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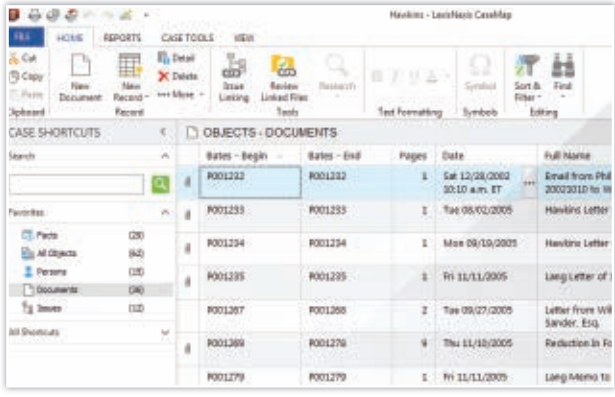

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STANDING FOR CHANGE
Beijing attorney Teng Biao (center) says that in China, about 300 human rights defenders have been detained and imprisoned in recent years.
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FEATURES

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TAKING FLIGHT
A law school incubator program helped Michelle Green develop a steady client base.
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podcast

Understanding Uncoupling

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

ABA Journal February 2015; Volume 101; Number 2 (ISSN 0747-0088) ©2015 ABA Journal is published monthly by the American Bar Association. Editorial, advertising, subscription and circulation offices: 321 North Clark Street, Chicago, IL 60654-7598. Periodicals postage paid at Chicago, Ill., and at additional mailing offices. PUBLICATIONS MAIL AGREEMENT NO. 40032229. RETURN UNDELIVERABLE CANADIAN ADDRESSES TO ABA/JOURNAL, PO BOX 875, STN A, WINDSOR ON N9A 6P2. The price of an annual subscription to ABA members ($5.50) is included in their dues. The price of an annual subscription to members of the Law Student Division of the ABA ($2.75) is included in their dues. Additional annual subscriptions to members, $5.50. Domestic annual subscriptions to others: Individual—$75; Institutional—$120. International annual subscriptions for others: Individual—$99; Institutional—$144. Single copy price, $7. Write to Service Center, 321 North Clark Street, Chicago, IL 60654. Changes of address must reach the American Bar Association's Member Records Department office 10 weeks in advance of the next issue date. Please include both your old and new addresses. POSTMASTER: Send address changes for the ABA Journal directly to the American Bar Association's Member Records Department, 321 North Clark Street, Chicago, IL 60654.

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Support for Parents

"Far from Home," December, page 17, misses a major aspect of how our child abuse and neglect laws operate to prevent children who are adopted and also biological children who cannot be safely cared for at home from accessing reasonable alternative support without relinquishing custody.

Even when custody relinquishment is the only available option to families who have made the reasonable determination that they cannot care for the child at the present time (often because the child's behavior is dangerous to other family members), the parents are labeled neglectful no matter what they choose to do. Some parents face an excruciating "damned if you do, damned if you don't" decision because by keeping the child in their homes they are subjecting their other children to risk.

Read Toni Hoy's excellent memoir, *Second Time Foster Child,* before making the plight of desperate adoptive parents even more difficult by criminalizing private relinquishments. Certainly, a publicly available relinquishment process—such as through safe haven laws or a right to surrender children based on a variety of factors, including inability to address the child's needs—could be beneficial, but what is most needed is a way for children to keep their fragile family ties but be served in community placements that do not force relinquishment on many families in desperate situations.

Calling for criminal penalties in the face of the criminal lack of resources for families with children who are more than troubled—i.e., children who have serious mental health needs (often due to childhood trauma)—seems like a step in the wrong direction, except in cases in which the parent doing the re-home is truly reckless about the replacement decision. There need to be plenty of safeguards for the parent who has run out of options short of the re-homing or relinquishment decision; and the article, by calling first for criminalizing what is broadly labeled as "re-homing," should not be something we clamor for.

Diane Redleaf
Chicago

What is most remarkable about this article is the slew of adoption "experts" who opine that the phenomenon of re-homing is primarily caused by adoptees' attachment disorders and other pathologies and/or lack of resources for adopters.

There is no actual evidence that adoptee maladjustment or lack of access to resources is at the bottom of re-homing.

If anything, the actual stories and testimonies of adoptees who have been trafficked (some through multiple re-homings) suggest that adoptive parents who re-home are mirroring the lax standards and ethics of the international adoption system that allowed them to adopt in the first place.

Ronald Morgan
Beaverton, Oregon

I do not believe plain criminalizing re-homing is the answer. This will deter people from considering adoption. Suggestions: (1) reinforce the screening and matching process of adopting parents and adoptees; (2) strengthen penalties and establish a civil cause of action for adoption agencies who misrepresent facts or information about a child with the intent to induce a prospective

parent to adopt (like a statutory fraudulent misrepresentation claim specific to adoption agencies); (3) strengthen post-adoption support programs; (4) establish a legal avenue for those parents who wish to re-home, thereby providing procedures that would include the same screening and matching process of adoptions (the new parent would have to adopt the child with the same procedures and subject to the same safeguards, just like the parent wishing to re-home did).

Glorian Maziarka
Jacksonville, Florida

COPYRIGHT ARTICLE UPDATE

Rightscorp may not be in the ticket-issuing business for much longer ("Piracy Patrol," December, page 27). It is the object of a class

Christopher Sabec, a former entertainment law attorney, co-founded Rightscorp.

PHOTOGRAPH BY LEN IRISH

action complaint filed in the U.S. District Court for the Central District of California (case No. 2:14-cv-09032), alleging (rather convincingly) violations of the Telephone Consumer Protection Act, the federal Fair Debt Collection Practices Act and its state counterpart, as well as abuse of process under federal and state law (issuing illegal subpoenas to Internet service providers). The business produced a net loss of about $2.3 million on revenues of only $690,000 for the nine months ended Sept. 30, 2014 (Form 10-Q).

Richard Bourgerie
New York City

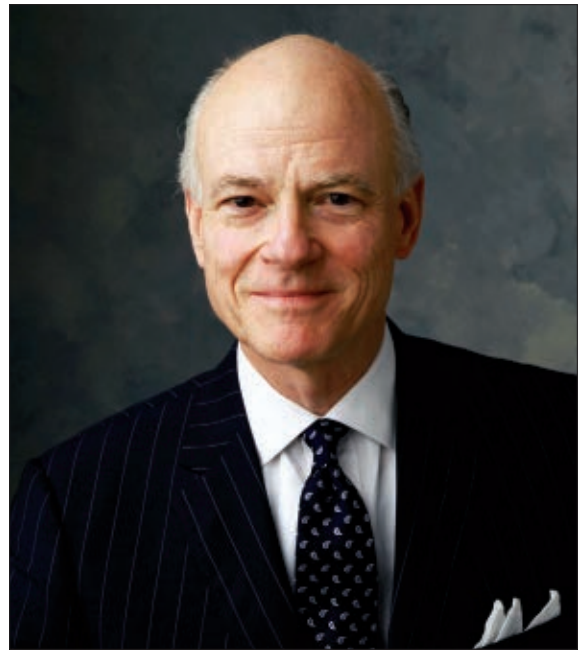
CORRECTION

In "Authorized Practice," January, page 72, University of Southern California law professor Gillian Hadfield should have been quoted as saying: "Suppose LegalZoom or Rocket Lawyer could hire LLLTs … ."

The *Journal* regrets the error.

Upstream Intervention

Early involvement, education are keys to keeping kids on track for productive lives



A close friend and law partner, Steve Morrison, devoted 10 years of his life and significant pro bono time to a landmark public education case, *Abbeville v. State of South Carolina*. Plaintiffs brought the original suit in 1993 on behalf of poor, rural school districts, seeking to hold the state to its constitutional obligation to provide every child the opportunity to acquire an adequate education.

In his closing argument before the trial court in 2004, Steve recounted an African parable about babies found floating down a river. "We have to get these babies out of the river," a young fisherman exclaimed as he scrambled to pull them out. As an older fisherman began walking away, the young man protested. But the elder explained, "You help as many of the babies as you can. I'm going upriver to see who's throwing babies into the river."

In other words, we need to focus on the root causes of injustice, not just its symptoms. Steve worked hard on *Abbeville* and, sadly, died in October 2013. But the efforts of Steve, Carl Epps and their team paid off. After a reargument in 2008, the South Carolina Supreme Court ruled for the plaintiffs in November, directing the state legislature to work with the school districts to ensure adequate educational opportunities for all the state's children.

This is an obvious victory for equal opportunity. Education is an important issue for the bar because of our commitment to eliminate bias and enhance diversity in our profession and the justice system. To meet this critical goal, we must look upstream at how best to nurture our children's capabilities. More than 60 years ago, lawyers played a major role in securing education on an equal basis in *Brown v. Board of Education*. Yet despite the efforts of pro bono and public interest lawyers, we are still far from securing the basic right of an adequate education for all children, particularly those from low-income families, children of color, children with disabilities and others from at-risk environments.

The problem is particularly acute in the "school-to-prison pipeline," in which disadvantaged students, especially those who need special education or social assistance, are often neglected. Minority students are disproportionately represented in this population as they often attend failing schools, are subject to zero-tolerance discipline policies, and drop out in high numbers—if they are not suspended or expelled first. Many become involved with the criminal justice system and are sent to detention facilities.

These are civil rights and economic issues. Students who leave school prematurely frequently are disengaged as citizens, lose earning capacity, become more dependent on public programs, and eventually join the prison population. Nobel laureate James Heckman of the American Bar Foundation has documented the benefits of high-quality early childhood education as the most economical prevention of these ills.

A national leader on these issues is the American Bar Association Diversity Center, which promotes equal opportunity in our legal and justice systems. Within the center is the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline, which helps develop interest in the law and promote career opportunities among diverse students from prekindergarten through college. The ABA Coalition on Racial and Ethnic Justice fosters discussion and shapes policy on matters arising from racial and ethnic bias in the justice system. These groups are joining the ABA Criminal Justice Section on a new Joint Task Force on Reversing the School to Prison Pipeline, which is hosting town hall meetings and developing policy strategies on the topic.

To get at the roots of inequality and injustice, we must ensure that all children have the opportunity to graduate from high school well-qualified for productive and sustainable work, higher education and active participation in family and civic life. Only by placing ourselves upstream to meet our challenges can we realize society's promise of equal opportunity for all. ■

Follow President Hubbard on Twitter @WilliamCHubbard.

PHOTOGRAPH BY MARC HAUSER

Opening Statements

EDITED BY JILL SCHACHNER CHANEN
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THE BLUEBOOK

A Uniform System of Citation

The Birth of Baby Blue

LEGAL MINDS DIFFER ON WHETHER *THE BLUEBOOK* IS SUBJECT TO COPYRIGHT PROTECTION

CONTROVERSY IS PROBABLY not the first thing that comes to mind when you think of *The Bluebook*, but the bible of legal citation is at the center of an increasingly nasty dispute over whether it is subject to copyright protection.

Open-source advocates are contending that the style and citation manual is an essential piece of legal infrastructure and can't be preserved as private property under copyright law. The book's publishers say otherwise.

The dustup began when Frank Bennett, an academic at Nagoya University Graduate School of Law, wanted to add *The Bluebook* to Zotero, an open-source citation tool. "He was told to stay off the grass," says Carl Malamud, president of Public.Resource.org, whom Bennett later contacted. "It really bothered me."

Lawyers at Boston's Ropes & Gray, who represent the Harvard-Yale-Columbia-Penn consortium that publishes the manual, claimed that *The Bluebook* contains "carefully curated examples, explanations and other textual materials" that are protected by copyright.

"The letters back and forth had a lot of law professors rolling their eyes," Malamud says. Among them was Christopher Sprigman, a New York University law professor, who believes *The Bluebook*, first published in 1926, has become part of the legal infrastructure required by courts and therefore should be equally available to everyone.

The law is not copyrightable and neither are systems of citation, Sprigman says. "In this case, a copyright is being used to keep something private that we all have to use." That's a problem for small firms, prisoners in jail and indigent parties who may not have access to the $30 manual.

Meanwhile, an anonymous source informed Malamud and Sprigman that *The Bluebook*'s 10th edition from 1958 was never copyrighted. So Sprigman and others are now using that version to produce what they're calling Baby Blue, "an expression of *The Bluebook* that's simpler, better and easier to use" that will be available in the public domain. "This isn't some romance novel. This is a piece of legal infrastructure," Sprigman says. "They've enjoyed a monopoly on this for a while. This is a project they can join or resist—I hope they'll join."

In a statement, lawyers at Ropes & Gray representing *The Bluebook*'s publishing consortium said, "The student editors remain actively committed to increasing access to *Bluebook* content. We have made earlier editions of *The Bluebook*, up to and including the 15th edition, available on our website," and more online content is scheduled for release in conjunction with publication of the volume's 20th edition in May.

According to Cornell University law professor and former dean Peter Martin, the *Bluebook* citation format is used primarily by academics and law journals. Very few courts actually require it. As such, Malamud's notion that *The Bluebook* is an edict of government is "a real stretch," he says.

Still, to help explain the complicated system, Martin has published for more than 20 years an introduction to citation rules on Cornell's Legal Information Institute website. "I acted in the belief that to tell people how to cite in accordance with *The Bluebook* is not infringing on copyright," he says. "Where I come down is that as a complex, richly illustrated—in terms of examples—book, *The Bluebook* enjoys copyright protection. So I wouldn't duplicate the book itself. But to provide guidance so cites are consistent with *The Bluebook* has been done for a long time and does not infringe copyright." He counts Sprigman's Baby Blue among those publications that are permissible.

Malamud agrees. "They can send us all the nasty letters they want. We'll still keep working on our Baby Blue project."

—Leslie A. Gordon

A Different View

New project rewrites SCOTUS opinions from a feminist perspective

MORE THAN 50 LAW PROFESSORS and lawyers are collaborating to analyze how U.S. Supreme Court jurisprudence would look if seminal cases had been adjudicated from a feminist perspective. The book *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* will contain 24 rewritten decisions on topics such as reproductive rights and substantive due process to show how feminist legal reasoning might actually change the course of law.

Inspired by the 2010 publication of a similar study in Britain, *Feminist Judgments* pioneers a new form of critical socio-legal scholarship in the U.S. The rewritten decisions will use the same precedent that bound the Supreme Court at the time of each case but will incorporate a feminist perspective on the facts and the law. The book aims to prove that stare decisis can mask what is really a masculine viewpoint, and that hidden gender bias—not stare decisis—may be what drives the reasoning and results in much of the nation's jurisprudence.

More than 100 people applied to contribute to the project, says Temple University Beasley School of Law professor Kathryn Stanchi, one of the project's three editors. Some contributors will rewrite the selected opinions and others will write commentary that will provide historical and nonlegal context to the decisions. "It'll be a collaboration between master theorists and people firmly grounded in the practical," including practitioners, legal writers and legal theorists—all from both genders, she says. "We were very, very mindful that feminism is a big tent, and there's room for everyone."

According to co-editor Bridget Crawford, a Pace Law School professor, the project is "more than a purely academic exercise," and the intended audience is broadly defined to include mainstream lay readers. "I can't think of another volume with 50 contributors," Crawford adds. "For those who say we're in a post-feminist era, I say feminism remains front and center. This book is a testament to that."

The project should be completed by year-end.

—L.A.G.

ILLUSTRATION BY JIM FRAZIER

Blawg 100 Top Vote Getters

After *ABA Journal* editors chose their 100 favorite law blogs for 2014, polls were open to the public. More than 10,000 votes later, the following blogs can claim bragging rights for winning the popular vote:

Careers/Law School
Best Practices for Legal Education
bestpracticeslegaled.albanylawblogs.org

Criminal Justice
Defrosting Cold Cases
defrostingcoldcases.com

For Fun
Lowering the Bar
loweringthebar.net

Intellectual Property
Trademarkology
trademarkologist.com

Labor & Employment
California Peculiarities Employment Law Blog
calpeculiarities.com

Law Practice Management
Divorce Discourse
divorcediscourse.com

Legal Research/Legal Writing
In Custodia Legis
blogs.loc.gov/law

Legal Tech
Electronic Discovery Law
ediscoverylaw.com

Litigation
The Velvet Hammer
karenkoehlerblog.com

News/Courts
Popehat
popehat.com

Niche
The Legal Genealogist
legalgenealogist.com/blog

Profs
Wills, Trusts & Estates Prof Blog
lawprofessors.typepad.com/trusts_estates_prof

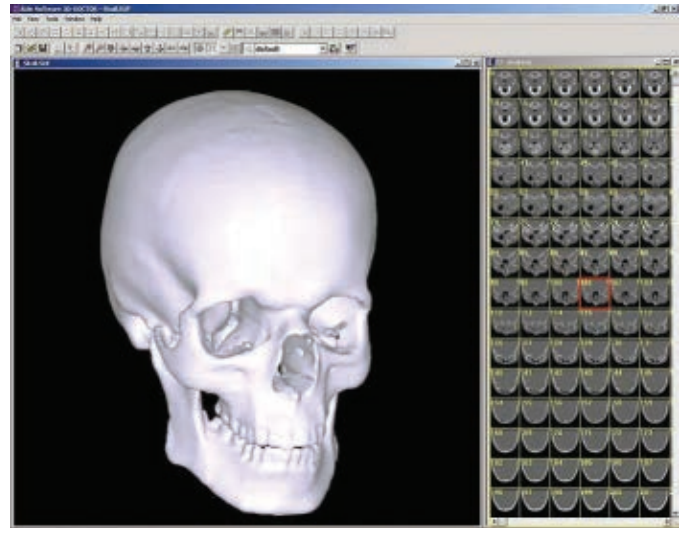
Tort/Consumer
Top Class Actions
topclassactions.com

To see vote totals, browse the complete list of 2014 honorees and learn which blogs have been elevated to our Blawg 100 Hall of Fame at ABAJournal.com/Blawg100.

—Sarah Mui and Lee Rawles

Physical Evidence

A Florida company offers 3D printing for demonstrative evidence



COURTESY OF 3D PRINTED EVIDENCE

TAKING A BREAK from law school wasn't Josh Weinberger's original plan.

But after encountering academic problems, Weinberger found himself working at a 3D printing studio in Jacksonville, Florida, and he realized that there was untapped potential for 3D printing in litigation.

Three-dimensional printers produce objects by following a complex computer-assisted design that binds together raw material. Using 3D printing, attorneys can make models from photos taken at the scene of an accident or a crime, allowing jurors to see evidence long since spoiled. They can scale up a fingerprint so an expert can point out distinguishing marks or scale down a crime scene to a tabletop. And, Weinberger says, models can be accurate down to the submillimeter level.

"You can take an X-ray or a medical scan and print out something that is an exact replica of your client's bone," he says. "You can get the exact replica of what you're talking about, versus something that kind of replicates it."

That's why Weinberger and his bosses at the Florida studio, Bryce Pfanenstiel and Adam Dukes, started 3D Printed Evidence, where they are offering to make demonstrative evidence for trials. Though they've been in business for only a few months, Weinberger says they've already done work for lawyers, including a scale model of part of a crime scene and medical models for several forensics experts.

The models cost $200 to $400 on average, which makes them cheaper than computer animations, but not necessarily less costly than other conventional demonstrative evidence, like poster boards. However, Weinberger says, the ability to touch the evidence can be powerful.

"Having the [tactile] component just makes it resonate that much further," he says. "You could watch a five-minute animation and when the jurors go back to deliberate, they don't necessarily have it in front of them."

—Lorelei Laird

Who Made That Hooch?

Distillers are facing lawsuits over labeling claims

What does handmade, small batch or even all-natural mean when it comes to liquors and spirits? That's the question pending in numerous courts around the country as some niche distillers are finding their labels under scrutiny.

Templeton Rye, which markets its boutique rye whiskey as based on a recipe used by farmers in Templeton, Iowa, to supplement their income during Prohibition, has been sued three times over the last year for false labeling and deceptive practices.

"Templeton Rye is marketed as the revival of a Prohibition-era whiskey recipe that was the favorite drink of Chicago mobster Al Capone. … Defendant has marketed Templeton Rye as being 'small batch' and 'made in Iowa.' … However, directly contrary to these representations, defendant's whiskey isn't actually made in Iowa. The whiskey—despite being named after Templeton, Iowa, and owned by a company that owns a distillery there—is instead distilled and aged at the Indiana factory of MGB Ingredients Inc. that also distills and ages whiskey for countless other brands," states the complaint filed in Cook County, Illinois, in *McNair v. Templeton Rye Spirits*, one of the class actions pending against the whiskey maker.

Templeton, for its part, says it can claim locally made status because it adds its own ingredients at its Iowa facility to replicate the original recipe. Last fall, company co-founder Keith Kerkhoff, a grandson of recipe creator Alphons Kerkhoff, defended Templeton on YouTube, saying in a video posted there: "It's kind of like they make the flour and we bake the cake. And there's a total difference right there, if any of you folks have ever tried flour versus a baked cake."

Tito's Handmade Vodka has four similar cases against it pending in courts in California, Florida, Illinois and New Jersey. All the lawsuits allege the label's claims that the product is "handmade" and "crafted in an old-fashioned pot still by America's original microdistillery" are misleading. "On information and belief, the vodka was made, manufactured and/or produced in 'massive buildings containing 10 floor-to-ceiling stills and bottling 500 cases an hour,' using automated machinery that is the antithesis of 'handmade' and that is in direct contradiction to both the 'handmade' representation and the 'crafted in an old-fashioned pot still' representation on the product," claims the plaintiff. The case, *Hoffman v. Fifth Generation Inc.*, was originally filed in San Diego County in California and has since been removed to a federal court there.

A statement released by the Austin, Texas-based Tito's in response to the California suit said in part that the vodka is still distilled at the same Austin location where the business was founded in 1995, using pot stills customized and hand-built on-site.

Real Housewives of New York's Bethenny Frankel also faced a class action suit in New York in 2013 over Skinnygirl Margarita's all-natural claims, but that suit was dismissed on standing.

TEMPLETON RYE WHISKEY, TITO'S HANDMADE VODKA

Both Tito's and Templeton have noted that the U.S. Alcohol and Tobacco Tax and Trade Bureau approved their brands' labels.

Alcohol labels are unique in that they must first be approved by the federal agency, says Bernard Kipp, an alcohol compliance adviser with Stoel Rives, a law firm in Portland, Oregon. "Labels have to be preapproved by two standards: First, mandatory information such as type of alcohol and alcohol content; and second, on whether the labels contain any prohibitive practices—in other words, anything that can be considered misleading," Kipp says. "And that's very subjective. So a label can be preapproved, but that does not guarantee that the product matches what the label claims.

