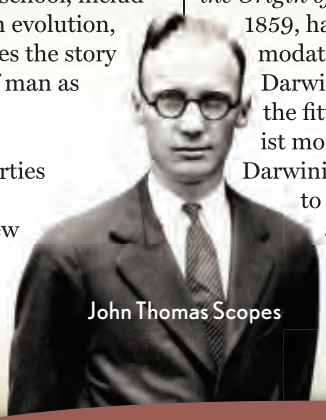
In the summer of 1925, the nation's media elite gathered in the tiny Tennessee town of Dayton. What brought them to the summer heat of the Rhea County courthouse was another "Trial of the Century." Although the century had already witnessed its share of sensational courtroom drama—Harry Thaw, the Chicago Black Sox, Roscoe "Fatty" Arbuckle, and Leopold and Loeb—the trial of John Thomas Scopes promised to be something different.

Clarence Darrow

Scopes was indicted for violating a state law that specifically forbade public schools from teaching Charles Darwin's theory of evolution. In the press, the trial was styled as a confrontation between free speech and the Bible and, not incidentally, a contest between William Jennings Bryan and Clarence Darrow, two of the most gifted rhetoricians of their time. But at its heart was a show trial in nearly every sense of the word.

In March 1925, Tennessee Gov. Austin Peay signed into law the Butler Act. Named for a Tennessee farmer and state legislator, the law reflected a belief held by fundamentalist Christians that Darwin's far-reaching conclusions about the development of life on Earth undermined the moral force of biblical truth. The law made it a criminal act for any publicly funded school, including universities, to teach evolution, or any theory "that denies the story of the divine creation of man as taught in the Bible."

Barely a month later, the American Civil Liberties Union began soliciting volunteers to test the new Tennessee law. Sensing that a trial would bring money and attention to their decaying burg, a group of Dayton businessmen recruited Scopes, a football coach and part-time biology teacher, for the ACLU.



John Thomas Scopes

Though the local prosecutor agreed to pursue a case against Scopes, Dayton elders found star power in Bryan and Darrow. Bryan, 65, was a three-time Democratic presidential candidate and secretary of state under President Woodrow Wilson. He was a devout Presbyterian, a staunch Populist, a steadfast Prohibitionist and an outspoken anti-evolutionist. Darrow was an avowed atheist, a director of the ACLU and the nation's most celebrated criminal attorney. At 68, Darrow seemed the perfect foil for Bryan.

There was much more at play in the case than God versus Darwin. The biblical implications of Darwin's *On the Origin of Species,* published in 1859, had already been accommodated by mainstream religion. Darwin's notion of "survival of the fittest," co-opted as a capitalist moral value by so-called social Darwinists, was as much an affront to Bryan's Populist leanings as to his biblical literalism.

In the midst of the Roaring '20s, however, America was poised between wars and extremes. The stock market was ginning money on its way to the Great Crash. Prohibition, though built on moral probity, was instead creating criminal empires built on political corruption and bathtub gin. America's powerful rural politics were yielding to big cities and an urban sophistication with white-collar employment, low-cost automobiles, birth control and jazz—and the backlash could be heard full-throated in nativism, anti-Bolshevism, radio evangelism and a re-emergence of the Ku Klux Klan.

Though the trial was intended by both sides to yield a guilty (and appealable) verdict, it still proved sensational. When Bryan agreed to testify as an expert on the Bible, so many spectators showed up that the proceedings were moved outside. Bryan's faith proved no match for Darrow's demanding rationalism. Darrow wondered aloud whether Bryan had questioned anything about the Bible.

"No, sir, I have been so well-satisfied with the Christian religion that I have spent no time trying to find arguments against it," Bryan replied, to growing guffaws. "Were you afraid you might find some?" countered Darrow. Said Bryan: "No, sir. ... I have all the information I want to live by and to die by."

1925 Benito Mussolini becomes the dictator of Italy and takes the title *Il Duce.*

1926 Gene Tunney beats Jack Dempsey for the heavyweight boxing title.

1927 Charles Lindbergh flies from New York to Paris, the first solo flight across the Atlantic.

1928 Mickey Mouse makes his first appearance in the Walt Disney cartoon *Steamboat Willie.*

1929 The U.S. stock market crashes, spurring the Great Depression.

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LAW BY THE DECADE

The Butler Act made it a criminal offense for Tennessee public schools, even universities, to teach evolution.

1925-1934

On its eighth day, the Scopes "monkey trial," as it became known, ended abruptly; to ensure a guilty verdict, Scopes entered a plea. But a state appeals court overturned the $100 fine the judge imposed on Scopes. With no grounds for appeal to the U.S. Supreme Court, the Tennessee law remained in effect until it was repealed in 1967.

Bryan, who died five days after the end of the trial, never had the chance to redeem his badly battered reputation, but the debate over biblical literalism has endured over the 90 years since. In 2005, a Pennsylvania school district was permanently barred by a federal court from teaching an alternative to evolution known as intelligent design, and the tension between faith and science continues in the public square.

—Allen Pusey

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William Jennings Bryan

The Rhea County courthouse (background) couldn't hold all of the 1,000-plus spectators, so the proceedings were moved outside.

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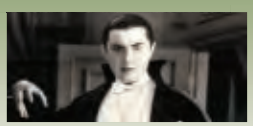
1930 Mohandas Gandhi begins his 240-mile march to protest the British salt tax.



1931 *Dracula*, starring Bela Lugosi, is released.

1932 Franklin D. Roosevelt is elected president.

1933 Adolf Hitler becomes Germany's chancellor.

1934 John Dillinger is named America's first Public Enemy No 1.

A NEW DEAL

President Franklin D. Roosevelt

PHOTOGRAPH BY VINCENZO LAVIOSA/©CORBIS

LAW BY THE DECADE

The famous "100 days" that opened FDR's first term as president were perhaps the most astounding period of legislative action in the history of the federal government.

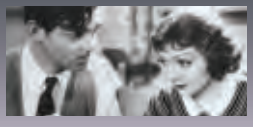
1935-1944

Alexander Hamilton had called the judiciary the "least dangerous branch," but by the 1933 inauguration of Franklin D. Roosevelt, the U.S. Supreme Court was a caged tiger. Its justices had been appointed by a sequence of Republican presidents, backed by the capitalists of the Gilded Age, and the justices' mission was the protection of individual property. Legal historians often refer to this period as the *Lochner* era, named for the landmark 1905 ruling rejecting a New York state law that would have limited bakery employees' working hours in an effort to preserve their health. The court said the Constitution implied a "liberty of contract" favoring business owners and stood by laissez-faire government.

But the Great Depression wiped out that thinking as a quarter of the labor force became jobless, hungry and desperate. Roosevelt vowed to eliminate "fear itself," and in his first 100 days began to install the New Deal, a flurry of domestic programs using government regulations to revive the sputtering economy. The statutory package, an alphabet soup of acronyms, included the National Industrial Recovery Act and the Agricultural Adjustment Act. The NIRA was an omnibus bill that sought cooperation among industries, workers and the government to provide fair competition and promote collective bargaining. It created the National Recovery Administration to oversee policies, and businesses proclaimed their alliance by posting its blue eagle logo. The AAA provided relief to farmers by paying them to reduce production, helping to cut crop surpluses and increase prices.

A seething Supreme Court was watching this active Congress and president churn out federal programs. Its conservative faction was led by four aging justices—Pierce Butler, James C. McReynolds, George Sutherland and Willis Van Devanter—referred to as the Four Horsemen. They were often joined by Chief Justice Charles Evans Hughes and Justice Owen J. Roberts, and together they resisted the New Deal. In 1935's *A.L.A. Schechter Poultry v. United States,* the entire court invalidated the NIRA, saying the commerce clause stopped at state borders, barring Congress from its power of regulation. In 1936, the court split along partisan lines, with the Four Horsemen, Chief Justice Hughes and Justice Roberts rejecting the AAA. In another case, a furious Justice McReynolds dissented from the bench, proclaiming that the Constitution was dead and decrying Roosevelt as little more than the Roman Emperor Nero "at his worst."

With his New Deal programs foundering, Roosevelt and his advisers came up with a counterattack. After his thunderous landslide re-election in 1936, he proposed a bill that would grant him the power to appoint an additional justice for every member of the court older than 70. He argued that the measure was meant to lighten the justices' workload, but few were deceived: Roosevelt wanted his own justices. Republicans slammed Roosevelt's arrogant "court-packing plan," but public opinion was split. Nevertheless, the plan was never put into place. Justice Van Devanter announced he would retire; and then,



It Happened One Night wins the Oscar for best picture.

1935

King Edward VIII abdicates his throne to marry Wallis Simpson, a divorced American.

1936

German and Italian air forces bomb the Basque village of Guernica in the Spanish Civil War.

1937

Joe Louis knocks out Max Schmeling in one round at Yankee Stadium.

1938

Germany invades Poland, starting World War II.

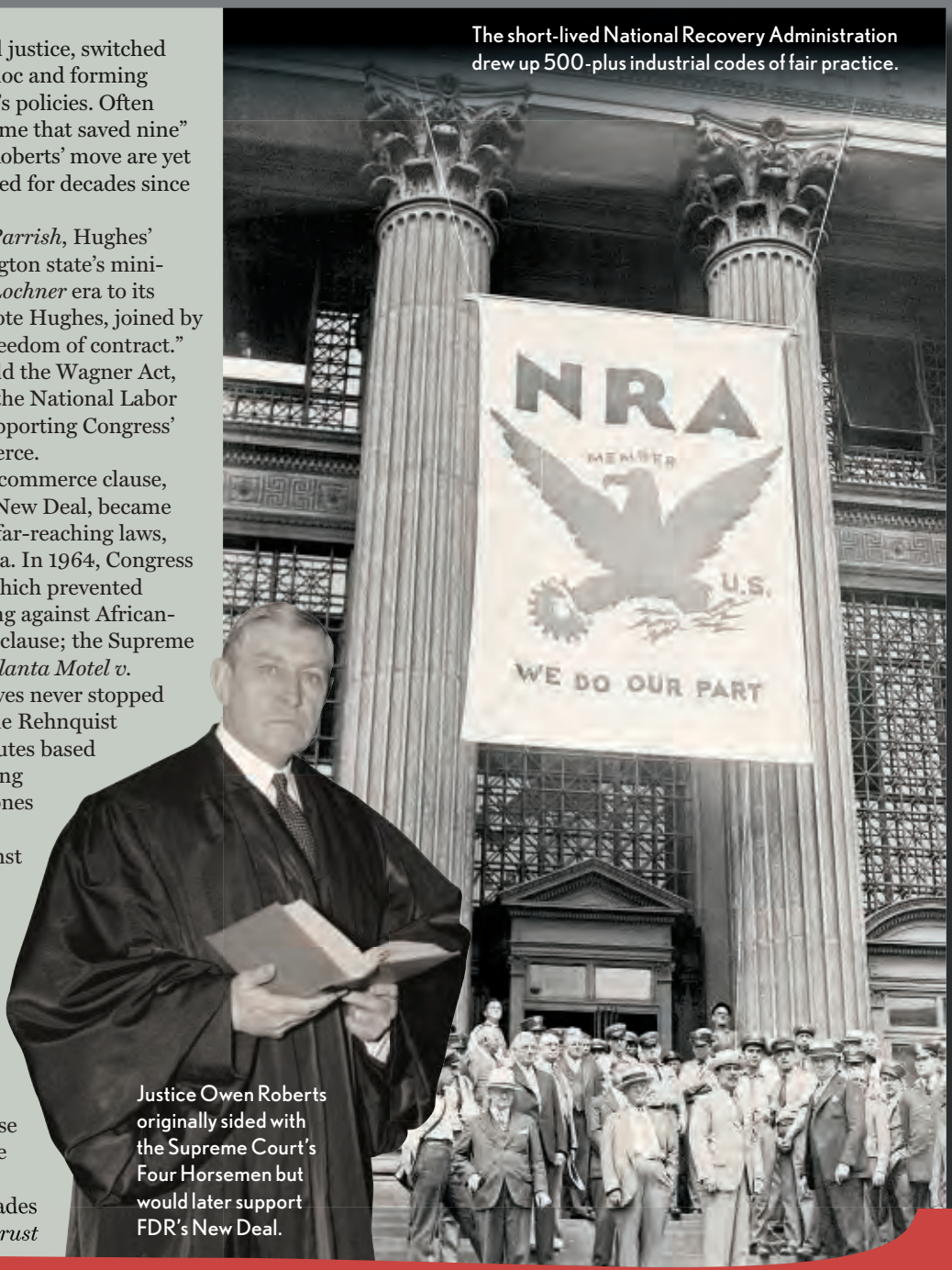
1939

ASSOCIATED PRESS

curiously, Roberts, the pivotal justice, switched sides, joining the New Deal bloc and forming a majority favoring Roosevelt's policies. Often referred to as the "switch in time that saved nine" justices, the reasons behind Roberts' move are yet unknown and have been argued for decades since by legal historians.

In *West Coast Hotel Co. v. Parrish*, Hughes' 1937 decision upheld Washington state's minimum wage law and sent the *Lochner* era to its grave. "The Constitution," wrote Hughes, joined by Roberts, "does not speak of freedom of contract." That year the court also upheld the Wagner Act, a crucial statute that created the National Labor Relations Board, this time supporting Congress' control over intrastate commerce.

The expanded scope of the commerce clause, which validated much of the New Deal, became critical for Congress to enact far-reaching laws, especially in the civil rights era. In 1964, Congress based the Civil Rights Act—which prevented businesses from discriminating against African-American customers—on the clause; the Supreme Court upheld it in *Heart of Atlanta Motel v. United States*. But conservatives never stopped distrusting it. In the 1990s, the Rehnquist court turned over several statutes based on the commerce clause, among them the Gun-Free School Zones Act in 1995's *United States v. Lopez*, and the Violence Against Women Act in *United States v. Morrison* in 2000. In his *Lopez* concurrence, Justice Clarence Thomas stated the case starkly: "Our case law has drifted far from the original understanding of the commerce clause. In a future case, we ought to temper our commerce clause jurisprudence." The fate of the New Deal is likely to play out in the Supreme Court for decades to come. —*Richard Brust*



The short-lived National Recovery Administration drew up 500-plus industrial codes of fair practice.

Justice Owen Roberts originally sided with the Supreme Court's Four Horsemen but would later support FDR's New Deal.

PHOTOGRAPH COURTESY OF THE LIBRARY OF CONGRESS; ©CORBIS

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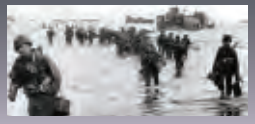
John Steinbeck wins the Pulitzer Prize for *The Grapes of Wrath.*

The Japanese attack Pearl Harbor, launching the U.S. into World War II.

Anne Frank's family goes into hiding in Amsterdam.

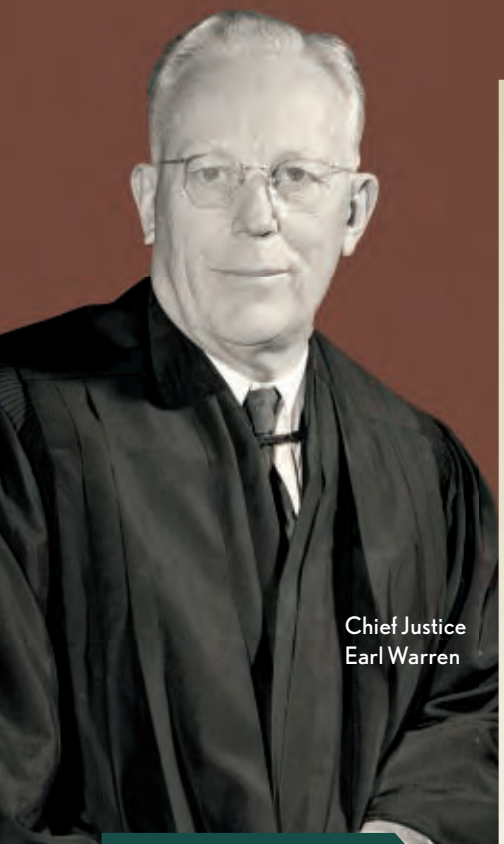
Singer Frank Sinatra debuts on radio's *Your Hit Parade.*



D-Day: The 150,000-member Allied Expeditionary Force lands in France.

1940 1941 1942 1943 1944

FOOTNOTE 4



Chief Justice Earl Warren

LAW BY THE DECADE

The Supreme Court announced one of the most compelling rulings in American history and set the stage for a remarkable series of cases that attempted to liberate individuals from government pressure.

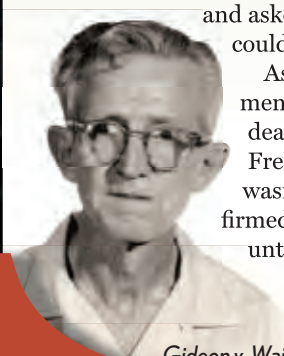
1945-1954

The Carolene Products Co. was convicted of marketing a compound called Milnut—skim milk and coconut oil mixed to resemble condensed milk. It violated a federal law prohibiting the interstate sale of milk or cream blended with fat or oil other than milk fat, on grounds that such a mixture was a health hazard. The company sued, arguing the statute exceeded Congress' powers under the commerce clause and the due process clause. In 1938 the U.S. Supreme Court upheld the law, stating that there was a rational purpose for Congress to pass it.

But the court added Footnote 4, which implied that there may be an opportunity to examine more carefully any statutes that restrict political processes or violate the 14th Amendment, or that require greater attention to laws that "prejudice … discrete or insular minorities." If the Supreme Court could address individuals who are denied the rights of citizenship, it could herald a refreshing approach to ensuring democracy.

Meet the Warren court.

Legal historians say Footnote 4 provided the court's guiding principle on equal rights, and when California Gov. Earl Warren took over as chief justice in 1953, he was already facing a daunting challenge: a pile of school desegregation cases from four states and the District of Columbia, named for the case from Topeka, Kansas: *Brown v. Board of Education*. In one of his first conferences, several justices said Warren made clear that segregation had no place in contemporary America and asked how the court could reach unanimity.



As a recess appointment after the sudden death of Chief Justice Fred Vinson, Warren wasn't officially confirmed by the Senate until March 1954. Two and a half months later, the court announced one of the most compelling rulings in American history. *Brown*, the 13-page decision that abolished separate but equal education, set the stage for a remarkable series of cases that attempted to liberate individuals from government pressure: *Baker v. Carr* (1962), giving the court jurisdiction to equalize voting districts; *Gideon v. Wainwright* (1963), stating that all indigent criminal defendants must be provided counsel; *New York Times v. Sullivan* (1964), narrowing libel laws; *Griswold v. Connecticut* (1965), recognizing the right of privacy; and *Miranda v. Arizona* (1966), specifying that suspects under arrest must be told their constitutional rights.

