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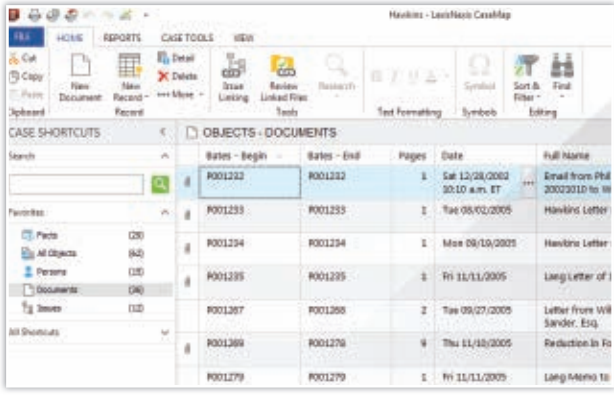

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ABA JOURNAL
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LOST BEARINGS
The pressures of the legal profession can exact a painful toll. Lawyers can lose their way, spiraling into various forms of addiction and odd patterns of behavior—with some even stealing from their own clients.

44

FEATURES

COVER ILLUSTRATION BY STEPHEN WEBSTER

BIZ BOOSTER Nancy Cremins aims to help more women launch startups.

27

LEGAL INSIGHT.
BUSINESS INTELLIGENCE.

On a daily basis, in-house counsel are required to navigate vast amounts of data to do their jobs effectively. Last year alone, attorneys were confronted with:

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This month's
ABA JOURNAL
podcast

Appealing for Help

With such a stressful profession, many attorneys face addiction and other mental health issues. If you find you're struggling or know someone who is, find out what resources are out there.

Beginning
March 2
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ABA JOURNAL

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Alternative Branding Solution?

Regarding "Flexing ABS," January, page 62: Great article! The legal profession is changing so much, and perhaps this will enable us to rebrand the image of lawyers around the world.

The U.S. has a problem of overregulation. This prevents the population from obtaining any advice unless they have the funds. This leads to a certain injustice, since some can't enforce or understand their rights.

Moreover, it is clear that the U.S. uses much more legalese than in the U.K., and thus anyone who does not have a legal background will have a hard time understanding the issues at stake. This is a serious issue, since most people deal with contracts they don't understand.

I think that opening up the market and offering legal services at a fixed price would simply open a previously untouched market; it would not at all impact the practice of BigLaw firms since they deal with a completely different customer base. It would also provide jobs to law graduates who seek an alternative to the traditional law firm route.

Donia Alwan
New York City

This article is completely spot-on! The ridiculous and antiquated ethics rules in the USA hamper competition, innovation and the ability of firms to provide services to their clients. The people who are helped by the rules are not the clients but the attorneys, since these laws only serve to limit their competition.

Josh Effron
Rolling Hills Estates, California

"Flexing ABS" provides a good description of the interplay between the traditional ban on nonlawyer ownership of law firms, restrictions on multidisciplinary practice and the unauthorized practice of law. In its treatment of UPL by lawyers licensed in one state but not in another, however, the article repeated a small, common, but important mistake.

If I am sitting in my Florida office and a Florida resident walks in and asks for some legal advice about corporation law in Delaware (where I am not licensed), I can give that advice and charge for it, without fear of running afoul of any UPL laws in any jurisdiction. I am not engaging in the unauthorized practice of law in Florida because I am licensed in Florida, and I am not engaging in the unauthorized practice of law in Delaware because I am not practicing law in Delaware.

It is true that the Florida rules prohibit me from "practicing law" in Delaware in violation of Delaware's rules, but Delaware has no power to reach outside its borders and decree that only Delaware lawyers may advise clients with respect to Delaware law, outside of Delaware.

William Hodes
Lady Lake, Florida

LIMITED SUPPORT

I found the article about limited license legal technicians in Washington state to be perplexing ("Authorized Practice," January, page 72). After passing a bar exam, I would be willing to take a pay cut to get meaningful work experience in any area of law, and so far I have been unable to find even meaningful volunteer work in my area.

Further, I cannot understand why I am required as a lawyer to complete a bachelor of arts and pass the LSAT to gain admission to an accredited law school, when a legal technician only needs an associate's degree and completion of a single course in family law. Can I sit for the LLLT bar exam now that I completed all of my credits at an ABA-accredited law school?

Dan O'Connor
Brunswick, Maine

I can't imagine the State Bar of California approving this sort of thing anytime soon. These are the same people who couldn't see fit to approve bringing California's Rules

ILLUSTRATION BY JUSTIN METZ

of Professional Conduct in line with the ABA Model Rules of Professional Conduct, as interpreted in most other jurisdictions, after almost five years of dithering about. The idea of the state with the most lawyers—and probably the highest number of underemployed ones—approving paralegals doing legal work, even on a limited basis, without some sort of backlash, is unlikely.

It's one thing for a paralegal to work on issues with a team of attorneys, who are ultimately responsible—quite another for them to pursue it independently. In the end, clients get what they pay for.

Barbara Frezza
La Jolla, California

I was a paralegal for more than 11 years. Logically, then, I should have an interest in any proposition that would permit nonlawyers to "practice" law. However, I think any proposition that allows nonlawyers to practice law would not properly serve the public.

I really cannot wrap my arms around the notion that real, qualified attorney help is so unavailable. Law schools have turned out scores of new attorneys. Many are so hungry for work and money—not to mention hungry in their stomachs—that they compete with paralegals for their jobs. Why can these attorneys not take on all those folks starving for legal help? They certainly will not charge the same fees as a 20-year BigLaw partner.

Also, it's vital to note that even though "legal technicians" might be thoroughly tested, vetted and licensed, the charlatan potential remains. LLLTs have not received the depth of legal training attorneys receive. Even attorneys who specialize still have the breadth of knowledge to see and analyze fact patterns in greater depth than most nonlawyers. There is a reason attorneys are referred to as "counselors at law."

Consumers deserve the best the legal industry can give them. Maybe the courts should try harder to streamline their hard-to-navigate procedures to be more comprehensible and user friendly.

Bob Davidson
Denver

MAGNA CARTA MUSINGS

"A Magna Carta Style Guide," January, page 26, was very much enjoyed. However, the Magna Carta is considered a "recent" document for those of us who practice in the area of mining law.

The tin miners of England were granted wide freedoms by King John 14 years prior to the Magna Carta by the "Charter of Liberties to the Tinners of Cornwall and Devon" in 1201. These miners were granted the right to "dig for tin ... at all times freely and peaceably without hindrance from any man, on the moors and in the fiefs of bishops, abbots and earls" as they had been accustomed to do. The 1201 charter established a plenary forum for dispute resolution (before the chief warden of the stannaries and his bailiffs), granted freedom from other "summons" curtailing the miners' work, and directed local "treasurers" to oversee tin markets.

The granting of extraordinary rights to miners, given their special expertise and need for free access to lands and minerals, had been the practice in Europe during the Middle Ages, and it stemmed from the Roman and Greek mining laws.

The Magna Carta expanded this grant of freedom to a wider community, but it was a culmination of a long tradition of giving special rights to miners.

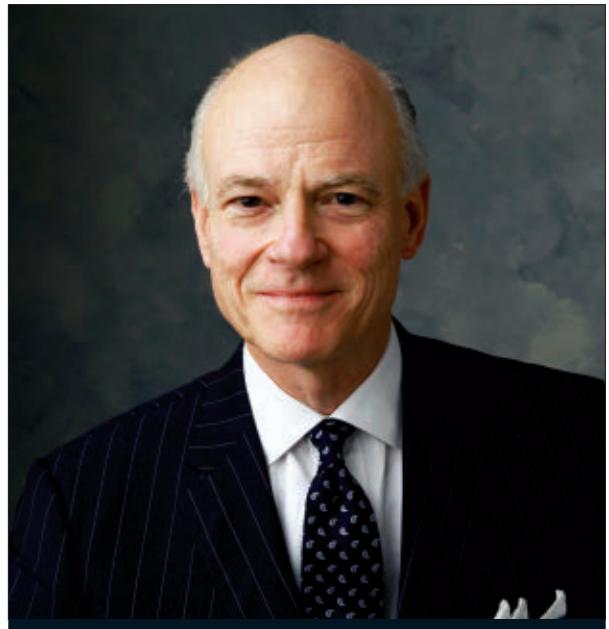
Robert A. Bassett
Greenwood Village, Colorado

Stick to your guns and continue to write "the Magna Carta." You'd never say: "Constitution was ratified in 1789." You'd look foolish saying: "Thomas Jefferson wrote Declaration of Independence." You'd wouldn't dream of writing: "2015 is the 800th anniversary of Great Charter."

Gregory M. Kennan
Sherborn, Massachusetts

Justice on a Global Scale

ABA Rule of Law Initiative helps advance legal reforms in more than 50 countries



ONLINE Learn more about the ABA Rule of Law Initiative at abarol.org.

Lewis Powell was elected president of the American Bar Association in 1964, several years before he served on the U.S. Supreme Court from 1972 to 1987.

In 1965, Powell wrote in these pages about the ABA's effort, launched in 1958, to explore "what lawyers can do of a practical character to advance the rule of law among nations." Reflecting on the state of international affairs at the time, he concluded that "the only viable alternative to the rule of force is the rule of law."

What Powell and his Cold War-era contemporaries recognized half a century ago holds true today in our globalized society: Our work to advance the rule of law cannot stop at our borders. Fractures in the rule of law have contributed to nearly every costly international challenge our nation faces, including health pandemics, migrants fleeing poverty, violent extremism, and illicit trade of weapons, drugs and human beings.

Countries with a fair and predictable rule of law are more likely to sustain healthy relations with one another. This promotes security and creates economic opportunities not only abroad, but also here at home.

The call for lawyers to do something "of a practical character" to advance the rule of law presented itself 25 years ago when the fall of the Berlin Wall led to a host of new nations yearning for justice under law. In 1990, the ABA established its first rule of law programs, now known collectively as the Rule of Law Initiative. At the time, ROLI's programs were exclusively in Central and Eastern Europe.

Today, with more than $40 million in annual funding from governmental and private donors, ROLI programs bring staff and consultants together with the pro bono expertise of ABA members to advance legal reforms in more than 50 countries.

Throughout the world and often behind the scenes, ROLI works to support the reform efforts of local colleagues drawn from judiciaries, bar associations, law schools, ministries of justice and civil society.

In China, for example, the ABA shares its legal expertise to support critical criminal law reforms, combat domestic violence, and support public interest lawyers in their efforts to implement new environmental laws and promote civil rights among marginalized communities. ROLI is an essential advocate for the rule of law in a country that is playing a dominant geopolitical role in the 21st century.

The ABA also has begun dialogue with members of the legal community in Saudi Arabia to cooperate in advancing legal reform. Other nations that we assist in the Middle East include Morocco, where ROLI works with community groups to promote gender parity and the right of citizens to initiate legislation.

Our efforts in Africa include the war-torn Democratic Republic of the Congo, where ROLI supports legal aid clinics, police training, and mobile courts to hold accountable perpetrators of widespread sexual violence and end a culture of impunity that has fueled two decades of conflict.

In the Philippines, ROLI is helping automate court records in a project to reduce case backlogs, curb corruption and strengthen the judiciary as a critical building block for economic development. Closer to home, ROLI is helping prosecutors, law enforcement and judges in El Salvador, Guatemala and Honduras respond to crippling levels of crime and violence with critical new forensic capabilities.

ROLI works closely with local partners to design and implement strategies that are both responsive to their needs and sustainable in the long run. We do not solely offer "American" solutions.

We all stand to learn and benefit from these collaborations. Together we must build a global rule-of-law movement that promises a more peaceful and prosperous world. ■

Follow President Hubbard on Twitter @WilliamCHubbard.

PHOTOGRAPH BY MARC HAUSER

Opening Statements

EDITED BY JILL SCHACHNER CHANEN /JILL.CHANEN@AMERICANBAR.ORG

#Warrant Wednesdays

Law enforcement jumps on a social media trend to help find criminals

SOCIAL MEDIA-SAVVY TYPES know all about the popularity of posting trends like Throwback Thursday and Man Crush Monday. Now law enforcement agencies are jumping on the bandwagon with Warrant Wednesday.

Across the United States and Canada, police departments are soliciting tips—and then often apprehending criminals—by putting warrant posters on their Facebook pages and Twitter feeds.

"We are very proud of the success of Warrant Wednesdays, not only in the number of arrests that have resulted from the postings, but for the attention it has generated on our Facebook and Twitter accounts," says Darcy Wells, a spokeswoman for the New York State Police, which began posting warrant posters on its Facebook page in late 2013. "We always see our biggest spikes in page activity on Warrant Wednesdays. We had 15 arrests in 2014 as a direct result of these postings and a total of 29 arrests due to social media tips in general."

The posts are electronic versions of traditional wanted posters, including a photo, description of the individual and crime, and a contact number for tips. Rather than post tips in response, people are encouraged to call or email information about the suspects to protect

ILLUSTRATION BY STEPHEN WEBSTER

their anonymity.

Police departments and sheriff's offices in Colorado, Illinois, Ohio, Oklahoma and other states, as well as Calgary, Canada, have also jumped on the bandwagon, posting warrants—often searchable with the hashtag "#warrantwednesday"—each week. Other law enforcement agencies in Florida and Indiana have launched similar "Turn 'em in Tuesday" campaigns.

"Embracing all manner of social media has had positive results for the New York State Police," says Wells, who notes that they've also recently started conducting Twitter town hall meetings about topics such as drunk driving and cybercrime. Wells says the Twitter town halls have increased the agency's Twitter followers—which, ultimately, can help solve crimes and promote public safety.

Sometimes the followers are the alleged criminals themselves. Last year, as was widely reported in the media, a woman unhappy with what she felt was an unflattering mug shot of herself posted on Facebook by the Columbus, Ohio, Division of Police called the department to complain. When 34-year-old Monica Hargrove—accused of giving a woman a ride to a pharmacy to get a prescription filled and then robbing her at gunpoint—asked that the Warrant Wednesday post be taken down, the detective she spoke with encouraged her to come to the police station to talk about it. When she arrived, she was arrested on aggravated robbery and kidnapping charges.

Even worse for Hargrove: The arrest generated attention from international news agencies, and her mug shot remains on the department's Facebook page.

—Judy Sutton Taylor

Under the Hood

Digital rights group asks U.S. Copyright Office for car-owner exemptions

IF YOU LIKE TO TINKER WITH YOUR CAR, you might want to consult with a copyright lawyer first. Digital rights groups are warning that all that software under the hoods of cars these days could lead to copyright violation claims against the home mechanic.

The concern has led the San Francisco-based Electronic Frontier Foundation to ask the U.S. Copyright Office to create a specific exemption for home mechanics under the Digital Millennium Copyright Act, which could otherwise be construed to prevent such home maintenance.

"That American tradition of tinkering with your vehicle in your garage is threatened by copyright law, of all things," says EFF attorney Kit Walsh. "Let's say you replace the cylinder. But you need to calibrate it and torque it right, or it's not going to work. To do that, you need to change variables in the software."

Car companies have plenty of reasons to be concerned about home mechanics mucking with code, says Dan Gage, spokesman for the Alliance of Automobile Manufacturers. "The typical car today has about 100 million lines of software coded. Your car is, in essence, a ... minicomputer on wheels." Tinkering with code under the hood could affect safety systems or fuel efficiency and emissions, he says.

Of course, garage hobbyists have always risked causing themselves trouble. "It's certainly possible for people trying to tinker with their own property to screw it up," Walsh says. "That is nothing new. What is new is that people who want to or have the sophistication are legally barred from doing so."

Washington, D.C., lawyer Michael Remington of Drinker, Biddle & Reath served as longtime chief counsel of the House of Representatives intellectual property subcommittee before the enactment of the DMCA and was one of the law's private sector negotiators. He sees the issue as "a classic exam question: Read a statute that was not drafted for this purpose, and how would you work it out?"

A ruling is expected by midyear.

—Ed Finkel

ILLUSTRATION BY STEPHEN WEBSTER

10 QUESTIONS

It's Only Rock 'n' Roll

Why did the lead guitarist of Blind Melon leave music for labor and employment law?

PHOTOGRAPH BY DAVID FONDA

AS THE GUITARIST for alternative rock band Blind Melon, Rogers Stevens spent years headlining venues and festivals around the world, recording albums and living his childhood dream.

The band's self-titled 1992 debut album went quadruple-platinum thanks to the strength of the chart-topping single "No Rain," and they've toured with the Rolling Stones. Stevens also has enjoyed success as a music producer and as a guitarist with other bands. Recently, however, the 44-year-old ax master signed on for an entirely different kind of gig: He became a lawyer.

Last year, Stevens became a first-year associate in the Philadelphia office of Ballard Spahr. It's his first office, first regular work schedule and quite possibly the first time he can't show up somewhere in ripped jeans.

The first question must be: Why?

It was at the end of 2008, mid-December, and we had just canceled our tour due to our own internal instability. We had been on the road for 10 months, my wife was pregnant with our second child, we already had a 2-year-old, and suddenly it wasn't fun anymore. Within two days, I decided I was going to college. We moved to Swarthmore, Pennsylvania—my wife grew up there, and her parents still live there—and by January, I was sitting in class at Delaware Community College.

Was it a difficult adjustment?

I just did it. I ground it out. I like reading; I like studying and engaging with ideas.

It wasn't the first time you had to figure out a new direction—I am thinking specifically of 1995, when Blind Melon lead singer Shannon Hoon died from an overdose and the band broke up.

We were at the apex of our career when Shannon died. We were on all cylinders, and it was over like that. We were very close, and it broke my heart. We walked away from the band for 10 years. I was traumatized. My whole life, I had been working toward this, and it worked—and then it just ended abruptly, and I lost my friend. In 2006, two of the guys in the group said they'd met a singer who just blew them away; he could sing all the old songs, and we discovered we could write new ones with him—it just worked. We rebuilt our career, made a record, went on tour. But it went down in flames at the end of 2008.

When you returned to school, was a law degree a part of your plan?

I had been considering it, especially as I got into my mid-30s. Rock 'n' roll is a young person's sport—it's hard to maintain that kind of energy as you get older, or at least do so gracefully. I had dealt with lawyers over the years, but I found out that the deal-making wasn't what interested me about it. I liked what happened when the deals went wrong. I liked forming arguments, taking a position and defending it. Other than getting a law degree, I didn't have a big plan on how I would approach a career, post-law school. My strategy was: I was going to go to the best law school I could get into, and then I'd see where the chips fell in the end.

Did your classmates ever ask you to perform in things like the law school follies?

I have been asked to do these things, and I have done them. Some of these experiences have been less embarrassing than others.

Why Ballard Spahr?

Penn has a program where every student is required to do a certain amount of pro bono service. I did that through Ballard with the Mural Arts Program, and I started meeting people up here. I felt like this place had a pulse. Obviously, there are a lot of smart lawyers at the firm, and I thought, "I could learn a lot here."

Are you still performing with Blind Melon?

Yes, we just did some shows in California. But I am not touring like I was—I won't go and live on a bus again.

Ever tempted to become the band's lawyer?

No, because they wouldn't pay me my rate! I am kidding. I do look at stuff, but I wouldn't represent the band. I don't want to be in that position.

Do your kids appreciate how cool it is to have a dad who moonlights as a musician?