"Proving whether the statements on the label are true with these smaller distillers comes down to someone checking the batch records against the claims," he says. "That's where the rubber hits the road."

Kipp says the U.S. Supreme Court may be the impetus for the number of false advertising suits filed of late after its decision last year in *Pom Wonderful v. Coca-Cola Co.* The court greenlighted Pom's claims against Coca-Cola that the soft drink giant's product labels on its pomegranate blueberry drink were misleading because the beverage contained less than 1 percent of those juices. —*Judy Sutton Taylor*

Hearsay

$33,837

The amount of money charged to the city of Detroit by bankruptcy lawyer David Heiman for travel expenses between Detroit and Heiman's Florida vacation home.

Source: The Detroit News, *Dec. 3.*

1 Million Sold

Donuts Inc. (a purveyor of generic top-level domain names) reports registering its 1 millionth Internet address, heavenly.coffee, last October.

Say What?

"Anybody knows how long jury duty last?"

"I'm the wrong guy to be put on jury duty. Dude is innocent in my book. It's all he say and she say. I wish I could talk to the guy."

"I just told these people I don't wanna be here, and they keeping me and talking to me like I'm gonna get along and be friendly."

"I need to be a lawyer. ... This is crazy!"

—Tweets supposedly describing jury duty from the verified Twitter account of Arizona Cardinals defensive end Darnell Dockett on Dec. 2. (According to azcentral.com, Dockett wasn't on jury duty in either county where he could have been summoned.)

$130 Million

The amount of money that New York City plans to spend over the next four years on reducing the number of people with mental health problems in the city's jails.

Source: nytimes.com, Dec. 1.

Less Than 1%

Legal spending represented 0.38% of company revenue in 2013.
56% of those dollars were paid to outside counsel.
5% was paid directly to discovery providers.
***Source: Huron Legal's* 2014 Impact Benchmarking Report.**

3:1

In 2013, there were, on average, **3.31** bar admittees for every law job in the country. That's up from 2011, when the ratio was **2.93** admittees for every law job.

Source: TaxProf Blog, Nov. 16.

ISTOCKPHOTO (3), ANDREW ROBERTS (3)

Cartoon Caption Contest

WINNER! Congratulations to Thomas G. Boyer for garnering the most online votes. Boyer's caption, below, was among more than 150 entries submitted in the *Journal*'s monthly cartoon caption-writing contest.

WINNING CAPTION

"You'd think our own daughter would call to tell us she's trying her first case. But no-o-o, we get a text."
—Thomas G. Boyer of Waukesha, Wisconsin

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, Feb. 8, 2015, with "February 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

Donna Hill, who is legally blind, distributed her book online, but her reading software is unable to decipher it.

PHOTOGRAPH BY JEFF WOJTASZEK

Sites for Sore Eyes

People with disabilities want the Internet to be more accessible

by Wendy N. Davis

National Pulse

When Donna Hill self-published a book, *The Heart of Applebutter Hill*, in May 2013, she arranged for it to be distributed on electronic platforms, including Scribd, an online service that hosts digital books and other online documents, including court rulings.

But when the legally blind 64-year-old author tried to use Scribd, she found that the company's site was incompatible with screen-reading software she uses that converts text into speech or sends it to a refreshable Braille display.

As a result, Hill, who has used screen-reader applications to navigate the Web since she first went online in 2005, was unable to read her book on Scribd.

"It makes me livid," says Hill, who lives in Susquehanna County, Pennsylvania.

She says she complained to the San Francisco-based company. "They don't give a damn about blind people," she says. "We don't register. And to have an accessibility issue this fundamental is proof that when you sat down to design your website, there was no thought whatsoever given to accessibility."

In July, the National Federation of the Blind (for which Hill has done some volunteer work) sued Scribd, alleging violations of Title III of the Americans with Disabilities Act by failing to make its services available to blind users. The organization says in its complaint, filed in U.S. District Court in Vermont, that the federal Americans with Disabilities Act requires operators of "any place of public accommodation" to offer equal access to people with disabilities.

The rights group is seeking a declaratory judgment against Scribd and an injunction ordering the company to make its site and apps accessible to blind people.

Scribd's answer, filed in late October, says the ADA only applies to "places," and not to Web services.

The company says in its court papers that it's working on changing its site, and is "sympathetic" to the NFB's concerns. Still, Scribd argues, applying the ADA to websites "would sweep far beyond Scribd to the entire online industry, forcing massive expenditures of resources without the balance and clear standards that would emerge from the legislative process."

The NFB filed its opposition to Scribd's motion to dismiss on Dec. 29, stating that "Congress unequivocally intended that the ADA's broad mandate for providing access to public accommodations apply to emerging technologies like those now offered by Scribd."

SCRIBD ISN'T THE ONLY COMPANY THAT'S BEEN SUED for allegedly failing to make its site accessible to disabled people. Advocates for the vision-impaired and the deaf have brought lawsuits against several large companies—including Netflix, Redbox, Target and eBay—on grounds they violated the ADA.

Meanwhile, the stakes for disabled people are increasing, as more and more services migrate online.

"This could be a new civil rights issue," says University of Tennessee law professor Bradley Areheart. "The Internet is increasingly important every day, and it shows no signs of relenting," says the co-author of "Integrating the Internet," a paper slated to appear in the *George Washington Law Review* this year.

Areheart adds that much of the progress disabled people have made in gaining access to physical venues could be eclipsed by barriers on the Web.

The 25-year-old statute gives examples of the types of places it covers, but it doesn't include Internet services, which barely existed when the law was passed. Instead, the ADA specifies that it applies to places like hotels, zoos, laundromats and movie theaters.

Areheart argues that the law should be interpreted to apply to "commercial websites," which, he says, are analogous to the examples mentioned in the law.

"Few are claiming that the entire Internet needs to be publicly accessible," he says. "That would be onerous for every individual."

The Supreme Court hasn't yet decided how the 1990 rights law should apply to websites, and lower court judges disagree about the answer. In the broadest interpretation of the ADA to date, U.S. District Judge Michael Ponsor of Massachusetts allowed the National Association of the Deaf to proceed with a 2012 lawsuit accusing Netflix of violating the law by failing to close-caption its video streams.

Netflix unsuccessfully argued that people stream videos at home, and that private residences aren't places of "public accommodation."

Ponsor rejected that argument. "The ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation," he wrote, adding that Congress "intended the ADA to adapt to changes in technology."

Netflix also argued that adding captions to content it didn't own could raise copyright issues, but Ponsor said no evidence had yet been developed about those issues.

Soon after that ruling, Netflix settled the lawsuit by agreeing that it would close-caption all videos by the end of 2014.

But in two other recent cases, federal district courts in California dismissed ADA allegations against Redbox and eBay.

Judge David Carter in the Central District ruled in May that the ADA doesn't require Redbox to close-caption its video streams.

And Judge Edward Davila in the Northern District dismissed allegations that eBay violated the ADA by failing to offer a verification mechanism that was suitable for Melissa Earll, a deaf woman who wanted to sell vintage comic books and other memorabilia on the service. She alleged that eBay required prospective sellers to verify their identities by typing in a code that's provided over the telephone.

Earll has appealed the dismissal to the 9th U.S. Circuit Court of Appeals at San Francisco.

The judges in those matters said that 9th Circuit precedent makes clear that the ADA applies only to websites closely connected to brick-and-mortar locations, such as Target—which was sued in 2006 by the NFB for failing to make its site compatible with screen readers. After losing a motion to dismiss the lawsuit, Target agreed to settle by paying $6 million and making its site friendlier to people who access the Web via screen readers.

The U.S. Department of Justice is expected to issue more-encompassing regulations soon, which could provide guidance to courts but won't necessarily settle the issue. The Federal Communications Commission recently issued regulations requiring captioning of streaming video, but those rules

only apply to broadcasters and cable companies, and don't apply to consumer-generated content.

In December, the FCC established the Disability Advisory Committee to address disability issues within the FCC's jurisdiction. The committee is expected to keep the FCC apprised of current and evolving communications issues for people with disabilities.

Howard Rosenblum, CEO of the National Association of the Deaf, says the group "encourages consumers to caption their videos" that are posted to platforms like YouTube. "Consumers generally are not places of public accommodation," he says, "but the websites that host such videos may be."

MEANWHILE, THE INTERNET ASSOCIATION—a trade group made up of some of the largest Web companies, including Amazon, Facebook, Google, eBay and Yahoo—warns that applying the ADA to the Internet "may place uncertain, conflicting, burdensome and possibly ruinous obligations" on Internet companies.

"Liability would potentially flow not merely to large conglomerates, but also to small Web-only businesses or even individuals who have neither the wherewithal nor the technical skill necessary to comply," the group wrote in an amicus brief filed with the 9th Circuit, where Earll's appeal against eBay is pending. The organization adds that the potential for liability would be disastrous for innovation and the Internet economy.

The Internet Association adds that making sites accessible could prove expensive, noting that compliance with the DOJ's forthcoming guidelines is expected to cost a minimum of $5,000 and possibly as much as $100,000 per site, depending on the type of content.

Daniel Goldstein, who represents the NFB, downplays those concerns. "I don't think that most people with disabilities in this country are looking for perfection. They're looking for an opportunity to participate." ■

MARTIN DIVISEK/BLOOMBERG VIA GETTY IMAGES

"Domestic drones will devastate the Fourth Amendment unless there are some really strict guidelines," warns John Whitehead.

Drones at Home

States eye regulating aerial surveillance

by David L. Hudson Jr.

National Pulse

With a police helicopter hovering over his Taos County, New Mexico, home, Norman Davis consented in 2006 to allow a platoon of law enforcement officers, armed with A-15 semi-automatic weapons, to search his premises. The choppers had spotted marijuana plants that Davis, then 72, claimed he grew for medicinal purposes.

Based on his consent, the state district court threw out Davis' request to suppress evidence. But the New Mexico Court of Appeals—the second-highest appellate court—ruled in January 2014 that under the state constitution's search law, officers should have obtained a warrant for aerial surveillance. The court upheld the suppression motion.

Yet the court added one brief view of the future: "It is likely that ultra-quiet drones will soon be used commercially and, possibly, for domestic surveillance." At press time, Davis' case was scheduled for argument before the New Mexico Supreme Court on Jan. 14.

While the federal government uses these unmanned aerial vehicles for military purposes, states are increasingly turning to drones for law enforcement as a means of enhancing surveillance and gathering data. However, many worry that the increased use of drones domestically portends poorly for those who care about privacy and the Fourth Amendment freedom from search and seizure.

"Domestic drones will devastate the Fourth Amendment unless there are some really strict guidelines," warns John Whitehead, president of the Rutherford Institute, a Charlottesville, Virginia-based nonprofit legal group. "Information collected by a drone should not be used as evidence by a court of law," adds Whitehead, who wrote about the technology in his 2013 book, *A Government of Wolves: The Emerging American Police State*.

STATES ARE TAKING NOTICE AND CONSIDERING REGULATION. According to the National Conference of State Legislators, more than 20 states have passed laws related to drones. Some limit

law enforcement's use of drones or other unmanned aircraft. For example, in Idaho, a law signed in 2013 provides that, except for emergencies "for safety, search-and-rescue or controlled substance investigations," no person or agency may use a drone to conduct surveillance of private property without a warrant.

Tennessee has a similar law known as the Freedom from Unwarranted Surveillance Act. The law allows aggrieved individuals the right to sue law enforcement agencies in civil court for violations. It also provides that "no data collected on an individual, home or areas other than the target that justified deployment may be used, copied or disclosed for any purpose," and that such data must be deleted within 24 hours of collection.

"The legislation doesn't eliminate the use of drones," says Austin, Texas-based attorney Gerry Morris, co-chair of the National Association of Criminal Defense Attorneys' Fourth Amendment Committee. They "require some sort of showing of probable cause. This is something that is constantly overlooked. Just because government officials are required to go get a warrant doesn't mean they won't be able to use the drones. It just means that they are required to follow the Constitution when they use them."

However, in California, Gov. Jerry Brown vetoed a measure in September that would have required law enforcement to obtain a warrant for the vast majority of uses of drones. Brown claimed the bill, AB 1327, would put greater standards on law enforcement than those required by the U.S. and state constitutions.

"AB 1327 would have been the first law in California to regulate drones," says constitutional law expert Erwin Chemerinsky, dean of the University of California at Irvine School of Law. "Drones may be a very valuable tool for investigation in some cases. Under AB 1327, the police still could use drones if they demonstrated to a judge that there was probable cause. I strongly favored AB 1327 and was very disappointed when Gov. Brown vetoed it."

On the other hand, states have passed laws related to drones that fund the technology or encourage the development of testing sites. For example, the North Dakota legislature passed a law funding a drone test site.

Legal experts believe that at some point courts will need to address the constitutionality of these measures and of law enforcement's use of the technology. "I do think more legislation is needed," Morris says. "I don't think the court opinions at this point have caught up with the technology. Legislators have to address the issue and get out in front of it."

On the federal level, the 2012 Federal Aviation Administration Modernization and Reform Act governs the rules regulating drones' domestic use.

"The FAA has the responsibility of drafting a set of rules for integrating unmanned aircraft systems into the airspace," says Joseph Vacek, a lawyer and aviation professor at the University of North Dakota. "It has taken more time than expected because there has been no industry consensus. I predict that by 2016 we will have the rules in place."

ONE QUESTION THAT MAY ARISE FROM DRONE REGULATION is the difference between state and federal privacy protection. For example, the New Mexico Court of Appeals interpreted the state constitution as more protective of privacy than the U.S. Constitution.

"It would be better for states to legislate in this area," says Vacek. "Perhaps we will have a conflict that could eventually wind up before the U.S. Supreme Court. Current Supreme Court law says surveillance from the public airspace is OK. But the court could provide a different answer with respect to drones."

Adds Chemerinsky: "It is unclear how the Fourth Amendment applies to drones. The technology is too new for the courts to have ruled."

In *Florida v. Riley*, the Supreme Court ruled in 1989 that the police may use low-flying aircraft to gather information without a warrant or probable cause. The court said that this was not a search within the meaning of the Fourth Amendment, Chemerinsky says. "If the court follows this with regard to surveillance by drones, there would be no constitutional limit on their use."

"Technology has outpaced law in this area," Whitehead says. "Traditional search warrants won't work with drones. They have the ability to hack into Wi-Fi and use scanning devices from airspace. They represent the essence of a surveillance-police state."

Experts are still unclear how often drones are now being used. "We haven't been able to determine the amount of domestic drone use. Much of that information is confidential," Morris says.

"Many police departments have bought drones and many of them are ramping up for their use in the future," he says. "I think the trend is going to continue. I don't know if I have ever seen such a hot-button issue with the public—as far as law enforcement surveillance with drones. People are really concerned about it."

"Domestic drones are being used," says Whitehead. "We don't know how many, but we know that the Department of Homeland Security has used them and some police departments have used them. They will be used far more frequently in the near future."

Whitehead is dubious about the future. "The Fourth Amendment is on life support," he asserts.

"The [National Security Agency] is downloading 227 million text messages a day. This violates the Fourth Amendment. We have moved into a new paradigm. Many sci-fi movies are coming true.

"Nearly every technology in the [2002] movie *The Minority Report* is available today. It's like those guys are prophets. By 2025 to 2030, we are going to be in a cyborg kind of reality. It sounds preposterous to most people, but it is reality." ■

After *Alice*

Business-method and software patents may go through the looking glass

by Steven Seidenberg

Supreme Court Report

Few U.S. Supreme Court rulings have been embraced so enthusiastically. As soon as the court handed down its decision in *Alice Corp. v. CLS Bank* last June, lower courts and the U.S. Patent and Trademark Office began displaying a new, marked hostility toward software and business-method patents. They are now striking down these patents in record numbers and denying applications that would previously have been granted. It is basically open season on these patents.

"After *Alice* came down, some feared that almost all software-related patents would be held invalid. It looks like that is happening. Since the decision, district courts have uniformly knocked down those patents. But what may be more interesting is that business-method patents are going down in droves," says Rochelle C. Dreyfuss, a law professor at New York University and co-director of the Engelberg Center on Innovation Law & Policy.

"It's a new world order in the aftermath of *Alice*," says Dale S. Lazar, a partner in DLA Piper's Reston, Virginia, office.

In *Alice*, the justices toughened the rules for deciding which inventions are eligible to be patented. The court unanimously declared that in order to be deemed patent-eligible subject matter, an invention must pass a two-step inquiry: First, does the invention consist in significant part of a patent-ineligible concept —for example, a law of nature, natural phenomenon or abstract idea? If so, the invention is patent-eligible only if the remaining parts of the invention have an "inventive concept"—one or more elements that ensure a patent on the invention amounts in practice "to significantly more than a patent upon the ineligible concept itself."

The invention at issue in *Alice* was a computerized method to perform electronic escrow for online transactions. The court found the patent on this invention claimed the abstract idea of escrow, which was patent-ineligible. The remainder of the invention, performing the escrow on a general purpose computer, was not sufficient to provide an inventive concept.

"A mere instruction to implemen[t]" an abstract idea "on ... a computer ... cannot impart patent eligibility," the court stated. Finding that the invention consisted of patent-ineligible subject matter, the court struck down the patents on the invention.

Alice Corp. v. CLS Bank

A computer-implemented, electronic escrow service for facilitating financial transactions contains abstract ideas ineligible for patent protection. The patents were based on an abstract idea, and implementing those claims on a computer was not enough to transform that idea into a patentable invention.

HIGHER HURDLES

Soon after *Alice* was decided, the PTO issued new guidelines for its examiners. "The patent office has changed its practice and is applying great scrutiny to what are arguably business methods and inventions related to software," says Heath W. Hoglund, vice president and chief patent counsel of Dolby Labs in San Francisco. He also chairs the Patents Division of the ABA Section of Intellectual Property Law.

Thanks to the patent office's tougher scrutiny, the agency is granting far fewer patents on business methods and software-related inventions. The agency "is rejecting everything it can. Some applications are even being pulled after allowance, which is unheard of in my experience," says Robert R. Sachs, a partner in Fenwick & West's San Francisco office.

The agency's Patent Trial and Appeal Board also has adopted a tough new stance. The board has been striking down droves of business-method patents under the Transitional Program for Covered Business Method Patents, according to Dreyfuss. This temporary program allows alleged infringers to challenge the validity of financial-method patents in administrative proceedings before the PTAB.

"Potential applicants in some technical areas should think really hard about whether they want to spend money filing for patents. Any patent applications for software, e-commerce, business methods —it seems as if those would be increasingly hard to get through the patent office," says Ryan M. Corbett, an attorney in the Tampa, Florida, office of Burr &

FLICKR CREATIVE COMMONS

Forman. He co-chairs the Section 101 Subcommittee for the Patent Litigation Committee of the ABA's Intellectual Property Law Section.

Attorneys prosecuting patents will likely try clever claim language to get around the patent office's tough new standard for patent eligibility. The Supreme Court warned against this, stating in *Alice* that determining whether something is patent-eligible subject matter should not "depend simply on the draftsman's art."

So patent attorneys might have only limited success. "People in the U.S. will figure out some way to get protection for software-related inventions, but it will be different and more narrow protection than what they have been getting," Dreyfuss says.

"People in the U.S. will figure out some way to get protection for software-related inventions, but it will be different and more narrow protection than what they have been getting." —*Rochelle Dreyfuss*

The courts, too, have turned against business-method and software-related patents. In almost every case since *Alice* in which a party asserted that such patents consisted of ineligible subject matter, the courts have concurred and struck down the patent. In just four months, the district courts and the U.S. Court of Appeals for the Federal Circuit have thrown out 14 such patents. That is equal to the total number of all patents struck down in 2013 for ineligible subject matter.

Moreover, in the wake of *Alice*, courts are ruling on patent eligibility earlier in the litigation process. Instead of waiting until summary judgment to strike down patents for ineligible subject matter, a number of courts have issued such rulings on motions to dismiss.

Being able to assert invalidity so early in patent litigation tilts the playing field in favor of accused infringers. "It is a huge, powerful tool for defendants," says Hoglund. "It gives them the potential to end a case before the large costs of discovery and *Markman* hearings," during which a judge examines evidence and rules on the meaning of the words in the relevant patents' claims.

All this is bad news for nonpracticing entities, aka "patent trolls." They often seek to monetize software or business-method patents; and after *Alice*, many of these patents could well be struck down. "That gives them a lot less leverage to try to get settlements from defendants," Corbett says.

One of the trolls' main sources of power is the discrepancy between litigation and settlement costs. When a patent troll warns a company that it must purchase a license or be sued for infringement, both sides know that the cost of buying a license is far less than the millions of dollars in legal fees typically required to fight the infringement allegations in court. So even a noninfringing company has a strong incentive to purchase a license.

FEWER LAWSUITS AFOOT?

Being able to resolve the lawsuit quickly, on a motion to dismiss, dramatically changes this calculation. Now alleged infringers have a greater incentive to fight in court. Conversely, patent trolls now face the prospect of more court battles, higher spending on legal fees, and a good chance that their software or business-method patents will be struck down. They will need to think long and hard about which patents to assert and against whom. "It may even lead to fewer of these lawsuits being filed," says Corbett.

That seems to be occurring, according to an October report by Unified Patents, a consultancy that opposes patent trolls. The company found that patent trolls filed 35 percent fewer patent infringement suits in the third quarter of 2014, compared with the second quarter. Operating companies also filed fewer patent infringement suits, but the drop was significantly less, at 19 percent.

Nevertheless, there still will be plenty of litigation about what constitutes patent-eligible subject matter. "The Supreme Court is trying to take a consistent view on what is patent-eligible subject matter, but the court's ruling [in *Alice*] gives little guidance. District courts are left largely to figure this out on their own," Hoglund says. "A lot more needs to be answered on how to draw the line between eligible and ineligible subject matter."

Some experts fear that the post-*Alice* crackdown will deprive inventions of needed protection, resulting in harm to innovation and the economy. Others, however, are more sanguine. "If it cuts down on nonpracticing entities asserting patents of questionable validity, I think that is overall a good thing," Corbett says. "It may not be good for patent litigators, but it focuses efforts more on patents that protect things, rather than patents that just protect old ideas now being used on a computer. Those [latter] patents are not fostering innovation, which is kind of the point of patents." ■

ALICE'S ADVENTURES IN WONDERLAND ILLUSTRATED BY JOHN TENNIEL

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Practice

Andrew Dwyer

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Second Time's a Winner

3rd Circuit ruling upholds a lawyer's right to post glowing judicial comments about his work on the firm's website by David L. Hudson Jr.