In the wake of school desegregation confrontations in Little Rock, Arkansas, the court passed one of its most far-reaching decisions upholding its supremacy in determining the law of the land, regardless of what state governments

Gideon v. Wainwright guarantees citizens the provision of legal counsel.

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The atomic bomb is dropped on Hiroshima, Japan, by the Enola Gay, a B-29 bomber.

1945

Dean Martin and Jerry Lewis stage their first show in Atlantic City.

1946

Jackie Robinson becomes the first African-American major league baseball player.

1947

President Harry Truman is re-elected in an upset over Republican Thomas Dewey.

1948

Arthur Miller's *Death of a Salesman* opens at the Morosco Theatre in New York City.

1949

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may desire. To many scholars, *Cooper v. Aaron* (1958) represents the high-water mark of the Warren court, an assertion of judicial prerogative that critics still claim is an unconstitutional misappropriation of power. Many said the Warren court pressed judicial review too far, claiming that the Constitution meant exactly what the court said it meant.

The reaction to *Brown* and the Warren court's criminal justice cases was also harsh. The "Southern manifesto," a credo signed by a majority of Southern legislators, called *Brown* an abuse of power. Southern states sought to intimidate the NAACP; Alabama required the association to reveal the names and addresses of its members and agents. The high court rejected that law in a 1958 case. Nor did the criticism stop there. Moderates claimed that law was scanty in cases such as *Brown* and *Miranda*, and they questioned whether the court was delving into social engineering. In addition, many of the court's cases opened the field to more progressive decisions; *Griswold*'s right of privacy in contraceptive issues was a precedent for 1973's *Roe v. Wade*. Indeed, the current political and legal climate is still reacting to the Warren court, with stricter limitations on abortion rights, *Miranda* exceptions and curtailment of voting rights.

Estelle Griswold and Cornelia Jahncke of Planned Parenthood celebrate their victory.

But the fate of *Brown* is perhaps best revealed in a 2007 Supreme Court case: *Parents Involved in Community Schools v. Seattle School District No. 1*.

The more conservative Roberts court rejected two school districts' desegregation plans, saying they may not integrate through explicit accounting of a student's race. Both sides in the ruling claimed to be faithful to *Brown*. For Chief Justice John G. Roberts Jr., "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." In dissent, Justice Stephen G. Breyer read from the bench, saying wistfully, "It is not often in the law that so few have so quickly changed so much." —*Richard Brust*

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In 2014, *Brown v. Board of Education* celebrated its 60th anniversary.

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Sen. Joseph McCarthy charges that the State Department is infested with Communists.

1950


New York Giant Bobby Thomson hits a ninth inning homer to win the National League pennant.

1951


Republican Dwight D. Eisenhower defeats Democrat Adlai Stevenson for president.

1952


James Watson and Francis Crick announce their discovery of the structure of DNA.

1953


Bill Haley & His Comets record "Rock Around the Clock," starting the rock 'n' roll craze.

1954

CIVIL RIGHTS STRUGGLE GAINS MOMENTUM

In 1955, the U.S. Supreme Court received a case that followed logically from its ruling a year earlier in *Brown v. Board of Education* that separate public schools for races are "inherently unequal." *Naim v. Naim* involved a Virginia miscegenation law that negated the marriage of a Chinese man and a white woman, and the justices could snatch another dagger from Jim Crow.

But the court declined the matter because it might stoke the backlash underway, largely in the South, against *Brown*'s edict. Twelve years later it would overturn the Virginia law against interracial marriage. Much happened in the interim, and much didn't.

Brown launched a civil rights revolution, driven as much by peaceful protests and passive resistance as by law, which was flouted routinely.

In 1955, Rosa Parks refused to give up her seat on a bus to a white person and was convicted of violating Montgomery, Alabama's segregation law. Blacks boycotted the bus system for 13 months, until the Supreme Court ruled such segregation was unconstitutional in another case, *Browder v. Gayle*.

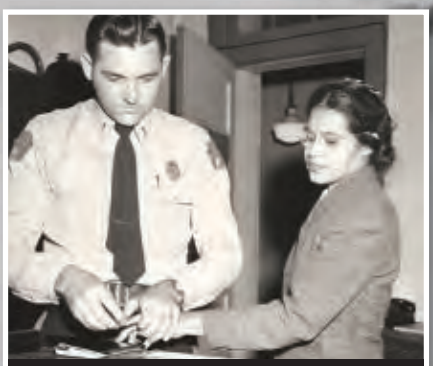
The boycott's 27-year-old leader, the Rev. Martin Luther King Jr., was catapulted into the national spotlight.

Legislation and judicial rulings only seemed to fan the flames of social unrest. In 1957, Arkansas' governor used the National Guard to keep black students from enrolling in Little Rock's Central High School. President Dwight D. Eisenhower federalized those troops, sent them home and brought in part of an Army airborne division to facilitate desegregation. That story played out elsewhere, dramatically so at the universities of Alabama and Mississippi.

The Civil Rights Act of 1957 ended up a weak shell of itself, though it did create what became the Justice Department's Civil Rights Division. Another Civil Rights Act iteration, in 1960, added little.

A 1960 sit-in by black college students at a Woolworth's whites-only lunch counter in Greensboro, North Carolina, caught on throughout the South. The retailer and other chain stores ended such policy. Heady accomplishments were subdued when Freedom Riders—groups of mostly college students—set out together in 1961 on buses through the South, challenging noncompliance with desegregation law. Abetted by the Montgomery police, a mob savagely beat some with baseball bats, pipes and chains—a scene reprised elsewhere.

King's willingness to face the mobs and take personal risk became a galvanizing force, solidified by his "I Have a Dream" speech at 1963's March on Washington for Jobs and Freedom.



Rosa Parks is arrested for violating the segregation law in Montgomery, Alabama.

In 1964, Freedom Summer activists went to Mississippi to challenge voter suppression and register black voters. Many were beaten by white mobs. In June, three activists—two white and one black—were murdered by Ku Klux Klansmen. President Lyndon B. Johnson leveraged the public revulsion to push through the Civil Rights Act of 1964, which asserted the force its predecessors lacked. The new act explicitly prohibited discrimination by race, sex, national origin or religion in schools, workplaces, public accommodations and businesses. And it had teeth: The Justice Department could sue for enforcement, and federal funds could be withheld for the same reason.

"It showed the South that the federal government meant business," says Richard Delgado of the University of Alabama School of Law. "In its way, it was as important as *Brown v. Board*."

But discrimination didn't end; it took new and sometimes disguised forms. Today, for example, there are claims of voter suppression based on the premise of preventing voter fraud. A University of Delaware study showed whites tend

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1955 Emmett Till, 14, is beaten and murdered in Money, Mississippi, for flirting with a white woman.

1956 "In God We Trust" becomes the national motto under President Dwight D. Eisenhower.

1957 The Southern Christian Leadership Conference is created, with Martin Luther King as president.

1958 McDonald's sells its 100 millionth burger, just three years after Ray Kroc opens the chain.

1959 The black-owned Motown Record Corp. is founded in Detroit.

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A Freedom Rider bus goes up in flames in 1961.

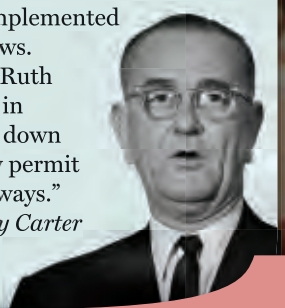
to support voter ID laws when a photo of a black person voting accompanies the survey question.

In 2013, the high court took its ax to the Voting Rights Act of 1965, a pillar of the civil rights movement, which declared that states and municipalities with a history of discrimination must be "precleared" by the Justice Department or a federal court before they change their voting laws.

In *Shelby County v. Holder*, the court shot down Section 4, which designates the precleared areas. "Things have changed dramatically" in the South, wrote Chief Justice John G. Roberts Jr. The decades-old coverage formula was based on "obsolete statistics" and therefore violates the Constitution, he wrote.

As a result, Texas and other Section 4 states have re-implemented their voter ID laws. Warned Justice Ruth Bader Ginsburg in dissent, striking down that section may permit a "return to old ways."

—Terry Carter



Lyndon Johnson

LAW BY THE DECADE

The fight for full equality continued.

1955-1964

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The Student Nonviolent Coordinating Committee is launched at Shaw University.

1960

The Peace Corps is established under executive order.

1961

The Cuban Missile Crisis brings the U.S. and the Soviet Union to the brink of nuclear war.

1962

President John F. Kennedy is assassinated in Dallas.

1963

The 24th Amendment is ratified by the states to prohibit voter suppression via poll taxes.

1964

WATERGATE
AND THE RISE OF LEGAL ETHICS

LAW BY THE DECADE

From a "third-rate burglary," the ABA Model Rules of Professional Conduct emerged.

1965-1974

1965 The Voting Rights Act is signed into law by President Lyndon B. Johnson.

1966 Medicare—a national health insurance program for Americans 65 and older—begins.

1967 Thurgood Marshall is sworn into office as the first black Supreme Court justice.

1968 Civil rights leader Martin Luther King is assassinated in Memphis, Tennessee.

1969 The first moonwalk: "One small step for a man, one giant leap for mankind."

ASSOCIATED PRESS, NASA

One of the lingering questions from Watergate—the most far-reaching political scandal in modern American history—concerns how so many lawyers could have allowed themselves to get sucked into the wrongdoing that was emanating from the Nixon White House.

The short answer is that many of the lawyers working in the White House or for the Committee for the Re-election of the President—aka CREEP—never questioned the ethical implications of their involvement in the cover-up of the break-in on June 17, 1972, at the headquarters of the Democratic National Committee in the Watergate office complex in Washington, D.C. And a large part of the reason why they didn't question their actions was that they weren't trained to do so.

"In 1972, legal ethics boiled down to: 'Don't lie, don't cheat, don't steal and don't advertise,' " said John W. Dean III, one of the lawyers brought down by Watergate with President Richard M. Nixon, during a 2012 interview with the *ABA Journal* for an article about the legacy of the scandal.

"When I took the elective course in ethics at law school, it was one-quarter of a credit," said Dean, who was White House counsel at the time of the break-in and went on to provide key incriminating testimony to the Senate Watergate Committee. "Legal ethics and professionalism played almost no role in any lawyer's mind, including mine. Watergate changed that—for me and every other lawyer."

In October 1972, Dean pleaded guilty to obstruction of justice and served four months in federal prison. He spent much of that time testifying in the trials of other lawyers charged with Watergate-related crimes. Of the 69 people ultimately implicated in the scandal—48 of whom were eventually convicted of crimes—Dean has noted that 21 were lawyers, including Nixon himself, along with two attorneys general, two White House counsel, an assistant attorney general and more than a dozen other high-level members of his administration.

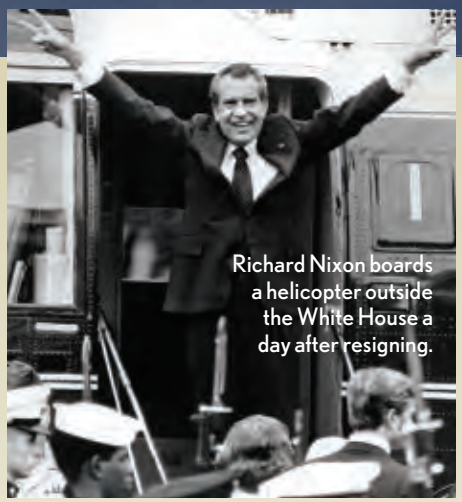
Before Watergate, lawyer ethics were governed largely by a vaguely worded set of platitudes that hadn't changed much in 80-plus years. Ethics, if taught at all, was an elective class in law school. Lawyers were under no professional obligation to brush up on the subject. And the law governing lawyers was still in its infancy.

But the sight of so many lawyers shamed so publicly provoked an outcry —and even calls for federal regulation of the legal profession—which the organized bar and law schools responded to in a number of ways.

The ABA Section of Legal Education and Admissions to the Bar, which is recognized by the U.S. Department of Education as the accrediting agency for U.S. law schools, started requiring schools to teach ethics. The National Conference of Bar Examiners developed the Multistate Professional Responsibility Exam, which law school graduates in all but two states are required to pass before they can be admitted to practice. And states began to require lawyers to include ethics in their continuing legal education.

In 1983, the ABA replaced the Model Code of Professional Responsibility, which had been in effect since 1969, with the Model Rules of Professional Conduct, which have since been adopted in whole or in part by 49 states. (California follows much of the substance of the Model Rules, but not the format.)

The Model Code was a huge improvement on the 60-year-old canon of ethics it replaced, which tended more toward moral exhortation than rigid, enforceable rules. But while the adoption of the Model Code was hailed as an important step in the increasing transformation of legal ethics from "fraternal norms" into "judicially enforced regulations," the code itself was soon criticized on a number of grounds. And threats of antitrust action by the U.S. Department of Justice helped persuade the ABA to begin a wholesale revision of the code.



Richard Nixon boards a helicopter outside the White House a day after resigning.

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The Model Rules essentially set forth black-letter rules followed by often lengthy comments designed to provide guidance for practicing lawyers. One of their most important elements entails a stronger emphasis on issues of client confidentiality, including when it is appropriate for lawyers to report wrongdoing by their clients.

"Today's rules would have had a dramatic impact on my decision-making back in 1972," said Dean, who spends much of his time giving presentations on legal ethics to law firms and bar groups. He has given thought to seeking to regain a law license.

"All of the Watergate lawyers who wanted their license back have gotten it," he said. "I don't know that I want to practice law again. It's more about redemption." —*Mark Hansen*

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1970 The first Earth Day celebration raises environmental awareness.

1971 The U.S. Supreme Court upholds the *New York Times*' right to publish the Pentagon Papers.

1972 Daredevil Evel Knievel breaks 93 bones after clearing 35 cars in a motorcycle jump.

1973 The U.S. Supreme Court, in *Roe v. Wade*, upholds a woman's right to abortion.

1974 President Richard M. Nixon resigns under the threat of impeachment.

ENVIRONMENTAL LAW IS BORN

In October 1975, the secretary of the interior listed a tiny 3-inch fish —the snail darter—for protection under the Endangered Species Act of 1973. The minnow did what legions of activists could not: halted construction on the nearly completed Tellico Dam in Tennessee.

The smallest fry became the biggest fish in headlines. In 1978, the U.S. Supreme Court upheld the statute's protection of the snail darter in *Tennessee Valley Authority v. Hill*.

Growing out of a 1960s social movement fearful of rivers on fire and pervasive chemicals, environmental law had become an institution.

The 3-inch snail darter starts it all.

Never mind that snail darters were relocated in 1979 when Congress exempted the dam from the ESA. Courts were receptive to environmental concerns. In another example in 1976, the U.S. Court of Appeals for the District of Columbia Circuit upheld the Environmental Protection Agency's regulation of lead gasoline under the Clean Air Act, enacted in 1963 but greatly expanded in 1970, '77 and '90.

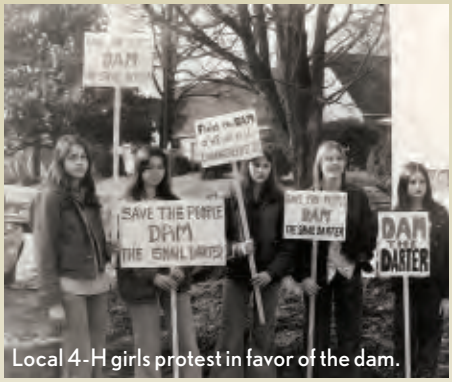
Environmental law was moving right along.

President Richard M. Nixon had quickened developments by creating the EPA through executive order in 1970, followed by the sweeping Clean Water Act of 1972, which aimed at ridding the nation's waters of pollutants. In 1976, more specific laws targeted solid and hazardous waste, and the manufacture and sale of chemicals.

The news media now eagerly pursued environmental stories. In 1978, reporters exposed dangerous levels of toxins in the groundwater of Love Canal, a neighborhood in Niagara Falls, New York. There were high rates of birth defects and serious illness; Hooker Chemical Co. had buried 21,000 tons of toxic waste in the area before selling the property to the city for $1 in 1953, noting the problem on the deed.

The disaster sparked outrage and led to lame-duck President Jimmy Carter signing the Superfund law in 1980 (the Comprehensive Environmental Response, Compensation and Liability Act) for cleanup and shifting costs to those responsible. It was retrospective: In 1995, Occidental Petroleum—which purchased Hooker Chemical 15 years after it had sold the land—would settle a lawsuit by paying the EPA $129 million in restitution.

In less than a decade, a revolution in environmental law had taken place.



Local 4-H girls protest in favor of the dam.

"The Nixon, Ford and Carter presidencies were the golden age of environmental lawmaking," says Michael Gerrard, an environmental law professor at Columbia Law School and former chair of the ABA's Environment, Energy and Resources Section. It was also overwhelmingly bipartisan.

But in 1981, President Ronald Reagan's administration came in with what it saw as a mandate to shrink government and get regulators out of the free market. Reagan appointed heads of the EPA and the Interior Department with a new mandate: Cut costs. Anne Gorsuch oversaw slashing of the EPA's budget and staff; James Watt cut Interior's environmental programs and put vastly more land on lease for coal mining.

Both were hounded from office. Environmentalism had gained such widespread support that Reagan's Republican successor, George H.W. Bush, followed through on a promise

PHOTOGRAPHS BY KNOXVILLE NEWS-SENTINEL

The Tellico Dam construction is halted.

The Vietnam War ends with the fall of Saigon.

1 9 7 5

The Democratic Republic of the Congo reports the first case of what will become known as Ebola.

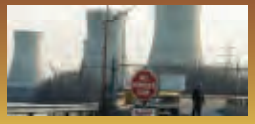
1 9 7 6

A 24-hour blackout in New York City prompts widespread looting, arson and thousands of arrests.

1 9 7 7

More than 900 members of the Peoples Temple participate in a mass suicide in Guyana.

1 9 7 8



A nuclear reactor at the Three Mile Island power plant experiences a partial meltdown.

1 9 7 9

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in his 1988 presidential campaign, supporting the Clean Air Act Amendments of 1990 that strengthened the statute.

But no other significant environmental laws have passed in the ensuing quarter century.

President Bill Clinton attempted a BTU tax, similar to a levy on carbon, and pushback helped give Republicans both houses of Congress in 1994. As the seeds of hyperpartisanship were planted while Georgia Republican Newt Gingrich was speaker of the House of Representatives, both environmental science and policy came under increasing attack from business interests and many conservative politicians.

Now, the American Legislative Exchange Council, which brings conservative state legislators together with corporate representatives to develop model legislation, is questioning whether humans are responsible for climate change and opposing renewable energy efforts.

Yet fearful of public scorn and investor flight, a number of big companies, such as Google and Yahoo, recently left the organization over ALEC's climate positions. So did Occidental Petroleum, which had paid for the Love Canal mess.