They've been to shows. We went out to California a few months ago and played this incredible venue—an old amusement park on the beach in Santa Cruz. We headlined, and there were about 8,000 people. For about 15 minutes, there was a window of "Wow, that's pretty cool!" and then someone flipped the switch, and I got no respect again. I was arguing with them about brushing their teeth in the hotel later that night.

You've been lawyering for almost a year now. Are you enjoying it?

I find it kind of exhilarating—maybe that's not the right word, but I like it. I am engaged all the time. I spend my day solving problems, and that feels like a natural fit. I am not happy unless I have a big challenge. I like the feeling of being up against it. And given the nature of this job, which often puts you in that position, I am very happy.

—Jenny B. Davis

Supersized

Alabamans are readying yet another effort to reform the state's famously long constitution

WITH 890 AMENDMENTS, Alabama has, by most accounts, the world's longest constitution. But that isn't necessarily a source of state pride. The length comes from a requirement that local governments get a constitutional amendment passed through the state legislature and then approved by the people for basic governance.

"County commissioners can't [pass] ordinances on the public health, safety, zoning or even simple taxes and fees," says Birmingham lawyer Lenora Pate, chair of Alabama Citizens for Constitutional Reform. "We have amendments to our constitution that require increases in simple fees."

This might seem cumbersome, but Pate says it was intentional. When the constitution was written in 1901, its writers said they wanted to establish "white supremacy by law." They wrote several expressly racist provisions, which remain even though they've been mooted. And to avoid empowering African-Americans who could have been elected in majority-black counties, the writers vested all power in the state legislature.

Centralizing power also made life easier for the era's big businesses, says Craig Baab, director of Alabama Appleseed's constitutional reform project. Baab says modern lawmakers like the system because it creates opportunities "to do the standard business of the legislature, which is swapping favors."

That's unfortunate for reformers, because the legislature has the power to stop rewrites. Any new constitutional convention must be called by an act of the legislature and then approved by the people. The ACCR has been trying unsuccessfully to pass a law calling for a new constitutional convention since 2000.

Other reform efforts have also largely failed. Voters have twice rejected constitutional amendments that would have removed some racist language. The Alabama Supreme Court tossed out a 2009 lawsuit alleging that the constitution was approved by voter fraud. And a 2011 Alabama Constitutional Revision Commission was dissolved in 2013 without passing anything controversial.

This year, as the Alabama legislature opens its 2015-2018 legislative session, the citizens' group is trying a new tactic: passing an amendment that would allow the 2019 legislature, rather than the people, to write the new constitution. Voters would have to approve giving this power to the legislature, then choose the legislators who would exercise it.

"We're kind of in a catch-22. Nothing has worked in 14 years," Pate says. "But we suspect that if [legislators] want the power, they may try this approach."

—Lorelei Laird

ILLUSTRATION BY JIM FRAZIER

Hearsay

$249 billion THE AMOUNT RAISED IN 1,205 GLOBAL IPOs IN 2014. *SOURCE: THOMSON REUTERS.*

Death Row Data

35 people were executed in 2014.
72 people were sentenced to death in 2014.
7 states carried out executions in 2014.

Source: Death Penalty Information Center.

9

The number of states that require insurers to cover gender reassignment surgery. They are: California, Colorado, Connecticut, Illinois, Massachusetts, New York, Oregon, Vermont and Washington. The District of Columbia also mandates it.

Source: Transgender Legal Defense & Education Fund.

$57 million

The share of a $16.65 billion settlement that whistleblower Edward O'Donnell will receive for his role in helping federal prosecutors settle with Bank of America over allegations of mortgage and securities fraud.

Source: nytimes.com, Dec. 17, 2014.

119,775

The total number of students enrolled in ABA-approved law schools as of fall 2014.
Source: ABA Section of Legal Education and Admissions to the Bar.
(For more, see "Count Off," page 66.)

Say What?

"Animals can't speak out against undergoing a painful procedure like piercing or tattooing. I'm glad we're standing up for them and banning this heartless practice."
—New York state Sen. Tom Libous, co-sponsor of a bill to prohibit the unnecessary piercing or tattooing of pets.

Source: Office of Gov. Andrew M. Cuomo.

DID YOU KNOW?

It is now legal to sell and use sparklers in New York state in localities that allow it (NYC won't, for now).

PHOTO ILLUSTRATIONS: ISTOCKPHOTO (3), J. MANZO, ANDREW ROBERTS

Cartoon Caption Contest

WINNER! Congratulations to Robert C. Goodman Jr. for garnering the most online votes. Goodman's caption, below, was among more than 200 entries submitted in the *Journal*'s monthly cartoon caption-writing contest.

WINNING CAPTION
"Now which one of you is the attorney?"
—Robert C. Goodman Jr. of Norfolk, Virginia

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, March 8, with "March 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

Erin Buzuvis: "Schools want ... to make their own decisions, in terms of what's right for their community."

PHOTOGRAPH BY JANE SHAUCK

A Crisis of Consent

Lawyers are dealing with changing rules on college sexual assault

by Stephanie Francis Ward

National Pulse

As colleges grapple with the recent publicity over campus sexual assaults and violence, so, too, are lawyers dealing with the complicated legal issues involved in filing and investigating grievances. The problem, some lawyers say, is that due process has been abandoned in campus disciplinary procedures that address student-on-student sexual misconduct claims.

Many point to a 2011 "Dear colleague" letter from the U.S. Department of Education's Office for Civil Rights. It states that sexual violence should be included among the offenses banned by Title IX of the Education Amendments of 1972, which prohibits gender discrimination in federally funded institutions and programs. The letter also states that schools must use the

preponderance of the evidence standard—which decides whether it is more likely than not that the act occurred—when making determinations about sexual harassment.

Some lawyers argue that the standard of clear and convincing evidence, which requires a high probability or reasonable certainty that an act occurred, would be the more appropriate evidentiary standard, considering the possible severe consequences of a campus discipline finding. They note that accused students face the prospects of being ostracized, expelled or subject to subsequent criminal investigations.

In January, California passed a law requiring universities to adopt a standard of affirmative consent in their discipline policies. Title IX does not tell universities to include such a standard in campus sexual misconduct investigations, says Erin Buzuvis, a Western New England University law professor and co-founder of the Title IX Blog.

But, she adds, universities "have to engage in calculated decision-making that is meant to address and protect harassment from occurring. Schools want the ability to make their own decisions, in terms of what's right for their community and their students."

PROCEDURAL INADEQUACIES?

Lawyers also complain that some students accused of sexual violence or harassment cannot ask witnesses questions directly in interviews or hearings. If the witness wants confidentiality, his or her identity is not shared with the accused. And some complaints are lodged a year or more after the incident in question. In addition, some say that students who claim they were victims of campus sexual violence are not always truthful.

"From a lawyer's point of view, the procedural protections—given the consequences—are woefully inadequate," says David Duncan, a Boston lawyer who represents both complainants and accused college students involved in sexual misconduct investigations. "Institutions of higher learning are dedicated to preserving their images. They are not dedicated to finding the truth or administering justice."

As of December, the OCR had open investigations involving 95 colleges accused of mishandling sexual violence and harassment investigations. If a school is found not in compliance with Title IX, victims can sue for monetary damages, and the federal government can target the school for enforcement action.

"Universities are sort of railroading guys accused of sexual misconduct right now, because they think that's what the Department of Education wants," says Brett Sokolow, president of the NCHERM Group (an acronym for the National Center for Higher Education Risk Management), a Malvern, Pennsylvania-based organization that advises schools on handling these types of investigations.

A December OCR finding against Harvard Law School determined that the school was not in compliance with Title IX—in part because it used the clear and convincing standard, rather than preponderance—while investigating a student-on-student claim involving sexual misconduct.

The decision considered two claims. In one, the school's administrative board, which has decision-making power, rejected a prior disciplinary board recommendation to expel a student. Besides using the wrong standard, the agency determined, there were significant delays in resolving the claim, and the school did not provide equal opportunities for post-petition review.

It was also found that the school's administrative board, as well as others involved in the decision-making process, had not received appropriate training. Under the resolution agreement Harvard Law School entered into with the DOE, training will be provided for faculty who participate in the adjudication or review of sexual misconduct claims.

How the faculty will respond remains to be seen. After Harvard sought to install a new university-wide sexual harassment and violence policy last July, 28 law professors signed a letter published in the *Boston Globe* in October contending that the policy "lack[s] the most basic elements of fairness and due process" and is "overwhelmingly stacked against the accused."

There's a sense among some law school faculty that Harvard should have pushed back on the OCR finding, particularly regarding due process rights for the accused, says professor Elizabeth Bartholet, one of the signers.

"There are many university leaders who have a problem with the policy. Harvard could have provided an important leadership role in terms of challenging the government. I think [universities] are very nervous and are acting incredibly timidly," says Bartholet, who serves as faculty director of the law school's Child Advocacy Program.

Harvard 's sexual and gender-based harassment policy states that "when a person is so impaired or incapacitated as to be incapable of requesting or inviting the conduct, conduct of a sexual nature is deemed unwelcome, provided that the respondent knew or reasonably should have known of the person's impairment or incapacity."

According to Bartholet, someone who had three alcoholic beverages could be considered impaired. She sees the policy statement as unrealistic and one-sided. "It doesn't matter who did the pursuing. Whoever decides to file the charge gets to be the complainant," she says.

"Sexual harassment is a very easy thing to claim," Bartholet adds. "That's why it's so important to have a process that is going to flush out the facts."

Others say that schools go too easy on students who engage in sexual misconduct. And with regard to due process rights, they note that campus investigations and hearings have different goals from the criminal justice system, with different protections.

Wendy Murphy, a lawyer who filed the OCR complaints against

Harvard Law School and a separate complaint against Harvard University on behalf of anonymous victims, says that people who experience sexual assault have their stories questioned far more frequently than those subject to other sorts of violence.

"It's extraordinary that people are complaining that [the investigation process] is so unfair or unusual, because it's been in place for decades and no one has ever complained about it in the context of racial or ethnic violence," says Murphy, an adjunct professor at New England School of Law.

She asks: "How can it only be a due process problem for sexist violence" but not for other infractions?

AFFIRMATIVE ALTERNATIVE

The California law defines affirmative consent as "affirmative, conscious and voluntary agreement" to a sexual activity. If someone is "incapacitated due to the influence of drugs, alcohol or medication," the law states, he or she cannot give consent. Students also are incapable of giving consent if they're asleep, unconscious or can't communicate because of a mental or physical condition.

But Sokolow says that if colleges are serious about eliminating student-on-student sexual violence and harassment, they need to engage in significant educational outreach and target teens before they get to college.

There's a common perception among college students that peers who rape are "sex-starved, desperate guys who have no game and hide in the bushes," Sokolow says.

But that's inaccurate, he adds, suggesting that a more common profile of a college student who rapes would be a charismatic guy who is used to getting his way and has ample opportunities for consensual sex.

"I can't educate a student who is predatory not to rape," Sokolow points out. "What I can do is teach people around him to recognize the signs." ■

AP PHOTO/THE OKLAHOMAN, BRYAN TERRY

Oklahoma City's Douglass Trojans turned to the courts, to no avail, after a referee's mistake cost them a shot at a state championship.

Court Drops 'Hail Mary'

High school fumbles a last-gasp legal play

by David L. Hudson Jr.

National Pulse

In one of football's last-gasp comeback plays, the "Hail Mary" pass, the losing team's quarterback rolls back and launches the football as far as possible hoping one of his receivers can—as in the answer to a prayer—haul in the toss and win the game.

In Oklahoma last December, a high school district attempted the legal equivalent of a Hail Mary, seeking a court order to replay a portion or all of a high school playoff game. The court, however, deferred instead to the state high school athletic association, which ruled the game complete and upheld the high school team's loss.

It was an unusual case, but one that may come up more often.

"These cases are uncommon," says Michael McCann, a law professor and director of the Sports and Entertainment Law Institute at the University of New Hampshire. "I think that most attorneys reason—correctly, in my view—that a dispute over the outcome of a sporting event does not constitute a potential legal harm, and thus they discourage their clients from filing a lawsuit."

Yet, says Tim Davis, a law professor at Wake Forest University who teaches sports law, "because of the increase in the recording of athletic events—but under circumstances where referees do not have access to video review—we may see a few more lawsuits of this nature. I doubt, however, that we'll see many."

However, Davis says, many of these lawsuits arise not only because of the litigious nature of society "but perhaps more importantly because of the interests at stake. For example, a loss of athletic eligibility may compromise an athlete's opportunity to receive a college athletic scholarship." He says there are "a substantial number of lawsuits that challenge high school associations' decisions involving other matters such as student-athlete eligibility."

The Oklahoma controversy began on Nov. 28 during a quarterfinal battle between Frederick A. Douglass

High School and Locust Grove High School. Douglass scored an apparent touchdown on a 58-yard pass to take a lead over favored Locust Grove with just over a minute left in the game. However, a referee penalized Douglass, saying that one of the team's coaches had impeded a referee on the sideline. The officials negated the touchdown rather than impose the correct penalty, either a 5-yard loss on the ensuing extra-point attempt or on the kickoff. The referee's blunder cost Douglass the game.

REPLAY REMEDY?

The Oklahoma City Public Schools District, within which Douglass is located, sued the Oklahoma Secondary School Activities Association in Oklahoma County District Court. The school district contended that the official's interpretation of the association's rules was unreasonable and arbitrary, and it sought the remedy of replaying either the game's last few minutes or the entire game.

A temporary restraining order was issued Dec. 4, while the judge considered the arguments. However, a week later Judge Bernard M. Jones denied the request for relief in *Independent School District No. I-89 v. Oklahoma Secondary School Activities Association*.

Jones ruled that though the quarterfinal playoff game may have been unfair, there was no legal right to sue to change the outcome of the game. He reasoned that there was no underlying right or protected property interest upon which the plaintiffs could rely. Jones also noted "various public policy concerns" that supported his result.

"What transpired during and to some degree after the disputed quarterfinal could be considered by many as a tragedy," Jones wrote. "More tragic, however, would be for this court to assert itself in this matter. While mindful of the frustrations of the young athletes who feel deprived by the inaction of defendant, it borders on the unreasonable—and in some respects extends far beyond the purview of the judiciary—to think this court is more equipped or better qualified than defendant to decide the outcome or any portion of a high school football game."

"There is neither statute nor case law allowing this court discretion to order the replaying of a high school football game," Jones concluded, adding: "This slippery slope of solving athletic contests in court instead of on campus will inevitably usher in a new era of robed referees and meritless litigation due to disagreement with or disdain for decisions of gaming officials—an unintended consequence which hurts both the court system and the citizens it is designed to protect."

Keith Sinor, athletic director for the Oklahoma City Public Schools District, says, "From the beginning, the [district] has been clear that we have a responsibility to support student-athletes and do what is right. The Oklahoma Secondary Schools Athletic Association game official admittedly applied the wrong penalty and [the district] followed the proper legal process to request the wrong be made right. The judge's decision presents an opportunity for the OSSAA to review and address the processes and procedures that affect every student-athlete in Oklahoma."

Experts support Jones' reasoning. "The decision in the Oklahoma case was absolutely the correct decision," says sports business scholar Marc Edelman, who teaches at the Zicklin School of Business at Baruch College, part of the City University of New York. "These types of cases happen from time to time, but usually these cases don't get very far. Courts take the general view that they should not interfere with decisions of private associations."

"As a general rule, the hands-off policy is excellent because courts would become burdened and the dockets would be clogged," Edelman says. "Courts also lack the experience to evaluate the minutiae of associations' internal rules unless there are allegations of bad faith or clear violations of federal or state law."

ASSOCIATED OUTCOMES

Deference to high school associations extends beyond more unusual cases to change the outcome of games but also to lawsuits challenging other rulings by state athletic associations, such as decisions forfeiting a team's victory.

In one case, the New York State Supreme Court in Monroe County determined that a high school association was correct in dismissing a school from a quarterfinal playoff game for using an ineligible player. The state athletic association had forfeited Aquinas Institute of Rochester's win over another school, Pittsford, because Aquinas quarterback Jake Zembiec was ineligible since he had not played in the minimum number of three regular season games. Zembiec, a major college recruit, had only played in two games during the season because of an injury, according to the Rochester *Democrat & Chronicle*.

Aquinas challenged the association's ruling. However, Supreme Court Justice Scott Odorisi rejected the suit and ruled in favor of the association in his Oct. 31, 2014, decision in *Aquinas Institute of Rochester v. Cerone*. Odorisi quoted precedent for the proposition that "courts should not interfere with the internal affairs, proceedings, rules and orders of a high school athletic association unless there is evidence of acts which are arbitrary, capricious or an abuse of discretion."

The outcome in these decisions in Oklahoma and New York raises the question: When can a high school team or district challenge an athletic association's decision?

Ultimately, Wake Forest's Davis says, it may come to the matter of teaching young athletes how to have perspective on team sports. "Perhaps allowing this type of lawsuit to proceed would send the wrong message to student-athletes about the true value of engaging in athletic participation." ■

8 Words May Make a Law

Although the ACA is 1,000 pages long, its future may depend on a single phrase

by Mark Walsh

Supreme Court Report

The Affordable Care Act is some 1,000 pages long, and it survived largely intact in a 193-page 2012 U.S. Supreme Court decision that upheld President Barack Obama's signature health reform law as an exercise of Congress' taxing powers.

Now, a mere eight words in the statute—and one Internal Revenue Service regulation—may threaten the future of the act.

The justices will hear arguments March 4 in *King v. Burwell*, a challenge to the IRS rules that extend subsidies to taxpayers in the 34 states that have refused to establish their own health insurance exchanges under the ACA and instead are relying on the federal marketplace.

Because the complex law depends on three principles—tax help for participants, shared responsibility (meaning the individual coverage mandate) and reforms of the insurance market—to extend health coverage to more Americans, a decision that significantly hobbled one leg of that stool would undermine the entire law, observers believe.

The case "is the most existential threat to the viability of the Affordable Care Act in about three dozen states," says Ron Pollack, the executive director of Families USA, a Washington, D.C., group that lobbies on behalf of health care consumers and is a strong supporter of the ACA. "The stakes are very high."

Michael A. Carvin, the Jones Day lawyer who will argue on behalf of four Virginia residents behind the latest ACA challenge, says the case is "all about the rule of law."

"Do you alter the law that was enacted to achieve a policy endorsed by the executive or judicial branches?" he asks. "No, you have to interpret the law as it is written, because we are a nation of laws—not men."

The ACA authorizes federal tax-credit subsidies for health insurance that is purchased through—as the eight key words seized on by the challengers put it—an "exchange established by the state under Section 1311."

That section provides carrots and sticks for the states to establish their own health care exchanges, or marketplaces. Another ACA provision, Section 1321, was a backup allowing the U.S. Department of Health and Human Services to establish a federal exchange for those states that failed to establish their own. That exchange was offered on the HealthCare.gov site.

PARTISAN DIVIDE

Few people contemplated that antipathy toward the ACA would drive so many states to refuse to establish exchanges. "Congress did not expect the states to turn down federal funds and fail to create and run their own exchanges," one federal judge put it when the case was first decided Feb. 18, 2014. Amid that political landscape, the IRS in 2012 promulgated rules extending tax subsidies to income-qualified participants in states served by the federal exchange.

Some members of Congress questioned the interpretation, and two scholars, Jonathan H. Adler of Case Western Reserve University School of Law and Michael F. Cannon of the Cato Institute, published an influential law review article in 2013 that called the IRS rule illegal.