Ethics

Andrew Dwyer vowed to appeal when a federal district court ruled in June 2013 that his law firm's website may not post excerpts from unpublished judicial opinions praising the quality of his work on various cases. And now Dwyer's persistence has paid off.

In August 2014, the 3rd U.S. Circuit Court of Appeals headquartered in Philadelphia overturned the U.S. District Court for the District of New Jersey in a decision that has caused First Amendment and lawyer ethics experts to take notice.

"The 3rd Circuit's opinion is highly persuasive and likely to gain traction as a significant national precedent," says First Amendment scholar Rodney A. Smolla, who is teaching this spring at the University of Georgia School of Law in Athens.

Dwyer had posted several quotations from court opinions concerning applications for fees in employment-discrimination cases on the website of the Dwyer Law Firm in Newark, New Jersey. One such quote stated: "Mr. Dwyer is, I think, an exceptional lawyer—one of the most exceptional lawyers I've had the pleasure of appearing before me. He is tenacious, professional in his presentation to the court, a bit too exuberant at times, certainly passionate about his position, but no one can fault his zeal and his loyalty to his client, and no one can question his intellect."

A judge whose comments were posted on Dwyer's website wrote a letter to him

in April 2008, asking that the quote be removed because he did not want potential clients to view his comments as a blanket endorsement of the attorney. Dwyer refused, and the matter reached the New Jersey State Bar Association's Committee on Attorney Advertising, which began working on a rule to address such situations.

The result was so-called Guideline 3, approved by the New Jersey Supreme Court in 2012. Guideline 3 provided that an attorney "may not include, on a website or other advertisement, a quotation or excerpt from a court decision (oral or written) about the attorney's abilities or legal services." The guideline did, however, permit an attorney to post the entire text of a judicial opinion.

The day before Guideline 3 was to go into effect, Dwyer filed a First Amendment lawsuit in federal court, contending that it violated his First Amendment right to engage in truthful and nonmisleading commercial speech.

THE MEANING OF GUIDELINE 3

In ruling against Dwyer, the district court reasoned that the rule was a mere disclosure requirement instead of a direct restriction on speech. The U.S. Supreme Court discussed disclaimer or disclosure requirements in *Zauderer v. Office of Disciplinary Counsel* (1985), a key early decision on lawyer advertising, noting that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers."

Relying on *Zauderer*, the district court in Dwyer's case determined that the disclosure requirement was reasonably related to protecting consumers from misleading speech.

Ruling on Dwyer's appeal, a three-judge panel of the 3rd Circuit ruled unanimously in Dwyer's favor on Aug. 11. In its opinion in *Dwyer v. Cappell*, the 3rd Circuit acknowledged that disclosure requirements receive less constitutional scrutiny than outright restrictions on speech. The panel noted that the New Jersey guideline bore characteristics of both a disclosure requirement and a restriction on speech. The court did not decide which category the rule fell into because even under the more deferential standard of review for disclosure requirements, the rule was constitutionally flawed.

The panel wrote that "Guideline 3 does not require disclosing anything that could reasonably remedy conceivable consumer deception stemming from Dwyer's advertisement." The opinion offered an example of a sufficient disclosure: "This is an excerpt of a judicial opinion from a specific legal dispute. It is not an endorsement of my abilities."

But that is not what Guideline 3 did. Instead, it required an attorney to post entire judicial opinions. The 3rd Circuit explained that "because Guideline 3 effectively precludes advertising with accurate excerpts from judicial opinions on Dwyer's website, it is unduly burdensome."

A ROUND OF APPLAUSE

Free speech experts applauded the appellate ruling. "The 3rd Circuit's reasoning was spot-on from a First Amendment perspective, recognizing the overbroad nature of New Jersey's guideline," says Clay Calvert, director of the Marion B. Brechner First Amendment Project at the University of Florida in Gainesville. "*Zauderer*'s 'reasonably related' standard is an extremely relaxed form of judicial scrutiny and highly deferential to governmental authority. The 3rd Circuit's decision in *Dwyer* is important because it finally gives judicial pushback to an example of sweeping governmental overreach and suggests there is a boundary beyond which *Zauderer* cannot be stretched."

In Smolla's view, the opinion follows a recent trend in which several federal appellate courts have restricted the reach of *Zauderer*. "There is growing judicial hostility toward regulations that impose burdensome disclosure or disclaimer requirements when the allegedly misleading character of the underlying advertising message is weak and attenuated," he says. "Courts are increasingly skeptical of the invocation by regulators of phrases such as 'inherently misleading' or 'self-evidently misleading.' "

In *Dwyer,* the 3rd Circuit "properly rejected the highly paternalistic view that consumers, including the potential clients of lawyers, are too unsophisticated to figure out for themselves that an accurately excerpted quotation from a judge, taken from the public record, is not a blanket endorsement of a lawyer's abilities," Smolla says.

"Judicial opinions are public, even if technically unpublished. Anyone could look them up," says Calvert. "Mr. Dwyer simply took a shortcut and saved the public the time of having to do so. If judges don't want their views of the counsel who appear before them known, then they should either keep them to themselves or disclose them within the confines of a close circle of friends—out of earshot of others."

For his part, Dwyer is pleased. "I'm obviously very gratified by the 3rd Circuit's decision," he says. "I thought the appeals court engaged in a conventional First Amendment analysis. There was not a shred of evidence that this rule was about protecting consumers from harm. Instead, this rule was about protecting the sensibilities of judges."

Dwyer says he plans on putting quotes about himself from judicial opinions back on his website, but "we are waiting on the trial court to issue the order implementing the mandate from the 3rd Circuit and waiting to see if the state files a petition for writ of certiorari to the U.S. Supreme Court."

If that happens, get ready for round three. ■

FOR MORE Read the 3rd Circuit's opinion in its entirety at ABAJournal.com/magazine.

The Power of Naming

Word choice influences the way jurors understand your argument

by Bryan A. Garner

Bryan Garner on Words

In some primitive cultures, names are thought to possess magical powers: Knowing someone's name gives you some degree of power over that person. In those cultures, one's true name is often known only to close family members—and another name is used by outsiders.

In a "sophisticated" culture like ours, we discount the power of names—perhaps too much. Lawyers certainly do. As a profession, we don't seem semantically savvy enough to know that names make stories more vivid and interesting. More than that, they powerfully influence how we understand problems—in far subtler ways than most of us realize.

I refer not just to proper names but also to labels given to abstract ideas. Consider two examples: *living Constitution* and *realism*. Would the American people rather have a living Constitution or a dead one? Would you rather have a realistic judge hear your case, or an unrealistic one?

Three years ago, I appeared with Justice Antonin Scalia before an audience of lawyers and law students. Asked about the "living Constitution," he quipped, "I used to say that the Constitution is dead, dead, dead—but I don't say that anymore." The local newspaper ran a headline: "Scalia: The Constitution is dead, dead, dead!" The paper was slow to print a retraction, but it finally did.

The living/dead antithesis is telling, though. It's no use arguing against a living Constitution because no one wants its alternative if that's a "dead Constitution." Debate over.

THE ENDLESS CONVENTION

But just what is the living Constitution? The phrase can be seen as a mid-20th-century euphemism for a document whose meaning morphs year by year according to the personal preferences of a nine-member committee in Washington—one that sits as a perpetual constitutional convention, discerning new meanings fairly often.

If you put it to a vote, the American people would doubtless rather have a stable Constitution than an unstable Constitution. But they would also rather have a living one than a dead one. That's the power of naming. Small wonder that referendum-writers are acutely aware of how the wording affects votes.

Consider our other example: *realism*. The term is commonly contrasted with formalism. Would you rather have a realistic judge or a formalistic judge? Almost anyone answering that question would choose the former.

But those names can also be misleading. One might equally well ask whether you'd like a willful judge whose personal policy preferences influence legal decisions or a judge who hews closely to the words of the statute or contract at issue. Almost any lawyer answering that question would choose the latter. But we don't have familiar terminology for this choice: perhaps willful judge vs. self-abnegating judge. (Most lawyers don't even know the verb *abnegate*.)

Judge Richard A. Posner, a self-proclaimed realist, described what that term means in a *Duquesne Law Review* article: "a judge who ... does not ... have a 'judicial philosophy' that generates outcomes in particular cases"; who "is a 'loose constructionist' " and does not follow "the literal meaning of the text"; who "wants to get as good a handle as possible on the likely consequences of a decision"; and who "wants to do what he can to improve the system." In days of yore, such a judge was decried as "willful": someone who imposes his or her own will on the law rather than following it.

A formalist, by contrast, is a judge who reasons deductively. In a criminal case, for example, a formalist would want to know precisely (in terms) what conduct is prohibited or prescribed, and then what (precisely) the defendant has done and whether those actions run afoul of the prohibition or prescription. Often the deduction will require subtle and close reasoning. It's rarely a simple-Simon matter, but that's how a formalist approaches a legal problem.

The cynical realist (I refer to no one in particular) says that all judges are political. They're all imposing their individual wills on the law because no judge has an objective lens for viewing the law. So we shouldn't criticize judges who are willful: They're just being honest and candid. The others are either deluded or dishonest.

The debate, you see, quickly descends into a series of counteraccusations and denials. Judge Posner, for example, refers to "Judge Alex Kozinski of the 9th Circuit, in an essay surprisingly denouncing legal realism (he is a legal realist)." That's called a *tu quoque*: You're another.

Let's get back to labels—to names. Can you see that, as a matter of English usage, *realistic* is more favorable than *formalistic*? Explaining the labels takes too many words. I'd wager that many people who would prefer a formalistic judge wouldn't have the patience to learn precisely what the labels mean. Yet the labels themselves are highly influential. In other words, the debate can be over once the labels are assigned.

For the practicing lawyer, this is a powerful lesson. If you represent American Airlines, do you refer to your client in a brief as "AA," "the Company" or "American"? American, if you're astute. If you represent Bank of America, do you call your client "BofA," "the Bank," or "Bank of America"? What if you could save 100 words by using BofA instead of the full name? No matter, says the semanticist: Make it Bank of America if you're in an American court.

Ah, but what if you're suing American Airlines or Bank of America? Then my tack would be to call the airline "the Carrier" and the bank "the Bank."

A SWINDLER BY ANY OTHER NAME …

Let's turn to another point: "Defendant" vs. "Davidson." Should we use real names for parties? Of course! That's your default, your only hope of writing vividly and memorably. Judges read all day about plaintiffs, defendants, appellants, appellees, petitioners and respondents. Capitalizing the words doesn't make them anything other than common nouns. Calling a litigant by one of these generic names, generally speaking, is about as sensible as calling characters in a novel "Protagonist" and "Antagonist."

What if you're a prosecutor? It's no different. Banish the thought that your best ploy is to dehumanize the defendant. You're prosecuting someone who has done bad things. Bad facts will stick to a name. To use *Defendant* is to use a Teflon label—and is therefore far less interesting, much less incriminating.

Yet our profession is funny about names and labels, especially initialisms. We're famously insensitive to their effects. How else to explain this sentence from a Social Security benefits case involving short-term disabilities: "Plaintiff employee was approved for STD benefits and was in fact given STD." No doubt, quite a vivid—and unfortunate—example of the power of naming. ■

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Going Beyond the Evidence

A skilled trial lawyer uses narrative persuasion to deliver a story to the jury in a complex criminal case By Philip N. Meyer

Crafting Stories

Trial storytelling is often highly creative and innovative. It is filled with aesthetic danger and strategic risk-taking—as are all forms of narrative art. But there is far more at stake for legal storytellers.

For them, endings and outcomes have consequences far beyond the telling of the story itself. And legal storytellers are further constrained in their creativity by ethical and evidentiary rules, by the need to tell meticulously accurate and "truthful" stories. It is also presumed that trial lawyers are limited by evidence presented in the courtroom, especially when they speak directly to the judge and jury while making their closing arguments. But is this always so? Skilled trial lawyers find ways to, in psychologist and lawyering theorist Jerome Bruner's masterful phrasing, assist jurors to "go beyond the information given" in the courtroom—that is, effective lawyers suggest narrative frames that enable jurors to translate evidence into story.

To do so, technical rules and constraints are often tempered by what legal scholar Karl Llewellyn called, in the context of judicial decision-making, "situation sense." To achieve their aims, trial advocates, like judges, must have a sense of what is apt; they must employ a practical wisdom that can't be reduced to mere rule following. Technical rules are supplemented by unstated understandings of what is tolerated in a particular local professional culture—including knowing who the judge is and what is permissible based on relationships with attorneys on the other side—and strategically assessing the necessities of pursuing high-risk storytelling strategies that a particular case may demand.

Let me provide an illustration from my book *Storytelling for Lawyers* and identify several techniques that Connecticut criminal defense attorney Jeremiah Donovan used in his closing argument in a complex criminal case to go beyond the evidence presented at trial.

A STORY'S TRANSFORMATION

Here is a simplified version of the complex backstory: Louie Failla—one of eight co-defendants, reputed members of the Connecticut faction of the Patriarca crime family—was charged with multiple counts of racketeering in federal court in a 13-week trial. The most serious charge against Failla, a low-level soldier and driver for the leadership of the family, was for conspiracy to murder Tito Morales, his daughter's former boyfriend and the father of Failla's grandson.

Two mob informants had testified against Failla. But the most damaging testimony against Failla came from his own mouth. His Cadillac had been bugged by the FBI, and Failla was a man condemned by his own words. In surveillance tapes played at trial, Failla's gravelly voice is heard plotting Morales' execution under orders of the cruel mob boss Billy "the Wild Guy" Grasso, along with the two mob henchmen who also testified against Failla. In the tapes Failla brags about his role in various mob activities and implicates the other co-defendants in numerous crimes, while making his own guilt seemingly irrefutable. Failla did not take the stand to testify, although Donovan introduced excerpts from surveillance tapes showing a loving relationship between Failla and Morales and Failla's grandson.

In the prosecution's closing argument, a serious and deadpan harangue, Failla is depicted as a "flat" (undeveloped and one-dimensional) character—a low-ranking soldier in a unified mob family of like-minded gangsters. In the prosecutor's story, Failla means exactly what he says and unequivocally reveals his intent to murder Morales.

In his closing argument, Donovan transforms the prosecutor's simple, moralistic melodrama—with its cast of villainous, conspiratorial mobsters (the bad guys) apprehended by virtuous law enforcement officers (the good guys)—into a different type of story: a complex, character-based tragicomedy. Failla's flat character comes alive as a conflicted protagonist. Donovan

depicts Failla as a "verbal chameleon," a narrative trickster, torn between the demands of his adopted mob family on one side and his love of his real family, including Morales, on the other.

Donovan's retelling meticulously revisits and unpacks the meaning or "subtext" of the most damning portions of the surveillance tapes, resplicing the transcripts and converting the evidence into a dramatic sequence of

Part of Donovan's courtroom performance involved telling jurors what Failla really meant by his recorded statements—that Failla didn't have homicidal intent. Donovan drew poster-size cartoons to make his argument.

cinematic scenes. In Donovan's counterstory, Failla merely pretends to go along with the murder conspiracy in order to stall the other mobsters, but he does nothing to carry out the execution. Indeed, his inaction provides Morales sufficient time to extricate himself from the situation.

NARRATIVE CONSTRUCTION WITH MINI-STORIES

How does Donovan structure this counternarrative, especially since there is little supporting evidence presented at trial? First, Donovan interweaves a sequence of related mini-stories that reconfigure his argument into a three-act dramatic narrative structure, with each story marking a transition point in the plot. Donovan begins by telling an Irish pub story that establishes a comedic tone for the closing argument:

"You all know, who—well, in a bar in Dublin, in walked a fellow. ... He had that glimmer in his eyes of craziness. ... He walked into the bar and said, 'All right, where's O'Toole?'

"All the patrons from the bar kind of looked into their drinks. They didn't want to be mistaken for O'Toole, except one little guy, 70 years old, 5-foot-2, in the back. 'I'm O'Toole. What's it to you?'

"Well, the big guy picked up O'Toole, ran him down the length of the bar, knocking off glasses all the way, and threw him through the plate-glass window, walked outside, picked him up, threw him through another plate-glass window and left him for dead. All the patrons looked up at the poor old boy in the bloody mess on the floor. Guy looked up and said, 'I sure pulled a fast one on that big fellow. I'm not O'Toole at all.'

"Now I feel like O'Toole, because in tape after tape after tape Louie Failla says, 'I am O'Toole. I'm the guy you're looking for. I'm the new capo for Connecticut.' ... And I'm getting up and saying he's not O'Toole at all. He's not. He's not guilty of the RICO offenses with which he's charged."

Donovan's basic premise is that Failla, akin to the O'Toole character in the story, is a fabulist, an exaggerator, a character akin to characters in an imagined mob story, whose literal words do not reveal intentions or motivations. In Hollywood parlance, Donovan's first act marked by the pub story provides the "setup" for the complex narrative that follows.

Near the end of the two-hour closing argument, in the final resolution and climax, Donovan revisits crucial passages from transcripts of the most incriminating surveillance tapes—where Failla plots Morales' murder with the two mob henchmen. Employing hand-drawn cartoons, Donovan contrasts Failla's spoken words (presented in hard-line cartoon bubbles) with the subtext of Failla's internal thought processes (captured in cartoon "thought bubbles").

Theatrically assuming his version of Failla's gravelly voice as if presenting a radio play, Donovan recites the most incriminating portions from the transcripts of the surveillance tapes, supplementing Failla's spoken words with Failla's unspoken interior monologue. Donovan thus presents a virtual testimony on Failla's behalf, despite the fact that Failla himself has never taken the stand to testify and there is no testimony or evidence in the trial record to substantiate Donovan's claims about what Failla was actually thinking.

Of course, Donovan's reading of the transcript does not go unchallenged. The prosecutor's rebuttal closing argument concludes:

"With respect to Mr. Failla and Tito Morales, ... Mr. Donovan is an excellent lawyer. ... But when Mr. Donovan stands here in front of you with cartoons and suggests to you what Louie Failla was thinking, I suggest to you that that's going too far. Because there is no evidence in this case about what Mr. Failla was thinking or saying other than the tape recordings which were admitted into evidence in this case. ... That's not the evidence. ... That's lawyers' games. Lawyers' games."

Nevertheless, despite the prosecutor's admonitions, Donovan's calculated use of cartoons and stories-within-stories enabled him to present Failla's version of the story without Failla ever taking the stand and subjecting himself to impeachment and cross-examination. Shrewd and successful trial lawyers often take calculated risks to go beyond the evidence given into the imaginative dimension of creative artistry and narrative persuasion. ■

PHILIP N. MEYER is a professor at Vermont Law School.

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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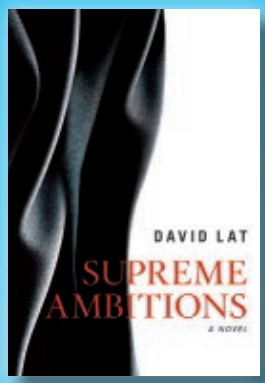
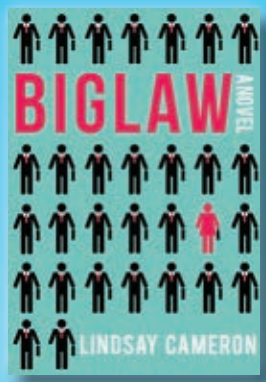
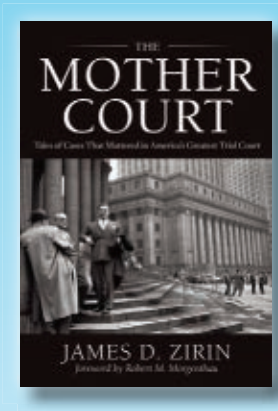
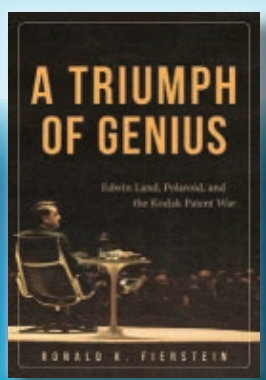
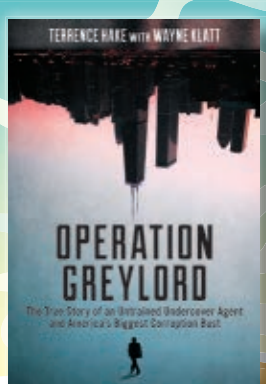










BUSINESS OF LAW

EDITED BY REGINALD F. DAVIS / REGINALD.DAVIS@AMERICANBAR.ORG

Out of the Egg

Young lawyers take flight after incubator programs by Kevin Davis

Solos & Small Firms

Like the incubators that help launch high-tech startups, law schools have been using the concept to jump-start the careers of young lawyers going into solo or small practices. It seems to be working.

The country's first law school incubator, based at the City University of New York School of Law, has seen graduates like Yogi Patel establish solid practices a year or two after they leave the program.

Chicago-Kent's incubator program helped Michelle Green establish a client base for her solo practice.

PHOTOGRAPH BY BOB STEFKO

"The incubator gave me the time to find my identity as a practitioner and get to the point where you are without fear that you won't be able to pay the rent next month," says Patel, who specializes in labor and employment law.

The CUNY incubator supports young lawyers by providing low-cost office space, mentors and networking opportunities in exchange for the lawyers providing free or low-cost legal services to those in need. Patel spent 18 months in the program, which helped him set up a small practice with an office in midtown Manhattan and a steady list of clients.

Not having the pressure of overhead costs allowed Patel to focus on building the business so that when he left the incubator, he already had some clients and income. One of the most valuable parts of being in the incubator program was meeting other lawyers at networking events.

"It takes two or three years before these relationships turn into real work," he says. "It was scary the first year or two. We still feel we're just getting started, and there's still a lot to learn. It's a continuum."

Patel, who since has teamed up with a partner and formed Lloyd Patel, makes sure to continue networking. "I spend a significant part of every day in network meetings—breakfast, lunch or dinner," he says.

He also learned to be careful in choosing new clients. "When you start, you're really desperate for any work you can get," he says. "And you can have a tough time chasing clients for fees. People take advantage of the fact that you're new."