—Terry Carter

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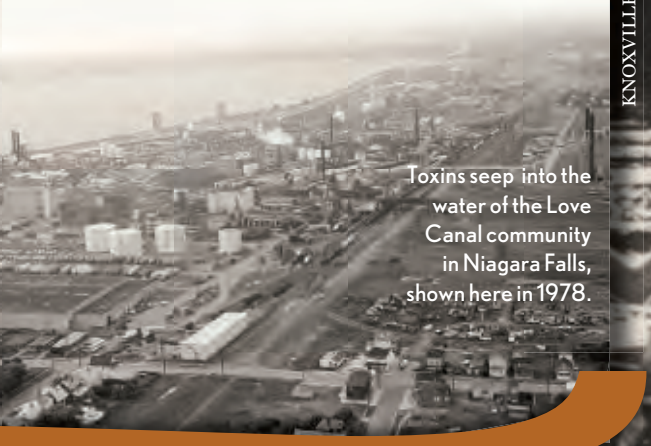

Toxins seep into the water of the Love Canal community in Niagara Falls, shown here in 1978.

KNOXVILLE NEWS-SENTINEL

LAW BY THE DECADE

Born through the efforts of Presidents Nixon, Ford and Carter, the golden age of environmental lawmaking was overwhelmingly bipartisan.

1975-1984

Rivers on fire, birth defects and cities blanketed with smog prompt Earth-friendly reforms

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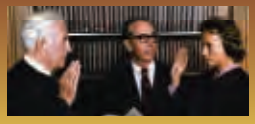
Cable News Network begins operation as the first all-news television channel in the U.S.

1980



The U.S. Senate confirms Sandra Day O'Connor as the first woman on the Supreme Court.

1981

Britain regains the Falkland Islands after a war with Argentina.

1982

China's population hits 1 billion.

1983

An explosion at the Union Carbide pesticide plant in Bhopal, India, kills thousands.

1984

LAW BY THE DECADE

The U.N. Security Council created the first entities since Nuremberg to prosecute for violations of international criminal law, such as the atrocities in the Rwandan and Balkan conflicts.

1985-1994

The FDA approves an HIV test that is still used to screen blood donations in the U.S.

1985

Radioactive fallout spreads from an explosion at the Chernobyl nuclear power plant.

1986

The Simpsons cartoon makes its first TV appearance on *The Tracey Ullman Show*.

1987

The Iran-Iraq War ends, after resulting in some 1 million deaths.

1988

Berliners start tearing down the wall that divides the city.

1989

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THE LEGACY OF NUREMBERG

Robert H. Jackson was one of America's most illustrious lawyers during the mid-20th century. In 1934, President Franklin D. Roosevelt, a fellow New Yorker, appointed Jackson to serve as general counsel of the Bureau of Internal Revenue. Jackson later served as solicitor general and attorney general; in June 1941, Roosevelt nominated him to the U.S. Supreme Court, on which he served as an associate justice until his death in 1954.

Justice Robert H. Jackson served as head of the U.S. prosecution team at the first Nuremberg trial.

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But the pinnacle of Jackson's career came on Nov. 21, 1945, in the Palace of Justice, one of the few major buildings in war-ravaged Nuremberg, Germany, that had not been destroyed by Allied bombers. As head of the U.S. prosecution team for the trial of 23 members of the political and military hierarchy of Nazi Germany, Jackson gave an opening statement on that day that not only set the tone for the trial but also articulated legal principles that the international community has been striving to implement ever since.

Jackson described the International Military Tribunal, which also included the United Kingdom, France and the Soviet Union, as "the first trial in history for crimes against the peace of the world. ... The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating," he said, "that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason."

At the end of the nearly yearlong trial, the Allied judges acquitted three of the Nazi defendants. Seven were given prison terms and 12 were sentenced to death (one in absentia).

The 13 Nuremberg trials set a precedent that for decades was never followed, and the Nuremberg principles —a commitment to holding individuals responsible for committing war crimes, genocide and other violations of international criminal law in the course of armed conflicts—became an unfulfilled goal as the major powers preoccupied themselves with the Cold War.

The Cold War began to fade in 1989 as the Soviet bloc broke apart, but the world continued to be a violent place. Estimates put the total number of deaths in the two world wars at some 80 million people. But since the end of World War II, there have been more than 300 smaller conflicts in various parts of the world, resulting in some 100 million deaths, most of them civilian.

In the early 1990s, bloody conflicts involving widespread atrocities broke out in the Balkans and Rwanda that the world community could not ignore. In 1993, the U.N. Security Council created the International Criminal Tribunal for the former Yugoslavia, and a year later the Security Council established the International Criminal Tribunal for Rwanda. They were the first entities created to prosecute and try individuals for violations of international criminal law since the Nuremberg trials nearly a half-century earlier, and they sparked a renewed interest in the creation of a permanent tribunal to handle such cases.

To the surprise even of advocates, the International Criminal Court was created under a statute finalized in Rome on July 17, 1998. The court came into existence on July 1, 2002, and established its headquarters at The Hague, Netherlands. The Rome Statute has been ratified by 122 nations; three notable holdouts are China, Russia and the United States, although relations between this country and the ICC have warmed considerably in recent years.

More than a decade after its birth, the ICC is one of the most notable achievements of international law—and politics—in recent decades. While the court faces political and funding challenges, David Scheffer, a law professor at Northwestern University who led the U.S. delegation at the Rome conference and served as the first U.S. ambassador-at-large for war crimes issues during the Clinton administration, notes that "international criminal justice is, by definition, a long-term project, and one must sustain a long-term vision, particularly for the ICC, to realize the full potential it offers for the future." —*James Podgers*

ASSOCIATED PRESS; CERN

Soviet President Mikhail Gorbachev is awarded the Nobel Peace Prize.

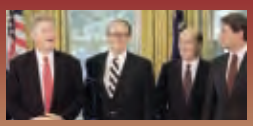
1990

Operation Desert Storm begins with air strikes against Iraq.

1991

Johnny Carson makes his final appearance as host of *The Tonight Show.*

1992



President Bill Clinton signs the North American Free Trade Agreement.

1993

The first conference devoted to the World Wide Web's commercial potential is held.

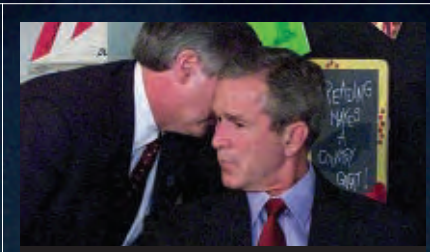
1994

A NEW MILLENNIUM

It was to have been a decade defined by the promise of the new millennium, a seemingly magical moment that would sever us from the last few years of the 1990s—the tawdry politics of impeachment, the irrational exuberance of the dot-com bubble, the dread of a Y2K digital disaster that never materialized.

Instead, the new century came to be defined by the twin terrors of a crisp Tuesday morning in September 2001, and the word *war*—once glibly reserved for public policies on literacy or poverty or drugs or cancer—took on a deeper, darker meaning. After the events of 9/11, war filled in the background of everyday life: in barriers erupting like acne on public architecture, in politely invasive searches by airport security, in the everywhere eye of a camera, in the erosion of words that redefined treaties and torture and the very nature of war.

Less than a month after the attacks on New York City and Washington, D.C., Congress passed and President George W. Bush signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. The USA Patriot Act, as it quickly came to be known, greatly expanded the ability of government agencies to gather and share domestic and foreign intelligence on individuals, whether or not they were U.S. citizens. It expanded



The White House chief of staff informs President Bush of the terrorist attacks.

limits on the scope and duration of wiretaps and on electronic data storage of credit card, banking and voicemail records. It broadened the definition of "money laundering," expanded the ability of the government to seize foreign assets, allowed agencies to seek education records and eased compliance with courts established under the Foreign Intelligence Surveillance Act.

In its most controversial section, the Patriot Act also expanded the use of national security letters as a means of gathering information. The NSL, a form of subpoena, required no probable cause and forbade the recipient—usually a telephone company or Internet provider—from disclosing its existence, even to an attorney. By 2007, the government was using NSLs to also investigate U.S. citizens.

Armed with new authority, Bush authorized a series of programs at the National Security Agency aimed at developing new levels of surveillance and analysis. Early on, the programs needed to be reauthorized every 45 days. But as they continued, they gained lives of their own. It would be years before the reach of this escalation in signal intelligence and data-mining would be grasped by the public; in the meantime, there were more obvious concerns.

By January 2002, the government began housing prisoners—"enemy combatants" in the "War on Terror"—in Cuba, on a repurposed U.S. Naval base at Guantanamo Bay. In a series of secret memoranda, lawyers from the Justice and Defense departments argued that neither suspected al-Qaida prisoners nor their Taliban patrons were subject to the Geneva Conventions. And although terrorists had been tried successfully in federal courts on the mainland, government lawyers recommended a parallel system of justice at "Gitmo"—one specifically designed to escape scrutiny under international treaties or U.S. laws.

Despite vigorous disagreement by Secretary of State Colin Powell, White House Counsel Alberto Gonzales declared that the changing nature of war had rendered "quaint" many of the provisions called for by international norms. And on Feb. 7, 2002, Bush accepted his lawyers' advice and ordered that the military comply with the Geneva Conventions, but

People looking toward the World Trade Center react after planes crashed into the upper floors of both towers.

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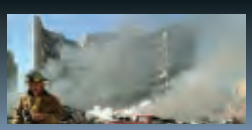
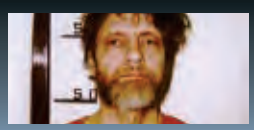


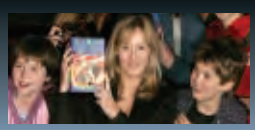
Domestic terrorism strikes the U.S., with the bombing of a building in Oklahoma City.

1995



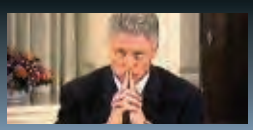
Ted Kaczynski, aka the Unabomber, is arrested after eluding authorities for 18 years.

1996



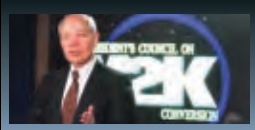
J.K. Rowling releases *Harry Potter and the Sorcerer's Stone*, and later strikes literary gold.

1997



President Bill Clinton is impeached by the House, resulting in a Senate trial and acquittal.

1998



Fears over the millennium bug lead to frantic preparations that prove unnecessary.

1999

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U.S. guards watch over Afghan detainees at Camp X-Ray in Guantanamo Bay, Cuba, in 2002.

only "to the extent appropriate and consistent with military necessity."

What that could mean was clarified six months later by Jay S. Bybee, an official at the Office of Legal Counsel, who chronicled the evolving nature of torture, then redefined it in ways that allowed "enhanced interrogation" techniques to be used without the likelihood of prosecution under U.S. or international laws.

In 2003, just a few months after war began in Iraq, Amnesty International began to publish reports of human rights abuses—including beatings and sexual humiliation—against U.S.-held detainees at the notorious Abu Ghraib prison in Iraq. As months passed, more stories and photos of naked Iraqi prisoners being beaten or berated began to emerge. In 2004, the American Civil Liberties Union released a report by agents on assignment at Abu Ghraib, who admitted that a variety of extraordinary interrogation techniques had been used by military interrogators. The report allowed that the executive order signed by Bush had done much to confuse the issue of abuse.

On Jan. 22, 2009, two days after his inauguration, President Barack Obama signed Executive Order 13492, ordering the Defense Department "promptly to close" the Guantanamo detention facility. It remains open.

In 2011, Congress reauthorized most of the USA Patriot Act. Obama, in Europe at the time, was unavailable to sign it at the White House. The bill was signed by autopen. —*Allen Pusey*

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LAW BY THE DECADE

After the events of 9/11, war filled in the background of everyday life.

1995-2004

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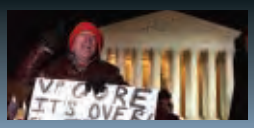
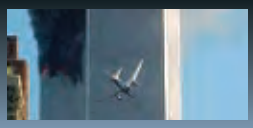


The Supreme Court stops a Florida recount, giving George W. Bush the electoral advantage.

2000



Extensive air travel security measures, overseen by the new TSA, are adopted after 9/11.

2001

The Department of Homeland Security becomes a Cabinet-level federal agency.

2002

Seven astronauts are killed after *Columbia* explodes on re-entry into Earth's atmosphere.

2003

An earthquake in the Indian Ocean triggers a tsunami that kills 230,000 people.

2004

LAW BY THE DECADE

A struggling economy, disruptive technologies and client-driven legal services forced significant changes on the legal profession.

2005-2014

Hurricane Katrina hits Louisiana and Mississippi, causing catastrophic damage.

2005

The Federal Rules of Civil Procedure are amended to include e-discovery rules.

2006

The United States enters the Great Recession after staggering losses on subprime mortgages.

2007

Barack Obama is elected the first black president of the United States.

2008

Auto giant Chrysler files for Chapter 11 bankruptcy.

ASSOCIATED PRESS

2009

TECHNOLOGY CHANGES THE RULES

While Pangea3's lawyers slept through a warm and humid night in Mumbai in November 2010, major changes were afoot for them in chilly New York City. Half a world away, the ink was drying on a deal that would join the legal process outsourcer, deliberately based in India, with American legal information giant Thomson Reuters.

Sanjay Kamlani, Pangea3's co-founder and former co-CEO

Pangea3 was not the first legal process outsourcer, but it was among the most successful. When it opened in 2004, it had 12 attorneys in its Mumbai headquarters. By 2010, Pangea3 was employing hundreds of Indian lawyers and many perceived it as a threat to conventional law firms. That success came because, as the *ABA Journal* observed in 2007, it could offer Manhattan work at Mumbai prices—handling the simplest legal work for far less than an American firm would charge.

Clients may have been pleased, but the legal world was not so sure. Law firms were concerned about competition from legal process outsourcing; new attorneys worried that it would reduce entry-level job opportunities. Some raised concerns about the quality of foreign attorneys' work or the ethics of sending client information overseas.

But the purchase by Thomson Reuters confirmed that legal process outsourcing wasn't going away. The fact that a prominent American company was willing to put $100 million into Pangea3 suggested that it found the industry both permanent and profitable. Shortly after the purchase, Pangea3 opened its first work center in the United States, addressing client concerns about shipping work overseas.

Pangea3, and legal process outsourcing generally, were both inspired and enabled by technology. The rise of the Internet demystified lawyers' work, bringing basic legal information to the fingertips of nonattorneys. As legal services became more transparent, clients gained the ability to assess the value of law firms' work. When they found inefficiencies at traditional law firms, they started demanding lower prices. The legal profession responded by loosening ethical restrictions on "unbundled" services, which made it possible to outsource (or leave part of the work to clients). According to the ABA *Legal Technology Survey Report*, 37 percent of firms offered unbundled services in 2014.

Those aren't the only changes that could radically remake the legal profession. Do-it-yourselfers pursuing simple matters can turn to legal document companies such as LegalZoom (privately valued last January at $425 million) for the right forms and help completing them. Clients looking for full service at a lower price can seek out "virtual" firms that skip the high overhead of a bricks-and-mortar office, doing the bulk of their work online. The *Legal Technology Survey Report* noted that 7 percent of attorneys said their practices were virtual in 2014, up from 3 percent in 2011.

And while the U.S. has been loath to adopt them, alternative business structures—legal businesses owned partly or fully by nonlawyers—are serving the same goals overseas. ABS firms have a significant presence in Canada, Australia and the U.K. (where more than 300 have registered with regulators since March 2012), and U.S. bar groups have been considering whether to relax ethics rules to allow them.

There are still concerns about these changes. To some extent, they threaten the jobs of new attorneys and the business of large law firms. The ABA's Ethics 20/20 Commission declined to endorse alternative business structures, and ABA ethics opinions caution that unbundling, outsourcing and virtual work require a heightened attention to ethics.

But technology-driven changes also bring new opportunities to the legal profession. Unbundling, document services and virtual practice lower prices, which could increase access to justice for those of moderate means. The ABS model offers law firms with limited capital a new way to expand their businesses. And virtual practice means lower startup costs for new solos—plus work-life flexibility, something many lawyers would say they're sorely lacking. How many of these hopes and fears will be realized isn't clear, but watch this space.

—Lorelei Laird

PHOTOGRAPHS BY LEN IRISH; THE INDIA TODAY GROUP/CONTRIBUTOR

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A rig explodes at a BP exploration well, killing 11 and flooding the Gulf of Mexico with oil.

2010

The Legal Services Act of 2007 goes into effect in England and Wales.

2011

Dewey & LeBoeuf files for bankruptcy, becoming the largest law firm to fail in U.S. history.

2012

The high court rules that the federal government may not refuse to recognize same-sex marriages.

2013

The justices decide in *Riley v. California* that a warrant is required to search a cellphone.

2014

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Specific benefits subject to change

By Laura Snyder

Illustration by Justin Metz

Flexing ABS

Does the U.K. know something we don't about alternative business structures? Two U.S. legal companies are hoping to see the light.

For two nations sharing a language and legal history, the contrast in the visions at play in the legal systems of the United States and United Kingdom is more than striking. It's revolutionary.

The debates in the U.S. go on: Should ethics rules blocking nonlawyer ownership of law firms be lifted? Is the current definition of unlicensed law practice harming rather than protecting clients? What about the restrictions on multidisciplinary practices? >>

Paradigm Shift

Three years ago the *ABA Journal* began a series of reports on the shifting paradigm of law practice. This series looks at how the legal business is responding—and the legal profession often not responding—to pressures never before placed on lawyers and law firms: a maturing market, disruptive technology, economic recession and the rise of legal services competition.

In this, our sixth article in the series, attorney Laura Snyder looks at another challenge to traditional ways of practicing law, this one from overseas. Snyder—American by origin, based in Europe since 1995, and licensed to practice in Illinois, New York and Paris with 20 years' experience in international corporate law—credits a summer program in 21st century law with kindling her fascination with the United Kingdom's regulatory environment for legal services. And that fascination developed into an in-depth analysis of **alternative business structures** and two very American businesses—Jacoby & Meyers and LegalZoom—that are trying their hands at ABS with plans to use what they learn both internationally and (when they can) back in the U.S.A.

Her investigation included interviews with Gabe Miller, then-CEO and general counsel of J&M; James Peters, LegalZoom's vice president of new market initiatives; Crispin Passmore, executive director of the U.K.'s Solicitors Regulation Authority; Alex Roy, then-head of development and research for the U.K. Legal Services Board; and numerous law firm leaders, heads of legal councils, law professors and consultants on both sides of the ocean.


LAW

<< And those debates are by no means ending: Witness the newly created ABA Commission on the Future of Legal Services. Though ABA President William C. Hubbard does not mention ethics rule changes in the commission's primary task of identifying the most innovative practices being used in the U.S. to deliver legal services, some of those practices have been questioned as possible ethical breaches. Meanwhile, the rules and restrictions stay in place. The situation in the United Kingdom couldn't be more different: Such restrictions have largely been lifted, and under the Legal Services Act the creation of new ways of providing legal services—including through alternative business structures—is more than simply permitted; it is actively encouraged.