"The IRS ... cited not legislative history or statutory authority for what it did," says Cannon, director of health policy studies at the libertarian D.C. think tank. "They knew the relevant language of the statute did not permit them to do what they wanted to do, but they did it anyway. They just rewrote the statute."

Several lawsuits were organized by groups opposed to the ACA. In *King*, four residents of Virginia—which does not have its own exchange—say they would be subject to the ACA's individual mandate to purchase insurance solely because of the IRS rule. Eligibility for a subsidy triggers the individual mandate for a range of low- and middle-income taxpayers who might otherwise be exempt because of their modest household incomes—and thus not subject to a tax penalty for not purchasing insurance.

Both a federal district court and the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, upheld the IRS rule and the Obama administration's interpretation of the law. A panel of the appeals court ruled 3-0 on July 21 that the statute was "ambiguous and subject to multiple interpretations," and thus the agency's interpretation deserved deference.

Just hours earlier that day, a

King v. Burwell

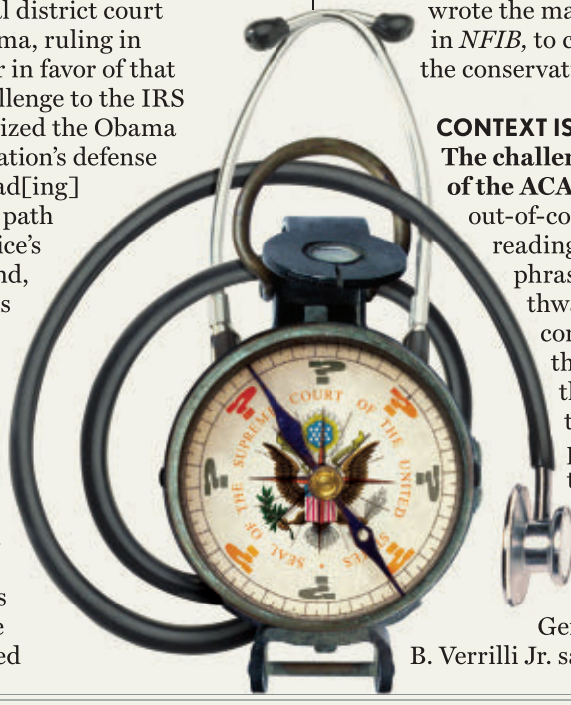
Are ACA tax credits available only if the insurance is purchased through state exchanges, or are they also available through the federal exchange?

FLICKR CREATIVE COMMONS

panel of the U.S. Court of Appeals for the District of Columbia Circuit had ruled 2-1 that the ACA "plainly makes subsidies available only on exchanges established by states."

A federal district court in Oklahoma, ruling in September in favor of that state's challenge to the IRS rule, criticized the Obama administration's defense of it as "lead[ing] us down a path toward Alice's Wonderland, where up is down and down is up, and words mean anything."

The high court stepped into Alice's rabbit hole and granted review of the Virginia case in November, casting off the Obama administration's plea that it should wait because the D.C. Circuit had granted en banc review of the case known as *Halbig v. Burwell*.



There was immediate speculation that the four conservative justices—Antonin Scalia, Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr.—who were in dissent in 2012 in *National Federation of Independent Business v. Sebelius* on the constitutionality of the individual mandate, were seeing the Virginia case as a fresh opportunity to gut the ACA. That is, if they could persuade Chief Justice John G. Roberts Jr., who wrote the majority opinion in *NFIB,* to come back to the conservative fold.

CONTEXT IS KEY

The challengers' reading of the ACA rests on an out-of-context "misreading of a single phrase" and "would thwart the act's core reforms in the 34 states that exercised their statutory prerogative to allow HHS to establish exchanges for them," U.S. Solicitor General Donald B. Verrilli Jr. said in a brief.

"Those states would face the very death spirals the act was structured to avoid, and insurance coverage for millions of their residents would be extinguished."

Verrilli maintained the law was designed on the idea that tax subsidies are available to participants in every state. "The act was debated, evaluated and passed under the universal understanding that tax credits would be available in every state—including states with federally facilitated exchanges," he wrote.

Jane Perkins, the legal director of the National Health Law Program, a Washington, D.C., group that backs the ACA, says the justices shouldn't focus on the key eight words of the statute cited by the challengers.

"As a lawyer who has often applied principles of statutory construction, I don't think you can isolate these words the way the plaintiffs have," she says.

Supporters of the law warn that a decision against the IRS rule would have serious repercussions for the viability of the law.

The D.C.-based Urban Institute predicted in a January report that the elimination of premium tax credits in the states without their own exchanges would increase the number of uninsured Americans by 8.2 million and deplete insurance markets not tied to group plans.

Perkins says that among the practical problems would be that federal funding for creating such exchanges has been used up, and that some states have passed laws prohibiting the establishment of their own exchanges.

"They can't turn around a barge on a dime," she says.

The Cato Institute's Cannon argues that the *King* case does not challenge the ACA itself—only what he and others view as an unlawful use of regulatory power to expand the law. And any removal of individuals from health insurance rolls would not be the fault of the lawsuit.

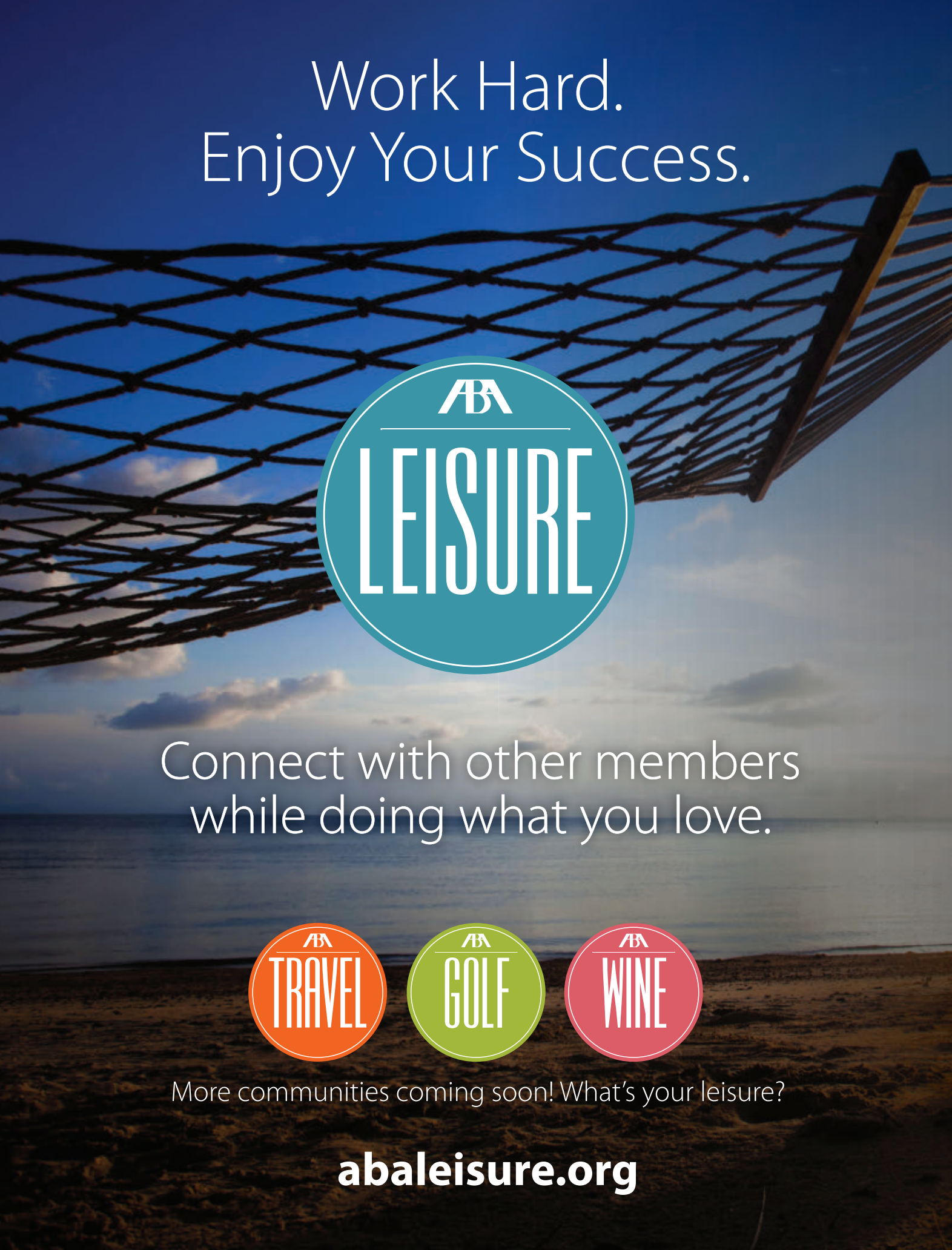
"It is not the job of the Supreme Court to look beyond the statute to its effects," he says. "That is the job of Congress."

But Pollack of Families USA, a former dean of Antioch School of Law (now the David A. Clarke School of Law at the University of the District of Columbia), notes that House Republicans have repeatedly tried to overturn the ACA, and that Republicans took over the Senate this year.

"If the *King* case comes down adversely [to the ACA and its supporters]," he says, "opponents in Congress will have significant leverage" over the law. ■

> Because the complex law depends on three principles—tax help, shared responsibility and insurance market reform—to extend health coverage to more Americans, a decision that significantly hobbled one leg of that stool would undermine the entire law, observers believe.

ILLUSTRATION BY VIKTOR KOEN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REUTERS/JASON LEE

Filling in the Blanks

A Chicago lawyer pieces together a missing couple's story to obtain a court ruling that they died by G.M. Filisko

Advocacy

When Malaysia Airlines flight 370 vanished after takeoff from Kuala Lumpur on March 8, 2014, it never occurred to Richard Campbell that he'd be involved in some of the earliest litigation over the disaster—or any missing-plane-related litigation, for that matter.

But by August, the Chicago-based head of Mayer Brown's wealth management practice, who focuses on estate planning, was in Cook County Circuit Court seeking a presumption-of-death ruling for two passengers on the flight.

How hard could that be? Millions watched worldwide as news coverage of the search stretched into months with no sign of the plane. Most believe there can't possibly be any survivors. But news coverage and public consensus are no substitute in court for admissible proof.

Campbell's case involved Muktesh Mukherjee, a native of India, and his wife, Xiaomo Bai, a Chinese national, who were returning from Vietnam. While the couple was vacationing, their two sons, Mirav, 8, and Miles, 3, were staying with their maternal grandparents in China, where the couple had been living.

The plane's disappearance was not only a tragedy but a legal morass for the children's maternal and paternal grandparents. They had no formal authority to care for the children, nor access to Bai and Mukherjee's assets to be able to do so.

Last April, both sets of the children's grandparents went to court in India and agreed to an order naming the paternal grandmother their legal guardian. Yet

they still lacked legal access to the couple's assets, which included a condo in Chicago.

"The grandparents needed a way to get the probate estate open and an administrator appointed," Campbell says. "Having real estate here created jurisdiction to open the ... estate."

Campbell's firm represents ArcelorMittal, a steel company where Mukherjee worked, which has offices in Chicago. The company solicited a lawyer to handle the probate matter, and in mid-May it landed on Campbell's desk. He and his associate, Gina Oderda, who Campbell says did the lion's share of the work, began immediately.

PRESUMPTION OF LIFE

Typically, a death certificate is issued by a government authority, and the process of opening a probate estate can begin. It was that death certificate that Campbell sought to have issued by a Cook County judge.

In Illinois, there's a presumption of life for seven years after a person has been missing. Obtaining a death certificate before that time elapses requires overcoming that presumption by establishing facts and circumstances—for example, exposure to peril—that would lead a reasonable person to conclude the missing person is most likely deceased.

Campbell knew the case was going to be difficult. "When you look at this from afar, this has to be the easiest missing-persons case ever," he says. "The entire world knows what happened. But judges are very wary of declaring someone dead because what's the worst that can happen? The person comes back—and that actually happens."

Proving the couple was on the plane would normally involve introducing business records authenticated by the airline, such as the passenger manifest, as an exception to the hearsay rule. Those records proved exceptionally difficult for Campbell to secure. "Usually a business record is easy to get, especially when you're not suing the company," he says. "But it was impossible to get ahold of someone at Malaysia Airlines. They didn't want to deal with us, in part because they thought we were personal injury lawyers looking to sue them."

The airline posted a passenger manifest on the Internet, but without authentication, it remained rank hearsay. The families also received from Malaysia Airlines certificates confirming Mukherjee and Bai were passengers. Without more, those were also hearsay.

Campbell planned a workaround. He'd rely on a different exception to the hearsay rule. His argument was that Malaysia Airlines was owned by the Malaysian government, so when the airline put the passenger manifest on the Internet, it qualified as a government record.

In addition, Mukherjee and Bai were Canadian citizens, so Campbell took a shot at securing evidence from Canadian government officials. "When it was still a possibility this was a terrorist attack, all the passengers had to be vetted," he explains. "So the Royal Canadian Mounted Police looked into the couple's background."

Miraculously, the day before the hearing, the problem was solved. Local counsel hired by Malaysia Airlines provided Campbell with authenticated documents proving the couple was on the plane.

PROOF OF SEARCH

Campbell next had to establish that the search was extensive and fruitless. "We needed proof of the search for the plane and the fact that it most likely went down in the ocean," he says. "And we knew we weren't going to get somebody to come and testify about the search in person in Chicago."

Again, Campbell relied on the government records exception to the hearsay rule. The Australian government, which conducted the bulk of the search efforts, published its Ministry of Transport's records on the Internet, detailing search areas and efforts. The searches—at first involving more than 150 ships and planes—covered millions of square kilometers of ocean surface and more than 850 kilometers underwater, and were ongoing at press time.

"We were able to get those admitted as an exception to the hearsay rule," says Campbell. "We argued they were records of the Australian equivalent of the U.S. Department of Transportation or the Federal Aviation Administration."

Finally, it was necessary to prove the couple hadn't just ducked away on a lark, possibly to return at some future point. The children's paternal grandfather, Malay, traveled from India to Chicago to testify. Campbell also introduced an evidence deposition from the paternal grandmother, Uma, who remained in India for the children's first day of school. Malay testified that the families vacationed several times each year, and that he and his son spoke by phone every Sunday. The last time they'd spoken, he said, was the Sunday before the plane's disappearance.

Malay also testified that he and his wife traveled to Beijing the day after the plane vanished and, while there for more than a month, found the couple's corporate apartment empty. They also visited Chicago in June, where the couple's condo also sat vacant. The temporary administrator of the couple's estate, Sanjit Ganguli, a cousin of Mukherjee's who lives in Great Falls, Virginia, then testified to the couple's total lack of financial activity after the plane went missing.

Judge Susan Coleman was convinced, stating she had no choice but to adopt Campbell's closing arguments as findings of fact. "I wholeheartedly agree that this set of circumstances is tragic," she ruled. "It's clear to this court that the presumption of death for both individuals has been shown."

Today, Campbell is heartened that the children live with their paternal grandparents in Mumbai and regularly see their maternal grandparents. He's also proud of the U.S. court system. "It was a highly emotional hearing and an outstanding example of what the judicial system can do," he says. "You hear lots of complaints about lawyers and the judicial system. But when you see you can get before a judge halfway around the world and solve a problem, that's a positive thing." ■

Bragging Rights

Federal court strikes down Florida Bar restrictions on lawyers citing past results in advertising

by David L. Hudson Jr.

Ethics

A Florida ethics rule interpreted by the state bar to prohibit lawyers from citing results from their past cases in radio and television commercials and indoor or outdoor display ads violates the First Amendment, according to a U.S. district court ruling that legal experts characterize as significant.

The case reflects the Florida Bar's long-standing ambivalence toward lawyer advertising, which the U.S. Supreme Court held in its 1977 ruling in *Bates v. State Bar of Arizona* to be commercial speech entitled to protection under the First Amendment. Since then, Florida has maintained one of the strictest regimes for regulating lawyer advertising of any state in the country. In recent years, for instance, Florida was the only state with an outright prohibition against lawyers including information about past results in their advertising. Other states generally followed the lead of the ABA Model Rules of Professional Conduct, which impose no blanket restrictions on references to past results, although six states (Missouri, New Mexico, New York, South Dakota, Texas and Virginia) require references to past results to be accompanied by a disclaimer.

But in January 2013, the Florida Supreme Court adopted a revised set of attorney advertising rules drafted and proposed by the state bar. The new rules permitted attorney advertising to cite past results as long as those results were "objectively verifiable." As revised, the rules did not restrict statements about past results to any particular advertising medium.

In the wake of this action, attorney Robert Rubenstein and his law firm Rubenstein Law in Miami developed an advertising campaign that featured references to past recoveries for clients. One of those ads included the words "Collected over $50 million for their clients in just the last year! Gross proceeds. Results in individual cases are based on the unique facts of each case." The bar issued an opinion letter to Rubenstein stating that the advertising containing statements regarding past results complied with the revised rules.

But in early 2014, the Florida Bar's board of governors shifted gears again when it issued new "guidelines for advertising past results." The guidelines amounted to the bar's interpretation and application of the rules adopted by the supreme court "to assist lawyers in complying with these requirements." The bar's guidelines state: "The inclusion of past results in advertising carries a particularly high risk of being misleading," necessitating the inclusion of more information than most types of advertising so as to comply with the formal rules. "Indoor and outdoor display and radio and television media do not lend themselves to effective communication of such information. Consequently, the bar generally will not issue a notice of compliance for advertisements in such media that include references to past results."

In effect, the state bar's guidelines reinstated the ban on including information about past results, at least in radio and TV commercials and on display ads such as billboards. And in an action that brought the point home, the bar notified Rubenstein that it had withdrawn approval of several of the firm's advertisements. When Rubenstein continued to run the ads, the bar initiated disciplinary proceedings against him.

FIRST AMENDMENT ISSUES

In March 2014, Rubenstein filed an action in the U.S. District Court for the Southern District of Florida, headquartered in Miami, seeking a summary judgment declaring that the bar's guidelines interpreting the supreme court rules violated his commercial speech rights under the First Amendment.

On Dec. 8, U.S. District Judge Beth Bloom in Fort Lauderdale granted Rubenstein's motion for summary judgment in *Rubenstein v. Florida Bar,* ruling that the ban on past results in certain media violated the First Amendment.

Judge Bloom analyzed the Florida restrictions under the U.S. Supreme Court's intermediate-scrutiny standard for evaluating regulations on commercial speech that was set forth in its 1980 decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*. Under the *Central Hudson* test, the bar must be able to show a substantial government interest advanced by its restrictions on commercial speech that is not false or deceptive, or does not concern unlawful activity. The bar also must show that its regulations advance the interest asserted and are no more extensive than necessary to advance that interest.

While acknowledging that the bar has a governmental interest in regulating lawyer advertising as commercial speech, Bloom held that its guidelines failed under the other prongs of the *Central Hudson* test.

First, Judge Bloom stated in her opinion, "the bar has presented no evidence to demonstrate that the restrictions it has imposed on the use of past results in attorney advertisement support the interests its rules

Robert Rubenstein

were designed to promote."

And second, she wrote, the guidelines "amount to a blanket restriction on the use of past results in attorney advertising on indoor and outdoor display, television and radio media. The bar has not demonstrated that the prohibition's breadth was necessary to achieve the interest advanced, or that lesser restrictions—e.g., including a disclaimer or required language—would not have been sufficient."