Fred Rooney, director of the International Justice Center for Postgraduate Development at Touro Law Center in Central Islip, New York, developed the first incubator at CUNY School of Law in 2007. There are now more than 30 similar programs around the country.

"It's spreading like wildfire," says Rooney, an *ABA Journal* Legal Rebel who has taken his concept international. "It's an amazing movement that started with this little idea. And it helps lawyers get started by doing the right thing."

DOING THE RIGHT THING, as Rooney describes it, means providing legal service to those who normally cannot afford it. Bikram Singh, another graduate of the CUNY program, developed an unexpected niche from his experience assisting low-income clients.

"I had no idea housing would be my specialty," he says. "The litigation experience you get in housing isn't the same as in other cases. It moves quickly. We learn faster and gain a lot of skills."

When he went solo, founding the Singh Law Firm in New York, there was still much to learn. "You're still learning the law, learning how to charge and bill, and how to collect," he says. "A friend said it would take two to three years to have a consistent flow and a decent salary, and he was absolutely right."

Michelle Green was among the first to complete the incubator program at Chicago-Kent College of Law, which requires applicants to have a business plan. She had started a solo practice after graduation and worked from home specializing in small-business matters. She joined the incubator for a needed boost.

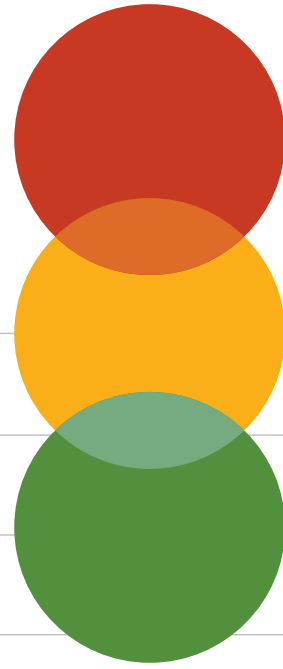
The incubator connected her with more small-business owners from whom she learned about a pressing need. "They said they wanted to build an ongoing relationship with an attorney," she says, "but were not big enough to hire in-house counsel."

So Green developed a package in which she would provide 10 hours of legal services each month at a set fee. It turned out to be a great fit, and she eventually began to build a bigger client base through the incubator.

Now her practice, G&G Law, has a small office on the north side of Chicago, two full-time employees and one part-timer.

"At the incubator I met a really good group of attorneys with solo and small practices," she says. "I got a list of attorneys who I could refer matters to and call them with questions. I learned a lot that way and developed a client base. It really helped make me feel more confident." ■

Merging Traffic



82 law firm mergers got the green light in 2014

LAW FIRM MERGERS again kept up a manic pace in 2014, according to management consultant Altman Weil. Figures on the firm's MergerLine webpage show 2014's announced merger totals were well ahead of most previous years, even excluding the highly discussed tie-up between Morgan Lewis Bockius and Bingham McCutcheon, which Morgan Lewis would not call a merger. But by the end of the year, the 2014 total of 82 was shy of 2013's record of 88.

SEE MORE PRACTICE STATS ONLINE
ABAJournal.com/lawbythenumbers

DATA EXCERPTS FROM: Altman Weil's MergerLine webpage.
Link to the site at ABAJournal.com/lawbythenumbers.

GRAPHICS BY JAMIE GANNON

Predictive Coding Has Something to Prove

Courts and judges embrace it, but is it really fixing discovery? by Jason Krause

Maura Grossman

e-Dicsovery

THE OBAMA WHITE HOUSE STAFF will have generated about a billion emails by the time a new president is ready to be sworn in. Given the inevitable litigation and public records requests related to these documents, almost all of the messages will need to be searched, reviewed and (possibly) produced for legal demands.

That's the type of emerging litigation nightmare lawyers and technologists hope to address with predictive coding technology. With the ongoing, worldwide explosion in data, computer-assisted review is being touted as the answer to the rising cost and complexity of civil discovery. Technologists believe it can eliminate the time and inconsistency of human review by replacing human discretion with computers.

But while predictive coding solves some problems, it introduces new complications. And despite a spate of recent cases employing the technology, questions remain as to how effective it can be.

"A lot of lawyers have been blindly relying on predictive coding to get discovery done," says Bill Speros, a Cleveland-based e-discovery consultant. "A lot of the claims are coming from vendors, and it's easier to believe the hype than to ask what the man behind the curtain is doing."

AS THE FORMER LITIGATION DIRECTOR for the U.S. National Archives and Records Administration and senior counsel at the Department of Justice, Jason R. Baron knows something about searching White House emails. In the 2000s, his legal team struggled to review 20 million Clinton-era White House emails for the case *U.S. v. Philip Morris*.

At the time, the task was nearly impossible, but he has come to believe that computer-assisted review is now the solution to these kinds of problems.

"Technology-assisted review has already advanced incredibly in less than a decade," he says. "I am absolutely certain that a decade from now, artificial intelligence in e-discovery will be more sophisticated and powerful than we can even imagine."

Still, despite the increased use of predictive coding in litigation, it can be an ill-defined and nebulous process. Consider that there are at least 30 different types of machine-learning-based classification tools. Given that different classifiers are optimally suited for different types of data, the quality of results will vary depending on the data involved.

In some cases, poorly implemented predictive coding protocols may cost more than manual review, especially if experts must be brought in to settle disputes. Or parties may demand larger volumes of documents than necessary because computers can review more data than humans. "If you don't have successful negotiations at the outset," says Speros, "the costs can quickly get out of control."

Litigator Maura R. Grossman of Wachtell, Lipton, Rosen & Katz has co-authored several influential papers on the use of technology-assisted review in electronic discovery. One publication compared technology-assisted review to manual review, finding TAR to be quite effective.

"We found that certain kinds of TAR—specifically, active learning and rule-based approaches—can be as effective as or better than manual review," she says. "But that doesn't mean that anything called TAR is automatically better than human review in every circumstance. It is not a magic, one-size-fits-all solution."

In the 2012 dispute *Da Silva Moore v. Publicis Groupe*, the use of predictive coding was first approved by a court; it was later upheld at the federal district court level. But as

PHOTOGRAPH BY ADAM LERNER

more reported cases approve of the technology in litigation, there is wide variance in guidance.

In one matter, *Edwards v. National Milk Producers Federation*, the court describes a straightforward process to find a control set of documents, as well as how to use that control set to train computers to find similar documents. The court even sets the statistical standard for judging whether the process is a success. In other cases, the courts take a hands-off approach, letting the parties and their vendors define the process.

TO ACHIEVE THE OPTIMAL PERFORMANCE from a TAR tool, attorneys have to think critically about the capabilities of the software and the anticipated workflow.

Some concerns are clear-cut and practical. For example, they must consider whether the tool works with spreadsheets, numbers, audio or other types of files found in a given document collection.

More complicated concerns include determining the best way to select documents for training the software.

"The technology is powerful, but there is no standardized process or checklist you can follow," says Grossman. "While we don't know all the right answers yet, the solution isn't 'anything goes.' It is important to do controlled studies to learn what works best under what circumstances."

Legal technology experts agree that courts must not uncritically accept the claims of predictive coding vendors or testifying experts. If the process is employed in a matter, legal teams must check the computer's work using old-fashioned human judgment.

At present there are various flavors of technology-assisted review—and a lively debate among experts on which are best.

"Debate is healthy, but much of it is philosophical and should not be interpreted to mean the technology doesn't work," Baron says. "The technology will work as well as the processes and workflows the lawyers using technology can put in place." ■

PHOTOGRAPH BY SAVERIO TRUGLIA

Law Scribbler by Victor Li

The Author: Sedgwick Ex-Chair Writes About What He Knows

Former Sedgwick chairman Kevin Dunne is coy about how much of his debut novel, *The Chairman*, is autobiographical. Case in point: The main character's name is Boxer Tate, a former bouncer who beats up a patron one night, gets locked up, becomes a lawyer and works his way up to the highest echelons of the legal profession, all the while juggling two beautiful and powerful women. "Well, let me put it this way," he says with a laugh. "I write about what I know."

Dunne, who served as the firm's chairman from 2001 until 2007, had no shortage of material to draw on. A commercial litigator, Dunne represented the Brown & Williamson Tobacco Corp. in several major class actions. He has also represented such clients as the DaimlerChrysler Corp., Genentech Inc. and State Farm Insurance Co.

During his time as chairman, Sedgwick expanded from 285 to more than 350 attorneys and added offices in Austin and Houston while establishing an affiliation with a firm in Bermuda. After stepping down in 2007, Dunne, now of counsel at the firm's San Francisco office, had some free time and decided to try his hand at writing fiction.

"As a lawyer, I have about 150 publications—mostly presentations and one law book that's been on the market for 15 years about depositions," Dunne says. He was inspired to write fiction after reading Stephen King's *On Writing: A Memoir of the Craft.*

King "really glorifies writing and makes you very excited about it," Dunne says. "He talks about the richness you can bring to yourself and others."

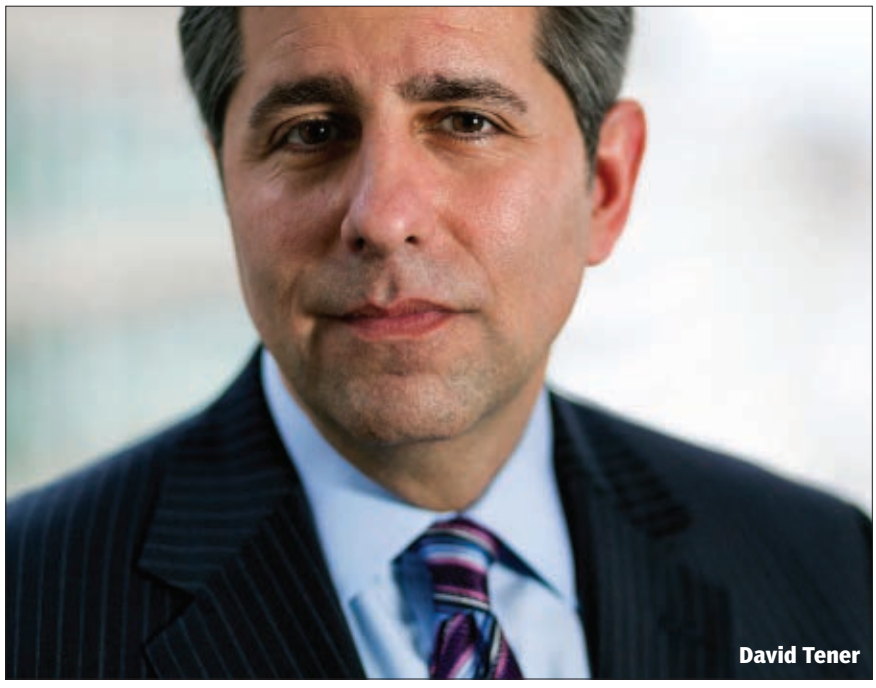
One of Dunne's biggest challenges was to take the business of law—something that's been second nature to him for decades—and make it accessible for the general public.

"People who have read it have said there's a lot of law in there," says Dunne, who takes his main character through multiple class action lawsuits on behalf of insurance, pharmaceutical and tobacco clients while moving his way up the ranks of the law firm world. "I think this book may be a challenge, but you also come away from it thinking 'I could do this!' "

Dunne approached the writing process like a trial lawyer prepares for court. "When I first put my pen to the paper, I knew I'd have to shut myself off for at least six hours a day and divorce myself from the rest of the world," he says. "It was like preparing for trial. I'd work during the day, and I'd wake up in the middle of the night and have an idea."

Dunne says he is weighing the notion of writing another book and has a few ideas floating around in his head. "Writing this book was a lot of fun," he adds. ■

LAW SCRIBBLER ONLINE: Victor Li shares his reporter's notebook at ABAJournal.com/lawbythenumbers and on Twitter as @LawScribbler.


David Tener

Little Big Stats

Small firms are using data tools for analysis too

by Robert Ambrogi

Big Data

YOU PROBABLY THINK OF BIG DATA as the province of big firms. Those are the firms more likely to represent the large corporations that amass big data, advising about its retention, management and discovery. Large firms even use big data themselves for internal benchmarking and competitive intelligence. Big, it would seem, wields big.

Small firms, however, also stand to benefit from big data. Various technology tools enable even solo lawyers to analyze large data sets in ways that provide them with intelligence they can use in their practices.

Take the example of Caesar, Rivise, Bernstein, Cohen & Pokotilow, an 18-lawyer intellectual property firm in Philadelphia. It uses a product called Patent Advisor that was developed by Reed Technology Information Systems, a LexisNexis-owned company.

In a 2013 agreement, the U.S. Patent & Trademark Office authorized Reed to mine data from its Patent Application Information Retrieval system, which provides details about applications and their status. Under the agreement, Reed makes PAIR data publicly available as a bulk download.

Reed developed Patent Advisor to help lawyers slice and dice this data to gain insights into patent approval and the examiners who drive the process. It provides granular data about every examiner, including how long they take to grant a patent, how long they take with specific types of patents, and how well the examiner stands up on appeal. It can also be used to evaluate how certain companies or even certain law firms fare with specific examiners.

Patent attorneys at Caesar Rivise use Patent Advisor to help them make strategic decisions at critical junctures in a prosecution, explains David M. Tener, the firm's managing partner. After an examiner issues a final rejection, for example, the lawyer must decide whether to appeal, which can be expensive, or to continue to work with the examiner.

"That is a good time to look at the statistics," Tener says. "The attorney can look back at 10 to 20 years of the examiner's history. What is the examiner's record on appeal? What kind of backlog does the examiner have? How do cases fare after an interview with the examiner? In some cases, it makes the decision for you."

The firm also uses Patent Advisor to benchmark its performance internally and to generate competitive intelligence. "How fast do we get a patent versus a competitor in a particular art unit? We can compare apples and apples," Tener explains. "You can use these stats to show a client you're doing the best job."

IN SOUTH CAROLINA, Gerald Healy is using big data in a different way. After law school he joined the Marine Corps as a judge advocate. When he left the Marines two years ago, he launched Military Justice Attorneys, a virtual law practice specializing in the criminal and civil defense of active-duty military and their families.

Working from a home office, Healy has expanded the firm to add two lawyers and soon a third, all also working virtually from home offices. The firm tripled its earnings last year and he expects them to double again this year. One key to that growth has been tracking data on the firm's marketing.

With a military practice, Healy's potential clients could be anywhere in the world. That made it essential to track how leads came to him and to evaluate the cost-effectiveness of his various marketing methods.

To help do that, Healy chose Avvo Ignite, a cloud-based marketing dashboard from the company that operates the Avvo online legal directory. Ignite compiles and analyzes data about how prospective clients come to a firm and the cost to convert them to clients. Healy chose the platform in part because it is cloud-based, so it is accessible to all the firm's lawyers.

"This lets me see how well my attorneys are doing at getting back to leads, track the conversion of those

PHOTOGRAPH BY ERIC PRINE

leads, and track the sourcing of those leads," Healy says.

Even with Ignite, however, Healy found it a challenge to track leads precisely, particularly those that come in by phone. Although Ignite can automatically track phone leads, it did not provide the detail Healy wanted on the marketing source that resulted in the phone call.

He jury-rigged a workaround, funneling calls through the cloud-based answering service Ruby Receptionists. Ruby collects information from the prospect and then submits it through the firm's website, where Ignite's automatic tracking picks it up and begins to follow it.

With online marketing, tracking the source of a lead is often difficult. Healy says. The source could be a retweet of a tweet of a link. Between Ignite and Ruby, Healy believes he is capturing the data he needs to measure the effectiveness of his marketing dollars and continue to grow his firm. ■

Apps for All

Which are must-haves? It depends on your practice

by Dennis Kennedy

Kennedy on Tech

PEOPLE DOWNLOADED MORE THAN 100 BILLION MOBILE APPS IN 2014. More than a million apps are available on each of the iOS and Android platforms. Yet most users rely on a core set of roughly two dozen apps.

Are there essential apps every lawyer should be using? The answer is yes, but the answer will not be the same for every lawyer. Because most apps have a specific focus, lawyers' use of apps emphasizes both the variety of types of practice and unique ways lawyers practice.

In fact, even the lawyer who spends time with the iPhone J.D. blog, the Droid Lawyer blog or Tom Mighell's *iPad Apps in One Hour* book will likely feel disappointed by the number of apps targeted specifically to lawyers. It's still worth your while to monitor developments in this area, especially if you are a litigator. For example, the TrialPad app probably is as close to a "standard" legal app for lawyers as we have seen to this point.

But fear not. There are plenty of useful apps out there, especially if you take a step back and think about how you practice, how you use mobile devices and the intersection of the two.

Mobile apps are especially good for three things: allowing you to perform tasks anywhere and at any time, extending the range of what you can do with computer programs or Web services, and taking advantage of the features of a mobile device (camera, microphone, sensors) to give you new tools right at hand.

Let me suggest a four-step strategy for finding apps that will help you.

APPS FOR PROGRAMS YOU ALREADY USE: Microsoft now has app versions of its Office products. Password manager tools like 1Password have app versions that allow you to use and manage passwords securely on your mobile device. Look for apps associated with programs you commonly use and watch for app announcements from those vendors. And consider the value of apps that tie back to your office systems or to cloud-based tools.

APPS FOR CONVENIENCE: Your mobile device camera can be surprisingly helpful. Apps use the camera to let you scan documents, make and send copies, capture whiteboard notes, scan bar codes and business cards, and much more. Microphone-related apps let you record meetings and your ideas. Stopwatch and countdown timer apps can be extremely useful, as can navigation and travel apps. Think creatively about how the features of a mobile device might help you, and explore apps that exploit those features.

APPS FOR HOW YOU WORK: As an advocate of David Allen's *Getting Things Done* approach to task management, I find the Omnifocus app essential, but there are a wide variety of to-do and checklist tools. If you like to outline, sketch out ideas or "mindmap," there are apps for that. Focus on exactly how you work and try to think beyond just legal apps.

THE ELUSIVE "OTHER": There are great app sites like App Advice that announce and review new apps. Almost any article on best apps should give you ideas. Ask friends who are heavy app users. And keep an eye out for local CLE presentations.

It's a great time for you to take the initiative on finding apps that will work for you. If you broaden your thinking, you will definitely enhance the value of your mobile device to you—and, very likely, to your clients as well. ■

Dennis Kennedy is a St. Louis-based legal technology writer and information technology lawyer.

PHOTOGRAPH BY LOU BOPP

By Victor Li
Illustration by Jean-Francois Podevin

Dewey's Judgment Day

As the legal giant disintegrated, its leaders continued to sell how great things were

In December 2011, Dewey & LeBoeuf chair Steven Davis used a calm, matter-of-fact tone in a phone interview about his firm's uncharacteristically aggressive streak of lateral partner hiring during the previous year. It was all part of the plan, Davis said.

"When we created the firm, we said that our fundamental strategy was to be in the category of elite global law firms," Davis told this reporter during an interview for a story that appeared in *The American Lawyer* magazine. "We wanted to be the firm that targeted complicated and challenging work from great clients and was capable of working throughout the globe."

After the 2007 merger of the highly regarded New York City-based firms Dewey Ballantine and LeBoeuf, Lamb, Greene & McRae, Davis' primary focus for several years was integration. That changed when 2011 hit, as Davis said he felt it was time to execute part two of his plan to make Dewey into a global law firm behemoth.

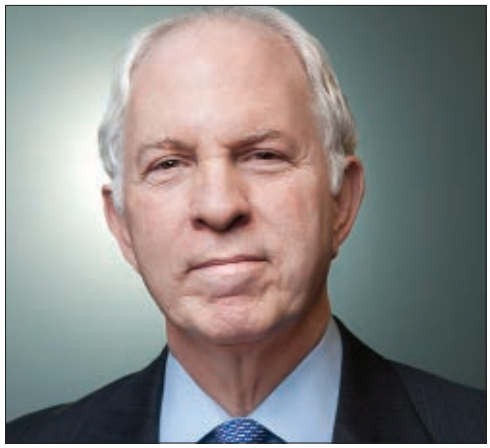
During its last year and change of existence, Dewey & LeBoeuf was clearly in expansion mode, having welcomed nearly 40 lateral partners, including well-respected lawyers and BigLaw veterans such as Latin America corporate specialist Michael Fitzgerald of Milbank, Tweed, Hadley & McCloy; mergers and acquisitions partner Ilan Nissan of O'Melveny & Myers; and intellectual property litigator Henry Bunsow and antitrust litigator Roxann Henry, both of whom came from Howrey.

But just one month after the interview, Davis was singing a different tune. During a global partners' meeting, Davis was widely reported to have revealed that the firm was on the verge of collapse. Those newly acquired lawyers were now back on the market—only this time they were joined by every single one of their partners, counsel, associates, secretaries and other Dewey & LeBoeuf employees. Within six months, references to the firm were in past tense.

Dewey & LeBoeuf wasn't just history; it had made it, too. When it shuttered its doors in May 2012, it was the largest law firm failure in U.S. history.

Dewey & LeBoeuf presented itself as a thriving global giant. In reality, it was a debt-ridden disaster that tried to buy its way out of trouble. The firm's greatest piece of capital during its last few years of existence was its sterling reputation, and the firm leveraged that to paint a rosy picture that was accepted by law firm consultants, media professionals, investors, financial institutions, lateral partners and its own lawyers and employees. Davis and others continued to paint that rosy picture of Dewey up until the very end.


H.Podvin d'après Magritte



Legal consultant and recruiter Jon Lindsey sensed all was not well at Dewey & LeBoeuf after several partners complained they weren't receiving promised payments, with some claiming they were being paid less than senior associates.

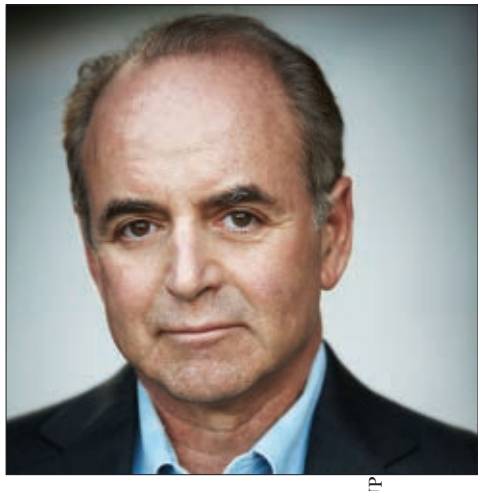
One more historical bullet point: Dewey & LeBoeuf became the highest-profile law firm to have some of its leadership criminally charged with grand larceny, securities fraud conspiracy and falsifying business records. At publication time, Davis, executive director Stephen DiCarmine, chief financial officer Joel Sanders and client relations manager Zachary Warren were facing trial for their roles in Dewey's failure. Davis, DiCarmine and Sanders were scheduled to be tried in Manhattan in February (Warren is scheduled to be tried separately at a later date). If they wish to go free, they'll have to convince a jury that their relentless positivity was not a cynical ploy but a sincere belief that Dewey's best days were still ahead.