And what is happening on the other side of the ocean may have direct consequences for the United States. Below is a tale of two companies that brings the picture—and its significance for the U.S. legal services market—into sharp focus.

The two companies, LegalZoom and Jacoby & Meyers, figure among the most recognized legal brands in the U.S. They are different in many ways, yet have remarkable commonalities.

>>ZOOMING IN<<

Founded in 1999, LegalZoom launched in 2001 with $2 million in seed funding. Over the course of several years it raised upwards of $100 million of private equity funding to finance its operations nationally.

LegalZoom began by providing an online legal document creation service together with an education center for individuals and small businesses searching for help with their legal needs. It has encountered challenges from a few state bars around the country claiming that it engages in the unauthorized practice of law. While none of those challenges has permanently stopped its operations, the company nevertheless responded by building a network of local attorneys and adding to its offerings an attorney referral service under a fixed-fee subscription legal plan.

LegalZoom's sales have grown to more than $150 million, and it claims to be the most recognized legal brand in the U.S. To obtain funds for further expansion, the company filed for an initial public offering in 2012. However, dogged by recurrent claims that it engages in UPL and by a lack of clarity regarding the legal nature of its products and services, LegalZoom withdrew the IPO filing, citing unfavorable market conditions. It also increased its focus on new product development.

But in February 2014, LegalZoom announced with Permira, a European private equity firm, "the acquisition of more than $200 million of the outstanding equity of LegalZoom by a company backed by the Permira funds."

Now having proved its concept nationally—in a 2012 filing with the U.S. Securities and Exchange Commission, LegalZoom claimed service to 2 million customers over 10 years and 2011 revenue of $156 million—and still having access to private equity funding, LegalZoom is expanding overseas. The U.K. was an obvious place to start given the common language and similar legal systems.

>>J&M EVERYWHERE<<

Jacoby & Meyers was founded in 1972 by Leonard Jacoby and Stephen Meyers, two UCLA law school classmates. It began as a single storefront office and has grown to more than 310 attorneys and 600 staffers, providing legal services via its virtual office technology and more than 130 offices in all 50 states. Billing itself as "America's largest full-service consumer law firm," J&M seeks to provide an alternative source of legal support to lower- and middle-income clients who otherwise could not afford to hire a lawyer.

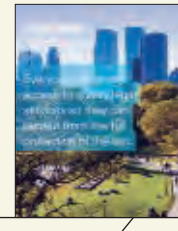
Since J&M was founded, it actively sought to develop and implement more cost-effective and efficient means to reach and serve clients. It opened branches in shopping malls, maintained Saturday evening office hours and was the first to accept credit card payments. To keep client costs low and predictable, J&M standardized its claims-handling process and charged flat fees.

In seeking to reach its target clientele, J&M did not shy away from controversy: It was a major instigator in the debate regarding attorney advertising, which culminated in the 1977 U.S. Supreme Court decision *Bates v. the State Bar of Arizona,* in which the court found lawyer advertising to be commercial speech and upheld lawyers' right to advertise. The day after publication of that decision, J&M placed its first newspaper advertisement; within days it also aired its first television ads, making it the first U.S. law firm to advertise on TV.

In 2011, J&M brought litigation against bar authorities in New York, New Jersey and Connecticut requesting that the enforcement of the "antiquated" ethical rule that restricts nonlawyer ownership of law firms be enjoined. Among its multiple arguments, J&M asserted that the rule violates the state constitutions, violates the separation of powers, is void for vagueness, and is an excessive burden on the flow of interstate commerce.

J&M argued that the rule prevented it from raising the capital necessary to pay for improvements in technology and infrastructure, to expand its offices and to hire

The LegalZoom Timeline



LegalZoom's founders Edward Hartman, Brian Lee, Robert Shapiro and Brian Liu in 2001.

LegalZoom files for an IPO in May 2012. By August 2012 the company puts its plans on hold, instead selling more than $200 million of its equity to a company backed by Permira, a European private equity firm.

Hits $150 million in sales and is named to Business Insider's list of 2011 Digital 100 and Fast Company's 50 most innovative companies in 2012.

LegalZoom's move to the U.K. comes after passage of the Legal Services Act in 2007, which liberalized the provision of legal services.

LEGALZOOM.COM, FROM LEGALZOOM'S IPO, FAST COMPANY, CREATIVE COMMONS

additional personnel. As a result of its restricted access to funding, suffered as well by other law firms, J&M argued that access to legal services for those otherwise unable to afford them was dramatically impeded.

Last July the firm voluntarily dismissed its New Jersey suit. The litigation, ongoing in New York and Connecticut, is taking its time wending its way through the courts—and as it does, that antiquated rule remains in effect.

So J&M didn't wait for litigation to finish before rolling out a new model for associating other law firms with its brand. However, in a difference from previous campaigns, J&M sought to roll the model out both nationally and internationally, notably across Europe. Again, the U.K.'s common language and common-law legal system made it the obvious choice for establishing a European foothold.

>>MODEL RULE ROADBLOCKS<<

The restrictions that have curtailed the two companies in the U.S. have their origins in ABA Model Rules of Professional Conduct 5.4 and 5.5, versions of which have been enacted in most states. Under these rules:

>>Nonlawyers are prohibited from creating, owning or managing law firms, either alone or in partnership with lawyers. (Only the District of Columbia allows minority-nonlawyer ownership of U.S. law firms.)

>>Multidisciplinary practices combining legal services with nonlegal services are restricted.

>>Lawyers admitted in one U.S. state but not in another may not actively seek clients in that other state, nor advise clients with respect to the laws of that other U.S. state. Each constitutes the unauthorized practice of law.

Because LegalZoom has nonlawyer ownership, under the ABA Model Rules it cannot purport to be a law firm or practice law in the U.S. So when it sought to offer clients access to lawyers, it could not do more than create a referral service, since its in-house attorneys were not allowed to provide legal services to anyone but LegalZoom itself. Even in creating the referral service, it had to avoid promoting another form of UPL by having any of its network attorneys advise clients in a state where he or she was not admitted to the bar.

As for J&M, its situation is more straightforward: It wants external investment to fund its expansion plans, but says it was unable to obtain this because of the Model Rules.

Between 2009 and 2012, the ABA Commission on Ethics 20/20 considered making changes to Rule 5.4 to permit nonlawyer ownership of law firms and to permit multidisciplinary practices. According to Andrew Perlman, chief reporter for the commission, the panel sought "empirical evidence" from the U.K. (and programs in Australia and D.C.), but ABS was so new, "there was very little evidence ... that could really demonstrate a benefit" to clients.

Still, a draft proposal to modify the nonlawyer ownership rule to be similar to the D.C. program was released for public comment.

"It suffices to say the response was overwhelmingly negative," Perlman says.

At the end of its examination, the commission declined to recommend any changes, saying that "the case [for making changes] had not been made."

Paul Paton, the dean of the University of Alberta's law school who served as an Ethics 20/20 reporter from 2010 to 2012, thinks the wrong question was being asked: "Where is the evidence of demand from consumers?"

Invoking the image of Steve Jobs and other innovation giants, Paton notes that these entrepreneurs did not wait for demand before creating products that developed huge consumer markets.

"If you need to assess the demand, you only need to take a look at how many people are accessing LegalZoom," Paton says. "Lawyers could be providing those services."

Even in the absence of changes to the Model Rules, certain elements of the legal services market in the U.S. are being reengineered. These service providers have identified imperfections and inefficiencies in the traditional law firm model, and have created new services and new business models to address them. In doing so, the need to negotiate their way around the Model Rules has forced them to take one of two paths.

The less risky path has been to craft and market services for law firms themselves or for other companies, and notably for large companies with their own in-house legal departments. This is the path that companies such as Axiom Law (legal placement and outsourcing), Lex Machina (legal data analytics), KCura (Web-based e-discovery) and Anaqua

(intellectual property asset management) have followed.

Gillian Hadfield, a professor of law and economics at the University of Southern California, explains: "We have created a set of rules where there are more exceptions if it is just lawyers that want to play. As a result, the restrictions of the Model Rules apply only in a limited manner when the decision-maker for the client is a licensed lawyer."

The other path, taken by companies that develop and market their services for individual consumers and small businesses, is significantly riskier. RocketLawyer and Shake are two examples of companies whose shareholders and senior management include nonlawyers. Because they sell directly to individuals and small businesses without the intermediary of a licensed lawyer as the purchaser, they must carefully restrict their offerings. For example, RocketLawyer can sell document templates, but it cannot offer the services of its lawyers in direct client support for using those templates. The most it can do is offer an attorney referral service with the option of a limited prepaid legal plan.

"U.S. companies have to tailor their models in order to fit the Model Rules," says Hadfield, who sits on LegalZoom's Legal Advisory Council. "There are many things that U.S. companies cannot do, and the fact that there is a little going on at the margins does not come close to what could be done if the restrictions were not there."

In August, however, RocketLawyer and the ABA announced a pilot program to link potential small-business or self-employed clients to the ABA's network of practicing lawyers through RocketLawyer's cloud-based platform.

»OPERATION U.K.«

While facing these limits in the U.S., LegalZoom and J&M have set their sights overseas.

LegalZoom, fresh from an additional round of private equity funding and wanting first to dip its toes into the U.K. market before diving in, has entered into a partnership with QualitySolicitors, a national network of franchised firms. Via this partnership, LegalZoom can leverage its technology and automated document-creation capacities and again combine them with a prepaid legal plan. However, the regulatory environment in the U.K. affords greater flexibility, and LegalZoom is able to directly provide its customers the support of QualitySolicitors lawyers in a manner that is integrated with every customer purchase under a variety of prepaid

The Jacoby & Meyers Timeline

Leonard Jacoby and Stephen Meyers open their first law clinic in 1972. The press shows up and they are off to a running start, the beneficiaries of free advertising. This draws the ire of the local bar. The State Bar of California initiates disciplinary proceedings, charging that they violated the ban on advertising.

In June 1977, the U.S. Supreme Court rules, in Bates v. State Bar of Arizona, that attorneys have a constitutional right to advertise. The day after the decision, Jacoby & Meyers places an ad in the Los Angeles Times. Two months later, it launches its first television advertising campaign.

Jacoby & Meyers' innovations include being the first U.S. law firm to advertise on television, accepting credit card payments, charging flat fees and using computer systems to track cases. By 2010 the firm's television advertising spending exceeds $10 million per year.

MJ HUDSON

In August 2013, MJ Hudson becomes a 30 percent equity joint venture partner in Jacoby & Meyers Europe Limited, the holding company that will acquire consumer law offerings and build out J&M's European operations.

COURTESY JACOBY & MEYERS (2), YOUTUBE, FLICKR CREATIVE COMMONS

legal plans. As a result, the experience of a LegalZoom customer in the U.K. is less segmented and more streamlined than that of a U.S. customer.

In establishing its U.K. foothold, LegalZoom's most immediate objective is to learn to adjust its offerings and marketing to the culture and expectations of the U.K. customer. But LegalZoom's longer-term priority is to use the U.K. as a "legal laboratory," a place to experiment with different customer service and delivery models to determine what the best "consumer-facing" legal service looks like and then expand that model outside the U.K.

J&M's initial step into the U.K. is in the form of a joint venture—Jacoby & Meyers Europe Limited—with an affiliate of MJ Hudson, a niche London-based private equity and corporate law firm that was set up in 2010. Working with this firm, J&M is finalizing its model for a complete consumer and small-business law franchise offering, provided through virtual and physical offices.

J&M's offering provides to its law firm members a recognized brand together with technology, infrastructure, back-office capabilities and experienced legal practice management. J&M is also working with its U.K. joint venture partner to develop plans for European expansion using direct recruitment, associations and acquisitions.

Again, with many differences, LegalZoom and J&M have two important commonalities: Both are using the U.K. as a place to develop new models for legal services. And both intend, in time, to deploy those models outside the U.K.

>>OPENING THE LAW<<

The U.K. Legal Services Act—adopted in 2007, three years after the blockbuster Clementi report (see sidebar on next page)—radically overhauled the regulation of legal services in England and Wales. The 400-page act instigated hundreds if not thousands of changes, including allowing nonlawyers to hold ownership and management positions in law firms and allowing creation of multidisciplinary practices.

"Massive evidence shows that there is a huge unmet need for legal services," says Alex Roy, then-head of development and research of the Legal Services Board of England and Wales. "The unmet need is by no means limited to individuals and small businesses, but for them the situation is particularly acute.

"The U.K. reforms are about putting the customer at the heart of the relationship, and about prioritizing the needs of the customer. The reforms allow for people who have different skills and expertise to be brought together—people who typically aren't brought together—in order to meet customer needs, and in order to improve access to justice and to legal services."

To distinguish firms that have nonlawyer owners or managers, or that engage in multidisciplinary practices, from traditional law firms and sole practitioners, the U.K. rules provide for a new kind of legal company, referred to as an alternative business structure.

From early 2012—when ABS firms were first authorized—until press time in early December 2014, 386 had been established, 339 by the Solicitors Regulation Authority and 47 by another regulatory authority, the Council for Licensed Conveyancers.

Not all ABS firms are remarkable. For example, one of the first was a firm with just one solicitor. The application was made to permit the solicitor's spouse, who was not a solicitor, to become a shareholder.

However, this example belies the wide variety and creativity of many ABS firms. They include:

Corporate and commercial services: **Knights Solicitors**, a firm that dates back to 1759, combines commercial and corporate legal services for companies with wealth management services for individuals. Upon converting to ABS status in early 2013, it became a multidisciplinary practice by adding town planning to its real estate offering. In addition, it received a seven-figure investment from the private equity firm Hamilton Bradshaw, using the investment for a new IT system and employee training.

Reputation defense: Before acquiring ABS status in 2013, **Schillings** was a traditional law firm specializing in privacy and defamation. Upon acquiring ABS status, it integrated a cybersecurity business and recruited risk management professionals from the management consulting world, transforming itself into a multidisciplinary practice combining legal services with risk consulting and cybersecurity. Schillings' current COO is now the firm's first nonlawyer partner.

The Clementi Report

In 2003, Sir David Clementi, a former deputy governor of the Bank of England, was appointed to carry out an independent review of the regulatory framework for legal services in England and Wales. His report was issued in 2004. The Clementi report's recommendations included:

- An overhaul of the governance structures, and notably a separation of regulatory functions from representative functions into separate bodies so as to avoid conflicts of interest—the former to promote public interest and the latter to promote lawyer interest.
- The establishment of a regulatory scheme to permit multidisciplinary practices.
- The establishment of alternative business structures that could see different types of lawyers and nonlawyers managing and owning legal practices.
- The creation of a regulatory oversight body controlled by nonlawyers.

Strategy consultancy: Obtaining ABS status in early 2013, **Omnia Strategy** is a multidisciplinary practice that advises governments, multinational companies and high-profile individuals on a wide variety of matters such as international public law, international counsel, negotiation and dispute resolution, and strategic communications, including reputation management. Its management team includes lawyers, along with experts in economics, diplomacy and communications.

Insurance claims defense: **Triton Global** is a multidisciplinary practice that integrates insurance claims administration, legal defense and representation, and claim investigation and adjusting for professional indemnity insurers and policyholders. As an ABS, Triton Global was the first legal services provider to offer employee share ownership, and to become a member of the U.K. Employee Ownership Association.

Consumer services: **MyHomeMove** is a conveyancing service assisting consumers with real property transactions, notably the purchase and sale of their homes. **Kings Court Trust** is a probate service assisting families through the probate process upon the death of a loved one. Both operate on a volume model supported by online platforms. While both employ lawyers, including on their respective senior management teams, neither company's CEO is a lawyer. They also have in common a shareholder, Smedvig Capital, a private equity firm that invests in fast-growing businesses.

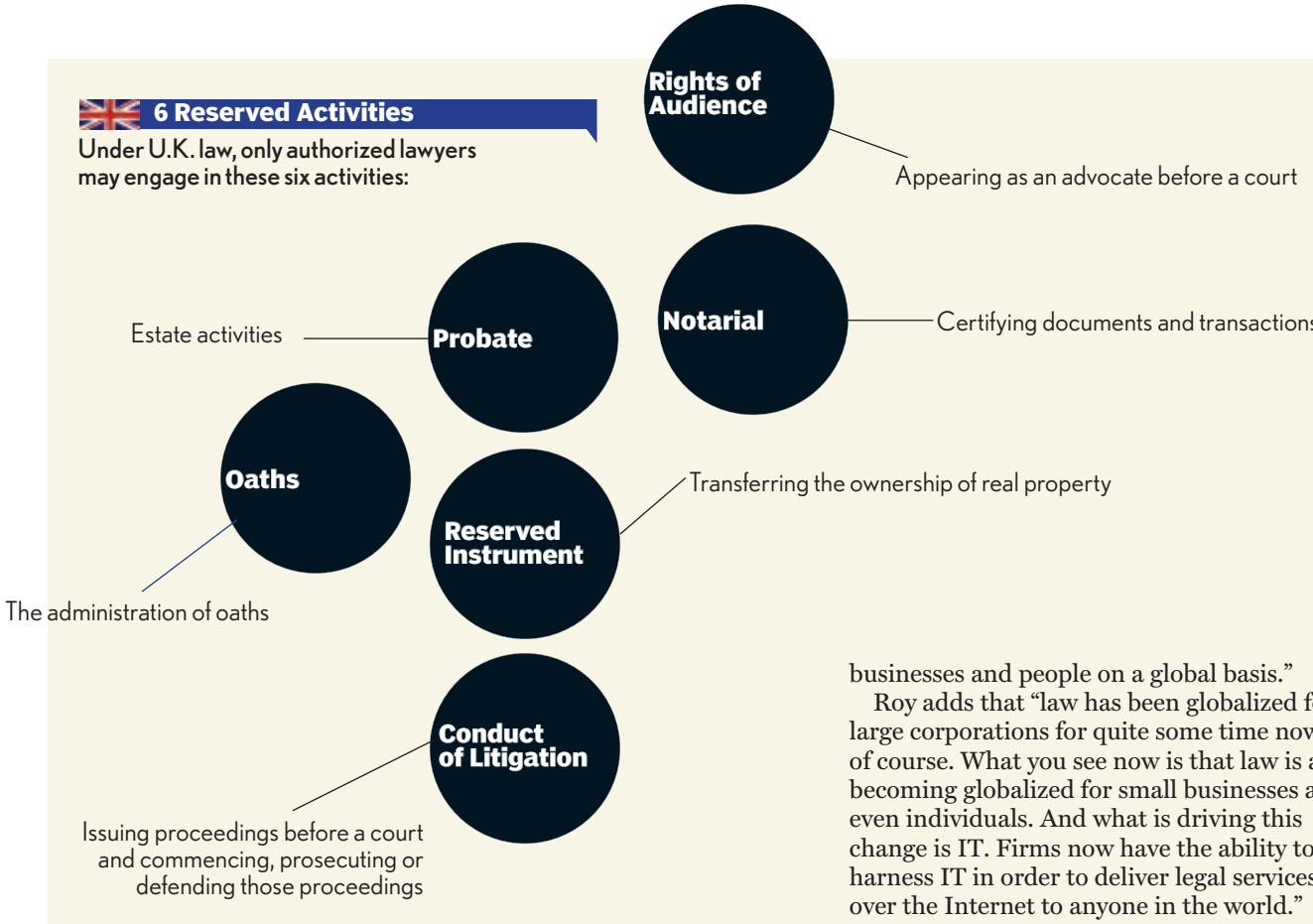
But the adoption of the ABS structure is not always necessary. As Roy explains, "While the discussion of the U.K. regulations is often focused on nonlawyer ownership, MDPs and the creation of the ABS structure, the changes in our regulations are much more profound. Essentially, we've taken away the restrictions on competition in the legal services market, and in doing so we've fostered a general climate of innovation and creativity in the provision of legal services. As a result, whether they do it as an ABS or not, all lawyers need to re-engineer what they do and how they do it in order to compete in a very different environment."