SUPPORT FOR RESULT

The outcome in *Rubenstein* was welcomed by First Amendment experts and advocates of lawyer advertising who were interviewed by the *ABA Journal*.

"It's a case where a state bar's guidelines, which typically are designed to help attorneys interpret a state bar's rules, actually chewed up the rules and then spat back an all-new presumption that past-results advertising on some forms of media generally is not permissible," says Clay Calvert, director of the Marion B. Brechner First Amendment Project at the University of Florida. "It's akin to a comment in the *Restatement (Second) of Torts* eviscerating an entire section or legal theory."

"It seems intuitive," Calvert says, "that ads on highway billboards, as well as TV and radio commercials, are limited in the sheer amount of information they can convey about past results because of space, size and time features. Additionally, such ads are fleeting—you drive by a billboard at 70 mph, the 30-second radio commercial disappears into a song—and thus they don't provide consumers much time to thoughtfully mull over the facts contained in them, compared with, say, an ad on the Internet or in the newspaper.

"Unfortunately for the Florida Bar," he says, "intuition is not evidence and, specifically, it is not evidence that past-results ads on billboards, TV and radio are more likely to be misleading than those in print newspapers, magazines and on the Internet."

In Calvert's view, "Judge Bloom nailed it correctly by rigorously applying *Central Hudson*'s requirement that a regulation on commercial speech must, in fact, directly and materially advance a substantial interest. Simply put, governmental paternalism must be grounded on actual evidence that it truly helps the public; and here, there not only was no such evidence, but contradictory data. The direct-and-material-advancement prong of *Central Hudson* really provides the First Amendment teeth in the test."

Calvert and other experts say the decision sends a clear message. "This may only be a lone district court decision, but the court's logic is sound and the decision bodes well for the First Amendment and might just stop other states from enacting similar measures," says Calvert. And Deepak Gupta, the founding principal of Gupta Beck in Washington, D.C., which represented Rubenstein, says, "This decision is likely to have a major national impact. It says to state bar regulators across the country: 'Don't try this at home. If you're considering emulating Florida's restrictive approach, you will face a First Amendment challenge and you will lose.' "

As far as the Florida Bar is concerned, the case is closed. Its board of governors rescinded the guidelines in the wake of Judge Bloom's ruling in December. "The bar will not appeal," says Barry Richard, a shareholder at Greenberg Traurig in Tallahassee who was lead attorney for the bar in *Rubenstein*. "The board of governors has repealed the rule that was at issue." ■

FOR MORE **Read the opinion in *Rubenstein v. Florida Bar* at ABAJournal.com/magazine.**

PHOTOGRAPH BY SONYA REVELL

The Lying Client

Why you should do your own legwork before putting your trust in a client

By Janet S. Kole

Advocacy

I was raised to be a naive and trusting person. This is not a good mindset for a lawyer. People sometimes lie, and being cautiously skeptical is a good thing. Being lied to is unpleasant, but it is much worse when the liar is your client, because those lies might get you sanctioned or disbarred. So the first rule of good lawyering is: Don't trust your client until you know he or she is telling the truth. I'll tell you about one of my first clients, and you'll see why I made up my mind to become a skeptic instead of a believer.

It was my first year of practice in a large national firm. I had been allowed to prepare this client for his deposition and to defend the deposition.

Lawrence Turcot was a middleman for women's coats. He purchased coats from manufacturers and sold them to department stores. Turcot was being sued by one manufacturer for failure to pay for a shipment. His defense was that the coats were defective.

"They put the pockets in backward," Turcot told me. "No one's going to buy a coat with backward pockets."

Thinking I was being a diligent lawyer, I asked him to bring one of the defective coats to my office the morning of his deposition. He brought in a pink triangle coat with pockets that were, indeed, reversed—someone shaking hands with the wearer would be able to slip a hand in the pocket, but the wearer couldn't.

"I'm telling you," Turcot said, "no woman would wear this, and no department store will be able to sell it."

We went to opposing counsel's office for Turcot's deposition. Under oath, he said the same thing he told me: The coats were defective.

I'm sure you can see where this is going.

"These are meant to be raincoats, aren't they?" opposing counsel said.

"Yes," my client said.

"Isn't it true that the coat pockets were put in that way to keep rain out?"

Looking sheepish, my client admitted that was so.

I felt stupid, but the case settled, as it should have. I later found out that a senior partner knew the case was a lost cause, couldn't get the client to pay for the coats, and thought it would be good deposition experience for me since I couldn't screw it up.

The most important lesson I learned from that deposition was: Make sure you are prepared. Don't assume you can learn everything you need to know about the subject matter of the deposition, or indeed of the lawsuit, from your client. (Or even from a colleague, as it turns out. I should have asked the senior partner why he was letting a first-year lawyer defend the deposition of a client.)

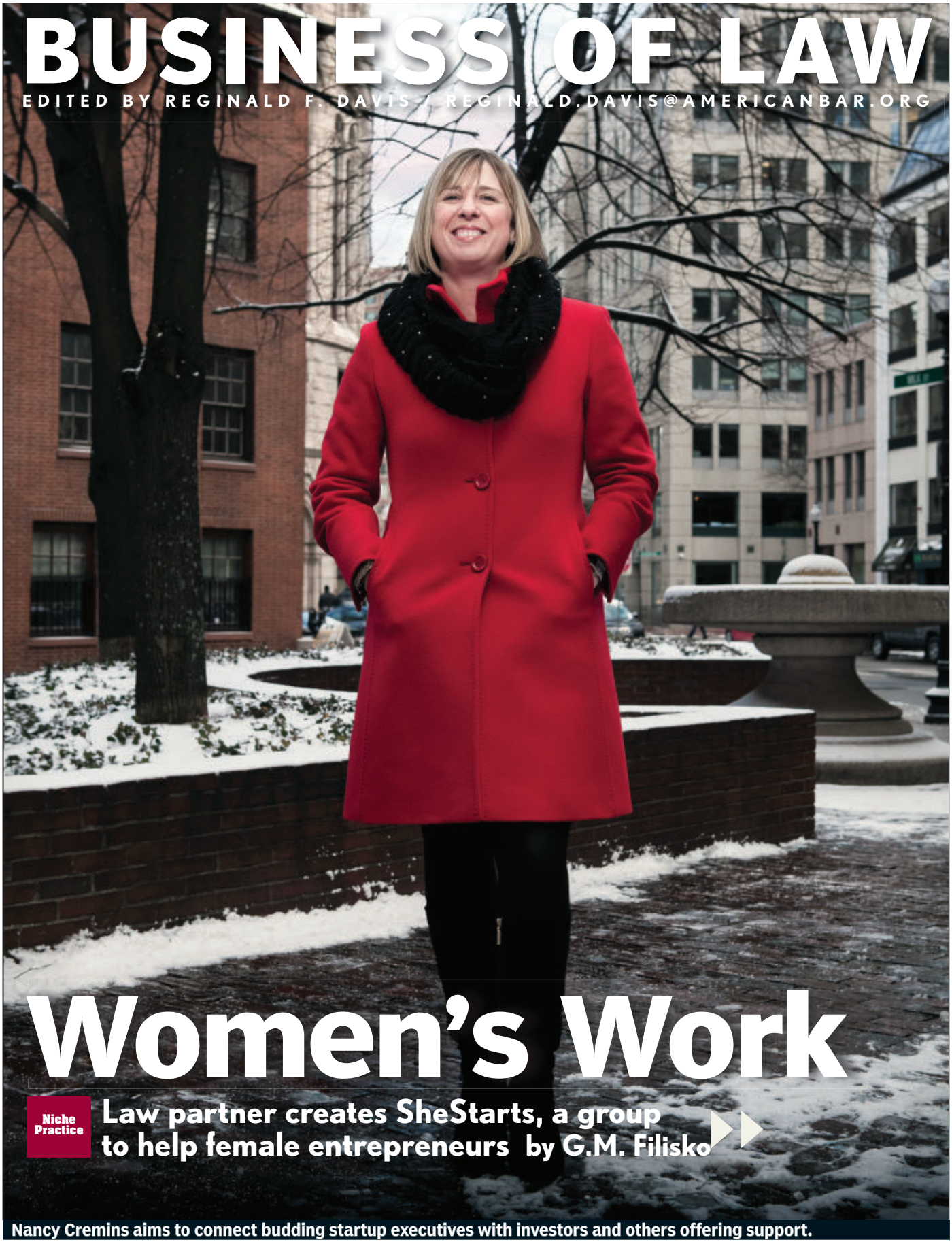
Every jurisdiction has a form of Rule 11 of the Federal Rules of Civil Procedure, which requires a lawyer's diligent investigation of what a client says: "By presenting to the court a pleading, written motion or other paper—whether by signing, filing, submitting or later advocating it—an attorney ... certifies that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, ... the factual contentions have evidentiary support."

Don't risk sanctions or embarrassment. Ask your client about "the facts." And then ask what your client expects the other side to say in defense. Then check it out for yourself, to the degree possible. The Internet is a fount of information. Don't blindly trust your client to tell you the truth—or at least not the whole truth. It pays to be a skeptic. ■

JANET S. KOLE is a retired trial lawyer from Philadelphia and author of numerous books, including *Pleading Your Case: Complaints and Responses,* and the murder mystery *Suggestion of Death.*

BUSINESS OF LAW

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



Women's Work

Niche Practice

Law partner creates SheStarts, a group to help female entrepreneurs by G.M. Filisko

Nancy Cremins aims to connect budding startup executives with investors and others offering support.

PHOTOGRAPH BY JOSH ANDRUS

Women starting companies just don't get the breaks men do.

According to a 2014 Babson College study, startups with women on their executive team are three times more likely to get venture capital funding now than 15 years ago. However, 85 percent of businesses that received venture capital had no women on their executive team. Overall, startups with female chief execs got only 2.7 percent of investments.

"Let's be frank," says Barbara Clarke, a Boston-based angel investor with Astia, "there's a tremendous amount of sexual harassment and, I'd say, bad behavior in the startup community. I've had really brilliant CEOs say, 'Why don't you get a guy to run this company and we'll invest?' "

Nancy Cremins, a feminist who handles disputes faced by entrepreneurs and emerging companies, is looking to change that. Early last year, the Boston-based partner at Gesmer Updegrove teamed up with Liz O'Donnell, a public relations and marketing exec who also specializes in emerging businesses and runs the Hello Ladies blog.

Their launch? SheStarts, whose mission is to create an ecosystem that supports female entrepreneurs.

"When you go to startup events, women make up a small minority of participants," Cremins says. "We thought: 'How do we create an environment where we can bring women entrepreneurs together, as well as the people who can help them—like service providers, investors and people who have tech expertise and all the things you might need to grow your company?' We wanted to do it in a way that feels authentic and comfortable and to really build a community."

'How do we create an environment where we can bring women entrepreneurs together, as well as the people who can help them—like service providers, investors and people who have tech expertise and all the things you might need to grow your company?'

PITCH PERFECT

SheStarts hosted its first event in February 2014 and has held quarterly events since. This year it expanded to six events annually.

"We started with a very informal networking event with about 40 people," Cremins says. "We had everybody introduce themselves, explain what they do, and mention a problem they were having. It was an opportunity for people to see if they could solve another's problem or suggest someone who could."

During that event, Cremins heard loud and clear that attendees craved guidance on developing a pitch for their startups.

"We surveyed the crowd, as well as people who couldn't make it to the event, and pitching was far and away the thing they needed the most help with," she recalls. That became the theme of the second event. The third featured a discussion of panelists from a range of startups—one in biotech, one who launched a device, another in fashion technology, and a fourth who began a service company—revealing what they wish they'd known before starting.

For Amrita Aviyente, co-founder and CEO of Date My Wardrobe, an online market for renting, selling or showcasing your high-end fashion, SheStarts is about building women's confidence.

"They don't know how capable they are," she says, "but when they see other women doing it and hear their stories, they're much more willing to take a risk."

And the group is making Clarke a better investor. "It helps me in many ways, and it's a virtuous circle," she says. "The more companies I see, the better I am at honing my own skills at judging startups myself."

Cremins, however, is looking for even more signs of success. "I wish I could say we found an angel investor who invested $1 million in a business and the business is doing great—and I anticipate we will," she says. "Right now, the victories are there, but they're more modest. People are making connections. I hear back that this person met that person, who was super helpful or will be able to help this person launch or grow."

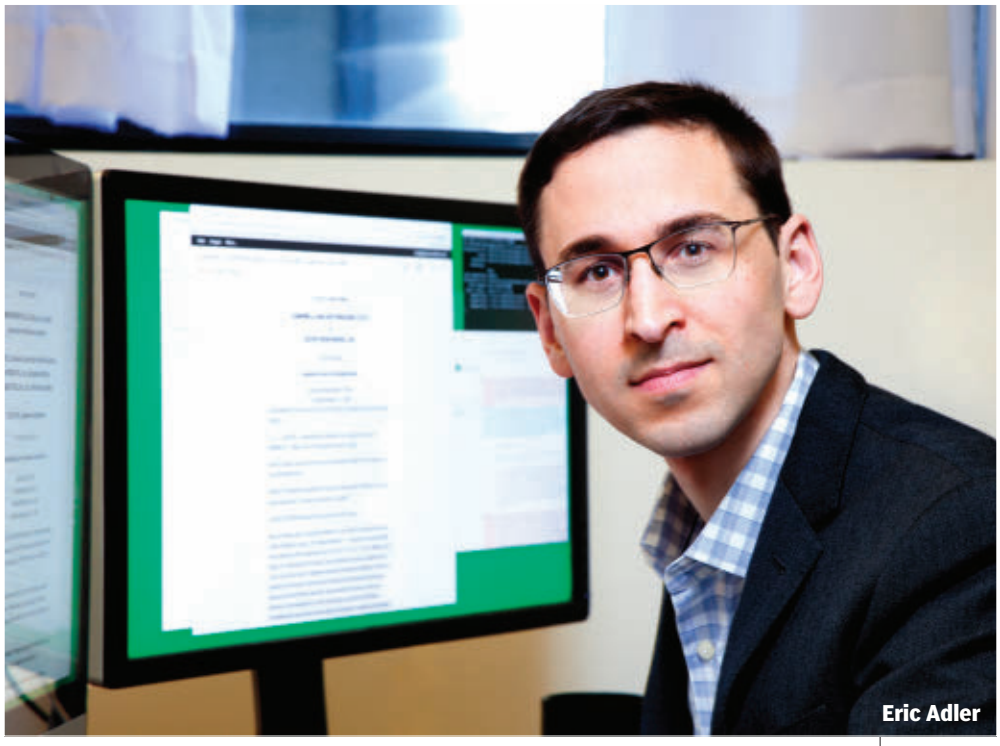
DOING GOOD AND WELL

Cremins herself has benefited from a similar network of women.

"I've found the more senior up the ladder you go, the fewer people you see like you," she explains. "I've been a board member of the Women's Bar Association of Massachusetts for a long time. It's given me support and a community where I felt I could talk about things, be myself, and get advice and mentoring that's helped me have a successful career. To me, that was essential to finding career happiness."

When Cremins started hearing from friends that starting a business can be lonely and isolating, she drew on that women's bar experience to form SheStarts. Cremins readily admits the group could become a pipeline of business for her law firm, but contends that's not the only reason she began it. "I care about gender equity."

"When I learned more ... about the entrepreneurial ecosystem and how funding isn't merit-based—and that it's not at all equitable between women and men—I wanted to do something about it," Cremins says. "I can do something where I am, and this is what I can do. That's why it started." ■


Eric Adler

PHOTOGRAPH BY LEN IRISH

Troll Defense

Law school clinics join to help battle patent abuse

by Steven Seidenberg

Legal Services

It is a sad but all-too-familiar tale. A small firm is accused of infringing a dubious patent, but if the firm defends itself in court, it risks years of litigation, millions in legal fees and a devastating award for infringement damages if it loses. Thus, many firms reluctantly settle, often paying six-figure sums they can ill afford.

CarShield's story ended differently. The California-based startup successfully defended itself in court thanks to free legal assistance it received from a law school clinic participating in the Law School Patent Troll Defense Network. The clinic filed a motion to dismiss in April 2014, and shortly before oral argument on that motion, the plaintiff dropped its lawsuit against CarShield.

"Patent trolls are looking for the easy buck, and they won't get that from a small business that has free legal advice," says Jonathan Askin, a Brooklyn Law School professor who founded and directs the Brooklyn Law Incubator and Policy Clinic. BLIP represented CarShield in the infringement suit.

Created in October 2013, the Law School Patent Troll Defense Network is still getting off the ground. It is supposed to be a nationwide group of law schools, law students and lawyers that work together to provide free legal services to small businesses threatened by patent trolls. For now, however, it has participating clinics at just seven law schools: Brooklyn, John Marshall, New York University, Suffolk University, University of Southern California, University of Utah and Washington College of Law at American University.

The network has handled fewer than 10 cases so far, and results have been mixed, according to Jon Potter, president of the Application Developers Alliance, the trade group that founded and runs the network. (App makers are particularly targeted by patent trolls, Potter explains.)

FINDING THE 'RIGHTS'

"The biggest challenges," Potter says, "are finding the right clients at the right time and matching them with law schools."

The right clients "are willing to take a principled stand against patent trolls rather than seeking to make a quick settlement," says Eric Adler, a partner in the Brooklyn law firm of Adler Vermillion, who advised the BLIP clinic on how to handle the CarShield litigation.

In addition, he says, those clients "are willing to sign engagement letters that limit the types of arguments and litigation the clinic will undertake. Instead of making all available legal arguments, the arguments may be limited to those that would have the most impact on other patent cases or that would be best for the students to work on for pedagogical purposes."

Timing is also key. "Some companies have come to us too late in the litigation process," Potter says. "They are already looking down the barrel of a gun."

The network is trying to improve its marketing so that more potential clients will know early in the dispute that free legal help is available. It's also trying to bring more law school clinics on board. That has been very challenging, Potter says. The source of the difficulty: Clinics usually handle work that is relatively fast and easy, such as immigration matters or landlord-tenant disputes. Patent litigation, by contrast, can be tremendously complicated and extremely time-consuming, and it can stretch on for years.

Yet law school clinics can handle this work if appropriate

arrangements are made. "We proved the concept this year when we won our first patent troll case," says BLIP's Askin. Handling such long-term litigation is "a real burden on me," he admits, so he limits the clinic to "maybe one case a year."

And he has organized the BLIP clinic to have an institutional memory. To "maintain continuity from semester to semester," he says, "some students become team leaders and work in the clinic for a second semester."

LAW FIRMS NEEDED

The network is also seeking more firms to work with the clinics. "The law firms are concerned that this is very sophisticated litigation; it takes years of experience to do it properly," says Askin. "They are also worried it would take many, many hours of law firm partner and associate time. But I think they are starting to recognize it is great training for their younger associates."

Adler, the private practice attorney, says it was no strain on him to oversee the BLIP clinic's work on the CarShield case. "I sent the students a few cases to read. They drafted the motions and the briefs. They did very professional work. My partner and I did some light editing," he says. "It couldn't have been easier for me."

The people behind the Law School Patent Troll Defense Network are determined to make it succeed.

"This is a real passion project with us," Potter says. "We want to make this work because we think it is great for law students, great for law firms and great for entrepreneurs." ■

Best of the East

Hong Kong, Singapore vie for U.S. law firms' offices

by Anthony Lin

International Practice

Last fall, as the Occupy Central political protests began to snarl traffic in Hong Kong, some commentators began voicing the opinion that the unrest would only have one clear winner: Singapore.