Warning Signs

But not all partners viewed the firm through the same halo as Davis and his fellow executives. Catherine McCarthy, an energy partner in the Washington, D.C., office, says she became aware of problems at the firm in the fall of 2011.

An 18-year veteran of LeBoeuf Lamb and then Dewey & LeBoeuf, McCarthy says she became concerned after making trips to the New York office, which seemed more in tune with what was really going on at the firm. By March 2012, she says, she'd be in New York one day and see partners packing up their offices, and then she'd be in D.C., where it was business as usual.

"There was not a lot of transparency about the firm's financial condition," she says. "I know that many partners asked a lot of questions about the firm's accounting in the years leading up to the firm's demise. They did not always receive complete responses, and the pattern was that the partners would get busy on client matters and not follow through."



Consultant Peter Zeughauser recalls being surprised that Dewey & LeBoeuf reported more than $1 billion in gross revenues in the first year of operations after the merger of Dewey Ballantine and LeBoeuf Lamb, noting that merged entities typically experience flat revenues.

COURTESY JON LINDSEY, ZEUGHAUSER GROUP

Outside observers also sensed something was up. Jon Lindsey, co-founder of the New York office of Major, Lindsey & Africa, says he knew the firm was in trouble about 18 months before it went out of business. "We kept getting visits from partners who said they had been promised certain amounts of money but weren't getting it," he adds. "Some of them said they were even paid less than senior associates. That seemed like a very bad sign to me."

Nevertheless, the firm continued to sell itself as a great place to be. London-based private equity partner Mark Davis, who joined in May 2011 from Taylor Wessing, says he came aboard because he hoped to join a U.S.-based global firm that would allow him to expand his practice.

"I did some due diligence when I was going through the lateral hiring process, and I did ask about financials," Davis says. "But there is a limit in any joining process to

AP PHOTO/RICHARD DREW, COURTESY BRUCE MACEWEN

how many questions you can get to ask.

"But I was joining Dewey & LeBoeuf, a great firm. On the basis of the information I was given, I had no reason to suspect there were any financial issues."

During the 11 months he was at Dewey, Davis says, he spent most of his time traveling and building up his practice. As such, he had no inkling that the firm was in trouble until that January partners' meeting.

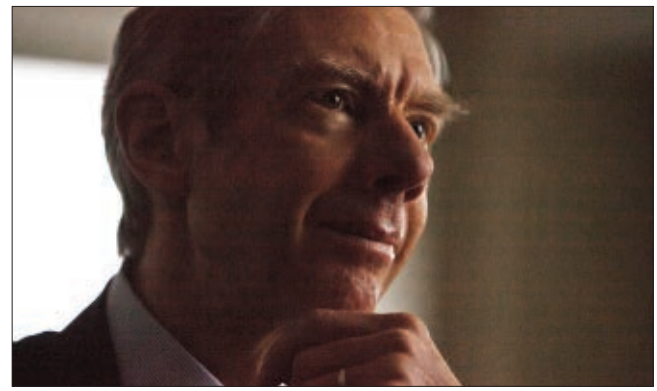
"I was still quite new and feeling like things were going well," says Davis, who joined McDermott Will & Emery in April 2012. "I was glad I had made the move—until the partners' meeting, when it was clear that there were big issues."

International arbitrator Pieter Bekker also joined Dewey during its last year. Based out of Dewey's Brussels office as counsel and then a nonequity partner, Bekker says he was recruited by famed arbitrator James Carter, himself a recent lateral to the firm.

"It was very hard to get information about the firm from the Brussels outpost," Bekker recalls. "No one showed up at the door after the firm collapsed. It was like they simply forgot about Brussels. I just cleared out there and was on the market for five to six months."

Bekker says he was one of the last lawyers on the payroll because he had to make an oral argument in federal court on behalf of a major client three days after the firm officially dissolved.

"The week before the firm officially closed its doors, I contacted the firm's management, which was now led by Steve Horvath and Jeff Kessler [and others], and told them I needed to be in court for a major client," says Bekker, who filed a claim against the bankruptcy estate for approximately $4,000 in travel-related work expenses he says the firm had agreed to pay him but never did.



In a somehat unusual move for a law firm, Dewey & LeBoeuf sought to raise $150 million through a private bond offering in April 2012 in order to refinance its debt. Bruce MacEwen, a consultant and president of Adam Smith, Esq., was immediately skeptical: "It was the most bizarre private placement memo I've ever seen."

Bekker recently relocated to the New York City area after his wife got a job there, and he is looking for work. "I didn't lose any capital contributions or pension funds," he says, "but my practice has suffered."

Big Losses Other partners say they lost significantly more than the $4,000 Bekker says he's owed from Dewey. Michael Fitzgerald, one of the biggest names to join the firm during its final year, claimed Dewey owed him $38 million in compensation that had been guaranteed when he made the move from Milbank Tweed in July 2011. In February 2013, Fitzgerald filed an objection against the proposed bankruptcy liquidation plan for the firm and demanded his money.

"Fitzgerald was fraudulently induced by members of management of the debtor to leave his prior law firm and join Dewey in July 2011 based on false representations and false promises relating to [Dewey's] business and financial performance," Fitzgerald's attorney, Alan Kolod of Moses & Singer, wrote in his objection.

Fitzgerald claimed that he had negotiated a five-year fixed compensation guarantee, and that Dewey promised to kick in $9 million to make up for forfeited pension payments. Fitzgerald, who is now a partner at Paul Hastings, settled his claim the next month while agreeing to pay $1 million to avoid having to pay out future profits to the bankruptcy estate.

IP litigator Bunsow went even further, filing suit against Davis, DiCarmine, Sanders and others, accusing them of "running a Ponzi scheme in order to enrich themselves and select partners of the firm." Bunsow, who joined Dewey in January 2011 from failing firm Howrey, claimed in his lawsuit that he'd been guaranteed

$5 million a year, and that when he asked about the firm's finances, Davis, DiCarmine, Sanders and others told him Dewey was in great shape.

Bunsow also claimed he was encouraged to make a $1.8 million capital contribution immediately, and was told by Sanders he could borrow the amount necessary to fund his capital account from Citibank, and that the firm would pay interest on the loan for three years. Bunsow, who started his own firm after leaving Dewey, voluntarily dismissed his case in March 2014.

Other partners apparently took more direct action. Law360 reported in April 2012—almost two years before charges were announced—that a group of partners "asked the New York district attorney to bring criminal charges against the chairman of the tottering firm."

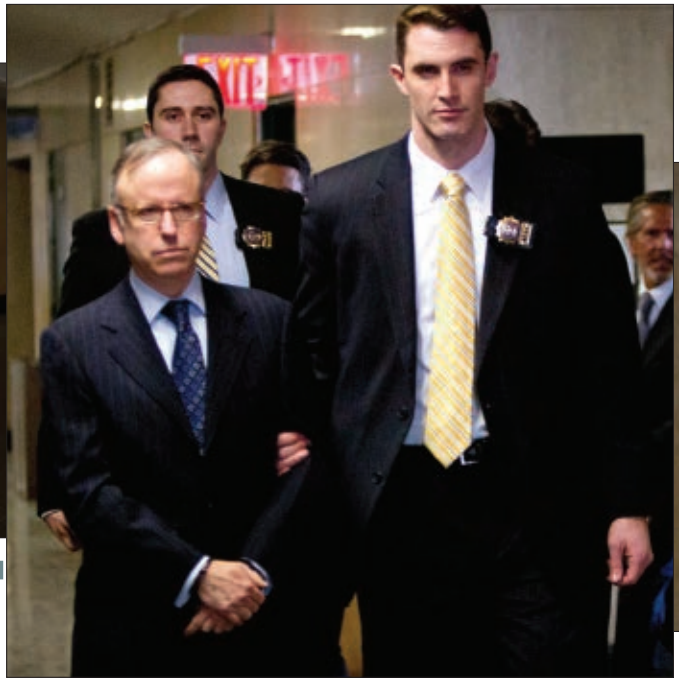
Fated Walk The irony couldn't have been lost on Davis and his three co-defendants as they made their highly publicized perp walk last March through the Manhattan Criminal Court building—once ruled by Thomas Dewey, the former Manhattan district attorney and namesake of Dewey Ballantine.

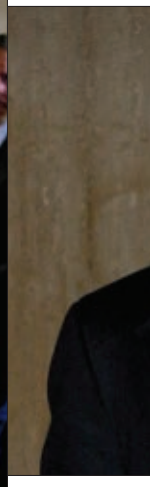
"Fraud is not an acceptable accounting practice," said Manhattan District Attorney Cyrus Vance Jr. at a press conference announcing the indictment. "Their wrongdoing contributed to the collapse of a prestigious international law firm, which forced thousands of people out of jobs."

According to the indictment, the firm's merger, which took place right before the onset of the Great Recession, was troubled from the start. The indictment alleges Dewey & LeBoeuf had been way below its expected financial benchmarks during its first full year of operations in 2008 and was carrying more than $100 million in debt. The firm had several lines of credit in excess of $130 million with various banks, and part of those credit agreements was a covenant requiring Dewey to maintain a minimum year-end cash flow—a covenant the firm could not meet due to poor financial performance.

"The defendants and others at the firm were aware that the failure to meet the cash-flow covenant during the 2008 credit crisis could have disastrous effects on the firm," the indictment alleges.

The defendants concocted a scheme to defraud the





TOP: REUTERS CARLO ALLEGRI, LEFT: RICK KOPSTEIN

The four Dewey defendants (left) arrive in handcuffs for their arraignment at Manhattan Criminal Court in March 2014. Bottom: (from far left) members of the defense team from the firms Morvillo Abramovitz Grand Iason & Anello, Bryan Cave, and Hughes Hubbard & Reed gather before a July hearing; Steven Davis; Joel Sanders; Stephen DiCarmine; and Zachary Warren (center).

ALL: REUTERS/CARLO ALLEGRI

firm's lenders, the indictment says, by inflating its numbers in order to meet its covenant. Prosecutors further allege the defendants and others continued doing this in subsequent years and lied to their partners and auditors about it.

Law firm consultant Peter Zeughauser recalls being surprised at Dewey's reported financial performance from the beginning. During its first full year of operations as a merged entity in 2008, Dewey reported just over $1 billion in gross revenue, a 2.1 percent increase from the previous year. Zeughauser notes that newly merged firms usually experience flat growth during the first year because it takes time before they reap the benefits of cross-selling or client-relationship expansion.

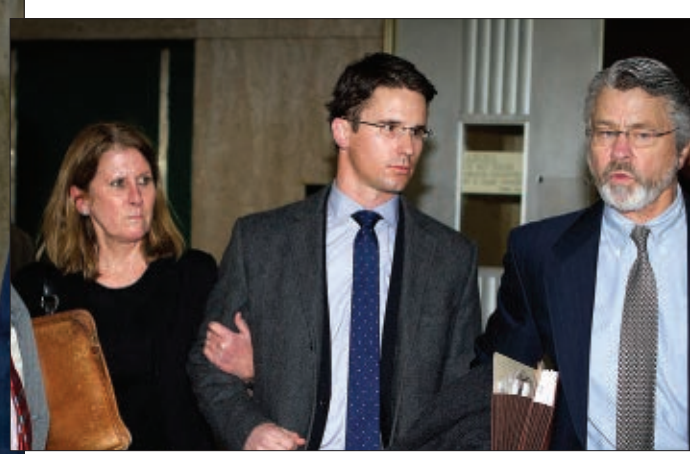
Legal recruiter Lindsey also found the numbers odd. "I didn't look at the numbers and go 'Oh my God, they must be lying!' " recalls Lindsey. "They were hard to believe, but there was no way to tell whether the numbers were legitimate or not."

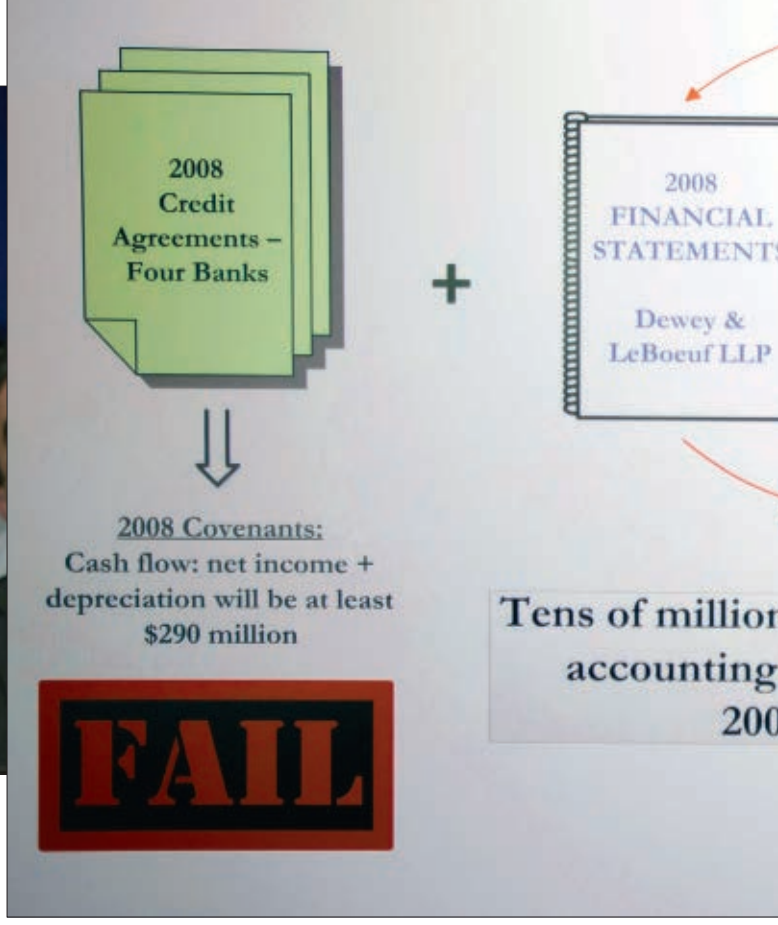
In an unusual step, the firm decided to seek $150 million in a private bond offering in 2010. At the time, Zeughauser recalls, he was not suspicious of the move. He even thought it was creative and, if successful, could cause other firms to follow suit. Keith Wetmore, then-chair of Morrison & Foerster, told Bloomberg it was a sign of Dewey's strength and financial stability, noting that "you need a pretty good balance sheet to interest institutional investors."

But others were skeptical. Bruce MacEwen, a consultant and president of Adam Smith, Esq., recalls being floored when he viewed Dewey's prospectus. "It was the most bizarre private placement memo I've ever seen," says MacEwen, who formerly practiced securities litigation. "There was no entry for risk factors in the table of contents—that's one of the pillars of an offering document. There were, I think, two pages about pro bono work, a couple on diversity. No mention of guarantees to partners. It was more of a marketing document."

That said, MacEwen notes, it was successful in bringing in investors. "I think the investors were mostly insurance companies," he says. "What can you say? They bought into it. And they're big boys."

Last March, the Securities and Exchange Commission charged Davis, DiCarmine, Sanders, finance director Frank Canellas and controller Tom Mullikin with securities fraud. Mullikin reached a partial settlement with the SEC in September.





CORBIS @BRYAN SMITH, REUTERS CARLO ALLEGRI

'Voracious Greed' Commentators and lawyers agree the firm's exploding payroll helped hasten its demise. "I am not sure when we lost our way on compensation matters, but at some point many of the partners started expecting—and receiving—compensation along the lines of senior partners at investment banks or rock stars," says McCarthy, the energy partner from D.C.

It's an assessment that Davis, DiCarmine and Sanders share. In their motion to dismiss, the three defendants blamed the "voracious greed of some of the firm's partners" as a factor in Dewey's demise.

To some, however, that allegation was laughable: It was Davis who had initiated the use of guaranteed, big-money contracts as a way of recruiting laterals and retaining important partners as well.

"Steve Davis' big coup was recruiting Ralph Ferrara out of Debevoise" & Plimpton, says MacEwen. "That was a huge success. Maybe that was Steve Davis' original sin, so to speak."

Ferrara, a securities litigator and rainmaker, turned heads when he joined LeBoeuf Lamb in 2005. According to *The American Lawyer*, Ferrara and his group didn't come cheap. LeBoeuf had to guarantee more than $40 million in salary and pension benefits to close the deal. It was money well-spent, however, given that Ferrara and his group had a book of business worth more than $60 million.

Other big contracts soon followed, to the point that Dewey's payroll soon resembled that of the New York Yankees. During the 2007 merger, Davis handed a massive guaranteed contract to his counterpart at Dewey Ballantine, firm chair and M&A rainmaker Morton Pierce. According to *The New Yorker*, Pierce wanted a Ferrara-like deal in order to stay with the newly merged firm, and Davis handed him a deal guaranteeing him about $35 million over five years. *The New Yorker* also stated that another LeBoeuf bigwig, insurance partner and former LeBoeuf compensation chair Alexander Dye, was given a $3 million annual guarantee to keep him in the fold. Fitzgerald's mammoth deal was one of the firm's later guaranteed contracts.

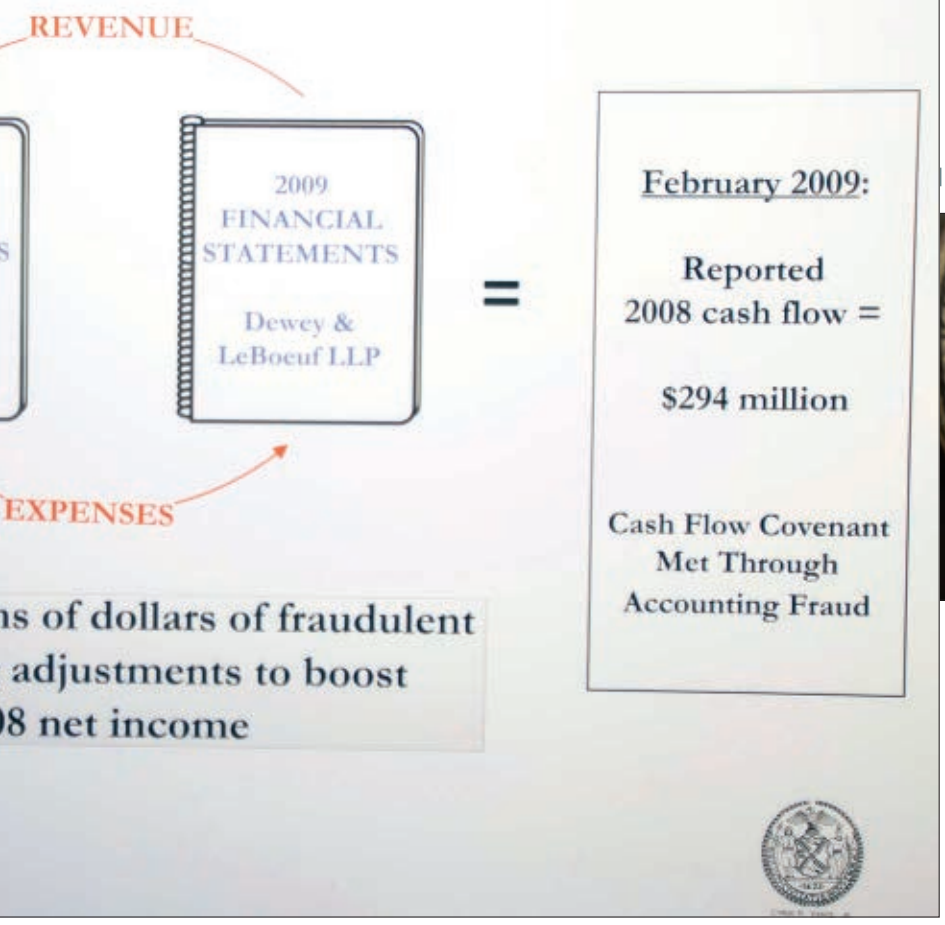
According to bankruptcy court filings, more than one-third of Dewey's approximately 300 partners had some sort of guaranteed compensation agreement. Consultants acknowledge that having short-term guarantees when partners join the firm is common and beneficial. Many of Dewey's guarantees, however, fell into the long-term, big-money category.

"When you do the math, it would take an extraordinary performance, year in and year out, in order to honor all those guarantees," Zeughauser says. "It should be clear to most reasonably intelligent people that those guarantees could not be honored. You can't make that many guarantees, especially when your performance is declining."

MacEwen agrees, noting that guarantees can have a destabilizing effect on a firm. "The partners that don't have guarantees then feel like chumps," he says. "That's incredibly corrosive to morale."

McCarthy points out that several Dewey partners continued to land huge guarantees even as they escaped from the failing firm. "We heard about our Dewey partners landing at firms where they were going to be paid $5 million per year and up as a lateral," McCarthy says. "I eliminated those particular firms from my list." McCarthy ultimately moved to Bracewell & Giuliani in May 2012.

In his December 2011 interview, Davis backed the use of guarantees to attract laterals. "It's pretty hard to bring



CORBIS @BRYAN SMITH

At a press conference on March 6, 2014, Manhattan District Attorney Cyrus Vance Jr. announced charges against four former Dewey employees. "Their wrongdoing," he asserted, "contributed to the collapse of a prestigious international law firm, which forced thousands of people out of jobs." The lengthy indictment alleges that early on, the recently merged firm resorted to various feats of accounting legerdemain in order to maintain lines of credit and stay afloat during the 2008 financial crisis.

in laterals without providing some period of guarantee or assurance," he said. "Some firms don't do it and I'm totaled by that. My perception is that it's very hard to get someone, especially of the quality we're shooting for, to move without providing some base level of assurance."

'Not Our Bankruptcy'

Usually when three law firm executives meet with top attorneys from competing firms, a young federal law clerk, and several younger associates, it's at a bar association meeting, a country club or a cocktail party.