"The U.K. benefits economically from being more open," Roy says. "Competition drives competitiveness drives performance of the firms. While the law itself across jurisdictions may be different, the model you use to deliver and the types of issues you have are the same. So you can take a platform and a way of dealing with law and apply it by modifying the underlying legal framework behind it. And while this might work more easily where you have similar jurisdictions, like common law, we increasingly see firms coming from Europe—from civil law jurisdictions—and competing in the U.K."

»GOING GLOBAL«

But far beyond just competing in one (the U.S.) or two or three (the U.K.) countries, ABS structures can arguably open the world to legal services providers.

In offering multinational, if not worldwide,



legal services from a U.K.-regulated ABS, LegalZoom and J&M expect to benefit from a tradition of export of law and legal services, together with a regulatory environment that promotes and supports such export, and the favorable reputation and high standing in which U.K. law and its legal service providers are generally held.

"The U.K. government senses in law and legal services a real opportunity for export," Roy says. "The U.K. already has a strong financial center and a large number of large international law firms. Feeding on that already competitive environment, the U.K. government sees the possibility to drive higher legal exports from the country, and to develop law and legal services as an area for competitive advantage.

"The U.K. government sees that it can promote law firms that can operate both here and overseas," Roy continues, "delivering high-quality [legal services] using the brand of England, where lawyers are seen as well-trained and highly skilled, and operating in flexible firms that can deliver advice to businesses and people on a global basis."

Roy adds that "law has been globalized for large corporations for quite some time now, of course. What you see now is that law is also becoming globalized for small businesses and even individuals. And what is driving this change is IT. Firms now have the ability to harness IT in order to deliver legal services over the Internet to anyone in the world."

Lisa Webley, a professor of empirical legal studies at the University of Westminster in London, agrees: "Even before the 2007 Legal Services Act, the U.K. was very open. Non-legally-qualified people have always been able to offer legal services, as long as they are not one of the six reserved activities. [See the graphic above.] The Legal Services Act did not change that."

In addition, Webley says, "the U.K. has for a long time been open to foreign lawyers. Our rules permit lawyers from nearly anywhere in the world to establish themselves in the U.K. and be regulated here as registered foreign lawyers. They can do that without attending law school or taking a bar exam here in the U.K. Their only restrictions are that they cannot claim to be solicitors or barristers, and they cannot engage in any of the six reserved activities, none of which include drafting contracts or providing legal advice. Because of this openness, from a U.K. base, it is not just possible but relatively easy to offer legal services in the law of pretty much any country in the world."

And in Webley's opinion, consumer legal needs in the U.S. are in sync with the new U.K. rules.

"The changes to the U.K. rules have been much discussed in relation to big, international practices, but where they will be a true game changer is for small, domestic U.S. legal practices," she says. "It is easy to imagine a U.S. legal service provider that comes to the U.K., raises investment capital in the U.K., puts money into technology and develops a more efficient business model, employs U.S. attorneys as registered foreign lawyers, and offers the entire package back to clients in the U.S."

And another nation's legal professionals are considering moves similar to ABS. In August the Canadian Bar Association released a report, *Futures: Transforming the Delivery of Legal Services in Canada*, that calls for radical changes in rules governing lawyers.

Citing globalization, technology, market competition and a need for expanded access to justice, the report says lawyers must be able to work "through new structures and in conjunction with other professionals (including alternative business structures)."

The 22 recommendations include nonlawyer ownership, multidisciplinary practice, regulation of law firms as well as lawyers, and a commitment to diversity. For such changes to go into effect would require approval by Canada's provincial bar associations and some legislative changes.

"It will take time—a few years at least—for it to all come together, but as things stand, it will happen and it will be a game changer," Webley says. "In the U.S., it is the consumer and small-business market rather than the large-firm market that is more vulnerable to the U.K. rules, as consumers and small businesses are used to getting all sorts of services over the Internet, and they are not impressed by heavy-hitting law firm partners or fancy offices. They just want less-expensive, quality legal services."

The ABA's Commission on the Future of Legal Services may play a role in this game as it considers the new practices nonlawyers are using to deliver legal services—something the U.K. has through its list of reserved activities only licensed lawyers may do.

"Regulators in the U.S. may try to stop this from happening," Webley adds, "but their room to maneuver will be limited. They may argue there is unauthorized practice of law, but U.S.-admitted attorneys would be doing the legal work. They may argue there is sharing of legal fees, but the U.S. lawyers will not receive fees; they will only receive a salary. They may argue that a nonlawyer cannot have the right to direct or control the professional judgment of the U.S. lawyer, but the other ABS structures that we have here in the U.K. demonstrate that mechanisms can be put in place to prevent that from occurring, albeit ones that are as yet relatively untested. In fact, a U.S. regulator would not have many options in a scenario like this one. It would be a 'market muddle.' "

John Flood, a professor of law and sociology at the University of Westminster, agrees. "Regulators in the U.S. may very well try to take action against a U.K.-based company providing legal services via the Internet to clients in the U.S., but there is little they can do to stop it," he says. "The regulators would not get a lot of support, and the FTC would quite happily eliminate the lawyers' monopoly."

But Paton, whose responsibility on the ABA's Ethics 20/20 Commission included its work on ABS, sees the roadblock coming not from lawyers and regulators, but from American clients. "I'm not as convinced of American consumers accessing legal services that way," he says.

Still, he foresees change coming to the U.S. in the face of ABS opportunities. "I'd rather see the legal profession lead," he says, "than have it come from government."

"Lawyers are very slow, so the changes will take time," Flood says, "but it will happen. The U.S. market, and especially the U.S. consumer market, is ripe for someone—anyone, from anywhere—who can provide quality products and services at a lower price. U.K.-based legal services providers have the ability to dominate not just the U.S., but the world, and they have the means to do it."

But none of this is new for LegalZoom or for J&M. They've already put together the pieces of this puzzle. Why else have they gone to the U.K.? ■

Laura Snyder has 20 years' experience in international corporate law. She is at work on a book-length look at the effect of alternative business structures on legal practice in the U.K., Australia and the U.S., to be released by ABA Publishing.

»SEE MORE ONLINE« Link to Jacoby & Meyers video ads and see an online gallery of firm leaders discussing their experiences: ABAJournal.com/magazine.

UNAUTHORIZED PRACTICE

Washington state moves around UPL, using legal technicians to help close the justice gap

Michelle Cummings looks forward to this spring, when she expects to take on her first law client. By then, the Auburn, Washington, resident will have completed her studies and taken the state licensing examination. Provided she passes, she will begin practicing right away.

Cummings' story could be that of any number of new lawyers looking forward to finishing law school and taking the first fledgling steps of their careers. But Cummings is not attending law school—at least not as lawyers know it—and she has no plans to become a lawyer.

Rather, Cummings is on a historic path to become one of Washington's (and the nation's) first limited license legal technicians. These nonlawyers will be licensed by the state to provide legal advice and assistance to clients in certain areas of law without the supervision of a lawyer.

The first practice area in which LLLTs will be licensed is domestic relations. Cummings and 14 others have taken the required courses and will sit for a licensing examination in March. The state will begin licensing those who pass in the spring.

Cummings' focus will be family law. For now, she plans to work at the Fiori Law Office, a two-lawyer Auburn firm. Someday she may start a practice of her own.

"I like the idea of being part of a firm," Cummings says. "If Loretta were to retire, then I have the option of hanging my own shingle. I like that idea, knowing that I'm building an opportunity where I wouldn't have to find a new job."

A paralegal since 1998, Cummings is also excited about having clients of her own. "Paralegals tend to multitask. I'll get to finally sit down at my desk, focus on the client and do the job they are paying me to do."

NOSING IN

Within a profession that so guardedly polices its practice, many may see Cummings and her classmates as representing the proverbial camel's nose under the tent. So far, Washington stands alone in formally licensing nonlawyers to provide legal services. But California is actively considering nonlawyer licensing, and several other states are

By Robert Ambrogi

Michelle Cummings

PHOTOGRAPH BY TIM MATSUI

beginning to explore it. New York has sidestepped licensing and is already allowing nonlawyers to provide legal assistance in limited circumstances while also looking to expand their use.

In its January 2014 final report, the ABA Task Force on the Future of Legal Education called on states to license "persons other than holders of a JD to deliver limited legal services." Now this issue of allowing nonlawyers to provide legal services is among the topics being taken up by ABA President William C. Hubbard's Commission on the Future of Legal Services.

"I fully anticipate that it will be one of the concepts that will be addressed by the commission," Hubbard says, noting that his appointees to the 28-member commission include both Barbara A. Madsen, chief justice of the Washington Supreme Court, which promulgated the LLLT rule, and Paula Littlewood, executive director of the Washington State Bar Association, which administers the LLLT program.

Jonathan Lippman

"The states are the laboratories of invention," Hubbard adds. "This is a good example of that. I think there is growing acceptance by regulators and private practitioners of law that we need to do things differently."

Proponents maintain there is simply no other way to address the justice gap in the United States. They cite multiple state and federal studies showing that 80 to 90 percent of low- and moderate-income Americans with legal problems are unable to obtain or afford legal representation. The economics of traditional law practice make it impossible for lawyers to offer their services at prices these people can afford.

If lawyers cannot fill the gap, the proponents say, we must find some other way.

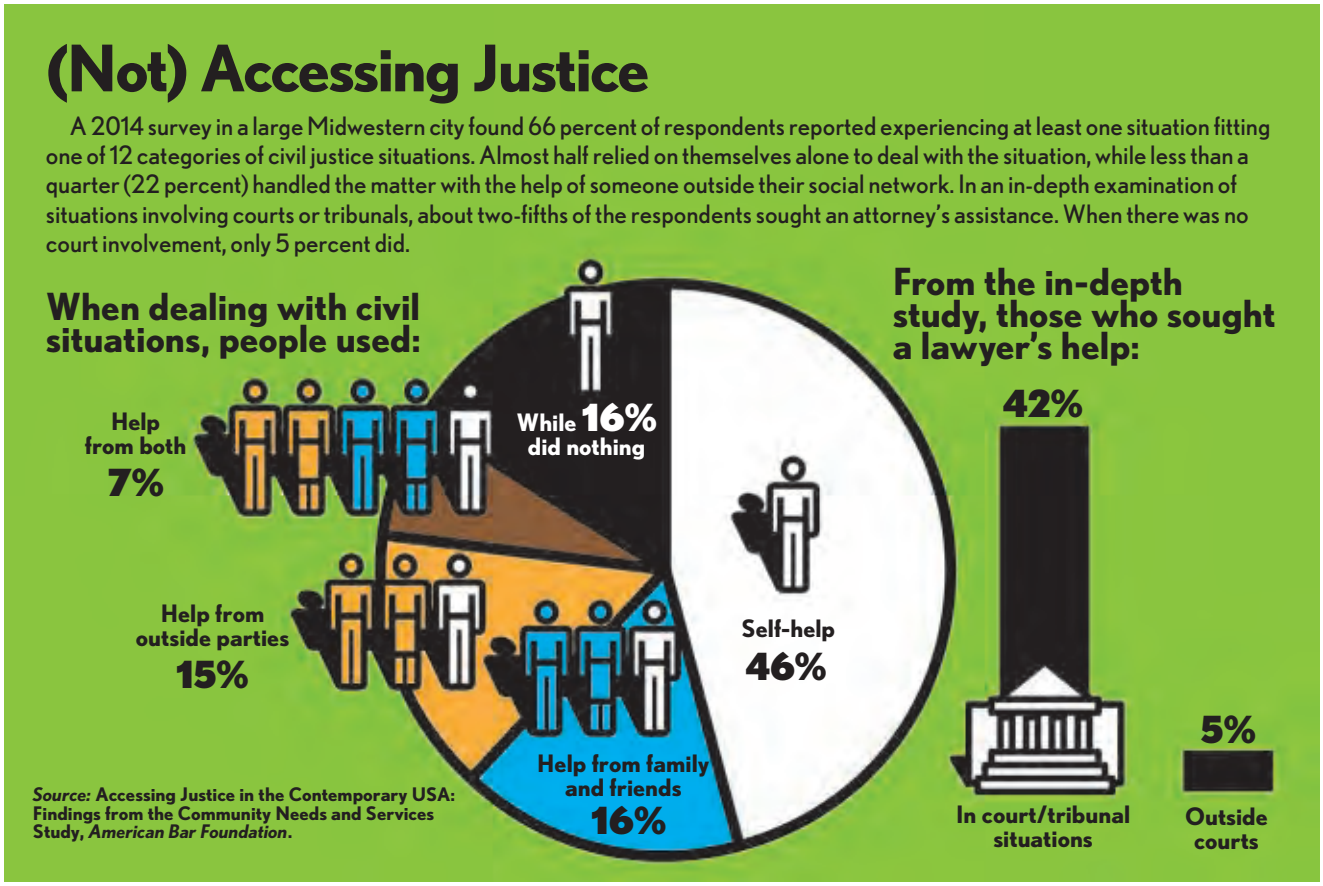
"Even with whatever success we've had with public funding of legal services and pro bono work by lawyers, there is still a gaping hole in our system of providing legal services to the poor and people of limited means," says New York Court of Appeals Chief Judge Jonathan Lippman, who has emerged as a leading advocate of allowing nonlawyers to provide limited services.

"We need to think out of the box and look at every possible avenue for filling this justice gap," Lippman says. "You can get nonlawyers who are experts in a particular area of legal assistance and who can be more effective in that area than a generalist lawyer."

Lippman says his interest in using nonlawyers was sparked by Gillian K. Hadfield, a professor of law and economics at the University of Southern California and another leading advocate for using nonlawyers to bridge the justice gap. After hearing her speak at a Harvard Law School forum, he invited her to New York to testify before his Task Force to Expand Access to Civil Legal Services.

"There is an urgent need for the judiciary to change the landscape

PHOTOGRAPH BY LEN IRISH



of options available to those with legal needs," Hadfield said in her Oct. 1, 2012, testimony, "to exercise your ultimate authority to decide who can provide legal assistance by expanding that list beyond expensive JD-trained and bar-licensed attorneys.

"Of course we want some services delivered only by expensive JD-trained and bar-licensed attorneys—we only want surgery performed by surgeons too," Hadfield continued. "But where are our nurse practitioners? Our legal systems desperately need the equivalent of nurse practitioners and other non-MD health care providers. We need non-JD legal providers who can perform simpler legal work at much lower cost and thereby fill an enormous part of the gaping legal need in this state."

In May 2013, Lippman appointed a committee with the specific charge of studying this issue, the Committee on Non-Lawyers and the Justice Gap. He asked the committee to focus on the use of nonlawyers in housing, elder law and consumer credit cases—areas where as many as 90 percent of litigants in the New York courts are without lawyers.

NEW YORK'S NAVIGATORS

The recommendations of this committee resulted in Lippman's launch in February 2014 of a pilot program in which nonlawyers, called navigators, provide free assistance to unrepresented litigants in housing cases in Brooklyn and consumer debt cases in the Bronx and Brooklyn. Navigators provide a range of assistance, from general information given at help desks to one-on-one help completing legal forms and assisting in settlement negotiations.

Navigators may also accompany unrepresented litigants into the courtroom. While they are not allowed to act as advocates in court, they are able to answer questions from the judge and to provide the litigants "moral support."

In Albany, Lippman created a second project that uses nonlawyers to advise elderly and homebound residents about their eligibility for benefits and other services.

"Perhaps we need to take a leaf from the medical profession, which has long recognized that people with health problems can be helped by a range of assistance providers with far less training than licensed physicians," Lippman said in announcing the initiatives during his 2014 state of the judiciary address. "We all accept that. Why not the same in the law?"

New York's navigators are generally college and law students. They must commit to volunteer for a minimum of 30 hours within three months of their training. A 2½-hour seminar and accompanying manual train them in the basics of housing and consumer-debt cases, as well as interviewing and communication skills. They receive no formal licensing.

Some receive a stipend for their work, such as Sagar Sharma, a prelaw senior at the City College of New York. He came into the program through a summer internship sponsored by Skadden, Arps, Slate, Meagher & Flom. Sharma's full-time work in the housing court last summer

GRAPHIC BY JEFF DIONISE

earned him an award for outstanding volunteer service.

By contrast, the Washington program under which Cummings hopes to be licensed looks surprisingly similar to state schemas for lawyer licensing and oversight.

It is regulated by the state supreme court and administered by the court-appointed Limited License Legal Technician Board. Like lawyers, LLLTs will be subject to strict education requirements, must pass a qualifying examination, will be subject to disciplinary procedures and ethical rules, and must be covered by malpractice insurance.

The Washington Supreme Court created the LLLT program on June 15, 2012, with its promulgation of Admission to Practice Rule 28. In an opinion that accompanied the rule, the court explained that it acted in response to "a ballooning population of unrepresented litigants."

"The authorization for limited license legal technicians to engage in certain limited legal and law-related activities holds promise to help reduce the level of unmet need for low- and moderate-income people who have relatively uncomplicated family-related legal problems and for whom some level of individualized advice, support and guidance would facilitate a timely and effective outcome," the court said.

BORN FROM CONCERNS

Ironically the rule had its genesis in concerns about unauthorized law practice in the state. Acting on the belief that the UPL problem was driven, at least in part, by the lack of a definition of authorized law practice, the state bar formed a committee in 1998 to come up with one. In 2001, the supreme court adopted the committee's recommended definition as General Rule 24.

The court, however, was concerned that simply defining law practice would not be enough to protect the public from unauthorized practice, recalls Stephen R. Crossland, a Cashmere, Washington, sole practitioner who served on the UPL committee. For this reason, the court simultaneously promulgated General Rule 25, creating a Practice of Law Board to "make recommendations regarding the circumstances under which nonlawyers may be involved in the delivery of certain types of legal and law-related services." The court named Crossland chair.