The two cities have long competed with each other as expat-friendly hubs for business and finance in Asia. Along with proximity to the world's fastest-growing economies, both have excellent modern infrastructure, well-educated local populations and common-law legal systems inherited from their pasts as British colonies. For international law firms seeking a base in the region, it can be a tough choice.

"There were factors pointing in both directions for us," recalls Yash Rana, Asia managing partner for Boston's Goodwin Procter. The firm ultimately decided to open in Hong Kong in 2008.

China was the main reason. Singapore and Hong Kong both have majority Chinese populations, but the former is its own country while the latter is geographically and politically part of China, though it has a separate government and legal system. Large Chinese companies most frequently turn to Hong Kong to raise international capital, and its stock market led the world in initial public offerings from 2009 to 2011.

As a result, law firms with a very strong financial-markets bent tend to favor Hong Kong. New York City's Davis Polk & Wardwell, along with several of its fellow Wall Street firms, has a sizable office in Hong Kong but none in Singapore. Partner James Lin says Hong Kong's human infrastructure is unmatched when it comes to China deals.

"Most of the bankers, investors, lawyers and auditors are here," he says. "More of that demographic of 'deal professional' lives in Hong Kong than elsewhere."

He doesn't see the largely peaceful Occupy protests—launched in opposition to perceived mainland Chinese interference in Hong Kong politics—changing that anytime soon.

Rana says Goodwin Procter looked at Singapore because of its proximity to Southeast Asian markets like Indonesia or the Philippines. The firm was also interested in Singapore's potential as a hub for work originating in India. But it ultimately decided on Hong Kong because its clients in the region, mainly global private equity funds, were mostly looking at China.

"The demand we have for China," he says, "outweighs all other markets in Asia combined."

SEIZING OPPORTUNITY

For some firms, the choice is more opportunistic than strategic. Duane Morris' chairman and CEO, John Soroko, says the firm opened its first Asia office in Singapore in 2007 mainly because it had the chance to recruit a group of partners there.

"We weren't offered an option that included Hong Kong," he says. "We never really did a spreadsheet that compared the pros and cons of the different markets."

Though that initial group of partners mostly left the firm within a couple of years, the Philadelphia firm regrouped in Singapore by launching a joint venture with local firm Selvam in 2011. That venture has since become the driving force behind the firm's further expansion in the region. In 2013, Duane Morris became the first U.S. firm to open an office in Myanmar.

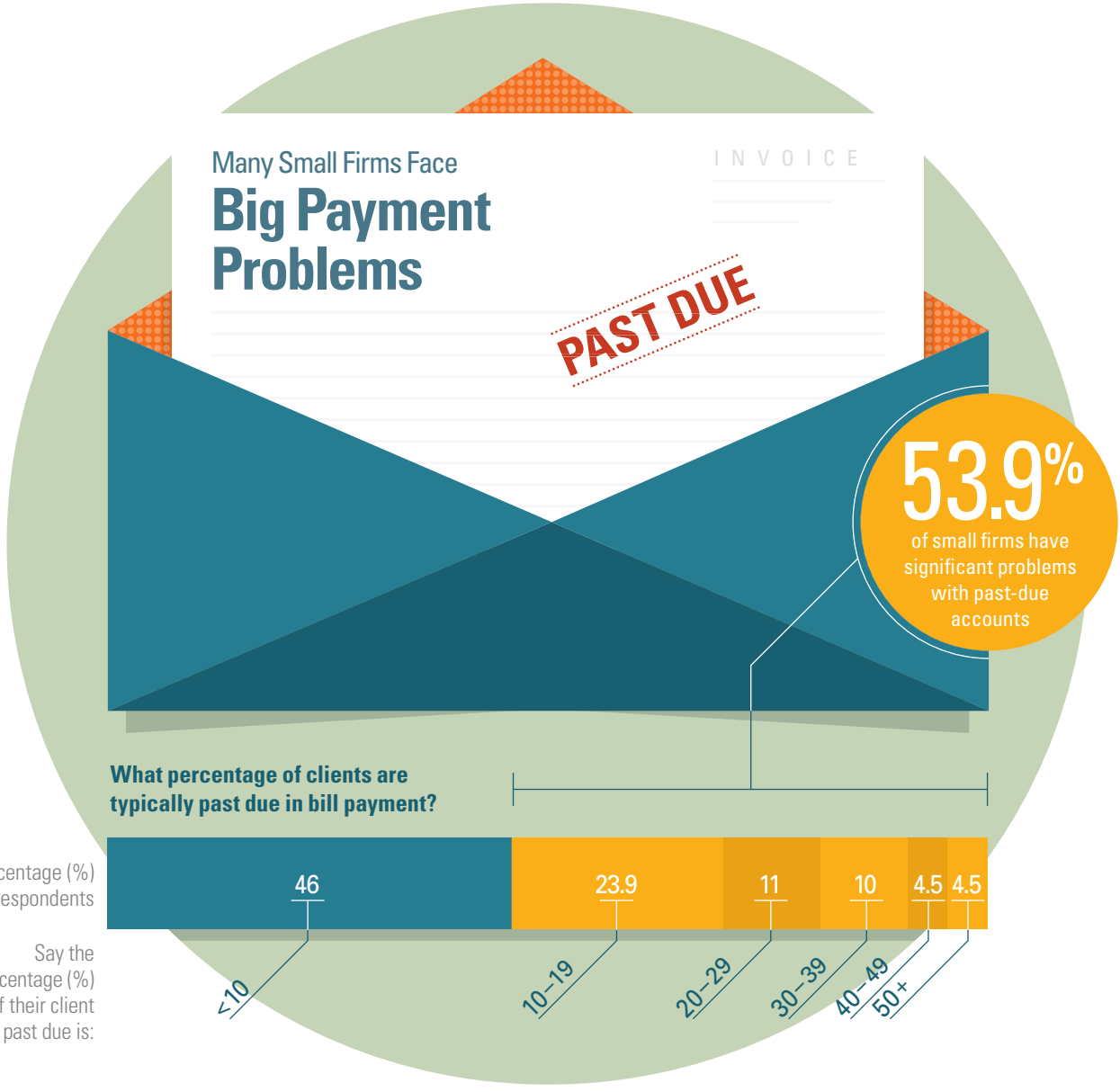
Soroko says the firm wouldn't rule out a Hong Kong opening, but notes that Duane Morris doesn't traditionally handle the sorts of big capital markets deals that draw other firms to that city. "That hasn't really been a focus for us," he says.

Rana, who relocated to Asia from Goodwin Procter's New York office, notes that personal preferences can also play a part in where firms go.

Hong Kong is generally regarded as the more lively and exciting city, while Singapore is cleaner, quieter and more family-friendly. Housing has historically been cheaper in Singapore, though prices have gone up significantly in recent years, and both cities rank among the world's most expensive in terms of property. A major issue for expatriates with children is that securing places in international schools is generally much harder in Hong Kong.

That was an issue for Rana and his wife, who have two school-age children. But they ultimately decided they preferred Hong Kong.

"And we couldn't be happier," he says, "on either a personal or professional level." ■



MORE THAN 73 PERCENT OF SMALL FIRMS surveyed have clients in arrears sometimes, most of the time or always, according to a 2014 study by the LexisNexis software division. And nearly half of the law firm respondents noted significant percentages—between 10 and 49 percent of their clientele—are typically past due in payment.

While clients' financial struggles were cited overwhelmingly as the reason for past due accounts, in-house problems like unclear billing and too much time between services being rendered and billed were also listed.

Of the 309 respondents, 95 percent work at firms of 10 lawyers or fewer, and 75 percent are at firms of one or two attorneys. The report says 89 percent are practicing attorneys engaged in a variety of practice areas.

SEE MORE PRACTICE STATS ONLINE
ABAJournal.com/lawbythenumbers

DATA EXCERPTS FROM: LexisNexis' *Past Due—the Discomfort of Collections in Law Firm Billing.* Link to the SlideShare presentation of the survey at ABAJournal.com/lawbythenumbers.

GRAPHICS BY JAMIE GANNON

Are Lawyer Lists Just a Vanity Fair?

Proliferation of 'best of' lists has marketers asking whether they're worth the trouble

by Richard Acello


Adam Severson

PHOTOGRAPH BY HOLLIS BENNETT

Marketing

Everyone loves to win awards—which is why so many have been created to provide the recognition attorneys believe they deserve. Unfortunately, awards, rankings and "best of" lists have achieved such a critical mass that some of the pros responsible for touting their attorney recipients have begun to question whether they are the equivalent of all-inclusive soccer trophies for 12-year-olds.

Joshua Peck, president of the Law Firm Media Professionals trade group, says marketers are beginning to talk about the issue.

"The subject has come up before because of discussions where colleagues were seeking sympathy because they were being asked to spend a great deal of time responding to 'best lawyers' surveys," says Peck, who is senior media relations manager at Duane Morris in Philadelphia.

"The private discussions evolved into a public forum at the October LFMP meeting," he says. "It was surprising; there was a consensus that we should not just talk about the problem, but that we should form a committee that looks at these things and looks at their value. The purpose of the committee would be to look at them without prejudice and figure out which ones may or may not be a waste of time."

How many best-lawyer lists are there? The number in circulation nationally and internationally, according to the Jaffe PR website, is more than 1,200. They range from Law360 to Chambers, ALM Media to *U.S. News & World Report*, and *Fortune*'s "40 under 40" series to *Super Lawyers*' Rising Stars.

"It's not uncommon for marketers to receive two or three survey requests a week," Peck says. "They're multiplying like bunny rabbits."

Peck says if a best-of list was vetted by media professionals in advance, "it would allow us to go back to management and say this has been examined by the industry and may not be the best use of time for our media or marketing group."

CAN'T JUST SAY NO

Why not politely turn down the opportunity? "Generally, it's not within the scope of the media people to say no," Peck explains. "If there is a list of the best that refers to a lawyer's specialty or region, they want to be on it."

"It's a justifiable argument that being thought of as prestigious leads to client development, more business and more partners, but are these activities the best way to achieve those goals?" he asks. "I'd say the growing sense is that, no, they aren't the best."

"Some lists you simply buy your way onto," he adds. "So it's intermingled—you write a check, supposedly not to get on the list but to help underwrite costs—but if you don't write a check, they're not going to put you on the list."

Peck has no illusions that whatever rating system for best-of lists his committee will come up with will gain immediate acceptance. "What we're trying to do," he says, "is change the conversation."

Peck hopes the LFMP survey committee will issue a report on its findings by the end of this year.

PLEA FOR RELIEF

Guy Alvarez, founder of the social/business website Good2bSocial, recently penned "A Legal Marketer's Plea for Change," a fictitious "I quit" letter that he says reflects the "steady stream of complaints" by chief marketing officers at some of the top law firms about how slowly those firms respond to current market conditions.

An excerpt: "I have been asking —no, pleading—for change, but it has been all for naught. ... Instead of focusing on what our clients need, you ask me to send letters to reporters to make sure they know you have been elected to the 2014 edition of *Super Lawyers* as the top practitioner in your field. ... It makes no difference that I told you that at the recent Legal Marketing Association's GC Forum, all three of the panelists [general counsel] indicated that they paid absolutely no attention to lawyer or law firm

rankings and awards."

The LFMP initiative has generated a positive response.

"As a general matter, the surveys are considered a chore by media professionals," says Adam Severson, president of the Legal Marketing Association and chief marketing officer at Baker Donelson in Nashville, Tennessee. "I applaud Joshua's initiative to evaluate the efficiency of these tools. There has been a lack of return on investment demonstrated on the benefits of the rankings, particularly spending money in sponsoring or advertising."

"There are just so many of them," Severson says. "Many are not clear about the credentialing process and what's involved in the evaluation—could be popularity contests—but in other places there's a thorough and vetted research process and interviews with competing firms."

"The challenge is there are so many of them and it takes time to manage them around other deadlines," notes Timothy Corcoran of the Corcoran Consulting Group in Lawrenceville, New Jersey, and 2014 president of the LMA. Some, he says, employ a rigorous process that takes months while others are "happy to take your info from the phone book."

Corcoran says firms ultimately will choose to participate in the surveys that work for them. "In any marketing ecosystem, you can select which ones meet your needs," he says. "The challenge I have is with marketers who say [surveys] are bad ideas—we should get rid of them. It's possible that Joshua and his peers have enough leverage to get the key players to take notice, to collaborate to find another way." ■

Governments Go ODR

Ambrogi on Tech

Tax boards use an online system to resolve disputes

by Robert Ambrogi

As a proving ground for online dispute resolution, there is no better venue than eBay. Transactions there give rise to some 60 million disputes a year. Virtually all are handled through eBay's own ODR process. Ninety percent of the disputes are resolved through the software alone, without a need for human intervention.

Of course, eBay and ODR are a natural fit. Buyers and sellers make their deals entirely online, so it makes sense for them to handle their disputes there. But what about brick-and-mortar disputes? Can eBay's style of ODR work to resolve them?

For one decidedly brick-and-mortar type of dispute—property tax appeals—the answer is turning out to be yes.

In 2011, the man who designed and ran eBay's ODR system, Colin Rule, left eBay and partnered with Chittu Nagarajan, the woman who formerly ran the largest ODR system in Asia. Together they founded Modria, where they assembled their own ODR platform, which was based on technology they licensed from eBay.

An early customer was the British Columbia government, which used the platform to manage appeals of property assessments. It was subsequently adopted by property tax assessors in Durham County, North Carolina; Alachua County, Florida; Orleans Parish, Louisiana; and Davidson County, Tennessee. In December, the Ohio Board of Tax Appeals launched a statewide online resolution center powered by Modria's technology.

4 STAGES OF ONLINE DISPUTE RESOLUTION

Modria's name is an acronym for "modular online dispute resolution implementation assistance." The technology is built around four modules, representing four stages of ODR: problem diagnosis, automated negotiation, mediation and arbitration.

"These modules work like Legos," Rule says. "We can click them together and dynamically build appropriate resolution flows for a wide variety of different kinds of disputes."

In Ohio, where most appeals still require a live, in-person hearing, the platform is used for case management more than case resolution. It starts with a problem-diagnosis module that helps a taxpayer evaluate the strength and costs of a potential appeal. Many cases never pass this stage, Rule says.

If the taxpayer moves forward, the case is filed through the platform and managed there throughout the process. The platform even manages check-ins on the day of the hearing and alerts the hearing examiner when the parties are ready. Hearing examiners use the platform to draft their decisions, drawing on templates and a library of preapproved language covering different points of law and issues.

By contrast, in Davidson County, Tennessee, which includes Nashville, the process is less formal. There, a taxpayer goes online to check his valuation. If he decides to challenge it, Modria's platform walks him through the process of filing a review request. The taxpayer explains why he believes his assessment is incorrect and can upload photographs and other supporting documentation. The system even allows the taxpayer to add information on comparable properties from a third-party property-valuation service.

Someone from the assessor's office reviews the filing and assigns it to an appropriate next step. Depending on the case, an inspector may visit the property and meet with the taxpayer. Most disputes are resolved through a mix of online and offline communications.

Modria's modular approach enables the technology to be adapted for a range of uses, Rule says. In the Netherlands, Modria built a system for the Legal Aid Board that helps divorcing parties reach a separation plan. If they are not able to create a plan on their own through the system, it provides an online mediator who will assist them. If mediation fails, the case is moved to a final, binding decision-maker.

Rule, who is not a lawyer, says that when he first began working in ODR more than a decade ago, lawyers were skeptical of it, if not scared. Now, he believes ODR is on its way to becoming widely used and accepted.

"For attorneys who are open-minded about this technology," Rule says, "there is a huge potential." ■

Robert Ambrogi is a Rockport, Massachusetts, lawyer and writer. He covers technology at his blog LawSites and co-hosts the legal affairs podcast Lawyer2Lawyer.

For Sale: LwFrm—GrtDeal

Valuing and selling a firm takes time, matchmaker skills

ILLUSTRATIONS BY STEPHEN WEBSTER

BY SUSAN A. BERSON

SELLING A LAW PRACTICE IS AKIN TO A dating game for solo and smaller-firm practitioners. Finding the right buyer who fits with a particular seller doesn't happen overnight.

"Generally, for a lawyer who decides he or she is going to sell, the process starts with being careful to reveal just enough information to pique a prospective buyer's interest in learning more about you and your business," says Ed Poll, a lawyer who has been helping other lawyers sell and buy firms since 1990. He is the author of *Selling Your Law Practice: The Profitable Exit Strategy*.

Wisconsin lawyer David J. Herrick, for example, is seeking an eligible buyer.

"I'm looking to retire," says Herrick, who has been practicing more than 30 years in rural Niagara. "I have my own building and office in it. File cabinets, desks, chairs. I know the building and office could be used for many commercial applications. I have the option of listing it with a Realtor. But I'm the only lawyer for our tri-county area. I'd really like to see another lawyer who's a good fit to take over what I did."

What Herrick did was build his practice from the ground up. "I graduated from the University of South Dakota, but I was born and raised in Waukesha [west of Milwaukee]. When I graduated, I knew I wanted to come back to Wisconsin. I studied for the bar, passed and always knew I wanted a rural area, so I came here and started my own practice."

Herrick understands the daunting nature of starting a practice out of law school in general, but also in this economic environment. "Of course, a problem today for so many young lawyers is that so many are graduating with significant debt, which can make financing a firm difficult," says Herrick.

David Herrick

PHOTOGRAPH BY SARA STATHAS

"When you're a young attorney like I was coming to an area that didn't have any attorneys, you try to get the blessing of the mayor and the city council. I was a member of the American Legion, and you participate—get to know people. That's the way to get the word out about you and what you do," he says.

Getting the word out is what Herrick is trying to do now. "I've let my clients know I'm looking toward retirement." But the buyer eligibility pool can be shallow for lawyers looking to sell because of the rules governing the sale.

"A lawyer's fiduciary duties play a big part in who a firm can be sold to," says Dennis A. Rendleman, ethics counsel for the ABA's Center for Professional Responsibility. "And that means a seller can obviously only look at buyers who are lawyers with the appropriate education, bar admission and skills to take over a seller's clients and cases.

"However, a seller should first learn whether the state where you practice has adopted Rule 1.17 of the ABA's Model Rules of Professional Conduct, titled Sale of a Law Practice. Most states have adopted the rule, which allows for the sale of an entire firm or just a particular area of practice, though some states have variations."

The center provides an online comparison of the applicable state laws adopting Rule 1.17. (For more on Rule 1.17, see "Set Sale," page 66.)

Familiar with Wisconsin's adoption of Rule 1.17, Herrick dipped his toes in the pool by posting the following ad in the *Wisconsin Bar Journal*:

NORTHEAST WISCONSIN LAW OFFICE in beautiful Niagara for sale. Reception area, four offices, conference room, library, file room and more. Contact Attorney David J. Herrick, P.O. Box 137, Niagara, WI 54151 or (715) 251-4551.

Buyer's Due Diligence Checklist

The checklist below also coincides with a seller's preparation to ensure documentation is organized for anticipated buyer review.

- Filed federal income tax returns for the previous three to five years.
- Payroll tax returns.
- Accounts receivable.
- Lines of credit or other debt agreements.
- Third-party/vendor agreements (equipment, leases, subscriptions).
- Professional liability insurance policy (and applications) with focus on prior acts and "tail" coverage terms.
- Staff/employee benefits.
- Staff/employee evaluations.
- Conflicts checks/clearance system.
- File management (open, pending, closed cataloging and storage of matters).
- Readily accessible policy manual or operations protocol for passwords of computer system.
- Up-to-date chart of all files for transitioning and closure.
- Updated information for contacts (employees, clients, vendors, suppliers, memberships).
- State bar's client file retention rules.