On Nov. 7, all were crammed into a courtroom in Manhattan Supreme Court. The purpose was to try to get the charges against all four Dewey defendants thrown out. Defendant Warren, who had been the firm's client relations manager, was also trying to get his case severed from the other three. Even he didn't want to be associated with Dewey's ex-brain trust. Judge Robert Stolz granted Warren's motion to sever, but kept most of the charges intact against all four defendants.

"It ain't over until it's over, but this was a very good day for the defense," said Warren's lead attorney, Paul Shechtman of Zuckerman Spaeder, in a statement after the November hearing.

The defendants have had a giant target on their backs since April 2012, when the group of unnamed Dewey partners met with DA Vance and suggested he look into what was going on at the firm. Vance's investigation uncovered a trove of emails between the defendants, and he filed some of the more salacious ones with the indictment. The prosecutors allege the emails clearly show the defendants resorting to all sorts of phony bookkeeping, including backdating checks, classifying partners' capital contributions as payment of legal fees and hiding write-offs.

"I'm really sorry to be the bearer of bad news, but I had a collections meeting today and we can't make our target," Sanders allegedly wrote to Davis and DiCarmine. "The reality is we will miss our net income covenant by $100M." Sanders allegedly claimed he might be able to adjust the books so that the firm only missed by $50 million or $60 million instead.

Vance has taken guilty pleas from seven Dewey financial officials. In his plea agreement, finance director Canellas said he had worked closely with Sanders and at the behest of Davis and DiCarmine in making the illegal adjustments so that Dewey would be able to meet its cash-flow covenants.

"I knew that the firm's unaudited, and eventually audited, financial statements were false and were being provided to the firm's lenders, to leasing companies with whom the firm did business, and to others," Canellas said in his plea agreement. According to the agreement, in return for his full cooperation, the DA's office agreed to recommend a prison sentence of two to six years for pleading guilty to second-degree grand larceny. Without an agreement, Canellas would have faced five to 15 years in jail.

Davis' attorney, Elkan Abramowitz, a partner at Morvillo Abramowitz Grand Iason & Anello, did not respond to a request for comment. Neither did Hughes Hubbard & Reed partner Edward Little, who represents

Sanders. Bryan Cave partner Austin Campriello, who represents DiCarmine, also declined to comment.

What's clear from their court filings is that Davis, DiCarmine and Sanders (who filed jointly) intend to argue that they lacked the requisite criminal intent because they fervently believed that the firm would eventually make good on its debts.

They point out that the first principal payment on the private placement bonds was not due until April 2013—nearly a year after the firm went bankrupt. They blamed the DA's office for torpedoing "an impending merger with another law firm" that destroyed any possibility that Dewey would make its initial payment. According to news reports, Dewey held serious discussions with Greenberg Traurig and what were then Patton Boggs and SNR Denton about possible mergers, but those talks fell apart.

"These defendants did not take the firm into bankruptcy causing it to default," wrote the attorneys for Davis, DiCarmine and Sanders in their motion to dismiss. "Others made that decision after these defendants were relieved of any authority at the firm."

In March 2012, Davis was relieved of his sole authority and subsequent decisions were made by a five-partner committee that included himself and four other Dewey partners.

"There could have been no evidence before the grand jury that when [Dewey & LeBoeuf] obtained the money via the private placement, any of these three defendants intended that the money would not be repaid with interest when due," wrote the attorneys for Davis, DiCarmine and Sanders in their motion to dismiss.

Warren, through attorney Shechtman, said in court filings that he was not involved in any of the alleged transactions and was merely present for some of the discussions relating to the financial adjustments in question. Warren's defense team also accused the DA's office of pursuing a personal vendetta, claiming in court filings that the prosecutors had it out for him because they believed Warren had lied when he met with them in Washington, D.C.

"There seems little doubt that the ADAs assigned to this case have come not to like Mr. Warren," Warren's attorneys wrote in their August motion to dismiss. "Perhaps it is because he refused to accede to their wishes when they interviewed him."

Shechtman also wondered how it was possible for a 23-year-old to have brought down such a venerated firm. "What evidence was presented to the grand jury that Mr. Warren, fresh out of college and with no accounting training or experience, knew that the arcane accounting adjustments at issue here were improper or were made with an intent to defraud?"

TOP: REUTERS/LUCAS JACKSON

Picking up the Pieces Arbitrator Bekker was hardly the only one to experience a career setback as a result of Dewey. While almost all of its equity partners quickly found new jobs, many associates and support staffers have had a difficult time finding employment.

"In Washington, my understanding is that every last

Geoffrey Raymond, known for his "annotated paintings" of fallen Wall Street icons, turned his attention to former Dewey chair Steven Davis for this portrait. The commentary in black came courtesy of the general public, while the remarks in blue were made by Dewey employees.

person in the office [attorneys and staff] found other positions," says McCarthy. "I know that was not the case in our New York office."

McCarthy says many partners tried to bring as many people with them as possible, but sometimes it wasn't possible: "Our head legal recruiter in New York, Lauren Rasmus [an attorney now at Morgan Stanley], worked for many, many weeks to make sure that the students who planned to join our firm the summer of 2012 were placed at other firms. Other administrative employees who were similarly situated left as soon as things started to get tough, but Lauren stayed to help the students."

Even with the benefit of hindsight, most former Dewey partners and law firm experts the *ABA Journal* spoke with are shocked about the indictments.

"I was embarrassed that I had been a partner of a firm that managed its own business affairs so poorly, but I did not believe that there would be criminal allegations against anyone at the firm," says McCarthy, who stresses that Davis and DiCarmine did a lot of good things at Dewey, such as increase diversity and emphasize pro bono work. "I thought our issues had to do with mismanagement, mistakes and some bad luck," such as the recession starting just as Dewey Ballantine and LeBoeuf merged.

MacEwen and Zeughauser say they didn't think criminal charges would be filed, at first. "When the still unnamed partners went to [the Manhattan district attorney], then that's when things changed for me," MacEwen says. "I thought, 'These guys presumably know things that we don't. They must think there's something there.' "

MacEwen says the defendants should have a hard time proving they were merely mistaken. "Almost all firms are run on a cash basis, and it's hard to run a business like that and have the reported numbers be that far off from the actual numbers," he says.

Zeughauser agrees, noting that "giving misleading numbers to lenders is a serious offense because you have to attest to the truth of those statements."

Lindsey notes the allegations against Dewey, if true, are unprecedented. "Other big firms that have gone under in recent years have had business issues," he says. "Howrey and Heller Ehrman had some big cases end at the same time and some other events that they tried to stop but couldn't. Thacher Proffitt & Wood was hurt when the bottom fell out of the structured finance market—there was nothing they could do about that.

"There are other reasons for law firm collapses, like bad leases or poor performance," he says, adding, "I've never seen anything like this." ■

LEFT: REUTERS/EDUARDO MUNOZ

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Soothing the Split

By G.M. Filisko with photography by Willie Petersen

Model Program Brings Holistic Solutions to Divorce

In what may be a first in the divorce world, Pamela Robinson refers to her experience in getting a legal separation as "beautiful." It even featured the appearance of a puppy.

"I was absolutely pleased with it," says the Denver mother of three and recruiter for accounting and finance professionals.

Robinson gives much of the credit to the Resource Center for Separating and Divorcing Families, a multidisciplinary, nonadversarial pilot program at the University of Denver that launched in fall 2013. Through it, divorcing and separating families are counseled on the legal and psychological aspects of dissolution by interns from the school's graduate psychology and social work programs, along with its law school.

Paradigm Shift

This is the latest article in the *ABA Journal*'s series of reports on the paradigm shift in how law is being practiced. As the legal business responds to the changes wrought by disruptive technology, financial strain and legal services competition, new approaches to client service are being tested, as in the Honoring Families Initiative described here.







It's a holistic approach that is gathering interest among some law theorists who note that many so-called legal problems are not solvable solely by the legal profession.

Families never enter an actual courtroom. If they're successful, their divorce or separation is granted by a visiting judge in a comfortable room on the university's campus—a feature that's more important than many people ever realize.

STACY HARPER, law school grad/ intern: screens potential clients.

"We had two different court dates at the courthouse downtown before we were introduced to the program," Robinson explains. "Just finding parking and ... the physical act of walking into this sterile environment that doesn't allow for cohesiveness or healing—I can't get over it."

She adds, "With its hard floors, the experience was very visceral to me and very intimidating. I can certainly see how it contributes to feeling tense and how that would lend to not being as good an outcome as we experienced."

The program started small with roughly 100 families in its first year and another 100 in the 2014-15 academic year. But its founders are expansionists. They're working to replicate it at universities and in communities nationwide.

"We're seeing a significant amount of interest because this just makes sense," says Rebecca Love Kourlis, a former Colorado Supreme Court justice who stepped down from the bench in 2006 to work full time on court reform and ultimately oversee the creation of the resource center.

"The more we talk about this nonadversarial approach, the more people pop up on our radar screen talking about how absurd it is to think judges should be deciding if your kids play soccer," she says. "The more we educate ourselves and speak on these issues, the more we think there's a tipping point—that people have become fed up with the way divorce has been handled, and they're hungry for an alternative."

A BROKEN SYSTEM

There's an entire movement of people asserting that family courts are fundamentally broken. After serving in the family courts, Kourlis joined the chorus.

"It started when I was on the trial court bench, when I'd have divorce litigants in front of me," she recalls. "I could see them being ripped apart by the process and the system, and I could see the effect it had on their kids because I would interview the kids. It was so painful and so patently wrong.

"The couple would start the process relatively conciliatory, and by the time they got to a final orders hearing, they were fighting about everything. That was my first clue to the fact that imposing an adversarial system built for civil disputes on a family in one of the most stressful, grief-ridden times of their life was just a complete mismatch."

One volunteer for the center is Robert Hyatt, former chief judge of the Denver District Court. He came to a similar conclusion as Kourlis during his nearly 30-year career, which ended with his retirement and taking senior status in January 2014.

"Here's what doesn't work in the family law court," Hyatt says. "When people go to court and judges take the bench, it's litigation with all the acrimony and anger that accompanies litigation. I asked myself over the course of years: Is this really the right venue for the bulk of people getting a divorce who just need a plan to co-parent their kids?"

Study after study back Kourlis and Hyatt, suggesting the heightened conflict common among divorcing couples is harmful for all parties involved. For children, divorce is especially damaging. They are less likely to graduate from high school, according to the *Canadian Journal of Sociology*. They're also twice as likely to be prescribed Ritalin, the drug commonly dosed out for attention deficit hyperactivity disorder. Other studies show that they are more likely to smoke (University of Toronto), and they're more likely to end up divorced themselves (University of Utah).

The Resource Center for Separating and Divorcing Families is one of several initiatives emerging from the Institute for the Advancement of the American Legal System, which Kourlis

heads and is based at the University of Denver. All pursue legal reform, including the Honoring Families Initiative, which works to create in-court and out-of-court solutions to problems that divorcing and separating families experience.

The RCSDF, which serves as the on-campus model for an out-of-court divorce center, is patterned after Canadian and Australian programs, and its goal is to create a process that floods separating and divorcing families with resources to ratchet back the level of conflict.

The center began working with families as a result of referrals from family courts, lawyers and mental health professionals. The program isn't free. Couples pay based on a sliding scale. But first, they fill out an application and are screened to ensure that they're appropriate for an out-of-court process.

KEY QUESTIONS

"We have basic eligibility criteria," says Melinda Taylor, the center's executive director. "We ask that they don't have any ongoing court-related protection orders or criminal violence, and that they have children."

Potential clients also attend in-person screening interviews. "We'd do a one-hour interview with each partner individually, with a law and a mental health student," explains Stacy Harper, a graduate of the University of Denver's Sturm College of Law who interned at the center during the 2013-14 academic year. "Then we'd meet with our supervisors and decide whether they were a good fit and whether we would take them on as clients. If so, we had a discussion about the services we thought they could benefit from and what services they were looking for."

JULIE MELOWSKY, psychology student: evaluates potential clients.

Who's not a fit? Primarily couples with domestic violence issues who need the protections and enforcement mechanisms courts provide. Also, couples whose behavior shows they won't be open to coaching on how to work together. But neither factor is a deal breaker. Whether any particular family fits the program depends on the family's demonstrated willingness to work together.

"Ultimately, we want to help families," explains Julie Melowsky, a student in the University of Denver's graduate school of professional psychology who interned at the center during the 2013-14 school year; she expects to graduate in 2016 with a doctoral degree in clinical psychology. "With domestic violence, if they're still willing to work together and there's no current domestic violence—maybe there was one instance a year ago—it was a gray line with the screening. But if one person refused to fill out the intake form, we wouldn't work with them."

Once in the program, families are assigned a two-person team of interns overseen by an experienced social worker, a psychologist and a lawyer. They're drawn from nine to 12 interns chosen for each school year, roughly evenly from the graduate psychology department, the graduate social work department and the law school. The social work and psychology interns do much the same functions, except that the psychology student does psychological testing, if requested.

All interns undergo a 65-hour training program: 40 hours of mediation skills and 25 hours of guidance on such issues as child development, how to interview people, co-parent coaching and family law basics.

Each student team works with its assigned family from start to finish.

"I notify the court, and the court stops the case, issues a review date and lets us take over until resolution," Taylor explains. "Then the interns are responsible from day one to set up the family's therapeutic services while the law student tracks all the legal time frames. We have access to court records and the court's e-filing system, and all documents and motions are done through us. If the families come to an agreement, that's when the judge comes and conducts the final hearing."

A CASE STUDY

Taylor walks through a typical case. It begins with the initial service-plan meeting. Team members might tell the couple: "Based on our interview with you and what's going on with your family, we know you want mediation, and we want to make sure you're adequately prepared for it. So we recommend a session of co-parent counseling."

REBECCA LOVE KOURLIS, creator of the center: works toward alternative dispute resolution.

Also available are support groups, which run for six weeks. They're segregated by gender and age, with men's and women's adult groups and three age levels of children's groups. Adult group sessions cover a different topic each week, Taylor explains, including stages of transition, self-care and moving on.

"We also have a local financial planner who agrees to take cases on a reduced-fee basis," she says. "The planner will advise couples on what their assets look like and what they'll need to set up a second household, along with things like whether they need to file for bankruptcy."

The process is much shorter than in-court dissolution. "We've made a commitment to the courts that we wouldn't work with families for more than 180 days for dispute resolution cases, so they're not languishing," Taylor says. "Most of our families are done within 90 to 120 days, and then they have their final orders hearing.

"But many, many continue services beyond the final order. Those are typically therapeutic services. We had a family who had final orders signed in May and came back to us because their son had suicidal thoughts. He's engaging in therapy with us. We get a lot of that."

A judge must preside over final order hearings, and Hyatt spends about a day each month volunteering in that capacity.

"At the final hearing, which is held on the university campus, not in a courthouse, we have an electronic recording system, and I'm still a judge," he explains. "We go through the parenting plan and talk about how it's going to work, and I ask questions, so I'm able to make appropriate findings for granting their divorce and approving the plan.

"The best thing about the plans is that you can tell—unlike lots of the parenting plans you see in court—that these people have put a lot of thought into them. I've been really impressed with the thoroughness and the details of how they're going to deal with their kids and each other going forward."

As a result, Hyatt predicts parties will engage in very little post-decree bickering. "The biggest problem [in traditional courtroom divorces] is that when you end up with the final court order, parties have become so invested in the battle that it's only just begun," he says. "We're inundated with post-decree litigation—motions to modify, motions to reconsider and motions to restrict parenting time based on not following the court's orders. It's just staggering. I'd be willing to bet not one of these parties will engage in post-decree litigation because this is their order. They fashioned it, and they never engaged in the ugliness that comes with courtroom litigation."

The Institute for the Advancement of the American Legal System has engaged a researcher to track the program's results, with a full evaluation after three years. "We've always said this is a three-year research project," Taylor says. "We want to look at outcomes so we can truly assess the advantages and disadvantages of this approach."

FAMILIES ARE FANS

Whatever the research shows, anecdotally the program has already logged successes. Pamela Robinson says the outcome mediated at the resource center was equitable for both her and her ex-husband, Jason, though she didn't initially feel that way.

"When we got down to splitting our assets and talking about things like credit card debt, that's probably where it got most tense," she recalls. "I did have questions because it didn't go so much in my favor. I have friends who are attorneys and CPAs, and I said, 'Does this sound right?' They backed up what the person at the resource center was saying."

Not having a lawyer was actually a benefit, in Robinson's

SHEILA GUTTERMAN, family law firm co-founder: watches the center's progress.

opinion. "During the division of the assets, when I came out thinking I was paying more—and I was, but that's what was fair and equitable—it was important that I didn't have somebody in my corner egging me on to fight," she says. "I could see where this could get ugly if we were in court and represented by people batting for us, rather than having two people who were advocates for both of us and for the family.

"It always came back to the family. That makes you put your fists down and remember, 'I'm not here to win.' It's just an undoing, and it felt like that."

Where did the puppy fit in?

"One of the counselors brought in her dog—a teeny tiny puppy—and how can you be mad when a puppy's in the room?" asks Robinson. "It made it about the family. That was priceless, and that really helped us."

Dena and Steven Singer are also relieved to have divorced without the stress, anger and cost they've seen others endure. They have two kids in college and another who's 12, and they signed the papers to end their 25-year marriage in October.

"I'm glad we went through this process this way," says Dr. Steven Singer, a family practitioner in Littleton, Colorado. "In family medicine, we're doing more outreach with care management, trying to get more of an idea of what's happening in the home."

"In a way, I feel this was a much healthier way for me to go through this," he says. "Even though there's some antagonism and anger and all these emotional feelings wrapped up with a failed marriage, it made it tolerable to go through."

Dena Singer, an emergency room physician's assistant, heard about the program from a friend and visited the center the day she called for more information.

"I loved it," she says. "What we didn't want was for it to be adversarial, and I didn't want it to be piecemeal. But aside from that, we really wanted a place my kids could go to, even my older ones.

"What kept me in my marriage too long was that it always felt too big to disentangle. Then someone says, 'We can help you figure out the infrastructure of your life and separate that out, teach you the legal stuff and also deal with the emotional struggles like teaching you how to tell the kids.' "

Though the couple didn't engage many of the mental health resources during their dissolution—primarily, they say, because their schedules didn't permit it—both expect their 12-year-old to join the kids' group therapy sessions in the future.

As if her divorce weren't enough of a challenge, Dena Singer's niece disappeared at the same time and was never found. "I'm a really strong and a really thoughtful woman, and during that time I felt like I was falling off a cliff," she says. "I'm very thankful for the people in my life who kept me from doing that, and the people at the center are part of that group. ... I could tour the country and talk to legislators and sell this program."

Jonathan Terbush, an internal auditor from Denver, calls himself a "huge evangelist" for the program. "I've told—I can't tell you how many people so far: 'You have to go through the center, and here's why.' "

That's a huge shift from the terror Terbush felt when he filed the papers to unwind his eight-year marriage and sort out issues surrounding his three children, ages 3, 6 and 8.

"I assumed we were going through a court divorce and that we'd have to retain legal counsel—the whole nine yards," he says. "I had really close friends who'd been divorced, and they either had a lengthy legal battle or it was very expensive. I'd also heard stories of people who'd lost everything and were basically working two jobs to afford a studio apartment. That scenario freaked me out."

All of Terbush's children participated in mental health counseling. "My oldest two kids were very confused about the whole situation," he recalls. "They had resources they could take home, stories they could read and stuff they could watch. There were play therapists interacting on a very intimate level with the kids to let them have a sense of control and understanding

of what's going on."

Terbush's daughter bonded so closely with one of the mental health interns, he's arranged for her to continue to receive services from the intern's new employer.

The men's support group was Terbush's go-to resource. "That was incredibly helpful," he says. "There were guys who'd just filed for divorce two weeks prior and guys who'd been divorced for more than a year, so there was a wide spectrum of situational awareness in the divorce process. It was a great exchange to have that range of perspectives, where everybody was able to contribute and help out in a very significant way."

JONATHAN TERBUSH, divorced father of three: touts the supportive services.

Terbush estimates he and his ex-wife paid no more than $700 for all the center's services. Singer says he and his ex-wife spent less than $3,000.

SOME CRITICISM, TOO

A few clients noted that because the center was new, the support groups didn't always have enough participants to provide maximum benefit to families—and some groups never took off. Taylor agrees there's an optimum size for support groups and says they're getting larger as word of mouth spreads.

Robinson also found some of the mental health students to be too inexperienced to be of much help.

"People sat down with us, and they didn't know what questions to ask," she says, "and we didn't know what they were trying to find out from us. ... Jason's in his mid-40s, and I'm getting there, and the students may not have enough life experience to be as effective as they could be."

The skill level of the program's mental health professionals is also something Sheila Gutterman, president and co-founder of the Gutterman Griffiths family law firm in Denver, would like to know more about. Gutterman, who came to the law with a master's degree in guidance and counseling and is married to a psychologist, is unaffiliated with the program but has a strong interest in alternative dispute resolution. And she's been following the center's progress.

"From the mental health perspective, I'd want to know the students wouldn't just open up all the feelings—and they'd be able to handle it once those feelings are opened up," she says. "Or if they're dealing with issues with children, that they're getting the supervision and training to see the entire picture. Mom might be alienating against Dad, and Dad looks like a jerk. But maybe Dad is a jerk. I do think experience matters."

Taylor says every client understands from the beginning that a goal of the center is to train professionals of the future. That's why they're closely supervised. "No one expects the students to be fully formed professionals yet," she says. "But they're remarkably good."

There are also critics in the local family law bar.

"The people who talk in litigation language are very threatened by the institute and collaborative law," Gutterman says. "There's tremendous resistance, even among people who give lip service to the notion: 'Well, we want to change the system; we're amicable; we settle everything.' There needs to be a whole paradigm shift."

MELINDA TAYLOR, RCSDF executive director: leads families to resolution within six months.

That lawyers are raising concerns about the center's work isn't news to Kourlis. "Of course there are objectors, and for the most part, I think they're

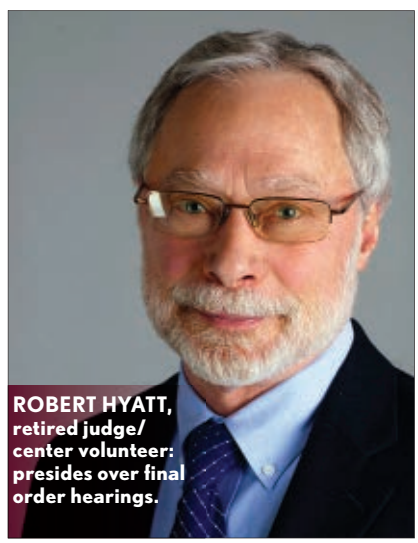
trying to voice legitimate concerns," she says. "For example, there are objectors who worry about domestic violence victims and feel you have to be really careful they're not swept into this process inadvertently in a way they'd be disempowered. Those are legitimate concerns, and there have to be screening systems.