As the POLB went to work studying the expanded use of nonlawyers, another committee was also at work in Washington studying the extent to which the state was meeting the civil legal needs of its residents. In a 2003 report, the committee concluded that low-income people in Washington face 88 percent of their legal problems without help from an attorney. Existing legal services programs, the study said, "are unable to address more than a very small portion of existing demand, never mind expanded demand."

These findings dovetailed with the work of the board and helped spur it to propose a rule authorizing legal technicians, Crossland says. "We called it a legal technician rule, but I think a better way to categorize it is as another category of authorized legal service providers."

In 2006 the POLB submitted the draft rule to the board of governors of the Washington State Bar Association. The response was, perhaps, predictable: The board voted to oppose it. Still, board members left the door open for the POLB to revise the rule and return for reconsideration.

The POLB refined the rule and drafted regulations to govern its implementation. In January 2008, it submitted its revised proposal to the supreme court for approval. The state bar's board of governors asked the court to hold off on action so as to give them time to solicit feedback from members and formulate a position. Late in 2008, the board of governors again voted to oppose the rule.

For four years, the rule sat at the supreme court. In 2009 the court published the rule for public comment. It twice placed the rule on its agenda for a vote, in 2010 and 2011, but each time it tabled the vote to a later date.

Then in February 2012, the POLB submitted further revisions to the court. The revisions were an attempt to address some of the concerns of the state bar, which remained opposed to the proposed rule. This version also changed the name from "legal technician" to "limited license legal technician." In June 2012, the supreme court finally voted to approve the rule, effective Sept. 1, 2012.

"The licensing of limited license legal technicians will not close the justice gap identified in the 2003 civil legal needs study," the court says in its order. "Nor will it solve the access-to-justice crisis for moderate-income individuals with legal needs. But it is a limited, narrowly tailored strategy designed to expand the provision of legal and law-related services to members of the public in need of individualized legal assistance with noncomplex legal problems."

INDEPENDENCE WAY

In Washington legal circles they are now known as "triple-LTs." They will be free to set their own fees and work independently of lawyers, even opening their own offices. The laws of attorney-client privilege and of a lawyer's fiduciary responsibility to the client will apply just as they would to an attorney.

LLLTs will be authorized to help clients prepare and review legal documents and forms; advise them on other documents they may need; explain legal procedures and proceedings, including procedures for service of process and filing of legal documents; and gather relevant facts and explain their significance. They may also perform legal research, but only if the work is approved by a Washington lawyer.

LLLTs may not accompany clients into court or engage in negotiations on a client's behalf. The LLLT board is considering whether to propose an amendment to the rule that would allow LLLTs to engage in these activities.

To become an LLLT, an applicant must have at least an associate's degree and complete 45 credit hours of core curriculum currently being taught at community colleges in the state. The core curriculum is specified by court rule and covers topics such as civil procedure, contracts, legal research and writing, professional responsibility, and law office procedures and technology.

In addition, applicants must complete courses specific

PHOTOGRAPH BY JONAH LIGHT

to the practice area in which they seek to be licensed. For family law, the only approved practice area so far, the 15-hour curriculum was developed jointly by the state's three ABA-approved law schools—at Gonzaga University, Seattle University and the University of Washington.

Applicants also must have 3,000 hours of substantive law-related work experience supervised by a licensed lawyer.

To help get the program started, the LLLT board decided to offer a waiver of the core education requirements until Dec. 31, 2016. To qualify for the waiver, applicants must have passed a certified paralegal examination and have completed 10 years of experience working as a paralegal under a lawyer's supervision. (The candidate must apply within five years of completing those 10 years of work experience.)

Once licensed, LLLTs will be subject to a regulatory framework similar to that for lawyers. They will be required to pay an annual license fee, fulfill annual continuing education requirements, set up IOLTA accounts for handling their clients' funds, and maintain professional liability insurance in the amount of at least $100,000 per claim and $300,000 annual aggregate.

IN CALIFORNIA, CRITICAL NEEDS

Down the Pacific coast, State Bar of California officials have been paying close attention to Washington's program. In March 2013, the bar appointed a Limited License Working Group to look at whether California should adopt a similar legal technician program. After a series of public hearings, the working group came out in July 2013 in favor of the concept and urged the bar to conduct an expanded study.

Among recent initiatives across the states:

- The Connecticut Bar Association's Task Force on the Future of Legal Education and Standards of Admission issued a June 2014 report recommending the state modify its practice rules "so that nonlawyers be permitted to offer some basic legal services to the public."
- The Oregon State Bar convened a Task Force on Limited License Legal Technicians in 2013. A final report and recommendation was expected before the end of last year.
- The Committee on Professional Responsibility of the New York City Bar Association issued a June 2013 report applauding the use of nonlawyer advocates such as courtroom aides and legal technicians.
- The Vermont Bar Association considered the topic of limited legal licensure at its 2013 midyear meeting and created a paralegals section of the bar that will continue to study the issue.
- The Massachusetts Bar Association voted in March 2014 to endorse the recommendations of the ABA Task Force on the Future of Legal Education, including the licensing of people other than those with law degrees.

Craig Holden, now California state bar president, chaired that working group and believes the need for alternative licensing models is unavoidable given the crisis in the delivery of legal services.

"The fact is that the justice gap has grown exponentially in the last several years," says Holden, a Los Angeles-based partner at Lewis Brisbois Bisgaard & Smith. "Since the 2008 recession, more than 6 million Californians have fallen below the poverty line."

Compounding the problem, he says, is that funding for legal services has dropped precipitously due to historically low interest rates causing dramatic reductions in IOLTA programs, a principal source of legal services funds.

"As a service profession, we must recognize that when you have 90 percent of people in critical areas of need not using lawyers because they can't afford them, then by any definition that's a crisis," he says.

California should authorize limited licenses similar to the Washington model in areas of significant need, such as family law, immigration and landlord-tenant law, Holden believes, with the licenses subject to strict requirements for education, experience and examination.

"This is not designed to take food off lawyers' plates," Holden says. "It is designed to home in on that large body of consumers who cannot hire a lawyer and who lawyers are not serving in any event."

Joseph L. Dunn, former state bar executive director, agrees. He sides with those who argue the economics of law practice make it impossible for lawyers to charge prices most consumers can afford. "This is not just a problem for the poor—it's gone beyond the poor to the middle class."

In November 2013 the California bar appointed a Civil Justice Strategies Task Force with a broad mandate to develop a plan for addressing the state's justice gap. The limited license is among the topics it is considering.

Even if the task force comes out in favor of a limited license, it could be years before a proposed rule would be presented to the state supreme court, Holden notes. How it would be received there is anyone's guess.

OTHER STATES

The idea of authorizing nonlawyers to provide limited legal services has percolated for years. In the early 1990s, both California and Oregon appointed task forces to consider limited licensing. Washington already has a form of limited practice, the "limited practice officer," approved in 2009 to help prepare documents for real estate and personal transactions. California, too, permits "legal document assistants" to provide aid to consumers.

But as other states confront their own justice gaps, Washington's first-in-the-nation limited-license rule seems to have captured their attention and spurred new interest in nonlawyers as a partial solution.

"We have received a flurry of interest from other states that are looking at this," says Paula Littlewood, the Washington bar's executive director. "People say to me: 'It scares me to death, but I know it is coming.' "

Crossland, who chairs the LLLT program, says, "I've had conversations with Colorado, New Mexico

"All we're providing is access to injustice, because the class of individuals described is not going to have the competency to actually do for the poor what needs to be done." —*Ruth Laura Edlund*

and California, and I've also spoken to New York, Ohio, Oregon and North Carolina."

CONCERN FOR CONSUMERS

In both Washington and California, opposition to limited licensing has focused on the potential harm to consumers. Even with advanced training, opponents say, legal technicians differ little from paralegals and lack the competency to handle complex legal matters without an attorney's supervision.

Typical of this view was the testimony presented by Seattle family lawyer Ruth Laura Edlund, a partner at Wechsler Becker and the former chair of the WSBA's Family Law Section, at a Feb. 23, 2012, town hall forum sponsored by the bar to air views on the limited license proposal.

"This rule is in my view a feel-good rule that would make us feel that we're doing something good, but all we're providing is access to injustice, because the class of individuals described is not going to have the competency to actually do for the poor what needs to be done," Edlund said. "Just because you're poor doesn't mean your legal problems are simple."

Opponents in California raised similar concerns. In a Feb. 1, 2013, letter to the California bar, solo Stephen E. Ensberg of West Covina questioned the competency of paralegals to provide unsupervised legal services. He said that clients frequently come to him to fix work done by independent paralegals and document preparers who have no attorney supervision.

"The state bar proposal now under consideration would simply give the veneer of legality to these unauthorized, ill-trained practitioners who do more damage than good," Ensberg wrote. "And they are not cheap, in any event. The proposal for licensed nonlawyers simply exposes the public to more harm than is already the current situation."

Another common concern is that limited licensing will have limited impact. While it is complicated and potentially costly for a state to set up and administer a limited licensing scheme, there is no guarantee that LLLTs will make any measurable gain in closing the justice gap, or even that they will charge affordable fees for their services, some say.

"Anyone who hangs out a shingle is operating in a business model that is enormously expensive," says Hadfield, the USC law and economics professor. The same factors that keep lawyers' hourly rates high—payroll, overhead, insurance, marketing and the like—will prevent LLLTs who hang out a shingle from charging affordable rates, she argues.

But Littlewood believes LLLTs will be able to keep their hourly rates low. The cost of entry to become one is much lower than to become a lawyer, she notes, so LLLTs are not burdened with debt starting out. Additionally, market forces will keep LLLT rates low, she argues. "If they charge near what a lawyer charges, the consumer will go to a lawyer."

Hadfield believes licensing nonlawyers alone will have only minimal impact in addressing the need for legal services. To make LLLT practice economical requires economies of scale, she argues, and that can be achieved only if private companies are allowed to provide legal services.

"Suppose LegalZoom or Rocket Matter could hire LLLTs and have them answering phone calls, engaging in online chats—maybe even manning retail outlets—and giving assistance actually filling out the forms and navigating the procedures, all based on protocols developed by lawyers and by the company," says Hadfield, who sits on LegalZoom's Legal Advisory Council. "That's the way you significantly reduce the gap. Then the LLLT can be hired at lower cost."

Hadfield further believes state regulation, not bar licensing, is the better way to expand legal services while still protecting consumers. "I don't think the bar and state supreme courts are set up to do the kind of regulation you want." She envisions a regulatory agency such as those that oversee many medical professions. The agency would license and oversee not only the nonlawyer professionals, but also legal services companies such as LegalZoom and Rocket Lawyer.

EMBRACING OPPORTUNITY

Back in Washington, Cummings and her classmates became the first class to complete the family law courses on Dec. 3, 2014. The licensing examination is scheduled for March.

Cummings credits her employer, Loretta M. Fiori-Thomas, for encouraging her to become an LLLT.

"I know there are some attorneys who aren't thrilled about this idea, but I appreciate that my boss is embracing it," Cummings says. "She is giving me the opportunity to better myself and the opportunity to help people. That's a gift.

"I look at this primarily as an opportunity to help people," she adds. "That's really what it's all about."

Meanwhile, in California, the fate of the LLLT remains uncertain. But former state bar executive director Dunn maintains that something must be done to address the unmet need for legal services.

"The profession has been struggling for years with different answers," Dunn says. "The question going forward is whether we want to embrace LLLTs or not.

"The unmet need is not shrinking, it's growing. We as a profession have to deal with this." ■

Robert Ambrogi is a Rockport, Massachusetts, lawyer and writer.

Short story by Jason Bailey
Illustration by Marc Burckhardt

ABA JOURNAL
SHORT FICTION CONTEST

Good News, Bad News

After a prickly motion hearing, a challenging client delivers a surprise to her lawyer

GOOD NEWS AND BAD NEWS ALIKE ARRIVE IN THE SAME WAY. In a letter, placed in a mailbox on the first floor of the office. Mailbox is a generous term. It's really a small wooden cubby with a name pasted on it using one of those label-makers grocery stores used to use. Thursday was no different; and when bad news came in, it sat there until 3:55, when I picked it out of the cubby and leafed through it in the mail room—not so much reading it as looking for the overall thrust of the decision. "Motion denied. Domestic violence order vacated." Signed and dated, Circuit Judge.

Bad news exists from the time the tragedy happens, here from the time the judge signs the order. But, it's funny how—when totally oblivious of the event—life continues without change. The concerned carry on tranquilly, ignorantly, until the news is revealed.

By the time I read through the order back in my office, a small rectangle with 20-year-old wallpaper, it was nearly a quarter after 4. And by the time I read the rules for appeal, nearly 4:30. By the time I made a few notes and looked up the client's phone number, it was bordering on a quarter till.

Not enough time for a good discussion.

She may be getting dinner ready.

It's unlikely she'll hear from her ex tonight.

Best not to rush into it. Think it over.

I resolved to call her Friday and deliver the news ... and stewed on the prospect of delivering bad news all evening and as I lay in bed, wishing for sleep.

FRIDAY MORNING IS TIME FOR MOTION HOUR, AND THE FIRST FRIDAY OF THE MONTH IS MOTION HOUR IN FAYETTEVILLE, THE SEAT OF LAFAYETTE COUNTY. It's a better motion hour than the third Friday of the month, which is motion hour in Cupp, seat of Cuyler County, Kentucky. Better because Fayetteville is no more than 40 minutes away while Cupp is a solid hour and half—and they both start at 8 o'clock. Every Thursday afternoon I write the court clerk's number on the inside of one of my manila case folders, in case I'm late. With court so close, I don't have to get up quite so early, but the clerk's number is still carefully tucked in my bag.

It's morning in Eastern Kentucky and it's not so late that the clouds don't cling to the hollers between the green hills, dropping their mountain dew. And fogging my windshield. I keep the front windows cracked because the air conditioning doesn't work ... and to let the moisture out that gets in when I forget to roll the windows up when it rains. Lately one of the electric windows has been finicky, but today it's working and I crack the window a little bit and the rush of cool air clears the fog from the windshield.

It's still warm and I consider lowering the driver's window all the way and letting my arm out and the rush of air in. Pride, self-absorption or a false sense of duty intervenes. It's a court day; I have my suit. I won't let the wind in to ruin my hair. Court, hearings, trials: They're all shows and the hair is a piece of it.

The gears grind a bit as I put it into third a little too aggressively for the road-worn vehicle. I listen to NPR until I get a few miles from town. The radio antenna broke going through a car wash a while back and gets limited range. I tend to lose reception somewhere around the turnoff for Maxy Flatts. Once it does, the best thing to listen to are the Jesus stations, of which there are more than a few. A lot of them sell financial advice during the commercials—they always tell me it's a good time to buy gold.

A radio-vangelist takes me the rest of the way to Fayetteville. I'm not late, but there are no spaces in the parking lot when I get there and park on one of the back roads. It means I go in the nondescript back door, not through the grand entrance they just redid. The courthouse sits on a hill, and they redid the steps by the front door with its wide porch and columns so the stairs now reach out in every direction down the hill. They seem to be doing work on the courtroom too, but it's not clear what. They've torn down some walls and insulation. Hopefully they're making it a little tighter for the winter, when it's freezing in the courtroom.

The lawyers at motion hour sit in the jury box, and in chairs and pews in front of the bar and behind counsel's tables. Most of these courtrooms have a swinging gate that separates the members of the bar from the public pews, just like the movies. But today I have a client with me, so I sit in the public pews with her, where we talk in hushed tones about what's going on, what to expect, how to behave when the judge calls our case. Today I'm asking for a temporary custody order.

My client is probably five or six years older than me, but looks older. Though when our case is called, I escort her to the bench exuding—or imagining to exude; it doesn't matter which—a weight of confidence usually borne by experience.

The hearing is held right there in the middle of motion hour. The only witnesses are the parties, questioned by their lawyers. It's a typical case—Mom is the primary caretaker: She takes them to the doctor, to school, fixes meals, etc. We finish our case in about five to 10 minutes and Dad's lawyer does the same thing, except she—the lawyer—is more aggressive: My client is

bad and the lawyer proceeds to elicit a number of bad stories about Mom. Two or three in, I object. "Your honor, she knows better than this," I say, gesturing to the lawyer with my yellow pad. "None of this is relevant to this motion and the question of custody." Or at least that's what I imagine that I said, the essence of which was "Objection, relevance," but in a more wordy, country lawyer type of way. What I really said, I have no recollection. I only remember the eruption that followed.

"Mr. Bailey, you know better than to object like that! Didn't they teach you better than that in law school!?"

As soon as the judge in his high chair barked the admonition at me, I had no idea what my objection had been, or at least what I had said. The air stood still and the low rumbling chatter of the courtroom disappeared. With the quiet came a primal awareness of many sets of eyes locked in on me, excepting opposing counsel, who avoided eye contact and—chin to chest—intently studied the floor. The admonition had everyone's attention.

The bench isn't that high, but he's sitting higher than me and I'm standing. I had been standing tall, confidently, but now I'm lost and only see him glaring down at me. I think I'm supposed to talk, to respond. But I have no idea "how I objected." Did I say: "Your honor, [the other attorney] knows better than that. … This isn't relevant." Which is actually how I was taught in trial skills class. I have no idea what has happened in the last 90 seconds other than I said something and the judge took unusual offense and, having barked at me from the bench, now has the murmuring courtroom silent all looking at me.

"Sorry, your honor." I capitulate. And I think: Should I make my objection again, but formally? I hesitate and the moment is gone. Probably for the best. If relevance was the objection (I think it was) then I've drawn his attention to it. The opposing attorney isn't pushing the issue anyways.

By the time it's my turn to talk again, I've regained my footing and my embarrassment is consumed by the task at hand: a temporary award of custody and use of the home. The argument ends and, despite his outburst, he grants my request.

In full. I've eaten crow but pretend I feel a little better about it because I did right by my client. Zealous advocacy through sheepishness? Although I try to satisfy myself from the very public shaming by focusing on the result, the judge's lashes still sting and I know no one in front of the bar will soon forget it.

As I pack up my bag, the elder stateswoman of the family bar says something nice—something about the judge not taking his meds today. I'm not sure if she's making conversation or having pity on me. Either way, it's a nice gesture in the midst of a feeble start to the day.

FROM FAYETTEVILLE I HEAD NORTH TOWARD CLARKSBURG AND A MEETING WITH A CLIENT. At the intersection where the bypass rejoins the main road there's a new anti-drug poster. "Volleyball my anti-drug" is the caption to a 4x4 poster mounted on a barbed-wire fence. The picture drawn in Magic Marker is of a sticklike girl figure with a ball and net. It's OK. My favorite was the one of the guy with the pink pig whose anti-drug was "hog showing."