"I placed the ad with the *Journal* because the ideal situation for me is that I'd like to find someone who is admitted in Wisconsin, wants a rural practice, and is capable of handling real estate law, probate matters and some litigation," he says. "I'd stay on for about six months on a part-time basis. ... I'm willing to mentor to make sure that the transition is a good one, and then the goal would be that I'd have the new lawyer take over the practice."

Herrick understands that his ad appeals to specific tastes. "I've enjoyed it, but a rural area isn't what many lawyers want," he says. "We'll see who responds to the ad."

But not all lawyers may find themselves in circumstances in which publicizing their intentions is in their best interests.

"I deal with lawyers who are in all kinds of circumstances, and especially those when discretion is needed," Poll says. "It's still a business, and sometimes it doesn't pay to advertise that you're wanting to close your doors."

Indeed, sellers in more lawyer-populated areas where the experienced-lawyer demand outweighs the client supply may find that instead of eligible buyer nibbles, their selling intentions may tee up staff or clients as potential targets for poaching competitors. That's one reason Poll created an online attorney marketplace, LawBiz Registry.

SEEKING TO BUY

Jim Cunningham is a California lawyer who placed an ad on LawBiz looking to expand in the greater Sacramento area, Truckee-Incline Village and Ventura County.

"I would be completely open to talking to an attorney who says I want to retire in 18 months," says Cunningham, an estate planner of more than 20 years.

Cunningham's firm has a presence in Southern and Northern California due to five acquisitions that expanded his practice.

"My first acquisition actually started out of necessity of helping someone else's clients in 2003," says Cunningham. "I ended up with a lawyer's practice because I was working in an area where there was a lawyer who had died without a succession plan. I ended up hiring his wife, taking control of the files, and helping out the firm's clients—who were people who would have been ships without rudders because the lawyer had not put a succession plan in place where another lawyer would be ready to step in.

"The second acquisition was from a lawyer who was leaving his practice to become a judge. Another acquisition was from an attorney who was moving to Colorado, and then 2013's acquisition was from a well-regarded retiring California lawyer. She had made referrals to me during her career. I knew what she did. She knew what I did. That acquisition of her firm—it just made good strategic sense since she was based in Auburn, and I moved into Northern California."

In addition to Poll's registry, bar ads and consultants, law school placement directors are another resource for potential buyers. But be prepared that after the initial attraction, the chemistry may not be there.

"Before you ever get to the conflict checking and due diligence phase, the seller and buyer have to talk," says Poll. "They need to feel each other out, kind of like a first date."

Indeed, Cunningham's experience has been that not everyone he approaches is a match. "The ideal seller is going to have an existing client structure which doesn't present conflicts, yet has business development opportunities for future work," he says. "Those are the kind of factors for me as a buyer that are probably common to most buyers."

Cunningham also takes into account a selling attorney's personality and philosophy of work and clients. "Discussions may end because something is just off," he says.

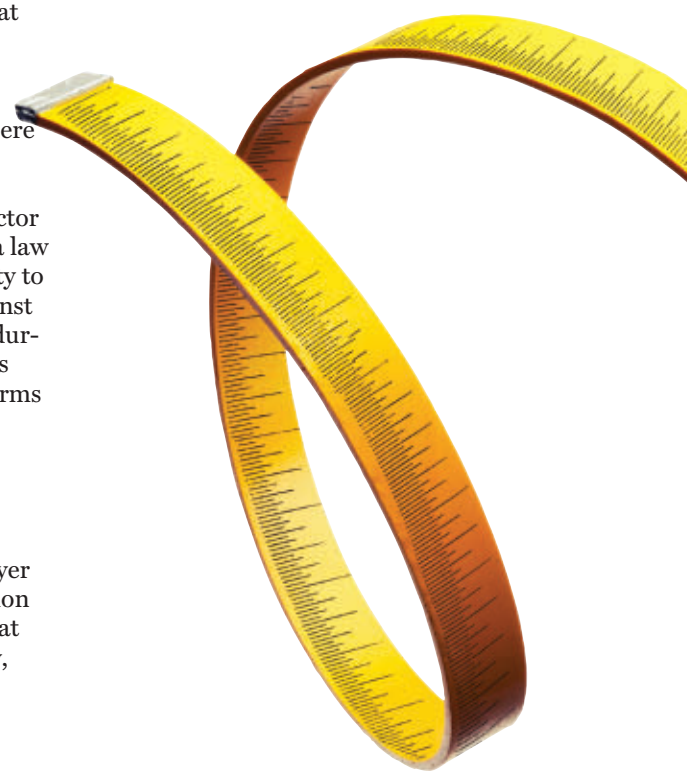
PREPARING FOR SALE

All practices have value. Maximizing value means making sure the

financial house is in order. "From a seller's perspective, there are things you should be doing before you decide to sell to maximize value—and keep doing once you decide to sell," Poll says. They include:

- Increase the profit margin. "Increasing billable hours is the obvious way to boost profits," says Poll. Consider investing in technology designed to free up time for additional billable work.
- Diversify the revenue stream. "Diversification decreases adverse risk to your financial bottom line if a client leaves," says Bill Brennan, the president of Brennan Strategy, a West Chester, Pennsylvania-based consultancy on law firm financial matters. He is a former principal of Altman Weil who has worked with Am Law 200 firms. Realization rates for accounts receivable are key. "Stay on top of collections," adds Poll.
- Continue business development and branding practices. "The feedback a buyer receives when conducting due diligence should be that the seller is known as the 'go to' attorney for the seller's practice area in that locale serviced," Poll says.
- Streamline operations. "Good management sells," says Poll. Low overhead, current and up-to-date data for clients, proper case management procedures: These are things that are attractive to an eligible buyer, according to both Brennan and Poll, and that can boost the seller's asking price.

Bill Brennan



PHOTOGRAPH BY DAVID FONDA

VALUING A PRACTICE

Fixed and intangible assets are the subjects of a valuation, though there is no one-size-fits-all method for measuring value to set a firm's price, Brennan and Poll agree.

"Valuation is important, but it's not necessarily a buyer's deciding factor in whether a deal moves forward," Brennan says. "For example, when a law firm is looking to buy because its partners want to add another specialty to their list of current practice areas and services, I've recommended against buyers doing valuations in the early stages. It wastes money and time during a phase when a prospective buyer should focus on whether a seller's practice areas present synergies and minimal financial headaches in terms of conflicts clearances."

Expect to hire a CPA or experienced consultant to assess the assets being sold. "Fixed assets—equipment, furniture—those are relatively easy to value," says Dale Lash, partner-in-charge of RubinBrown's Business Valuation Services Group in Denver. "Goodwill—that is the intangible asset that you're really looking at because that is what a lawyer or professional services firm is transferring." Goodwill is the combination of the lawyer's knowledge, skill, judgment and reputation, he says. "That list shows you why goodwill itself is more difficult to measure than, say, a desk. Goodwill is unique to that individual or firm."

How do you put a price on a lawyer's reputation? An earnings multiplier is a common method for goodwill valuation; deriving it, however, is a subjective process. "Goodwill, if there is value in it, flows from the ability of the seller to successfully transfer a book of business to the buyer," Lash says.

For the valuation experts to value goodwill, they evaluate the future income stream's components. Those components calculate a number used for an earnings multiplier.

ABA Model Rule 1.17: Sale of a Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including goodwill, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale,

(2) the client's right to retain other counsel or to take possession of the file,

(3) and the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within 90 days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Jim Cunningham

PHOTOGRAPH BY TONY AVELAR

"Goodwill for a group in a professional services firm is valued differently than an individual practice," says Lash. "The factors for evaluating the income and revenue streams differ."

Brennan and Poll describe valuation as an art, not a science, because of the subjective factors. However, common factors for a solo practitioner's earnings multiplier calculations include earnings history, geographic location, the practice's marketing plan and the seller's competition.

"Each practice is unique, just like each lawyer," Poll says. "That being said, a general rule of thumb for a standardized multiple range is one-half to three times the gross revenues."

Analyzing the subjective factors may increase or decrease the multiplier. "For example, assume the buyer can't make the clients comfortable for some reason—that may result in a lower multiple. Ultimately, you want to know what kind of repeat business to expect a buyer to have."

For small to medium-size firms, partner earnings and withdrawal rates are evaluated. "What's important is to learn meaningful information about the firm, its lawyers, client base and operations," Brennan says. "Questions such as: Are the nonretiring partners too dependent on the retiring partner? Is the region or practice struggling from a sluggish economy?" This information allows for benchmarks.

"Comparable-sized law firms may be researched when possible," says Brennan. "Factors that go into measuring value include the ability of the lawyers to perpetuate business, the level of their name recognition, and their respective expertise in the specialties or practice areas.

"Take a founder and rainmaker of a 20-attorney firm, for example, who wants to retire.

"That founder may explore selling and merging into a bigger firm, which could create value for the founder of the firm compared to seeing if, logically, the younger partners buy the retiring partner's ownership interest. The underlying philosophy of valuing a practice goes back to doing what a seller can do to boost profitability," Brennan says.

DOING YOUR DUE DILIGENCE

Scrutinizing balance sheets and liabilities and determining the status of credit lines along with other types of debt is done during the financial analysis.

Potential buyer Cunningham says, "In addition to client relationships and future referrals that offer the future stream of income from them, I'm looking at business operations."

The kind of infrastructure a seller offers becomes important. For example, an acquisition can bring additional costs for a buyer to integrate a seller's technology (or lack of it) for operational management.

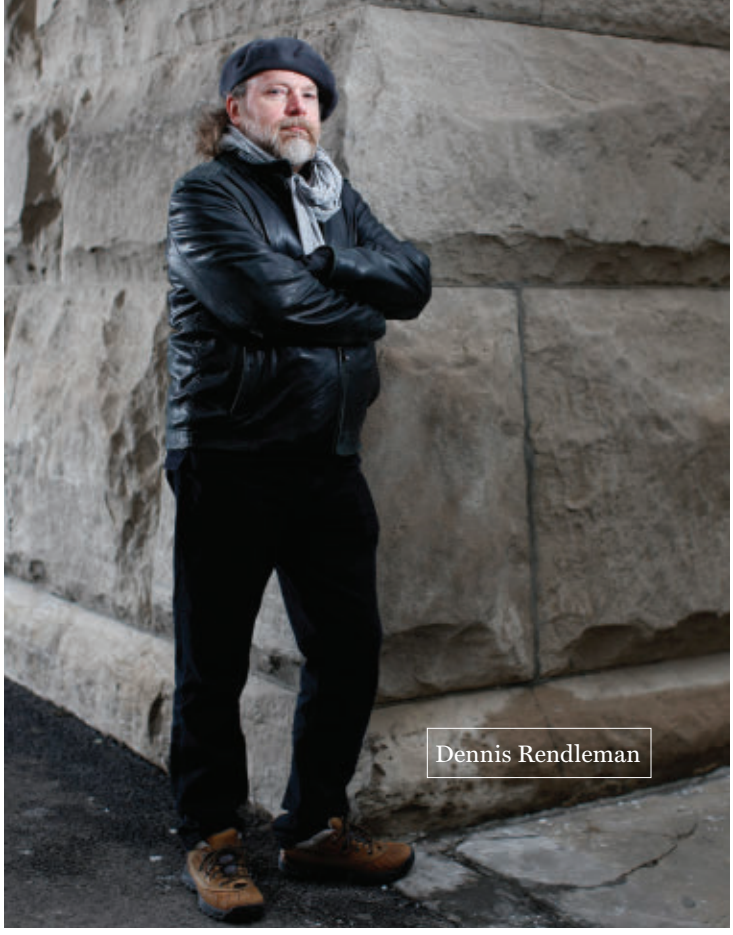
"I run an efficient business. Not all solo practitioners do," says Cunningham. "I may want discounts to the price for inconsistencies or operational weaknesses that increase my acquisition costs."

Anticipate scrutiny. "I recommend buyers review categories and amounts for expenses," Brennan says. "Are there uncharacteristic expenses? Do high client entertainment expenses evidence a client relationship or indicate a problem? Is someone exceptionally profitable or unprofitable?"

Both seller and buyer should address professional liability concerns. "The professional standards for conflicts clearance and appropriate administrative records management procedures need to have been in place to avoid professional liability," Poll says.

Sellers must verify that the buyer's expertise, credentials and reputation are intact in order to minimize potential liability.

"Inquire of the bar associations regarding disciplinary actions or complaints," Poll advises. "Inquire about the availability of 'tail' insurance coverage," as well.


Dennis Rendleman

WAITING THE MANDATED TIME

At a minimum, a seller and buyer should plan for 90 or more days before consummating a sale. Professionals say that from start to finish, a law firm sale could take as long as 12 to 24 months.

"It depends on the condition of the seller's practice, and sometimes even the seller's condition—say, if the seller is a solo whose health is the reason for the sale," Poll says. "A sale can't happen overnight because the rules dictate a time period for client notification about the deal.

"Generally, the attorney selling has to obtain the consent of the client to transfer the file or, depending on the state's law, not receive an objection from the client to the notification during the rule's prescribed time limit that gives a client time to object to turning over the client's file," Poll says. "If it turns out a client doesn't want the file information turned over to the buyer, the confidentiality rules prohibit the disclosure. Not waiting for your state law's time period for consent to expire can get a seller into real trouble."

Also ABA Model Rule 1.16(c) provides that a lawyer must comply with applicable law requiring notice or permission of a tribunal when terminating a representation.

"In practice, that means you may have a timing issue for the settlement or closing," says Poll. "A lawyer who is selling a litigation practice, for example, should be prepared for the possibility that he or she may not be able to withdraw from the representation. If a jury has already been empaneled, that could be a situation where the seller couldn't withdraw, so you couldn't have a closing date until after the trial."

Buyers looking to expand into new markets present additional opportunities for a seller, but also time delays. "Take an out-of-town buyer that has sufficient kinds of clients and work that the seller does so that the buyer has the abilities and capacities to take on the seller's practice with few conflicts. Strategically, scale-wise, sometimes that buyer may need to spread out the costs of the acquisition within its existing operations," Brennan says. "Planning and structuring that takes time."

Cunningham says of his experience that even an arm's-length transaction takes time.

"Take the due diligence I did with retiring lawyer Ann Armstrong. Our process, from start to finish, was about seven months. I had already known her, and she knew something about my practice to know that I was a good fit for what she needed for her clients. I knew she had about six staff [members]. But I still had to sit down and review the client files for conflicts, and then sit down with her clients to meet them and learn what they needed. That was an organized firm with client information readily available." Brennan, Cunningham and Poll concur that additional time should be anticipated for due diligence needs where outdated client data exists.

MAKING TIME FOR CLIENTS

It is in the financial best interests of both the seller and buyer to allocate time to make the seller's clients comfortable with the sale process. The number of clients a buyer can reasonably count on to stay represents the future income stream.

"Yet law firms are unique because, unlike other businesses, you can't really tie down the client base such as with noncompete agreements as with other types of business sales and mergers," Lash says. Neither the seller nor the buyer can force a client to stay if the client doesn't want to.

The good news is that the rules encourage a seller's continued involvement after signing the purchase agreement.

PHOTOGRAPH BY WAYNE SLEZAK

Seller's 'Due Diligence of Buyer' Checklist

- Researching buyer's expertise and skill.
- Verification of bar admission, license and certifications (if applicable).
- Researching buyer's reputation.
- Existence of any malpractice claims (professional liability insurance carrier, bar and court records, if applicable).
- Buyer's philosophy toward practice of law.
- Buyer's philosophy toward clients.
- Availability of "tail" insurance coverage.

"ABA Formal Opinion 468 addresses what a seller can do when facilitating a law firm sale done under Rule 1.17," says Rendleman. "Basically, the opinion provides that a selling lawyer can assist the buyer in the transition period for a reasonable time after the official date of the sale, so long as there is no additional cost to the client."

Poll and Brennan both say parties should expect transitioning to take time after they sign the sales agreement. "The parties to a sale need to understand that integration isn't automatic for staff, operations and sometimes even clients," Brennan says.

DOCUMENTING AND NEGOTIATING

The sale of a law practice involves documentation, due diligence and negotiations over price and payment structures.

"The sale of a law firm happens in a complicated market," says Brennan. "Before you ever start negotiations, you want to make sure you're identifying only serious targets and have accurate information about your options to achieve the best deal."

Transactional lawyers will understand that an offering memorandum, letter of intent, nondisclosure agreement and (eventual) purchase agreement routinely document the sale process. "The firm's legal structure, ownership, management, governance, along with client breakdown, go in the materials," Brennan says.

The letter of intent specifies the buyer is buying the practice. "Ethically, a buyer cannot select individual cases or clients to purchase," Poll says.

After the letter of intent is signed, due diligence starts. And with it sellers should prepare for a buyer's shifting perspective of scrutinizing inconsistencies to beef up negotiating power.

"Remember, the practice of law is personal," says Poll. A seller reminiscing about building a practice with a buyer nitpicking over details brings emotionally charged negotiations. "Heated discussions between the buyer and seller could kill a deal that otherwise makes sense," he adds. "Hiring an experienced professional for handling those negotiations may keep a deal from washing out."

Ed Poll

PHOTOGRAPH BY JONAH LIGHT

Deal structures vary for law firm transactions. "With the factors that go into sizing up firms as prospects, don't assume that the sale structure that worked for one firm automatically works for another," Brennan cautions. "After all, a person entering into an important business transaction without a lawyer is foolish. It makes sense that a lawyer without experienced representation when entering a transaction could experience the same fate."

One common deal structure is an earn-out, which ties the purchase price to the amount of business done over a certain number of months post-sale, or a percentage of clients remaining with the practice determined as of a date post-sale.

Poll doesn't favor earn-outs for retiring lawyers. "It doesn't work for many sellers because if you're retiring, you need to know with certainty how much money you're going to have to live on.

"One thing I always do: The sell number is fixed. If you need flexibility, you can have a payment schedule that is flexible. But the seller needs to go to sleep at night knowing how much he can spend, and you can't do that without the sell number being certain." Also with a fixed price, the buyer's sale terms can build in protections. "For example, if the seller's health is an issue such that the seller's presale performance doesn't involve making clients comfortable during transition,

that can result in a decrease of business for the buyer," Poll says. "A buyer would want to make sure that there's a term covering that precaution before closing."

Cunningham says of the structures of his five acquisitions, "it really came down to the sellers' particular circumstances and how I made that work with what I needed as a buyer. That dictated how the payment structures would be."

Dale Lash

SMOOTHING THE TRANSITION

Brennan says that "buyers should make sure a plan exists about what is going to be done to integrate the staff, the operations, the clients." Given that Rule 1.17 requires all clients to be informed about the sale, Poll advocates face-to-face meetings and similar letters of introduction.

"The language used by the seller is obviously going to be specific to the practice area, but conveying a message of trust and confidence in the buyer's skills and the seller's value of the client relationships is the purpose," Poll says.

From a buyer's standpoint, the seller's confidence level in the buyer's ability to provide continuity of services is key.