"Similarly there are the lawyers who take the position that there are very significant legal rights at issue, and people have to have enough information to make good decisions," Kourlis adds. "That's a very legitimate concern, and you have to build in a process that people indeed know what they're doing, the impact on them and what the law says."

However, Kourlis says, many opponents have been silenced by two factors. One is the increasing number of people who believe the family court system itself is damaging those who get sucked into it—a concept that Michael Town, a retired judge in Honolulu, calls "jurigenic" harm. The other is the staggering increase in self-represented litigants. In 2013, the ABA Standing Committee on the Delivery of Legal Services noted that national data indicates that 60 to 90 percent of family law cases involve at least one self-represented party.

"It's no longer responsible to say everybody should have a lawyer," Kourlis says. "Legal aid doesn't provide funding for divorce litigants, and a number of people don't want a lawyer because they believe it will fan the flames in their divorce.

"When we did our pilot project, there was much more opposition from the bar than we're encountering today, and I lay that at the feet of the increased research showing the [current] system is a disservice, and that there's a growing number of self-represented litigants."



ROBERT HYATT, retired judge/center volunteer: presides over final order hearings.

FUTURE STRATEGY

The goal is to have replicates of the resource center in place within five years. Kourlis is hunting for funding, and on her to-do list is creating a business plan to identify the components that must be in place for new centers. She's also planning a community-based model outside a university setting.

"The ultimate objective would be to create a replicable model any university or community could pick up and put into place," she says. "We'd be able to provide the training, the format and perhaps a case-management system, as well as permitting the sharing of data among the centers so everybody could be on the same trajectory."

Evidence of a tectonic shift toward a nonadversarial family law approach is emerging. There's been growing talk of other courts, like drug or veterans' courts, being venues for problem-solving. And asked at a recent Chicago appearance about future trends in the law, author and legal adviser Richard Susskind pointed to multidisciplinary approaches to legal issues.

Kourlis says, "We've begun to talk about divorce courts as being problem-solving, and now I'm beginning to see that everywhere. Or there's the notion that divorce has to be nonadversarial in the first instance. Again, people are coming out of the woodwork writing about that, doing radio programs or blogging about those issues. That really has surprised me."

If it catches fire, this type of out-of-court multidisciplinary approach could benefit the entire judicial system.

"One thing I find fascinating is that at the conclusion of our program, participants are expressing enhanced views of the law students and the court system," Taylor says. "People's perception about the court system and access to justice has improved, and that's something I didn't anticipate." ■

G.M. Filisko is a lawyer and freelance journalist in Chicago.

Vietnamese human rights lawyer Cu Huy Ha Vu is escorted by police in April 2011 after being convicted of spreading propaganda against the state. He served three years of a seven-year sentence and was exiled to the United States.

THE MOST DANGEROUS JOB IN LAW

In many countries, human rights lawyers put their lives on the line when they take a case

by Abby Seiff

ON APRIL 6, 2014, GUARDS AT VIETNAM'S remote Prison No. 5 escorted out a most unusual prisoner. He had been branded by the government as an enemy of the state and sentenced to seven years in prison.

Human rights lawyers had a different view of the man, whom they and human rights advocates around the world saw as a prisoner of conscience. Within the prison, he had earned the begrudging respect of his guards, to the point that some of them politely called him "doctor of law," while others called him "hero" or even "head of state."

REUTERS/THONG NHAT/VIETNAM NEWS AGENCY

For three years, Cu Huy Ha Vu had turned prison into yet another courtroom: winning better treatment for his fellow prisoners and assisting them in their legal struggles. Now, at last, he had won his own battle, though the victory came at no small price. When the guards escorted Vu out of the prison, they were ordered to take him directly to an airport. He was flown to the United States, whose diplomats had wangled an early release on medical grounds. It is unlikely he will ever set foot in Vietnam again.

In the Philippines, at least 23 human rights lawyers have been killed since 2001.

"They forced me to go directly from prison to the airport, and from the airport to fly directly to the U.S.," Vu says. "They didn't let me visit my home, visit my sons, visit all my relatives. That is a kind of crime."

Exile may be wrenching, but it is far from the worst treatment Vu and his colleagues around the world have faced at the hands of antagonistic government authorities.

Some 200 lawyers and other activists are imprisoned in Vietnam alone, which, despite recent efforts to introduce liberalized economic policies and develop more contacts with the West, still is ruled by a Communist Party that maintains strict controls on political expression and resists calls for greater recognition of human rights. Vu was arrested for spreading anti-Vietnam propaganda; other attorneys have faced spurious charges of sedition, tax evasion and conducting subversive activities.

INTERNATIONAL ATTACKS

The persecution of human rights advocates is hardly unique to Vietnam. On May 7, longtime Pakistani human rights lawyer Rashid Rehman was shot to death in his office. Rehman had received death threats in open court on April 9 while representing a defendant charged under Pakistan's blasphemy laws. Human rights groups have campaigned against those laws, which carry a potential death penalty and often are used to persecute religious minorities or to settle personal scores.

In the Philippines, at least 23 human rights lawyers have been killed since 2001, according to Lawyers for Lawyers, a Dutch foundation that seeks to promote the proper functioning of the rule of law by working for the freedom and independence of the legal profession. In Turkey, dozens of lawyers were beaten and arrested in 2013 when they joined in demonstrations against certain government policies and crackdowns on free assembly. In Russia, numerous criminal defense lawyers who sought to prove wrongdoing by law enforcement officials have received death threats, and several of those lawyers have been killed.

Indeed, few countries controlled by authoritarian regimes have not seen human rights lawyers being harassed, threatened, tortured and murdered.

During just a few weeks toward the end of 2014, police in Zimbabwe assaulted a lawyer monitoring a protest demonstration; three lawyers in Saudi Arabia were sentenced to five years in prison after calling for judicial independence; an Iranian lawyer recently released from prison had her license suspended without cause; and a human rights lawyer in Azerbaijan suffering ill health had his pretrial detention extended another four months.

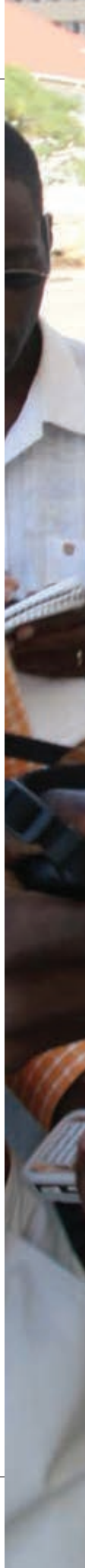
Gail Davidson, founder of Lawyers' Rights Watch Canada, says that in the past year, attacks have been aimed at lawyers whose work threatens to do one or more of the following: (1) Expose serious government wrongdoing, including involvement in torture and extrajudicial killings; (2) interfere with government-approved commercial activities involving the use of land, including resource extraction and commercial development; (3) assert the rights of marginalized people to occupy and live on lands targeted for use by commercial actors; (4) promulgate information on international human rights; or (5) make public extralegal government crackdowns on freedom of expression, association and assembly.

The attacks have included everything from illegal surveillance to trumped-up charges and "failure to provide protection to lawyers threatened with harm," Davidson says. The reasons for these attacks are evident, she adds. "As to the importance of lawyers, the Colombian lawyers have a saying: '*Sin abogados, no hay justicia.*' " There is no justice without lawyers.

Persecution, harassment and physical attacks against human rights lawyers continue despite the efforts of advocacy groups and even the existence of international accords asserting the right of lawyers to go about their business free of improper government interference.

Chief among these accords are the Basic Principles on the Role of Lawyers, unanimously adopted in 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Later that year, the principles were incorporated into a broader resolution on human rights that was adopted without a vote by the U.N. General Assembly. Although they are not legally binding, the principles underscore the vital role of lawyers and the obligation of governments to ensure that they are able to perform all of their professional functions.

The principles state that all people are entitled to call upon the assistance of a lawyer of their choice to represent them in criminal proceedings. The principles also assert that governments "shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be



AP PHOTO/MUJAHID SAFODIEN-STAR

Human rights lawyer Beatrice Mtetwa in 2008 outside the Harare High Court in Zimbabwe, where she applied for the release of foreign journalists who were jailed for working without accreditation.

threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics."

But in the real world, those principles often are ignored. China, Vietnam and Zimbabwe all were U.N. member states when the principles were "welcomed" (in U.N. jargon) by the General Assembly. So, too, were Bahrain, Cambodia, Colombia, the Philippines, Saudi Arabia, Swaziland, Turkey and most of the dozens of other countries implicated each year in abuses against human rights lawyers.

"By advising and representing the victims of human rights violations and their relatives in criminal cases against the alleged perpetrators, [lawyers] help to combat impunity," says Kingsley Abbott, an international legal adviser at the International Commission of Jurists.

As a result, such lawyers become clear threats to governments that are characterized by impunity, corruption and political pressure. "Lawyers from all regions of the world face intimidation, interference, arrest and imprisonment or violence as a result of defending human rights," Abbott says. "The persecution of one or more lawyers through these means may, moreover, be used as a way to intimidate their peers."

THE WORK MUST BE DONE

While Vu was still imprisoned in Vietnam, another lawyer halfway around the world was facing the most recent in a long list of her own legal struggles.

In November 2013, after nine months of a start-and-stop trial, Beatrice Mtetwa finally managed to have charges against her vacated by a court in Zimbabwe. In March of that year, the human rights attorney was imprisoned for eight days for obstructing the course of justice after demanding police produce a warrant for the raid of an opposition party office.

Mtetwa is a native of Swaziland, a small state surrounded almost entirely by the Republic of South Africa. She received her legal training at the University of Botswana, and has resided and practiced in Zimbabwe since 1983. Until the early 1990s, when she began defending human rights cases, she was known locally for her work as a prosecutor. But since then, her efforts supporting the rights of women and children, defending journalists (frequent targets of longtime President Robert Mugabe), and representing opposition politicians have gained her an international reputation.

"I have, of course, faced challenges here and there, as any acts meant to protect human rights are invariably interpreted as a fight against the state," Mtetwa says. "The challenges I have encountered include being physically assaulted by state agents, particularly the police, being arrested and prosecuted on trumped-up charges, having my pets poisoned."

In 2003, Mtetwa was detained on a spurious drunk driving allegation, beaten and choked. Four years later, she was beaten by police while taking part in a march by lawyers protesting the arrest of two colleagues. A 2009 U.S. diplomatic cable, published on anti-secrecy site WikiLeaks, gives a sense of the harassment she was undergoing at the time:

"Disturbingly, Mtetwa informed us that she also has become a target of the state," wrote James McGee, who was then the U.S. ambassador to Zimbabwe. "On March 11, she received a warning from a personal contact at police headquarters that the attorney general's office was considering ordering her arrest this weekend on charges of contempt of court. Mtetwa also mentioned that she was followed several nights ago by two unmarked Isuzu 4x4 trucks, which she suspected may have been driven by Central Intelligence Organization officers. She plans on avoiding her home this weekend."

At a program focusing on her work that was held in October 2013 during the annual conference of the International Bar Association in Boston, Mtetwa displayed a disarming modesty in describing what motivates her. "The work has to be done," she said. "I am very ordinary—my kids will tell you that. Some people think it's dangerous, but when you're working on a case, that's all you really focus on."

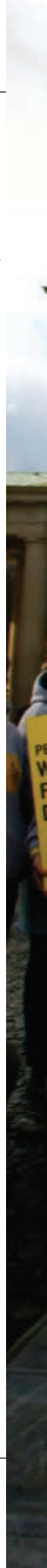
Mtetwa also urged lawyers to focus less on what she called "living the good life" and more on their public service obligations. "As lawyers, we need to give a little more to the societies in which we live," she said. "If we supported each other a little bit more, we'd get more people involved in the work."

OUTSIDER ATTITUDE

To that end, Mtetwa has resisted calls to enter politics. "It seems when you go into politics, you become like politicians," she says. "I want to fight whoever is in power if they violate human rights. Compromises of the rule of law have to be challenged right from the start. You have to be vigilant and challenge every little thing."

Mtetwa embodies the attitudes of many lawyers who are challenging human rights violations around the world, says John H. Mathias Jr., a leader in the ABA Section of Litigation, which sponsors the International Human Rights Award. Mtetwa received the award in 2010. Among other recipients are Elena S. Ezhora of the Stichting Russian Justice Initiative in Moscow (2007); Salih Mahmoud Osman of the Sudan Organisation Against Torture (2006); Monice E. Magoke-Mjoja, founder of the Women's Legal Aid Centre in Tanzania (2003); and Cuban lawyer Leonel Morejon Almagro, who was chosen to receive the award in 1997 but was not able to travel to the United States to accept it until 2001.

One important characteristic of these and other human rights lawyers "is personal courage on a number of levels, but often a willingness to face personal danger," says



REUTERS/JOHANNES EISELE

In Turkey, dozens of lawyers were beaten and arrested in 2013 when they joined in demonstrations against certain government policies and crackdowns on free assembly.

Human rights activist Teng Biao (center) in 2008 at the Brandenburg Gate in Berlin, calling for progress on human rights in China.

Mathias, a partner at Jenner & Block in Chicago. They also are willing to take a pass on what Mtetwa called living the good life.

"What they're doing is service to others and working for the oppressed," Mathias says. In addition to their strong commitment to justice and the rule of law, "they believe that one person can make a difference."

AP PHOTO, (R) AP PHOTO/ MIKE IVES

A Zimbabwean policeman struggles with protesters in March 2013 as they demonstrate against the continued detention of Beatrice Mtetwa, who was jailed for eight days for obstructing justice. Right: Lawyer Nguyen Thi Duong Ha—the wife of Cu Huy Ha Vu—in the courtyard of her home in June 2013 while her husband enters the fourth week of a prison hunger strike.

ACCEPTANCE OF RISKS

Those are the motives Chinese lawyer Teng Biao has taken to heart. "If you want to be a human rights activist," he says, "you must take all these risks and sacrifices."

One of Asia's most prominent legal activists, Biao is responsible for helping to introduce the very concept of human rights to mainstream Chinese society. In just over a decade of practice, the Beijing attorney has seen growing civilian activism and increased calls for government accountability.

But as Biao puts it, he also has "paid the bills bit by bit." Biao has been disbarred, had his passport confiscated and found himself under surveillance. He has been detained and arrested on multiple occasions. He has been kidnapped more than once. In 2011, Chinese authorities abducted Biao, tortured him and held him in solitary confinement for 70 days without any outside contact.

"When I was kidnapped and detained and tortured, I was told that if I don't quit I will be put into prison [for] five years or 10 years," Biao says. "Their purpose was to get me to stop. But every time I was released I just felt I had to continue. I feel it is my responsibility to struggle for human rights. I can't stop, [although] my work becomes more and more dangerous."

Eventually, it became untenable for Biao to remain in China. Today, he is a visiting fellow in the Human Rights Program at Harvard Law School. But when interviewed in May, he was still residing in Hong Kong, in a state of limbo since leaving the mainland the previous October. His family was still there, and when asked whether he would go back, Biao responded soberly, "I don't know. I can go back now, but once I go back to China I will be arrested and charged with a political crime immediately."

With the prospect of prison on the one hand and self-exile on the other, Biao remains unsure about his future plans. "After my visiting role in the U.S., I'll take a look at what's happening in China," he says. "On the one hand, I hope to speak out for my colleagues, the detained human rights defenders. On the other hand, I also hope to struggle for human rights inside China."

For his part, Vu has become convinced that his fight is better taken on from the United States. Right now, he's conducting a study of his country's democracy movement, thanks to a National Endowment for Democracy fellowship in Washington, D.C., supported by funding from the U.S. government. "From the U.S., I concentrate, from my heart, on liberating the Vietnamese people from the dictatorship of the Communist Party," Vu says, speaking through a translator. "And I think—I do not hope, I do think—that the Communist regime in Vietnam will fall undoubtedly in the very near future."

Coming from someone like Vu, such statements are not taken lightly by either government officials or advocates of reform.

During the interview with Vu in June, the *ABA Journal* translator went wide-eyed when she heard his last name. Vu's family line stretches back centuries, boasting numerous well-known figures in Vietnamese arts and politics. His father, Cu Huy Can, helped found Ho Chi Minh's

government—he was a co-signer of the 1945 declaration of independence from French colonial rule and is one of Vietnam's most famous poets.

"In my family, always there was a spirit of law," Vu says. "My father and my uncle would talk always with me about justice, about mutual help between the people, and about struggle against injustice."

But today's Vietnam—where journalists, bloggers and ordinary citizens who dare to criticize the government are routinely rounded up and imprisoned—has not lived up to that vision.

Vu, now in his mid-50s, studied law at the University of Paris. He returned to Vietnam and began a law firm with his wife, Nguyen Thi Duong Ha. Soon, he says, there were people coming to their office, begging for help and often in tears. "That shocked me—very, very strongly," he says. "Now, when I [saw] from my own eyes, not only injustice but the crimes committed by the Communist government in Vietnam, I cannot, I cannot stay silent. I must act."

Vu and his wife quickly became known for taking on the type of cases that would earn them powerful enemies. In 2005, he became the first person to sue authorities at the provincial level after battling officials in the coastal province of Thua Thien-Hue over plans to build a tourist resort on the lushly forested Vong Canh Hill, a protected site popular among tourists for its stunning vistas. The hill is located near a UNESCO World Heritage site.

Vu focused his attention increasingly on environmental and heritage law—a pursuit that put him at frequent loggerheads with the government. In response to his work, which included the defense of minorities and victims of land disputes, the government kept close tabs on Vu. He was pulled from government positions and became the target of smear campaigns. In 2009, he was fired from a position at the Ministry of Foreign Affairs in retaliation for a suit against the prime minister.

It was a pair of complaints in 2009 and 2010—lawsuits filed against Prime Minister Nguyen Tan Dung—that led to Vu's arrest in November 2010. Vu had accused the prime minister of illegally granting China a bauxite mining license and unfairly passing restrictions on complaints against the government. Both suits were referred to the Supreme People's Court, which refused to take them. But Vu was convicted of anti-state activity in 2011 and sentenced to seven years in prison. It was that sentence that brought him to Prison No. 5.

SUCCESS IN SMALL DOSES

In their struggles against the power of entrenched governments, human rights lawyers often must measure their successes in small doses. But that can also make any sign of progress seem like a monumental achievement.

"The cases I'm extremely proud of involve ordinary people whose lives were transformed by my intervention," Mtetwa told the *Journal*. She managed to obtain damages for an elderly woman arrested for the petty theft of her daughter-in-law's watch. She helped widows and orphans "keep their homes in the face of greedy relatives who try to dispossess them." And she has successfully battled against police brutality and enforced disappearance. She also is a defender of journalists. "Among her court victories was the successful defense of *New York Times* reporter Barry Bearak and British freelance journalist Stephen Bevan, both of whom were arrested under an obsolete press accreditation law," noted the Committee to Protect Journalists when it gave her an International Press Freedom Award in 2005.

"The view I take is that if the laws guarantee certain minimum rights, it is my job to use those laws to protect my clients' rights, and it has always been a source of great surprise and frustration that politicians try to criminalize my work," Mtetwa says.

In China, Biao has managed to have death sentences against some clients dropped, while others have even been released from prison. But sometimes, he says, success must be measured in other ways. "Sometimes, yes, we feel frustrated when we are not given justice; but we are still optimistic because even if we lost any cases, our work—our effort—is not meaningless," he says. "Because during our participation in these cases, we have let more and more people know about the corruption in the judicial system and political system, and we have made people get more and more awareness of their human rights."

Biao's modesty is evident. His cases, however, often have had far-reaching impact. In 2003, one of the first cases he took on after receiving his PhD from Peking University was a challenge against the constitutionality of regulations governing migrants. The complaint arose when an internal migrant—who had moved from his home province in search of work elsewhere—was beaten to death after being taken into custody for failing to carry a temporary resident permit. Under pressure from Biao and two other young lawyers, the government's administrative cabinet, known as the state council, agreed to strike down the regulations, replacing them with new and slightly more lenient measures.

In the following years, Biao and his colleagues launched a series of human rights movements, capitalizing on changing perceptions of the government while putting themselves ever closer to the line of fire. "We didn't have a great connection with the government after that," he says. "We continued our human rights work after that, but we were considered gradually as troublemakers."

As the work gained traction—aided by the Internet and growing public awareness—more and more activists who had fought for human rights alongside Biao were arrested. "The central government cracked down on the civil society and the human rights movement very, very severely," he says. "Nearly 300 human rights defenders have been detained and sent to prison since the spring of 2013," he told the *Journal* in May 2014.

But as is typical for lawyers like him, Biao is loath to back off. "I'm intellectual, I'm a lawyer, so I feel like I should take on more responsibility than the people who are the victims of this authoritarian regime," he says. "It's an important time for China now. I have to play my part in the transformation for the next generation." ■

Abby Seiff is an American journalist based in Phnom Penh, Cambodia.

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yourAba

Next Step: Referrals

Self-help centers could better serve consumers by helping them find lawyers, survey indicates

BY G.M. FILISKO

When it comes to access to legal services, there's a well-known justice gap. In too many cases, there are too many individuals who can't afford a lawyer.


Bonnie Hough

But Bonnie Hough, who works with pro se litigants in San Francisco, says a new national survey is calling attention to yet another gap: consumers who can afford legal services but still aren't getting them.

The market of consumers who can pay for lawyers was apparent in the recently released *Self-Help Center Census: A National Survey*, conducted by the ABA Standing Committee on the Delivery of Legal Services.

Hough, a committee member, says it's no surprise that many of the nearly 3.7 million people estimated to be served by self-help centers annually are poor. But she says there's also a sizable segment who can afford to pay for legal services, and lawyers would benefit from efforts to figure out how to create an effective pipeline between the two groups.

"This survey really shows that self-help centers are an effective service-delivery mechanism," says Hough, whose job as managing attorney for the Center for Families, Children and the Courts for the Judicial Council of California is to help San Francisco courts respond to the needs of self-represented litigants. "They're providing a lot of services, and the concept is clearly spreading because there are more centers in place than in the past. That's the good news."