Clarksburg is an old town. A river town. One that's seen better days, and so have its residents. There are beautiful old houses through the town, by the river and on the bluff above it. They all seem like they need more attention than the town and its residents

THE WINNING ENTRY

In September, we announced the results of the second annual *ABA Journal*/Ross Short Legal Fiction Contest. The winner of the $3,000 prize was first-time author Jason Bailey, a civil and domestic lawyer who currently practices in Grand Junction, Colorado. His short story, published here, was inspired by his experiences as a newly minted attorney working for Legal Aid of the Bluegrass in Covington, Kentucky—a Legal Services Corp. entity. Bailey, who graduated from the University of Kentucky College of Law in 2005, provided free civil, family and housing law representation for poor and indigent clients throughout the state. "It was my experience in Kentucky that the need for legal services far outstrips the ability to provide them, either on a pro bono or small fee basis," Bailey told the *ABA Journal*. He says he would like to see increased funding for the LSC and its entities such as Legal Aid of the Bluegrass. "It's a great deal for taxpayers," he says. The LSC and LSC entities "provide important legal services at an incredibly low rate to taxpayers, but it goes beyond helping poor people. We have to ensure that everyone has access to the justice system."

The annual contest, supported by the Erskine M. Ross Trust, is intended to encourage literary fiction that illuminates the role of the law and lawyers in society.

can spare. The door I knock on today is one I've seen before, one that opens on a maze of a floor plan with grand foyers, dining rooms, stairways and cupboards divided randomly to create apartments—the kind with old glass door handles and uneven oak floors that creak when trodden.

I've got something that needs signing and I don't trust sending it in the mail. Not at the fault of the mail, but in the fault of my written instructions. Directions to sign, date and notarize challenge the challenged. I once applied to teach English overseas, and I utterly failed the role-playing part of the interview, tripping up over the explanation of simple concepts to a student who lacks an understanding of simple words. I've gotten better since then, but the phone is always better than a letter and an in-person visit is always better than the phone. Anyways, she's one of my favorite clients. A sweet young woman, without fail she always calls me Mr. Belding. Belding is not my name.

I rap on the door. "Laura," I call. "It's Ernie Bailey."

There's some movement inside, and the door opens and she squints at the sun shining over my shoulder. I repeat, "Hi Laura. It's Ernie Bailey—I've got those papers for you to sign. Like we talked about over the phone yesterday."

"Oh! Hey, Mr. Belding," she smiles and says, inviting me inside.

Her home is neat, though the landlord should really have replaced the carpet a decade or so ago. A box of pink toys and dolls betrays the usual presence of a little girl. I go through the documents on the coffee table as we sit on the couch. She signs without question. I notarize it above the line with my printed name: Ernest Bailey.

I tell her I'll copy the papers back at the office and send her a copy. Give her another copy of my card, a reminder of my phone number, and tell her to call me with questions or if anything comes up.

"OK. Thanks, Mr. Belding."

AFTER A TRIO OF CINCINNATI CHEESE CONEYS, I take the road back to the office, windows down, watching the passing fields, farms and cattle, chasing the smell of rain that has already passed. The midday storm has left in its wake a blue sky and a quickly evaporating damp. I try to empty my head and avoid dwelling on the morning's events and worrying over the delivery of the bad news that's been waiting since the day before. It works, up to a point. Waiting to deliver bad news is never a good idea.

You risk them getting the news secondhand.

And it festers in the body of the messenger. Unmet obligations are the ephemeral cause of ulcers, hair loss and most other maladies that show with age. I resolve to deliver the news as soon as a I return. Or try; she might not even answer, and if she doesn't I'm not going to leave any message other than to call me on the machine.

She picks up on the second ring.

"Ms. Nappier, it's Ernie Bailey," I say, waiting only briefly for an acknowledgment. "I wanted to give you a call. We got the judge's order in the mail and unfortunately it's not good. He denied our motion."

Am I talking too fast? "The judge said that we weren't entitled to a protection order and we didn't show the girls were endangered with Dad. Therefore, judge said Dad didn't need supervised visitation, and we hadn't justified reducing Dad's visitation." A complete loss.

We'd had the hearing about three weeks ago. It had gone most of the day in the upstairs courthouse in Cupp. A town with a courthouse, grain silo and a diner with the best fried chicken in the state. Before I started venturing there, the town had put tape over the parking meters around the courthouse, conceding the lack of traffic to town, even on court days.

In the courtroom, the opposing attorney wore a gangster's suit with black and white patent-leather shoes. He once told me he buys 300 used suits at a time from some guy in his old neighborhood in Chicago. I don't know that I believe him, but he gave my client a good working over on cross-examination.

She was the kind of client that bordered on difficult. She easily qualified as challenging, with lots of questions and lots of demands on what "had to happen." I tried to prepare her for any outcome, but she refused to acknowledge the possibilities, as if she could mold the outcome through sheer stubbornness. So we pressed on with a full attack on Dad, his inattention, inappropriate behavior, cavorting, drunkenness, and a long list of Mom's complaints. In the end the judge didn't buy it. Any of it. I thought he was wrong, but not terribly wrong. And almost certainly acting within his discretion.

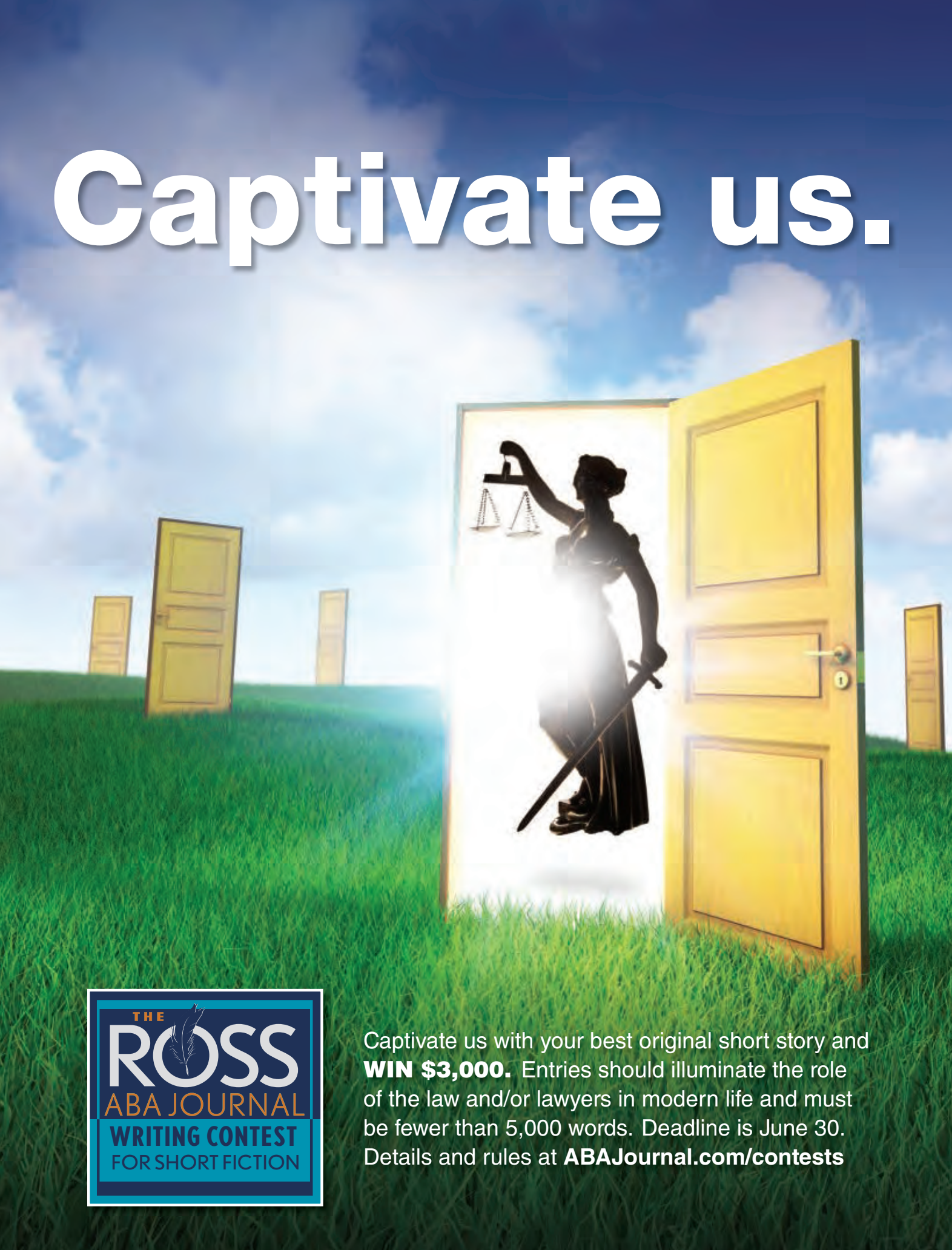
I explained as much to the client. Talked about the possibility of appeal. I didn't have much hope for one. But if she wanted, we could talk about it and whether we could help her with it. "But there's only a limited time period to appeal, so if you want to do it, we need to talk again early next week." I'd been talking straight for about 15, maybe 20, minutes now without interruption, and almost without pause. A loud TV on in the background was about the only sign that she was still there. Now both of us were silent and I waited for some response. An angry question. Quiet sobbing. Yelling. Her actual response was unexpected.

"Nah, I don't want to appeal. I guess if the judge thinks he ain't done nuthin' too bad, then I guess he hasn't."

Her response caught me off guard—it was accepting, but not one of defeat or resignation. I should have shut up and listened but started babbling, tripping through a rehearsed apology for an outcome that didn't go the way we wanted.

"Oh, that's all right, Mr. Bailey; you worked really hard for us. I ain't never had a lawyer before, and someone had to stand up to Roy and tell him he can't ack like this. Maybe he'll behave a little better now; I know he don't want to pay no lawyer fees again," she said with a laugh. "Well, I better get to fixin' supper. Thanks for your help, Mr. Bailey." ■

Captivate us.



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The Law of Ebola

The ABA's Health Law Section creates learning opportunities for lawyers seeking to advise clients about the impact of the outbreak

BY MARTHA MIDDLETON

Michael Clark: Ebola is at the intersection of human rights, science and the law.

Almost from the moment a U.S. hospital received its first patient from the current Ebola outbreak in West Africa, the possibility that the disease could spread to this country became a matter of legal concern as well as a potential medical crisis.

The quick response by the legal profession is a good thing, according to Michael E. Clark, who chairs the ABA Health Law Section. Even though only a handful of Ebola patients have been treated in U.S. medical facilities, the outbreak presents many interesting and difficult issues because it lies at the intersection of human rights, science and law, says Clark, a special counsel at Duane Morris in Houston.

Lawyers already have been asked to weigh in on legal issues such as how best to protect the privacy rights of patients and help guarantee health workers' safety. Lawyers also have provided advice on the extent to which states may impose quarantines, and whether airlines and shipping companies may restrict travel by individuals. Lawyers say many clients, particularly those in the health care field, have called seeking information about how Ebola might affect their labor and employment, human resources, risk management and environmental policies.

Some law firms have put together teams to advise clients on legal issues relating to the outbreak. In October, for instance, Reed Smith, an international law firm headquartered in Pittsburgh, launched a Global Ebola Task Force after clients in a range of industries began asking questions about how they might be affected.

"We saw that this issue really involves multidisciplines," says Patrick E. Bradley, a partner in the firm's Princeton, New Jersey, office who heads the task force. "Primarily, companies are trying to be proactive and trying to avoid overreaction."

The outbreak has caused many of Reed Smith's clients to consider how their business activities are affected by events in Africa, says Patrick F. Rice, a task force member. "This event, or series of events, has caused clients to see what touch points they have in Africa, whether it be employees to whom they have responsibilities, sales channels that go into Africa, whether they source things from Africa," says Rice, a partner in the firm's New York City office and a member of its Africa business team.

The Health Law Section also moved quickly to help inform its members and other lawyers about legal issues arising out of the Ebola outbreak. Educational initiatives are an important element to an effective response to the crisis, especially given its fast-changing dimensions, and the high levels of misinformation and fear that have been triggered by the disease, Clark says.

On Oct. 30, the section sponsored a webinar, Ebola 2014: A Public Health and Legal Perspective. A week later, Clark moderated a "tweet chat" on issues related to Ebola. (A tweet chat is a way for a conversation involving multiple parties to take place over Twitter.) And the section's annual Health Law Summit, held Dec. 8-9 in Washington, D.C., featured a program titled "What You and Your Clients Should Know about Responding to Ebola and other Health Threats."

Among the speakers at these programs were Montrece Ransom, a public health analyst at the Centers for Disease Control and Prevention in Atlanta; Melissa L. Markey, an attorney at Hall, Render, Killian, Heath & Lyman in Troy, Michigan,

PHOTOGRAPH BY KAYE MARVINS PHOTOGRAPHY

Health care workers remove the body of a man they suspect died of the Ebola virus on the outskirts of Monrovia, Liberia, in November. Many U.S. businesses have concerns relating to personnel in Africa, sales channels that extend there and products sourced from Africa.

who is an expert on pandemics; and Kirk J. Nahra, a partner at Wiley Rein in Washington, D.C., who chairs the firm's privacy group and co-chairs its health care group.

A book that addresses issues raised by Ebola and other infectious diseases is in the works at ABA Publishing. *Infectious Disease Law, Regulation & Policy* is slated for publication this summer. The book is co-sponsored by the Tort Trial and Insurance Practice Section, and the author is James T. O'Reilly, a volunteer professor at the University of Cincinnati College of Law and past chair of the Section of Administrative Law and Regulatory Practice.

SOBERING NUMBERS

Ebola spreads by direct contact (through broken skin or mucous membranes) with bodily fluids—saliva, blood, urine, stool, tears, semen, sweat, even breast milk—from a person carrying the virus who has begun to manifest symptoms, including fever, severe headaches, vomiting, diarrhea, intense weakness, bleeding and muscle or abdominal pain. Ebola also can be transmitted through contaminated clothes or bedding. The virus normally has an incubation period of anywhere from two to 21 days. A vaccine is in early stages of development and testing.

The current Ebola outbreak, which the CDC estimates is the worst since the disease was first identified in 1976, was centered in the West African nations of Liberia, Sierra Leone and Guinea. However, limited numbers of cases have been reported in Mali, Nigeria, Senegal, Spain and the United States, where Ebola became a local story in August when a handful of patients began arriving for treatment in U.S. hospitals. Two American nurses contracted the disease after treating patients who were brought to this country.

As of mid-November, 10 Ebola patients had been treated in the United States; two of them died, and the others recovered. The overall numbers are much more sobering: According to the Nov. 26 situation report from the World Health Organization, there have been 15,935 confirmed Ebola cases in the current outbreak in all eight countries affected, with 5,689 confirmed deaths.

A volunteer trains to treat Ebola.

In this country, states have the broadest legal authority to investigate and control public health outbreaks and protect the safety of citizens under their general police power, according to Ransom, who participated in the Health Law Section's webinar. While that power extends to isolating and quarantining within their borders, she explains, state authorities need to ask whether their actions are reasonable, necessary and proportionate to the situation. Whatever action a state takes, she says, generally must be the least restrictive measure necessary to maintain public health.

The federal government may take its own steps in many areas, legal experts say. In October, for example,

Continued on page 94

ABA Medal recipient Earl Anderson can boast of many accomplishments during his tenure in the association's leadership ranks

BY TERRY CARTER

In 1972, Anderson becomes the youngest active duty four-star Marine general.

Attorney, General

Earl E. Anderson already was 69 years old in 1988 when he became active in the ABA's leadership. But over the next quarter-century, Anderson—who has been an ABA member for more than 60 years—has played significant roles in creating a new division for government lawyers, helping guide the association's efforts on national security issues, serving on the Board of Governors and in the House of Delegates, working on task forces, and launching a project to provide pro bono legal assistance to military personnel. But those are just the highlights.

It's not that Anderson, now 95 and still active in the ABA, is a late bloomer; it's just that he was busy with other things during the first few decades after he joined the ABA as a 1L at the George Washington University Law School in 1950, when he was a 30-year-old major in the U.S. Marine Corps. He had flown bombers in World War II, and a few years later, he was selected with a handful of other officers to go to law school.

Actually, Anderson bloomed early. In 1972, he became the youngest active duty four-star Marine general—and the Corps' first aviator with that rank. He had briefly been assigned legal duties after graduating summa cum laude from law school in 1952; but with understandable ambition, he returned to flying, which appeared to offer more opportunity for promotion than working as a lawyer with the Judge Advocate General's Corps.

So he transitioned from bombers to helicopters, which had become more strategically important in the Korean War and thus offered upward mobility in the career sense. He would fly helicopters in Vietnam, too. Ultimately, he became the Marine Corps' assistant commandant, its second-highest officer.

In 1954, Anderson's Marine Aircraft Group gathers in front of an H-34 helicopter in El Toro, California.

PHOTOGRAPHS COURTESY OF DAVID ANDERSON, CIV, USAAF

In 1945, Anderson leads a squadron on a bombing mission in the Southwest Pacific.

PHOTOGRAPHS COURTESY OF DAVID ANDERSON, CIV, USAAF

Anderson's unusually lengthy and varied list of accomplishments was highlighted in August when he received the ABA Medal, the association's highest honor, during the General Assembly at the 2014 annual meeting in Boston.

STANDING TALL

Anderson, who lives in Vienna, Virginia, near Washington, D.C., took the podium in the Veterans Memorial Auditorium at the Hynes Convention Center using a cane, though otherwise standing firm. In trademark fashion, he went into detail about a few individuals with whom he had served in war—men who sacrificed their lives to preserve freedom and justice.

Anderson was introduced by past ABA President Robert J. Grey Jr., a partner at Hunton & Williams in Richmond, Virginia. The two men had bonded in the late 1990s, as Grey began his own ascent in the ABA leadership, and they worked together in the Virginia delegation to the House of Delegates. Their close ties continued when Grey was president in 2004-05 and Anderson was a member of the Board of Governors.

Grey says that Anderson's emphasis on others in his speech was typical: "When accomplishing great things in the ABA in various causes, he never looked for credit, never promoted himself. So a lot of people didn't know how much he was getting done. He

Anderson, commanding officer of Marine Bombing Squadron 443, at ease on Emirau Island.

Past ABA President Robert Grey (right) introduces Anderson (center) as the recipient of the ABA Medal, presented by then-ABA President James Silkenat.

cared more about what was happening for others."

Anderson expresses pride and does take credit for his leading role in creating the ABA's Government and Public Sector Lawyers Division in 1991, which he would chair in 1994-95. "We needed a forum for them to participate," he says. "They were one-eighth of all the lawyers in the U.S."

That effort grew out of Anderson's first venture into significant ABA work.

Following his retirement in 1975 after 35 years in the Marines, Anderson became head of the Office of U.S. Foreign Disaster Assistance. In 1977, he was named head of the office of the U.N. disaster coordinator, a position he held for five years. Then in 1988, when he had more time on his hands, his friend John R. DeBarr, who was incoming chair of what is now the Solo, Small Firm and General Practice Division, asked Anderson to speak on his behalf at the annual meeting in Toronto. DeBarr, a retired Marine brigadier general, had been the staff judge advocate to the commandant, the Corps' highest-ranking lawyer.