"We had a letter from the seller to the client explaining the situation: 'I'm retiring; here's the new attorney,' " says Cunningham. "There's a 90-day limbo period in the rules, of course, where I waited. To give you an idea of how much time I put in transitioning the seller's clients, last year I had about 700 meetings with the clients I took over from the retiring lawyer in Auburn. I'd do the whole review of the clients' files, then meet and confirm with the clients of the seller whose files I'm taking over to walk through with them the existing estate plans that they currently have.

"In estate planning, we've had changes in the law; so you go over that they understand the changes, and it's a long process of asking the same kind of questions you would as if someone new walked in the door for help. I'd recommend other buyers who want a smooth transition allow for time to do the same because the clients need to get to know you, and you need to know them—that is, if you're expecting them to stay after the seller leaves."

Another marker for the transaction timeline is when to buy or sell. "When a geographic legal market lacks a presence for a specialty that your firm has, expansion may be worthy of the partners' consideration," Brennan says. Likewise, Poll says, "when your practice area is hot, that's obviously of greater value. If you're contemplating retirement, you have to consider that while you may want to stay engaged in the practice of law, sometimes circumstances don't allow you to do it. Your health or a loved one's health issues can turn you from lawyer into caregiver."

Procrastination is costly. "Nearly every week a lawyer in his 60s or 70s, wanting to sell and retire, calls me," Poll says. "It's usually the wife of the lawyer, I know, that is making that lawyer call me because she can't get him to make a plan, and she sees what he doesn't: He's not immortal.

"My message is simple. Make a plan while you are able. Start the process early, the earlier the better." That's the best way to maximize value and be sure clients get uninterrupted service. ■

Susan A. Berson, author of several finance and tax books for lawyers, is a partner with the Banking & Tax Law Group of Leawood, Kansas.

> "Nearly every week a lawyer in his 60s or 70s, wanting to sell and retire, calls me. ... My message is simple: Make a plan while you are able."
>
> *–Ed Poll*

PHOTOGRAPH BY MCCORY JAMES

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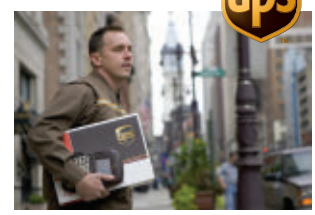

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Before the Fall

SOMETIMES STEAL FROM THOSE THEY'VE VOWED TO PROTECT

By Stephanie Francis Ward with illustrations by Justin Metz

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310-559-5833

CRYSTAL METH ANONYMOUS
855-638-4373

GAMBLERS ANONYMOUS
626-960-3500

MARIJUANA ANONYMOUS
800-766-6779

NARCOTICS ANONYMOUS
818-773-9999

NATIONAL ASSOCIATION OF ANOREXIA NERVOSA & ASSOCIATED DISORDERS
630-577-1330

NATIONAL HELPLINE FOR JUDGES HELPING JUDGES
800-219-6474

NICOTINE ANONYMOUS
877-TRY-NICA

OVEREATERS ANONYMOUS
505-891-2664

SEX ADDICTS ANONYMOUS
800-477-8191

SEXAHOLICS ANONYMOUS
866-424-8777

AT ONE POINT IN HIS LEGAL CAREER, Dallas attorney Tom Corea had a fancy downtown office, a six-bedroom/six-bathroom house, a fleet of high-end cars, and his own indoor horse arena. He also had a wife, a girlfriend and a mistress.

But Corea's high-profile, extravagant lifestyle belied a serious problem that would eventually lead to an undoing covered in tedious detail by local media.

In 2013 he pleaded guilty to three counts of misapplication of fiduciary property and he's now serving a 25-year prison sentence in Texas.

How could a lawyer reach such professional heights, with all the trappings of success, only to crash and burn so spectacularly?

During a court appearance, Corea told the Dallas County Criminal District Court that he developed an addiction to Klonopin, a prescription drug that treats anxiety, and to other prescription medicine, including a seizure medication.

Corea's former attorney, John M. Helms Jr., adds more context, telling the *ABA Journal* that Corea wasn't making money the way he once was, and that he had marital problems. Helms says the personal and financial troubles led Corea to become someone entirely different from the person he envisioned himself to be when he graduated from the University of California's Hastings College of the Law in San Francisco some 20 years ago.

"He was taking medicine for [stress] and I think he started to become dependent on the medicine, so it became sort of a spiral," Helms says. "The stress got worse, the marital problems got worse, the practice got worse and the prescription meds use got worse."

Prosecutors alleged Corea took $3.8 million from 58 clients, who retained him for plaintiffs personal injury work. In addition to charges of misapplication of funds by a fiduciary, prosecutors charged Corea with theft, securing the execution of a document by deception and fraudulent use of identifying information.

If lawyers think that Corea's experience is particularly unique to him, Helms says they are mistaken. There are warning signs to watch for. Ask yourself: Do you feel like your professional life is out of control? Are you using alcohol and drugs to alleviate pressure, stress and sadness?

"I think it's important for law students and young lawyers to understand the kinds of personal situations and pressures that lawyers can face at different points in the practice," Helms says. "They also need to be told that the way to deal with it is not to try and work things out like a gambler would and think that they'll get the next jackpot and everything will be OK."

About 18 percent of attorneys in practice two to 20 years experience problem drinking, according to a 1990 study in the *International Journal of Law and Psychiatry*, compared with about 10 percent of the general population. Of those practicing 20 years or more, 25 percent were problem drinkers, the study states.

There's a widely held belief that lawyers struggle with substance abuse, depression and anxiety at a very high rate, says Patrick Krill, a former land-use lawyer in Los Angeles who directs the Legal Professionals Program at the Hazelden Betty Ford Foundation, the nonprofit alcohol and drug addiction treatment organization.

"But there is actually a paucity of current and reliable data on the behavioral health of attorneys," he adds. Krill's organization is working on a new study, with the American Bar Association's Commission on Lawyer Assistance Programs, looking at substance abuse rates and patterns among lawyers, as well as mental health concerns. He expects the findings will be published this summer.

Counselors say that misappropriation of client funds usually occurs when money doesn't come in as a lawyer had expected, leading to stress in both personal and professional lives. Many self-medicate rather than getting help.

SHAME IS OFTEN A COMMON TRIGGER, says Krill, who is based in Center City, Minnesota. "It becomes a pattern of guilt, shame and self-medication," he adds. "That's especially likely when you have somebody who's involved with theft."

Lawyers who get caught often say that they intended to pay clients back. The attorneys who represent them say that's probably so, but many stumble as they get deeper in debt. The ABA's Standing Committee on Client Protection regularly surveys the administrators of lawyers' funds for client protection. Of the United States administrators who reported information, it was found that in 2013, a total of 936 lawyers were involved in claims approved.

If clients do get something back, it's

often significantly less than what was stolen from them. Like many lawyers accused of stealing clients' money, Corea had no prior record of public discipline in the state where he practiced. So clients often have no reason to suspect anything until it's too late.

"He impressed me because he had a suite at the top of a building in downtown Dallas," says Glenda McCoy, who hired Corea to represent her in a wrongful death suit against Pfizer, the pharmaceutical company. The case settled for $225,000 in March 2012, but she never got the settlement money, reportedly because Corea kept it all for himself. Instead, she accepted a $40,000 award in 2014 from the Texas Compensation to Victims of Crime Fund, the State Bar of Texas' client security fund, which caps awards at that amount.

CLIENTS MAY NOT NOTICE WHEN A LAWYER IS HAVING A HARD TIME, but other lawyers do. Yet they are often reluctant to say anything, because they don't have direct knowledge of behavior that violates professional conduct rules, says Terry L. Harrell, executive director of the Indiana Judges and Lawyers Assistance Program in Indianapolis.

"With personal problems, often you only see the tip of the iceberg and don't know exactly what the problem is or what is going on," says Harrell, who serves as chair of the ABA's Commission on Lawyer Assistance Programs. Most programs offer referrals and peer assistance, she says, as well as consultation and sometimes facilitation for interventions.

People seeking help for addiction or mental health problems often fear that lawyer assistance programs will share information with attorney discipline agencies. What they don't realize is that many states extend attorney-client privilege to LAP staff and, Harrell explains, that LAP staff often have no duty to report misconduct to regulation agencies, including behavior that involves stealing client funds.

What are the signs that someone might be having problems?

"If someone is not functioning, that's all you need to know to go talk to them," Harrell says. It can be a very emotional conversation, which is why most avoid it.

"Could someone get angry and defensive? Absolutely," she says, mentioning ways to approach people. True concern is a good place to start. Maybe note that the person is missing more work, she says, or that you've noticed they don't laugh like they used to.

"You want to get them to start somewhere and at least talk to a family doctor."

If the person's response is that they're struggling but will be OK, Harrell adds, let them know you are available if needed.

"So if they do realize they're at a point where they need help, you are someone they can come to," she says. "You're not there to criticize or get them into any trouble; you just want to help. And admit that you don't understand everything that's going on."

She also advises having steps in place, should the person come to you for help. Calling your state's lawyer assistance program works well.

"A pretty large number of friends call and ask if the program is really confidential. As soon as I convince them 100 percent that I can't take anyone's law license, they put the person on the phone," Harrell says. "Then it quickly becomes a self-referral."

Lawyers in Bend, Oregon, may wish they'd taken the initiative to approach their state bar's attorney assistance program about Bryan W. Gruetter, who was accused of taking $1.1 million from clients.

According to a November 2013 U.S. district court filing, Gruetter diverted client retainers and settlement funds through wire transfers. He and others used the money to pay for personal and business expenses. His crimes took place between 2008 and 2012.

After Gruetter's arrest, other Bend lawyers told the State Bar of Oregon's Client Security Fund Committee that they often saw him at restaurant bars on weekdays around lunchtime playing video poker, says Steven R. Bennett, a Portland lawyer who chaired the committee.

Gruetter pleaded guilty to one count of conspiracy to commit wire fraud. He received a 63-month sentence with three years of supervised release. Bryan Lessley, a federal defender who represented Gruetter, did not respond to interview requests.

The Oregon State Bar assumed control of Gruetter's firm in 2012 after 19 people complained. Gruetter, who resigned from the state bar, didn't have a record of public discipline before 2012, so clients had

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no reason to think he would steal from them. Indeed, he was a former Oregon State Bar ethics committee chair.

GRUETTER'S PETITION TO ENTER A GUILTY PLEA stated that he suffered from cirrhosis of the liver and bipolar 1 disorder, also known as manic depression. A prohibition on gambling is included in Gruetter's supervised release conditions.

"He was very good at hiding things. He'd be gone for weeks at a time and would tell people that he was sick or someone died," says Tim Williams, a Bend personal injury lawyer. "Clients would ask him for a meeting, and he'd cancel at the last minute."

Williams mentions a client who left him for Gruetter. She had called Williams, who was in a deposition and couldn't call her back immediately. She was anxious about her case, Williams says, and later that day she fired him and hired Gruetter.

Gruetter acknowledged that Williams' firm had done substantial work on the case and agreed to pay him a $50,000 referral fee. Williams eventually got the money, after various excuses from Gruetter.

The woman received her portion of the settlement, too, but she later found out that Gruetter didn't pay her medical providers. They sued her, and Gruetter defended the case for free, says Williams, a partner with Dwyer Williams Potter. She lost in arbitration, and Gruetter appealed. He did not respond to the motion for summary judgment that the providers' lawyers filed, and a default judgment was entered against the woman.

The medical providers started a collections process against the woman, and her wages were garnished, says Williams, who now represents several of Gruetter's former clients. He found out that Gruetter often told clients he was keeping all or part of their money to cover outstanding liens. He also told clients that if they waited long enough, the lien holders would abandon their claims and the client would wind up with more money.

That never happened, Williams adds.

"The thing about personal injury work is that clients have to hold out hope that they will get something at the end of the day. They're always hoping to get more," Williams says. "I think that's the way he was so successful stealing—it was the promise of more."

The Oregon State Bar's Client Security Fund paid 43 of Gruetter's former clients a total of $938,704. Some of the claim amounts were in the six figures, but each award was capped at $50,000.

The claims exceeded the fund reserve balance in 2012, but were investigated and paid over a period of two years, says Bennett, a partner with Farleigh Wada Witt. The Client Security Fund assessment, which is paid by active members of the Oregon State Bar, was raised from $15 a year to $45 to build the reserve back up.

As of September 2014, 52 applications related to Corea were approved by the Texas bar's client security fund, says Claire Mock, public affairs counsel for the bar's office of the chief disciplinary counsel.

According to Helms, Corea didn't intend to steal money.

"I think he certainly mishandled trust accounts. But I don't think his intention was simply to take people's money and run away. I think he intended to pay them back at one point," Helms says. "The problem was that as his law practice experienced financial difficulties, his ability to keep the firm operating was much harder than he thought it would be, and he allowed client funds to be used for that purpose, hoping and believing that a big hit was just around the corner."

Corea—who started his practice in Arizona and later moved with his family to Texas, where he joined Dallas' Bickel & Brewer—at one point had a successful debt-collection practice representing creditors. Much of the work involved default judgments, and he opened his own Dallas firm in 2003.

A significant amount of the collection cases were in the Navajo Nation court, Helms says, until Corea was suspended by the Navajo Nation Bar Association in 2009 for routinely requesting hearings held by telephone. According to the suspension notice, Corea claimed to have approximately 600 cases, 200 of which were in the tribal courts.

In 2010 the State Bar of Arizona publicly censured Corea. According to the finding, a Navajo Nation judge determined that Corea repeatedly used a dismissed Texas case to make it look like he had a scheduling conflict so he could get telephone appearances, rather than travel to court locations in Arizona. He also violated a court order directing him to transfer his tribal court cases to another lawyer by a certain date.

Around the time of his suspension by the

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Navajo bar, Corea switched his practice to plaintiffs personal injury work. He tried to set up a high-volume, assembly line practice, much like he had done with the debt-collection cases.

UNLIKE DEBT COLLECTIONS, Helms says, Corea's personal injury work couldn't run like an assembly line.

"The cases were different from each other, and there were more expenses associated with them," Helms says.

It's unclear what sort of trial or court experience Corea had when he started his personal injury practice.

"I asked him that, but I didn't push it," says Helms. "I think that Tom had a very high level of confidence in his own abilities, since he'd had so much success earlier."

Soon after Corea's theft arrest, he filed for Chapter 7 bankruptcy protection. Listed as unsecured creditors were CBS Outdoor, which sells advertising space, and Dallas-area affiliates of MundoFox, CBS, Fox and NBC. Together, the claims are worth more than $255,000.

"He kind of appeared out of nowhere in this heavy marketing campaign. I don't know anybody who has ever seen him in a courtroom," says Michael J. Hindman. A plaintiffs personal injury lawyer with Dallas' Rolle, Breeland, Ryan, Landau, Wingler & Hindman, he represents three clients against Corea. Two, a former client and a health care provider, are creditors.

As for the likelihood of more lawyers encountering problems like Corea's, Hindman responds: "I don't think anything happened to Tom Corea other than Tom Corea. If you're going to do plaintiff work, you need to understand going into it that it's a roller coaster," he adds. "If you decide to live your life like your best month is going to happen over and over again, you've got no chance."

The Arizona bar public censure for Corea is not listed in his Texas bar information. The Texas bar requires that members provide it information about out-of-state discipline, says Lowell Brown, the agency's communications division director, and it did not receive information about Corea's censure.

After Corea was evicted from his law office, the landlord discovered the name of a Navajo Nation judge scrawled on the walls. The vandalism also included the judge's phone number, disparaging comments about her and drawings of penises. This happened after Corea's theft arrest, while he was out on bail.

Dirty toilet paper was found on the floor, the light fixtures and bathroom sinks were missing, and the steel jamb of the structure's loading doors was pulled from the frame, according to the *Dallas Observer*. When prosecutors presented evidence of the damage, estimated to be $200,000, to State District Judge Mike Snipes, he raised Corea's bail to $2 million. Corea was taken into custody.

Shortly after that, Corea hired Helms, a Dallas sole practitioner who previously was a large-firm partner and an assistant U.S. attorney.

"I was very curious about how all this happened," says Helms, who agreed to defend the case for a reduced fee.

Creditors' lawyers say the case was less complicated. "From the records we obtained and the witnesses we interviewed, it became apparent that Corea was using client funds to support a lifestyle of the rich and famous, and he was a real jerk about it. Corea was a guy who became a real monster, and he was living well outside his means," says Amy Ganci, an Allen, Texas, lawyer. She represents American Asset Finance, one of Corea's creditors.

Her client provides litigation finance and funding to lawyers, and Corea sold the business his attorney fee interest on a case for $90,000. Later, he reportedly forged a document to make it appear he'd paid the money back, and sold the same attorney fee interest to another company.

The case settled, she adds, and Corea took all the money, including his client's portion.

According to the Chapter 7 filing, Corea was $7.1 million in debt, and his assets were estimated to be worth $1.6 million. A substantial amount of his assets was tied up in his six-bedroom house in Palmer, Texas, a 280-acre property where his wife, Jennifer, bred, trained and showed quarter horses. The couple named the property Whistlestop Ranch.

In 2010 Corea told GoHorseShow.com that he settled a class action pharmaceutical case for $30 million. And his law office was in the Renaissance Tower, one of downtown Dallas' most fancy high-rises.

The Moinian Group, which owns the Renaissance Tower, is listed as an unsecured creditor in Corea's bankruptcy filing, with a $300,000 claim.

It might seem unlikely that someone

could settle a case for $30 million and file for Chapter 7 bankruptcy two years later.

"Anything's possible. He played a lot in the quarter horse world, which is very expensive, and he had a lot of toys that were expensive," Ganci says.

Whistlestop Ranch recently sold for $1.7 million. Jennifer Corea had a homestead interest in the property, Ganci says, and got approximately $400,000 from the sale, with the rest going to the bankruptcy court. Tom Corea filed for divorce in 2012, according to the Ellis County clerk's office, and it was finalized on Dec. 30, 2014.

Stories like Corea's are rare, says Kenneth L. Cunniff, a Chicago criminal defense attorney. He also thinks that some lawyers who steal clients' money never get caught.

Cunniff currently represents Curt Rehberg, a suburban Chicago real estate lawyer who last year pleaded guilty to taking more than $1.2 million from clients. The Illinois Attorney Registration & Disciplinary Commission placed an interim suspension on Rehberg, and in October Rehberg filed a motion to disbar himself.

McHenry County prosecutors alleged that Rehberg, an attorney based in Cary, Illinois, was involved with several trust accounts, and he never distributed the cash to beneficiaries. One of the charges dealt with a donation of more than $500,000 intended for St. Jude Children's Research Hospital.

Rehberg's problems started around 2003, when the Illinois ARDC gave him a public censure for neglecting a client's zoning matter and falsely representing the matter's status to the client.

He paid the client $106,000, which was difficult, says criminal defense lawyer Henry H. Sugden III of Crystal Lake. Another client was unhappy with a result Rehberg obtained for her, Sugden adds, and Rehberg paid her $12,000.

Four people worked for Rehberg, according to Sugden. Rehberg paid them all benefits, including 401(k)s, and gave them raises—even after the real estate market crashed.

"He was a good lawyer," Sugden says, "but a bad businessman."

According to McHenry County Court records, Rehberg filed for divorce in 2006, and in 2007 a mortgage foreclosure case was brought against him. He didn't have a drinking problem, according to Sugden, until the financial problems started.

"After the shit hit the fan, he'd go home thinking, 'How will I keep the doors open?' Then he'd start drinking," says Sugden, adding that Rehberg did go to the Illinois Lawyers' Assistance Program, and he's also completed a treatment program.