But the question remains of how to connect those who can afford to pay with lawyers who can help them.

"That's where the committee is really interested in focusing its future efforts, and I hope attorneys will be looking at this analysis and realizing there's an untapped market there," Hough says.

In the 20 years since the first legal self-help center was created in Maricopa County, Arizona, Hough has witnessed the growth of the concept. Self-help centers were introduced in California not long after, about 17 years ago, to a wary judiciary.

"In California at the time, there was a perception among the judges: 'We don't really need this because we don't see that many people needing help; and when they do come in, we can make sure they get what they need,' " she recalls. "Then, in Los Angeles, the self-help center was seeing 3,000 people a month in the first few months.

"Today when you look at the number of people being served, it's just extraordinary," Hough says. "Also, often one thing a self-help center can do and do very well is to explain to customers why, in their circumstance, it makes sense to hire a lawyer. They can say, 'I know this seems simple, but let me explain what's happening. I can't take the case, but I see you own a house, and here's why it makes sense to hire a lawyer to protect your house.' "

NATIONWIDE GROWTH

The survey data shows similar growth in most of the country. The committee identified about 500 self-help centers in more than 36 jurisdictions and sent an online survey. Representatives of roughly 47 percent of those centers, or about 222, in 30 states and the District of Columbia responded.

Family law and child support are the most common areas of the law for which customers receive services. Other common services cover domestic violence, guardianships, landlord/tenant matters, small claims and general civil matters.

California and Illinois have the most centers, though the facilities are

FOR MORE Read the full report on the *Self-Help Center Census* at ABAJournal.com/magazine

PHOTOGRAPH COURTESY OF THE CENTER FOR FAMILIES, CHILDREN AND THE COURTS

fundamentally different. California's court-based centers must be staffed by attorneys and support personnel directed by attorneys. In Illinois, many centers are located in public libraries with volunteer staffing.

Connecticut, Florida and Maryland also reported a significant number of centers. However, no centers from the midsection of the country —from North Dakota all the way down to Alabama, along with a patch covering Indiana, Ohio, Kentucky and the Virginias—responded to the survey.

"There are certainly transportation issues with some of those states," Hough says. "In California, we have huge density, so we can have a self-help center in every court and in every county."

In the future, those gaps in service may be filled as self-help centers find ways to serve those who can't easily seek help in person. Hough says some programs are offering more telephone and online assistance.

"Alaska's is really done all by telephone and Internet, and then the centers send someone to court to help people resolve their cases," she says. "They can do a lot of the basic 'How do you fill out the forms?' by phone, which makes a lot of sense. That's a very interesting model."

Minnesota blends the personal and technology-based models. Hough says it has an in-person center in Hennepin County, which encompasses Minneapolis and St. Paul, and then offers telephone and Internet services to residents throughout the rest of the state.

Additional systems are being deployed in spot locations. One center in California, for example, serves three counties—some of it via Skype when, say, a resident who doesn't speak fluent English needs to consult with a bilingual lawyer.

Two particular data points lead Hough to conclude that unbundled services may be an effective method of delivering legal services to even more consumers in the future.

UNBUNDLED UP

A measurable number of survey respondents believe at least some of their customers can afford to pay something for legal services. About 81 percent said fewer than one-quarter of their customers could afford to pay the going rate for legal services in their area. However, 19 percent said more than one-quarter of their customers could afford services at local rates. Also, 81 percent of respondents said they turned people away because the matters were too complicated or not the type of case handled by the center.

"We talk about unbundled services all the time because it really does fit into delivery mechanisms for our group, which is low- to moderate-income people," says William T. Hogan III, the committee's chair and a partner at Nelson Mullins Riley & Scarborough in Boston. "When the centers came out, one of the issues that came up in just about every case is that people would need the services of a lawyer, but that lawyer needs to be able to do limited-scope representation."

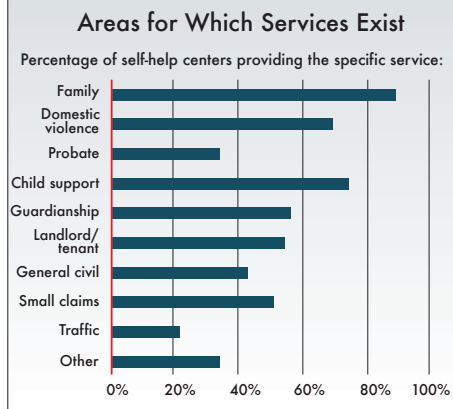
Hough expects that to be a big part of the committee's future focus. "I think they're going to spend time trying to figure out how to really develop this pipeline from self-help centers to the attorneys who can help with parts of a case and to really encourage limited-scope representation and unbundling."

That may also come organically through more interaction among the centers. Hough says the committee is hoping to post a directory of centers online so people throughout the country can identify resources available. That, she believes, will trigger those that weren't initially counted into coming forward and will facilitate even more information-sharing among the centers.

"The idea is to continue to encourage the model and the sharing of best practices," Hough explains. "This is a really new way of providing legal assistance. It's very practical and very much 'Here's information for you to proceed with your case to make the right decisions for you' without establishing an attorney-client relationship." ■

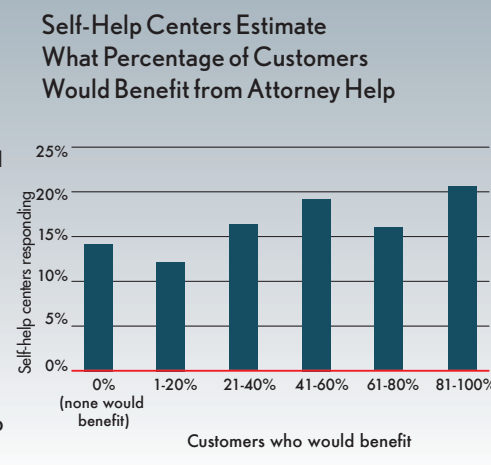
SELF-HELP SERVICES FOCUS ON DOMESTIC RELATIONS LAW

Self-help centers around the United States provide services most often in the substantive areas of family law, domestic violence and child support, but services are provided for several other types of civil matters, as well. The survey conducted in 2014 by the ABA Standing Committee on the Delivery of Legal Services received responses from 222 self-help centers in 28 jurisdictions.



GETTING HELP FROM LIMITED-SCOPE REPRESENTATION

Many customers of self-help centers would benefit from some amount of limited-scope representation by an attorney, according to responses to the national survey conducted by the ABA Standing Committee on the Delivery of Legal Services. But respondents also indicated that only a small percentage of their customers could afford to pay an attorney at the going rate in their communities. (This chart is based on answers from 186 of the 222 self-help centers that responded to at least some of the survey questions.)



GOIN' BACK TO HOUSTON

Spirit of Excellence Awards anniversary event will highlight the ABA's first midyear meeting in the Texas metropolis since 1981

BY JAMES PODGERS

Recent incidents in which black men died during confrontations with police officers—most notably in Ferguson, Missouri, and New York City—have put the issue of race relations in the United States back at the top of the news. Paradoxically, this attention comes at a time when at least two important anniversaries in the nation's efforts to achieve racial equality are being commemorated.

Fifty-one years ago, President Lyndon B. Johnson signed into law the groundbreaking Civil Rights Act, prohibiting discrimination by race, sex, national origin or religion in schools, workplaces, public accommodations and businesses. And this year marks the 50th anniversary of the Voting Rights Act of 1965.

The ABA will mark its own milestone in the ongoing struggle to achieve equality when it celebrates the 20th anniversary of the Spirit of Excellence Awards during the association's 2015 midyear meeting, being held Feb. 4-10 in Houston.

The presentation of the Spirit of Excellence Awards, which are sponsored by the Commission on Racial and Ethnic Diversity in the Profession, has been a highlight of ABA midyear meetings since 1995. Every year, the commission recognizes lawyers who work to promote a more racially and ethnically diverse legal profession. To date, 119 lawyers have received the awards, and another four bar leaders will be added to that honor roll at the awards luncheon on Feb. 7.

This year's award recipients are:

• Kim J. Askew, a partner at K&L Gates in Dallas. She is a past chair of the ABA Section of Litigation, and she currently chairs the Standing Committee on Public Education.

• Robert J. Grey Jr., a partner at Hunton & Williams in Richmond, Virginia. In 2004-05, he was the second lawyer of color to serve as ABA president. He is a special adviser to the association's Rule of Law Initiative.

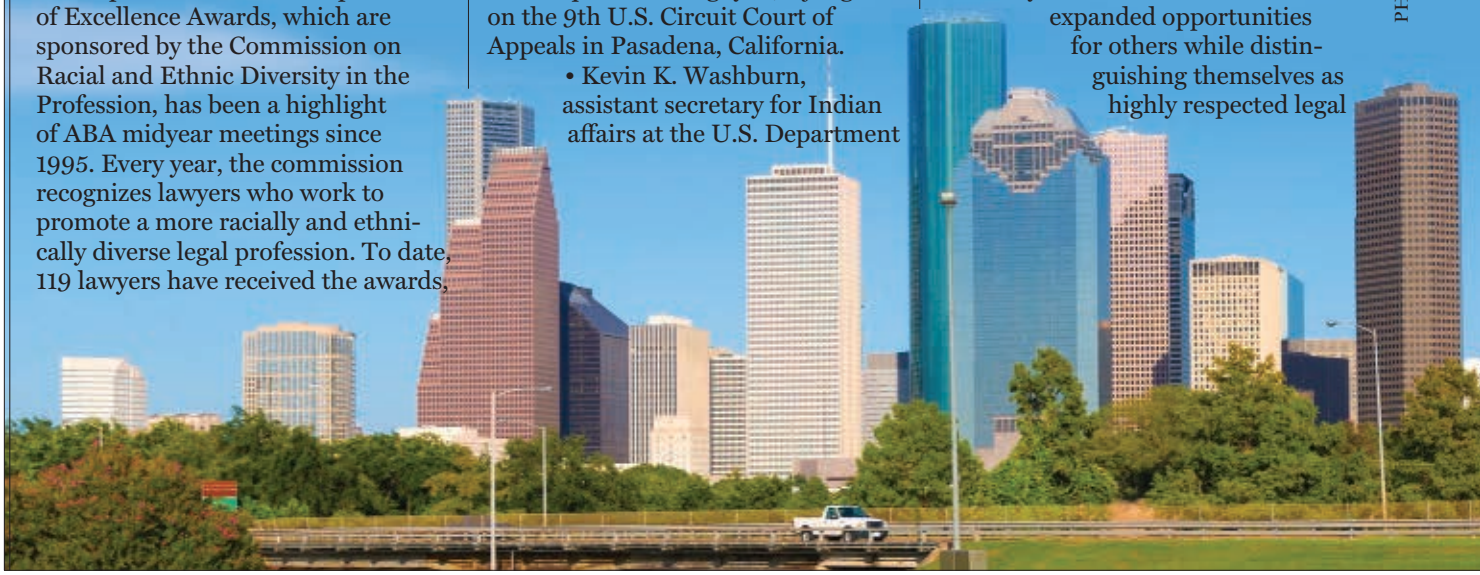
• Jacqueline H. Nguyen, a judge on the 9th U.S. Circuit Court of Appeals in Pasadena, California.

• Kevin K. Washburn, assistant secretary for Indian affairs at the U.S. Department of the Interior in Washington, D.C.

In addition to recognizing this year's recipients, the Spirit of Excellence Awards luncheon will feature a special video tribute to past recipients narrated by ABA President William C. Hubbard, a partner at Nelson Mullins Riley & Scarborough in Columbia, South Carolina.

DISTINGUISHED LEADERS

All of the recipients down through the years have something in common, says F. John Garza, chair of the commission and a general attorney at AT&T Services in Dallas. Each year's honorees have expanded opportunities for others while distinguishing themselves as highly respected legal



PHOTOGRAPH BY SHUTTERSTOCK.COM; AP PHOTO

On July 2, 1964, during a live broadcast from the East Room of the White House, President Lyndon Johnson signed the landmark Civil Rights Act.

professionals who bring unique and innovative solutions for their clients, communities and the profession, Garza says.

Even after two decades, he says, "it is important that the commission continues to honor individuals who are leading the legal profession to become a more fully inclusive organization. Diversity remains the most valuable asset among us as inclusion of different ideas and perspectives unite and strengthen us."

In a related event, the Section of Individual Rights and Responsibilities will sponsor a program marking the 50th anniversary of passage of the Voting Rights Act. In addition, the Young Lawyers Division will sponsor a Diversity Initiative Expo where ABA entities will showcase their initiatives, including fellowships, scholarships and awards.

Among other events at the midyear meeting, the Task Force on the Financing of Legal Education will hold public hearings on Feb. 6 and 7. The task force is headed by Dennis W. Archer, chair emeritus at Dickinson Wright in Detroit and the first lawyer of color to serve as ABA president, in 2003-04.

The association's policymaking House of Delegates will hold a one-day session on Feb. 9, and the Nominating Committee will meet Feb. 8. The committee is expected to select Linda A. Klein of Atlanta as its nominee for ABA president-elect. Klein, managing shareholder in the Georgia offices of Baker, Donelson, Bearman, Caldwell & Berkowitz, is running unopposed. ■

2015 UNCONTESTED REGULAR STATE DELEGATE ELECTIONS

On December 11, 2014, the Board of Elections certified the results of the 2015 State Delegate Elections. For a complete list of State Delegates (2015-2018) visit ABAJournal.com/magazine.

2015 CONTESTED STATE DELEGATE ELECTION

The following persons accredited to the state of Nevada have filed petitions for nomination for the office of State Delegate. The term is for three years commencing at the adjournment of the 2015 Annual Meeting. The name of each contested nominee and the names of 25 signers of his/her petition are published below in accordance with § 6.3(b) of the Constitution of the American Bar Association.

NEVADA

ALAN J. LEFEBVRE of Las Vegas, Nevada. Nominated by: Jonathan Blum, Richard Hy, Joseph J. Mugan, Brittany Wood, Nile Leatham, Jason Bacigalupi, Aaron R. Maurice, Matthew Saltzman, Robert J. Caldwell, Ryan Works, John R. Bailey, Joshua Gilmore, Kristina E. Gilmore, Russell J. Burke, Sarah Harmon, Kelly B. Stout, Joshua M. Dickey, Richard Scotti, Michael Lee, Benson Lee, Joseph A. Liebman, Paul C. Williams, Dennis L. Kennedy, Mark D. Hesiak and Christopher M. Humes.

REW R. GOODENOW of Reno, Nevada. Nominated by: Matthew C. Addison, Leo Bergin, James W. Bradshaw, David Clark, Robert W. DeLong, Kathleen M. Drakulich, Lucas Foletta, John Frankovich, P. Gregory Giordano, Rew R. Goodenow, Elana Graham, Matthew A. Gray, A. J. Bud Hicks, Michael R. Kealy, Vernon E. Leverty, Robert W. Marshall, Paul A. Matteoni, John B. Mulligan, Daniel F. Polsenberg, Alan B. Rabkin, Jess P. Rinehart, Timothy E. Rowe, Chad C. Schmucker, Richard D. Williamson and John R. Zimmerman.

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Leonard H. Gilbert

MEMBERS-AT-LARGE ON THE NOMINATING COMMITTEE

The ABA President will appoint one minority member-at-large and one woman member-at-large to the Nominating Committee for the term 2015-2018. Nominations for these appointments are submitted to the President by the Commission on Racial and Ethnic Diversity in the Profession and the Commission on Women in the Profession. For information, interested persons should contact the Commissions directly: Racial and Ethnic Diversity (312/988-5638) or Women in the Profession (312/988-5497).

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, Illinois. See the full text of this notice at ABAJournal.com/magazine.

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Domestic violence researcher, journal editor, therapist. Alternative to traditional feminist/advocacy views. Contact: John Hamel, LCSW, johnmhamel@comcast.net

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Show of Support

Financial commitment by Congress to address elder abuse issues is an encouraging step

BY RHONDA McMILLION

Responding to a push by the ABA and elder rights advocates for a greater commitment from the federal government to address the growing problem of elder abuse, neglect and exploitation, Congress has approved $4 million in new funding this year for the Elder Justice Initiative.

The funding was included in the omnibus appropriations legislation enacted by Congress in December for fiscal year 2015, which started Oct. 1, 2014. The funding is designated for grants that will allow states to test and evaluate innovative approaches to preventing and responding to elder abuse. These efforts would help strengthen adult protective services programs, which are the principal state and local agencies responsible for receiving and responding to reports of abuse, neglect and exploitation of vulnerable adults. The omnibus legislation also continued a funding level of $1.7 billion for the Social Services Block Grant, the only source of federal funding for APS programs.

Elder abuse has become a serious public policy concern. Recent studies indicate that one out of every 10 people over age 60 is a victim of abuse, and victims of elder financial abuse lose almost $3 billion each year in personal assets. Moreover, the instances of elder abuse appear to be grossly underreported, with only about one of every 23 cases being brought to the attention of appropriate protective services agencies.

In addition to inflicting physical, psychological and economic harm on older adults, studies suggest that abuse imposes an economic burden on all Americans when these victims rely on federal programs, enter nursing homes earlier or live in poverty.

The problem is expected to grow along with the nation's aging population. The U.S. Census Bureau predicts that people 65 and older, who represented about 13 percent of the population in 2008, will make up nearly 20 percent of the population by 2030. The country's fastest-growing demographic segment is people 85 or older.

Historically, very few federal resources have been available to fight elder abuse. The Elder Justice Initiative was established under the Elder Justice Act, enacted in 2010 as part of the Patient Protection and Affordable Care Act. The EJA, which passed with bipartisan support, was the first comprehensive national legislation that included provisions to create an infrastructure and essential resources necessary to develop and implement a nationally coordinated strategy in collaboration with the states to combat elder abuse, but it received no direct appropriations during its first four years.

MAKING AN INVESTMENT

Recognizing the need to address elder abuse issues, the Obama administration requested $25 million for the Elder Justice Initiative for fiscal year 2015, and a Senate Appropriations subcommittee approved $10 million for the program.

In correspondence, ABA Governmental Affairs Director Thomas M. Susman urged members of the House and Senate appropriations committees to support that level of funding to get the program off the ground. "Providing federal funding to better understand, treat and combat elder abuse is an investment in the health, dignity and economic future of our nation," Susman wrote, noting that the problem is not defined by socio-economic, racial or ethnic status.

Meanwhile, the ABA Commission on Law and Aging will continue to work with other interested groups and members of Congress to further expand efforts to address the growing crisis of elder abuse. The commission recently produced *Legal Issues Related to Elder Abuse: A Pocket Guide for Law Enforcement*. The guide sets forth actions that lawyers and other professionals in the justice system should consider if they suspect that elder abuse has occurred.

The next White House Conference on Aging, which is held every 10 years, is scheduled for this year and will coincide with the 50th anniversary of the Older Americans Act and Medicare and Medicaid, and the 80th anniversary of the Social Security Act. ■

▶ 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 ABA's letters to the House and Senate appropriations committees at ABAJournal.com/magazine.

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Ali Appeal Rejected by Draft Board

Feb. 20, 1967

In February 1967, Muhammad Ali was 25 years old, undefeated in 28 fights and the undisputed heavyweight champion of the world. His trademark was a brash, instinctively complex demeanor that made his public persona fundamentally controversial and imbued his reign as champion with the inferences of race.

As Cassius Marcellus Clay Jr., a black athlete from Louisville, Kentucky, he had won an Olympic gold medal in 1960, capping an illustrious amateur career before turning professional. After his defeat of Sonny Liston, a vulgar ex-convict with ties to organized crime, Clay emerged as both heavyweight champion and as Muhammad Ali—a follower of Elijah Muhammad and the Nation of Islam.

In 1964, Clay had been deemed unqualified for the service because of his lack of proficiency in reading and writing. But in February 1966, as the Vietnam War gained momentum, the standards were changed and Clay—now Ali—was reclassified as eligible for the draft. Ali applied for reclassification as a conscientious objector, stating publicly that he would refuse induction as a matter of religious principle. He argued that Islam recognized only "just" wars, and that the Vietnam War was not just.

Turned down by his draft board, his case was referred to the Justice Department for an investigation by the FBI. Testifying before Lawrence Grauman, a federal hearing officer, Ali stated: "The Holy Quran do teach us that we do not take part of—in any part of—war unless declared by Allah himself." Grauman, a Kentucky circuit judge for 25 years, concluded that Ali was sincere in his beliefs and recommended that his claim be sustained.

But the Justice Department, acting on its own, advised the draft appeals board in Kentucky to deny Ali's claim. The DOJ argued that his conscientious objection was selective, and that the Nation of Islam's resistance to the draft was based on politics and race rather than religious belief. On Feb. 20, 1967, with a 4-0 vote, the Kentucky appeals board rejected his petition without stating a reason.

Having moved to Houston, Ali was ordered to appear there for induction. He did so on April 28, 1967, accompanied by his lawyers. After he refused three times to step forward and accept induction, he was arrested and stripped of his heavyweight title. In June, a Houston jury convicted him after 21 minutes of deliberation; he was sentenced to five years in prison, fined the maximum penalty of $10,000 and banned from boxing.

In June 1971, the Supreme Court decided in *Clay v. U.S.* that the Justice Department had erred in its letter to the Kentucky draft board, and it reversed Ali's conviction. By then, Ali had resumed boxing and his stance against an unpopular war attained popular support that would not have been possible just four years before.

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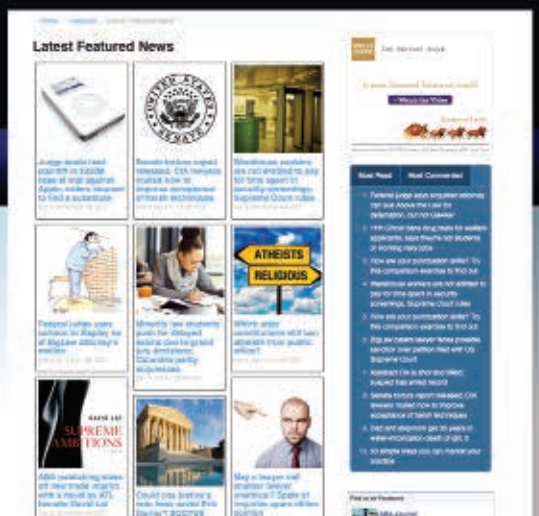

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