The division soon had a new committee concerned with government lawyers, and Anderson was its first chair. Later, the new Government and Public Sector Lawyers Division was launched.

AGENT OF CHANGE

Anderson also played a leading role in establishing the ABA's Military Pro Bono Project with lawyers helping enlisted military personnel and their families in civil matters. "We've had millions of dollars worth of pro bono hours donated by volunteer lawyers in this," he says.

In his ABA Medal acceptance speech, Anderson quoted the 19th century lawyer-statesman Daniel Webster's description of justice as "the ligament which holds civilized beings and civilized nations together." Then Anderson said: "Now, I believe with all my heart that the American Bar Association keeps the ligament of justice strong." The ABA, he continued, is an organization that "works tirelessly for freedom and justice and whose moral compass is pointed always, always to true north."

According to association guidelines, the ABA Medal recognizes "conspicuous service to the cause of American jurisprudence." Anderson's service either was conspicuous or perhaps should have gotten notice. A good example of the latter occurred as he finished law school. Anderson still grumbles, more than 60 years later, when he tells how he and other Marine and Navy officers studying full time in the law school program also had to work full time in JAG offices in the D.C. area. After morning classes, Anderson would hustle to work at the Pentagon and stay afterward until 1 a.m. or so to work on his school cases in the law library there.

Graduation also meant a change in duty station, and then-Capt. Anderson had an exit interview with his boss, the Navy's judge advocate general, Rear Adm. Ira Hudson Nunn, whose daughter was Anderson's classmate and colleague on the law review.

"He asked if there was anything he could do for me," Anderson says. The admiral got an earful about how Navy and Marine officers in the law school program had to both work and study full time, a policy that the junior officer called "penny-wise and pound foolish."

"He said, 'I'll change it today,' and he did," Anderson recalls.

"Anything else?" the admiral asked. Anderson filled his other ear: One reason they had to work for JAG in the Washington area while in school was because they were geographically available—which meant they could choose only among George Washington, Georgetown or Catholic University of America—all in the district. Meanwhile, Air Force, Army and Coast Guard officers in similar programs had the pick of law schools around the country, including Nunn's alma mater, Harvard. Moreover, members of the other services had no other military duties while they were in law school.

"He said, 'I'll change it today,' and he did," Anderson says. Few who entered the law program in ensuing decades knew that he had cut that broad new path for them.

Earl Anderson accomplished a lot in that manner, over a lot of years. ■

2015 BOARD OF GOVERNORS ELECTION

At the 2015 Midyear Meeting, the Nominating Committee will announce nominations for terms beginning at the conclusion of the 2015 Annual Meeting and ending at the conclusion of the 2018 Annual Meeting. For rules and procedures on filing petitions, visit ABAJournal.com/magazine.

NOTICE BY THE SECRETARY

At the 1996 Annual Meeting, the House of Delegates approved an amendment to the Constitution to provide that at least a 40-day notice shall be given to Association members of the time and place of the meeting of the Nominating Committee at which nominations for officers and members of the Board of Governors will be considered. For the full text of this notice, visit ABAJournal.com/magazine.

AMENDMENTS TO THE 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 of the House of Delegates will be August 3-4, 2015, in Chicago. For the full text of this notice, visit ABAJournal.com/magazine.

PHOTOGRAPH BY KATHY ANDERSON

Appropriate Disclosure

The ABA urges the Treasury Department to exempt law firm clients from beneficial ownership reporting rules

BY RHONDA McMILLION


Kevin Shepherd

The ABA is urging the U.S. Department of the Treasury to incorporate language protecting the confidentiality of law firm clients into a proposed rule establishing customer due diligence requirements for banks and other financial institutions.

The Treasury Department's Financial Crimes Enforcement Network, known as FinCEN, began the rule-making process in 2012. If adopted, the proposed rule would seek to combat money laundering, terrorist financing and other illicit financial activity by requiring banks and other financial entities to report information about the beneficial ownership of entities opening new accounts, including information about individuals who directly or indirectly own, control or manage an entity.

In its Advance Notice of Proposed Rulemaking, FinCEN sought comment on whether lawyers, law firms, accounting firms and similar entities should be required to disclose that they opened an account on behalf of another party. In May 2012, the ABA submitted a comment letter expressing concerns that such a rule could be interpreted to require lawyers to disclose the identities of individual clients or the beneficial owners of corporate clients when establishing accounts on their behalf, or depositing client funds into the lawyers' client trust accounts.

In its current proposed rule, FinCEN sets forth a guidance provision covering "intermediaries" such as law firms. The guidance defines an intermediary as "a customer that maintains an account for the primary benefit of others, such as the intermediary's own underlying clients." Under the guidance, an intermediary that opens a new account at a financial institution for the primary benefit of its clients would be required to disclose only its own beneficial ownership information, not the beneficial ownership information regarding its clients.

In written comments submitted to FinCEN on Oct. 3, 2014, Kevin L. Shepherd, who chairs the ABA Task Force on Gatekeeper Regulation and the Profession, voiced the association's support for the guidance as "a reasonable and effective way for financial institutions to gather clearly defined beneficial ownership information about the financial institution's direct customers without the detrimental consequences that could arise if intermediaries were required to disclose beneficial ownership information about all of their underlying clients for whom the accounts are opened and maintained."

MAKING THINGS CLEAR

But because the guidance is broadly worded, some financial institutions could "misinterpret the rule and seek to require lawyers and law firms opening such accounts to disclose information about their clients' identities and beneficial ownership," warned Shepherd, a partner at the Venable law firm in Baltimore. He urged FinCEN to clarify in the final rule that new accounts established by law firms or lawyers on behalf of their clients would be deemed intermediated accounts, and that disclosure of clients' identities and beneficial ownership would not be required.

"In our view," Shepherd stated, "the considerable time, effort and expense that would be required for lawyers and law firms to collect and report beneficial ownership information for the large percentage of their clients for whom they establish trust accounts is excessive and clearly disproportionate to any marginal ... benefits that the information might be expected to provide to FinCEN and other federal agencies."

Shepherd also stated that requiring lawyers to disclose their clients' identities and beneficial ownership information would be inconsistent with Rule 1.6 of the ABA Model Rules of Professional Conduct, which is widely followed by the states. Under the rule, lawyers generally are prohibited from revealing information relating to the representation of a client unless the client gives informed consent.

The ABA supports risk-based measures designed to combat money laundering, including the *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, as alternatives to the more costly and burdensome rules-based approach of legislation being considered by Congress and proposed agency rules. Last fall, the ABA, the International Bar Association and the Council of Bars and Law Societies of Europe jointly published *A Lawyer's Guide to Detecting and Preventing Money Laundering*, a PDF that is available free online. ■

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

FOR MORE Read the full text of the ABA's comments to FinCEN at ABAJournal.com/magazine.

PHOTOGRAPH COURTESY OF VENABLE LLP

Nurse Kaci Hickox (with boyfriend Ted Wilbur) treated Ebola victims in Sierra Leone; upon her return to the U.S., she was quarantined in New Jersey. Her home state of Maine also tried to quarantine her, but she refused, settling the issue in court and agreeing to monitor her health.

The Law of Ebola

Continued from page 89

the CDC and the Department of Homeland Security announced that they were introducing enhanced entry screening at five major U.S. airports that receive more than 94 percent of travelers arriving from West Africa.

Following that action, at least two states—New York and New Jersey—announced initially that they would impose a mandatory quarantine on health care workers with direct contact to Ebola patients, an action that many believed was overreaching and one that would deter some health workers from traveling to West Africa to help Ebola victims.

A nurse who treated victims in Sierra Leone, Kaci Hickox, brought the issue to the forefront in late October when, upon her return to the United States, she was ordered into mandatory quarantine in New Jersey. When she was released to Maine, that state also attempted to quarantine her, but she defied the order and pursued legal action. In November, she reached a settlement under which she was permitted to travel but was required to monitor her health and report any symptoms during the incubation period, which passed without her contracting the disease.

Nahra points out that much of the complexity of the legal response to any disease outbreak stems from the fact that the competing legal interests of different groups come into play. A patient's right to privacy, for instance, is protected under, among other laws, the Health Insurance Portability and Accountability Act.

RECORDS AND RIGHTS

Lawyers at the ABA programs on Ebola noted that some health care employees will start snooping into a patient's medical records, which is a clear violation of HIPAA. Entities covered under the law need to tell their workers that such actions are never permitted, the lawyers said. Two employees at the Nebraska Medical Center in Omaha were fired in September for inappropriately accessing the medical records of an Ebola patient being treated there.

Health care workers have distinct employment rights that might be affected by any disease outbreak, lawyers say. Under the Americans with Disabilities Act, for instance, questions can arise over whether an infected employee may have a disability for which reasonable accommodations must be made. The ADA also covers how much information an employer may request from an employee who calls in sick, when an employer may take an employee's temperature, and whether employers may require employees to stay home if they have symptoms of the disease.

There also are likely to be staff members who are not comfortable taking care of an Ebola patient, in which case the Occupational Safety & Health Administration may become involved, lawyers point out. Under the Occupational Safety and Health Act, an employer has an obligation to provide a safe and healthful workplace, and furnish appropriate personal protective equipment and training; an employer may have to adjust work schedules and rotate assignments to reduce exposure to dangerous conditions. Under the National Labor Relations Act, meanwhile, employees have the right to cease work in good faith because of abnormally dangerous conditions.

Preparedness is the main lesson that health care providers should learn from the current Ebola outbreak, lawyers say. Hospitals and other businesses need to have an emergency operations plan in place, Markey says, not only to respond to the current Ebola threat but also for any future high-risk infectious disease outbreak or other public health emergency. ■

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Traffic Stop Roulette

Sometimes motorists get lucky, sometimes they don't

If you do enough driving, it's all but inevitable that you're going to be pulled over by a police officer one day, and it's best to be cooperative (if not polite). The encounter will most likely be conducted professionally and you'll soon be on your way, muttering expletives under your breath. But for some unlucky motorists, things go terribly awry and leave them wondering: "What just happened here?"

According to news reports, an Indiana woman, Lisa Mahone, was stopped for a mere seat-belt violation in late September, with her boyfriend and two children in the car. Hammond police officers ordered Jamal Jones—a passenger—to show ID. Jones didn't have any identification and, the police reportedly say, refused to write his name on a piece of paper. The officers drew their weapons and ordered him out of the car.

After Jones hesitated out of fear, according to his lawsuit, one of the officers smashed the window, showering glass on all four occupants. A Taser was then used on Jones, who was dragged out of the car and arrested. Mahone's son captured the incident on cellphone video.

Mahone and Jones allege excessive use of force and false arrest in their lawsuit filed in the U.S. District Court for the Northern District of Indiana in October.

Also in Indiana, in August, another traffic stop ended in a nonviolent but perplexing way. State trooper Brian Hamilton pulled over Huntington County resident Ellen Bogan and gave her a warning ticket for speeding.

But according to a lawsuit filed in the Southern District of Indiana, Hamilton remained at Bogan's car window and asked whether she had accepted Jesus Christ as her savior. Bogan claims in the lawsuit that she was uncomfortable being asked such a question and felt compelled to answer yes. She says Hamilton then gave her a pamphlet from a local church ministry outlining "God's plan for salvation," and requiring her to acknowledge that she is a sinner.

Bogan's lawsuit claims First and Fourth Amendment violations.

And finally, on to Texas, where a traffic stop wasn't just perplexing; it (allegedly) got downright kinky.

In August an officer of the Cypress-Fairbanks Independent School District, which includes part of Houston, reportedly stopped a female motorist and told her that her auto insurance had expired. According to ABC13 Eyewitness News, officer Patrick Quinn also said he detected an odor of marijuana, and the woman allowed him to search the car. Quinn claimed to find drug paraphernalia, which she denied owning.

Court documents indicate Quinn told the woman he would allow her to go free if she would let him smell and lick her feet—or she could give him her underwear instead. Though the woman said she agreed to comply with one or both requests, Quinn changed his mind and let her go. The woman subsequently reported the incident to police, and Quinn was charged with two felony counts of official oppression. The school district reportedly placed Quinn on administrative leave pending the outcome of the court case.

So apparently the way a traffic stop plays out can come down to the luck of the draw. It's too bad for good cops everywhere that sometimes that draw is a wild card. ■

ILLUSTRATION BY JEFF DIONISE

The attorney general's Dupont Circle home was just one damaged in a multicity bomb attack on officials deemed hostile to organized labor.

Palmer Raids Target Immigrants

Jan. 2, 1920

At the end of World War I, anxiety in Europe and the U.S. over an emerging Bolshevik government in Russia all but overshadowed Allied victory. Known in America as the Red Scare, this fear of world communism often expressed itself as xenophobia, racism and the suppression of organized labor. In the public mind, decades of violent confrontation between labor and business interests conflated the highly diverse influences of anarchism, nihilism, socialism and communism, making them seem on the verge of overthrowing the U.S. government.

On the night of June 2, 1919, bombs erupted in seven cities—all within a 90-minute time frame—striking the homes of judges and other officials deemed hostile to organized labor. One of the targets was U.S. Attorney General A. Mitchell Palmer, whose Washington, D.C., residence was ripped by dynamite and shrapnel as his family slept. Although Palmer's family was unharmed, pieces of the bomb—and the bomber—damaged doors and windows in the neighborhood. A Quaker and a Progressive Democrat, Palmer earned a pro-labor record in Congress. But by the time of his recess appointment by President Woodrow Wilson, his anti-communist zeal had taken the form of undisguised nativism.

Palmer urged deportation of foreign radicals and staged a series of unsuccessful raids aimed at Russian immigrant labor groups. With only tepid support in the courts, Palmer upgraded an intelligence unit inside the Justice Department and appointed 24-year-old J. Edgar Hoover to run it. And by fall—as strikes affecting the steel, coal and railroad industries, and even the Boston police, exacerbated anti-immigrant fervor—Hoover had gathered dossiers on 60,000 potential deportees. On Nov. 7, federal agents swept through more than a dozen cities, arresting over 1,000 immigrants, mainly Russian. But reports of warrantless searches and indiscriminate violence tempered public regard for the results. By December, the number of actual deportees dwindled to a few hundred, among them anarchist firebrand Emma Goldman.

On Jan. 2, 1920, Hoover's agents swept through 33 cities in a spectacular show of force, targeting two Russian labor organizations and arresting more than 3,000 labor activists. Twelve prominent lawyers denounced the raids as "utterly illegal acts" whose warrantless arrests, police violence and widespread property destruction "brought the name of our country into disrepute." That same month, the American Civil Liberties Union was established and began defending the targets of the raids. Nearly all the resulting arrests were voided.

At the height of the Red Scare, Palmer—at the urging of Hoover—predicted an armed revolution would begin on May 1. When May Day passed without incident, Palmer was left a laughingstock, and his once legitimate presidential ambitions were consigned to the margins of American politics.

Attorney General A. Mitchell Palmer

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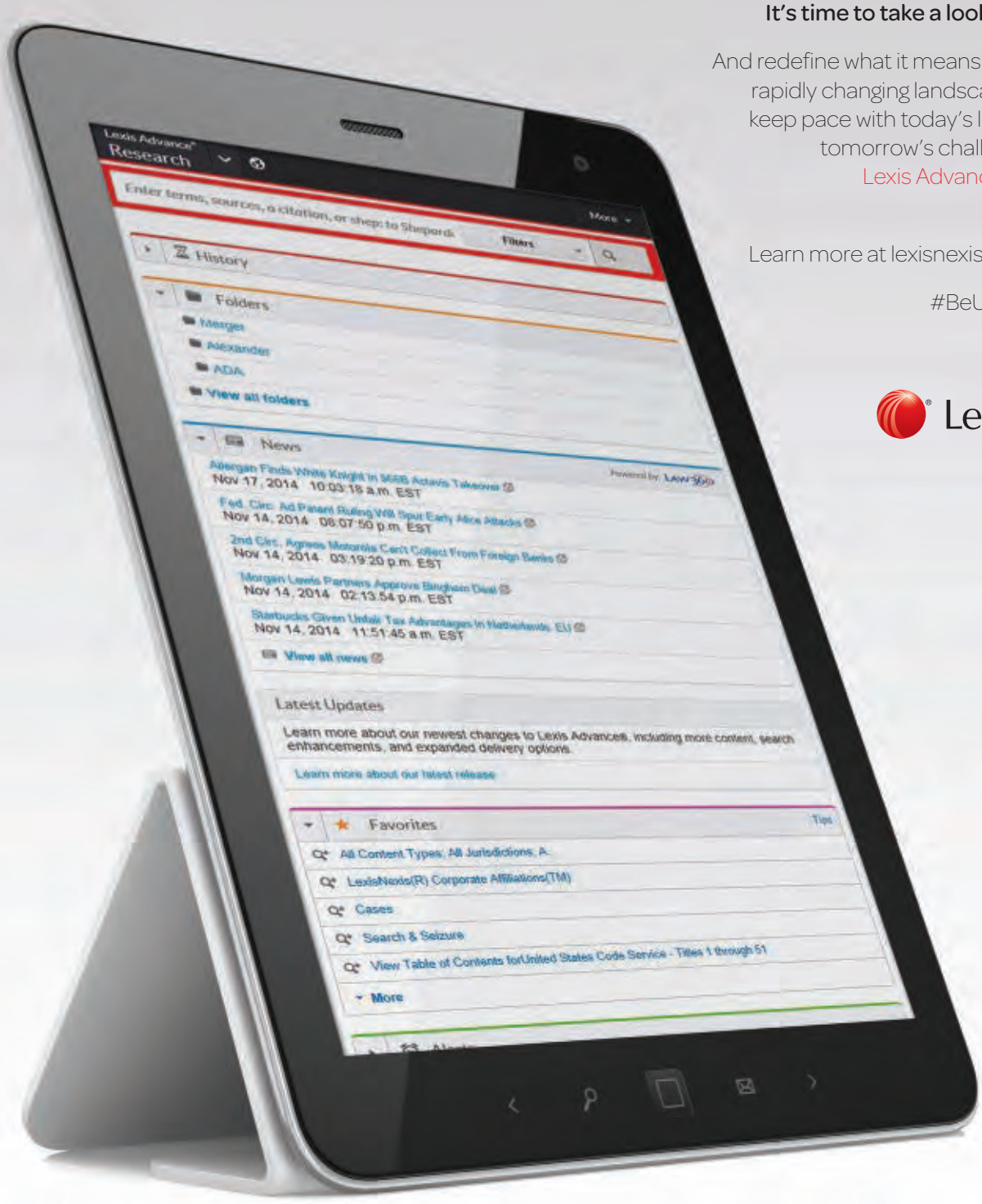

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