"I think Curt feels better already," Sugden says of his client, who was sentenced to serve nine years in prison.

Cunniff, who would not comment on Rehberg's case specifically, says that when lawyers come to him for criminal or attorney misconduct defense work, he asks about their background and often advises that they contact a lawyer assistance program.

"Because they think what's perfectly normal isn't," says Cunniff, who is of counsel with SmithAmundsen, "they come away from LAP dramatically improved in their lives. Even if they end up losing their license or going to jail, they are eternally grateful."

IF YOU WANT TO CUT BACK OR STOP USING A SUBSTANCE, but haven't been able to do so, you might have an addiction issue, according to Krill. He also mentions cravings, repeatedly using a substance—even if it puts you in danger—giving up important activities because of substance use, and continuing to use, even when it causes relationship problems.

Admitting that they need help, Krill adds, is hard for many lawyers, and overall the profession does not offer much help.

"The professional climate within the legal profession tends to be emotionally isolating, rigorously demanding, anxiety-provoking and devoid of adequate consideration for any type of balance or personal wellness.

"Most attorneys wear their hard-earned ability to swim in such rough professional waters as a badge of honor. They aren't inclined to let others know they suddenly 'can't cut it,' " he says. "And it's that fear—that others will find out they're weak, vulnerable or troubled—that attorneys commonly tell me stands between them and getting the help they think they might need." ■

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TELLING TALES, ELUDING DEATH A new appro

BY RICHARD ACELLO

"The first time he murdered was to get a car," Jill Patterson says, "and the second time he murdered was also to get a car.

"At age 6 his mother didn't have a car, and they were doing illegal things in the house. So when he was 6 she said she was taking the defendant to a birthday party, and instead she drove him to an orphanage.

"Days before the second murder, the defendant wrote multiple entries in his diary about longing for a car: If only he had an automobile, he could travel to Montana and be a rancher, to Florida and grow oranges, to California and catch a boat somewhere.

"You need a car to possess a life."

ach changes capital cases in Texas

Photography by Justin Clemons

Patterson, a professor in the creative writing program at Texas Tech University, is describing a criminal defendant in a capital case and the nexus—the link between past experience and recent, tragic events—that underlies the narrative she wrote about him.

Patterson wrote this for Texas' Regional Public Defender for Capital Cases Office, known as the RPDO, as part of a radical approach to death penalty cases that has helped reduce the number of executions in a state that still leads the nation in that category.

Even as Patterson works on other cases, she is helping to expand that program, seeking other volunteer writers to research, interview and assemble life stories that can mean life or death for the accused.

Patterson recalls the event that got her involved in writing narratives and connected her with the RPDO.

"I found out a business professor was establishing this office of 'narrative management' at Texas Tech, and he translated it to a team of criminal defense attorneys. I was invited to a meeting and maybe it was just curiosity at first, but I felt like I had to go," Patterson says. "So I met Hans Hansen, who was involved in the nexus between narrative management and criminal justice. The idea drew me in."

A STUDY AND A THEORY

Hans Hansen isn't a lawyer and had no interest in death penalty cases back in 2007. Hansen is a management professor at Texas Tech University in Lubbock who was invited to help with the organizational design for the new public defender's office.

"For me, it was a research setting, so while they were getting help, I was conducting a study," Hansen says. He believes in narrative theory, which might be explained as "life (and organization) is a story."

In a 2011 article, "Managing to Beat Death: the Narrative Construction Process," published in the *Journal of Organizational Change Management*, Hansen explained narrative theory.

"We all story our lives," Hansen wrote. "We make sense of events by constructing narratives in an attempt to reconcile explanation and experience—to help us pin down and organize our experience."

Any coherence humans gain from the constant stream of experience, Hansen argues, is something our minds create in the wake of those experiences. "It is our doing. We abstract from experience to build narratives that help us to rein in that experience, put an order to it, and assign meaning—capturing what we can as it rushes by us."

"The postmodern view of narrative," he writes, "is that individuals and organizations are nothing more than the stories that constitute them."

An accumulation of an organization's stories becomes its culture. "It's the little old lady at the guard desk who wouldn't let the CEO in because he didn't have a badge," Hansen says. "That tells you that at that company, what is rewarded is following the rules."

When Hansen was approached by the Regional Public Defender for Capital Cases Office, he was charged with turning "lone wolf" defense attorneys into a team.

"The RPDO is the first of its kind in the country," Hansen says. "You have to be particularly qualified to do capital cases in Texas; and generally speaking, nobody is interested in capital defense work, so it attracts the very worst and the very best. If times are good, lawyers won't take the case, as it figures to be 'three years of my life for $25,000.' "

A COUNTERWEIGHT FOR THE DA

The RPDO was contemplated as an "anti-DA's office," Hansen says.

"The office was opened in 2007 and took its first case in early 2008," he recalls. "What I would do for the team was write a collective narrative about how they're going to defend versus the death penalty. So I met with a who's who of death penalty law in Texas. Our goal was to rewrite the way the death penalty is defended. We leveraged a hundred years of experiences, and then we set out to write a new story."

The death penalty story has been changing, and it appears close to expiration in some parts of the country. In 2000, there were 85 executions in the U.S., according to the Death Penalty Information Center. By 2007, executions had dropped to 42, to 39 in 2013 and to 35 last year.

In Texas, however, a conviction of first-degree murder is still likely to bring a death sentence. The state has accounted for 520 of the nation's 1,400 executions since 1976, according to the Death Penalty Information Center. But even in Texas, executions have declined, from a high of 40 in 2000 to 10 in 2014, the center reports.

A driver in the reduction of the number of Texas executions is the RPDO. Established by the state in 2007, the office is administered in Lubbock and staffed by attorneys, mitigators and investigators specializing in capital defense. The RPDO handles cases in all but the state's eight largest counties.

While looking to write new scripts for death penalty defendants, Hansen and those working with him had to account for narratives already in play, like "Don't rub the judge the wrong way—you've got other cases to think about" and other aspects of courtroom culture.

"Usually," Hansen says, "defense attorneys wait for the DA to give them the facts, so we changed the narrative to 'Let's conduct our own investigation.' The typical practice was to let the prosecutor drive things—it's a subtle change that makes a huge difference because cops get it wrong all the time.

"It was a thousand little things we did differently," Hansen says, including their behavior with judges. "We demanded money to pay for experts," he says. "We ask for the money and tell him 'If you don't supply it, we'll get you overturned.' So we get the expert funding more often. It was little cultural changes, not 'go along' so much."

Hansen says that in the past, "DAs got the death penalty 98 percent of the time, but in my time in the program only one person has gotten the death penalty out of more than 80 cases."

"We're the Bad News Bears of the death penalty," he says.

FLIP THE NARRATIVE

Part of the RPDO's cultural narrative is never go to trial. Its audience is ultimately not the judge or the jury or the defendant. ("Sometimes the defendant thinks something will happen in court and they'll be acquitted," Hansen notes.)

The staff's effort is focused on the district attorney. "If we can find enough mitigating evidence of, say,

abuse that the defendant was sexually molested, we tell the DA what we're going to tell the jury. If we can give them even a 1 percent chance that they'll lose," Hansen says, "they'll take a deal."

The prosecutors "save time and money—'I can get life without parole right now for nothing, so why go for the death penalty?' "

In using narrative theory to construct a strategy, Hansen also looks at the narratives guiding the opposition.

"We're conscious of the narrative guiding the DA, which is 'seek justice,' which equals the death penalty," Hansen says. "The narrative of 'reduce taxpayer spending,' that's the one we want to go by. So if we drive up the cost of the case—in one instance we hired an expert to say that our client's exposure to asbestos in public housing affected his frontal lobe and therefore his impulse control—the judge calls the county commissioner for $500,000 to pay our experts and the DA has a similar cost, so it's $1 million.

"So the county commissioner calls the DA and says, 'Are you going to spend a million dollars on this case?' and it becomes: Are we going to have a new fire station or are we gonna spend a million to kill the defendant? We saved our client's life because we made the narrative of 'save money' more important than 'seek justice.' "

James Farren, district attorney of Randall County, Texas, knows all too well the financial cost of capital cases, though he says he's never been pressured to accept a life sentence for financial reasons.

"I've never had anybody that overt about it," Farren says, "but they don't have to be overt. ... I know [death penalty cases are] going to be very expensive and resource-draining. My county doesn't have the resources of the federal government, so we have to be careful that [the] cases where I seek the death penalty are the most egregious of all."

And Farren has received RPDO narratives for cases he's prosecuted. "Absolutely," he says. "I understand that they're trying to get me to see

HIRING A NONFICTION WRITER TO CRAFT A NARRATIVE IS A NEW IDEA. In most courtrooms it's the lawyer who has the job of creating a favorable tale from the jumble and mass of facts, and persuading a decision-maker that this or that fact or piece of evidence is what the judge or jury wants to focus on.

Philip Meyer—a Vermont Law School professor, author of *Storytelling for Lawyers* and *ABA Journal* contributor—says the good news is that a lawyer doesn't have to be a professional writer to create compelling narratives. "It's something that can be taught," Meyer says. "Attorneys have told me it's extremely useful for them to think in terms of plot, character, style and setting."

"When we're talking about narratives and mitigation, we're not talking about invented stories but factually meticulous stories—and ones grounded in evidence striving for truth. Something that creates empathy for the character and an understanding of something in the environment that pushed him or caused him to act in the way he did."

In a wider context, compelling storytelling, Meyer says, is about "how to depict compelling characters you can have empathy with and make them understandable."

Meyer doesn't think someone who writes a brief can't be a good storyteller, though many briefs—like judicial opinions—do not make for riveting reading.

"Some briefs are boring, but some briefs are good," he argues. "Effective lawyers intuitively are good storytellers. Not everybody can be a great novelist, but

if you learn something about persuasion and effective storytelling, good lawyers have that ability. As Bob Seger said: 'What to leave in, what to leave out.' That's something that can be taught and learned."

Sean O'Brien, an associate law professor at the University of Missouri at Kansas City, says law schools are becoming more aware of the importance of what messages reach the judge and jury.

"In the death penalty arena, the power of narrative is in dealing with life-and-death issues," O'Brien says. "The fact is, there's already a narrative—there's a homicide and an innocent victim and a perpetrator who needs to be brought to justice. Prosecutors are trained to motivate juries to impose a sentence of death."

"Most of us have a natural reluctance to cause the death of a person," O'Brien says, "and prosecutors need to overcome this obstacle so they appeal to the jury's ability to identify with the family of the victim—using narrative techniques to do that, often rebuilding the last day of the victim's life, and that's a powerful narrative.

"The defense lawyer has to convince the jury that death is too harsh for this person, and you can't do that by showing the client's IQ chart or taking a brain scan of the client. That's not persuasive because it doesn't appeal to the jury's sense of humanity or justice."

O'Brien says that when training lawyers, he compares the lawyer to a stand-up comic: "Something is funny or it isn't. And it's not in the explanation of it, but in the telling of it. Mitigation is the same way."

that when we get to the punishment phase of the case, they might have some mitigating evidence that might sway the jury, and the jury might not go for the death penalty."

But he also looks into a defendant's past himself: "I spend a lot of time considering the defendant's life story because usually it demonstrates a pattern of violence and disregard for other people's rights and demonstrates individuals who are narcissistic in what they want or need."

Hansen says the RPDO's new way of thinking about cases allows attorneys to think about strategies for the case as a narrative and the players as characters.

"The relationship between the defense counsel and the DA used to be really adversarial," he says. "Now we think about what string we're going to pull to get a plea."

An example: "If a cop gets killed and the DA doesn't go for death," Hansen says, "that DA is done because cops won't go to work for him. So we don't think of him as a bastard, but as a poor bastard."

"We look at the DA as someone who faces a bunch of pressures and who we want to persuade with our narrative."

TELLER OF TALES

Jill Patterson is more than a Texas Tech professor. She also edits *Iron Horse Literary Review*. Her work has appeared in *Texas Monthly*, *Gulf Coast*, *Grist* and other journals. This year, she began work as a Soros justice fellow, writing case narratives for the next 18 months while establishing a bank of other creative writers who will take on one pro bono case per year.

"I teach narrative nonfiction, and I'm always telling my students, 'You signed up for this class because someone treated you badly, and there's no such thing as a villain.' So this was an opportunity to practice what you preach and apply it to real-life circumstance."

Patterson says she hasn't investigated a case where she couldn't find

a nexus, "the reasons why he did it instead of 'He's a monster,' that their lives had led them to that point—the why they did it."

The work can be both disheartening and encouraging. "I sometimes feel like I'm cleaning up a mess on the back end," she explains. "If someone had paid attention when the defendants were children, we wouldn't be here."

"I see a lot of dark stuff," she says. "Experiences in childhood manifest themselves in crimes later on."

Patterson is encouraged by the RPDO attorneys. "I often pictured lawyers as slick, but these are solid gold. They have the education to be more wealthy, but instead they're helping people who are committing horrible crimes."

She's in the early stages of finding other writers who want to take on the work. "Discovering who did it is the climactic moment," Patterson writes in the article "Writing for Life" in the journal *Creative Nonfiction*. "They're building a story that can be told by the DA and reporters, one that will make sense to a judge and jury. But pointing a finger and saying, 'He did it!'—that's what writers call the surface tale. It's just facts and dates and times. A mere outline, really."

"Writers like me know that the end of any tragedy is a direct result of all the events that came before."

In "Writing for Life," Patterson explains her process: "I use headings like Key Characters, Timeline, Flashbacks, Cause and Effect [and] Climax as scaffolding. By the time I look at the crime scene photographs ... I know as much as it's possible to know about the defendant and his mindset. Then I start the long process of organizing the particulars into a dramatic story." A narrative usually involves six to eight months of work, she says.

Patterson has written seven narratives for the RPDO (nine total, including work for other entities). Four received sentences of life without parole and two cases were pending at press time. But her work on the case of Eric Williams, a lawyer and former justice of the peace convicted of killing a prosecutor's wife, could not prevent a death sentence.

"That was my first [loss]" she says, "and a very hard blow for many reasons."

Texas' approach of using creative nonfiction writers is unique. Ken Rose, a senior staff attorney at the Center for Death Penalty Litigation, says he doesn't know how other states handle mitigation narratives, but in North Carolina "in capital cases narratives are composed by litigation investigators appointed by defense services who are often social workers who have specialized training, and they investigate history and background and circumstances of the crime."

VALUED EFFORTS

Patterson's lawyer colleagues on the RPDO appreciate her work.

"Using Jill as a storyteller is really effective in a variety of ways," says Maxwell Peck, whose capital case beat covers 26 counties in the Texas Panhandle. "Lawyers are trained in the law, but all we do is craft a narrative to fit a certain set of facts. A lawyer would not consider being his own ballistics expert, for example. We have a rudimentary knowledge in a lot of fields, and the same is true with storytelling. So there's no reason not to call in someone who has experience in creative nonfiction narrative craft."

"We've used her narratives to convince prosecutors; she also helps craft opening statement and closing arguments," Peck says. "We've also put some narratives into a video format. Even if it doesn't persuade the DA, we might show the video to our client to achieve a higher level of trust, and that can persuade the client to take an offer that they might not otherwise.

"Supreme Court Justice Scalia has said a capital jury can impose life without parole based on nothing more than mercy alone. The Supreme Court has said mitigating factors can be anything—any possible compelling narrative that might reach any given juror. That's why a narrative specialist is an interesting person, because they have the interest and the expertise to identify the most compelling narrative."

So there are cases where the defendant has to be convinced to take the plea?

"In 85 percent-plus of cases that go to trial in Texas, death is the verdict," Peck explains. "So yes, sometimes we have to convince the client to take a plea, and in the ABA guidelines of death penalty counsel, part of the duty is to seek a plea deal. Someone may be convinced of their innocence, or [they] don't want to face possibility of life without parole or have mental intelligence impairment that doesn't rise to incompetence. Just because we get an offer doesn't mean we get a deal done."

Rob Cowie, an RPDO attorney in Lubbock, appreciates how Patterson weaves the defendant's life story into the case, helping to understand the context of the crime to the client's life story.

"Texas has a bifurcated murder death penalty, so most of our investigation regarding punishment happens before guilt or innocence," Cowie says. "You use your mitigation story to get the state to waive the death penalty—especially in Texas, the goal is to never go to trial and reach pretrial resolution because the likelihood of death is so high."

"Jill helps relate the defendant to the crime to help you take the facts and the story that we all sense is there and put it into compelling fashion," Cowie says. "Because her focus is compelling nonfiction, she puts facts together and develops stories into compelling narrative. You're looking for a narrative where you can say about the defendant, 'Wow, that's a guy that people can give mercy to.' " ■

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yourAba

FIGHTING BACK

A task force of the ABA Health Law Section is helping breast cancer patients deal with their legal concerns

BY MARTHA MIDDLETON

Coping with cancer is never easy, even with the best possible outcomes. That harsh reality will hit home with nearly 232,000 women in the United States who the American Cancer Society estimates will be diagnosed with various stages of breast cancer this year. And not all the challenges cancer patients face are medical in nature. While coping with life-changing symptoms, treatments that sometimes are as debilitating as the disease itself and the anxieties of an uncertain future, cancer patients often must also deal with a slew of complex legal issues, including insurance, employment, bankruptcy, divorce and end-of-life decisions. And it's not always easy to get adequate legal help to sort through these issues.

In an effort to help meet those needs, the ABA Breast Cancer Task Force has stepped up its campaign to encourage lawyers nationwide to become legal advocates for patients with breast cancer and to provide lawyers with educational resources and training opportunities, says Jennifer L. Rangel, a partner at Locke Lord Edwards in Austin, Texas, who chairs the Breast Cancer Initiatives Executive Committee, which coordinates the work of the task force.

Last year the task force began offering free webinars for lawyers that so far have covered topics including labor and employment, employee benefits, case management and insurance appeals, family law, bankruptcy, and estate planning, Rangel says. While continuing to work with bar associations and local chapters of Susan G. Komen (originally the Susan G. Komen Breast Cancer Foundation), the largest breast cancer organization in the U.S., the task force also has entered into a partnership with the Cancer Legal Resource Center based in Los Angeles. This is the task force's first partnership with a national organization aimed at helping connect trained lawyers with cancer patients who need legal counsel. That same goal is behind the task force's increasing collaborations with law schools and medical schools around the country, says Rangel.

These activities reflect a new level of involvement for the task force in efforts to respond to the legal needs of breast cancer patients. The task force's roots date back to 1993, when the ABA Commission on Women in the Profession initiated its first program on breast cancer. The commission later implemented a new public education initiative designed to protect the legal rights of breast cancer patients. The Health Law Section assumed responsibility for the project in 2008.

PHOTOGRAPH BY JOSH HUSKIN

RAISING AWARENESS

The need to assist breast cancer patients with their legal issues is as great as ever. According to the American Cancer Society, there will be more diagnoses of breast cancer in 2015 than any other form of the disease. Only lung cancer accounts for more cancer deaths among women.

Those numbers help explain the task force's commitment to increasing awareness and training about breast cancer within the legal profession. "I'm very passionate about this," Rangel says. "We want to make sure that others know who we are and that we're here."

In addition to the free webinars inaugurated in 2014, the task force offers breast cancer legal advocacy workshops in cities around the country and provides a legal advocacy guide, training toolkit, survivor material and other educational materials. Covering the rights of cancer patients on a wide variety of issues, the training helps lawyers in numerous practice areas prepare to offer their specific expertise to cancer patients, often for reduced fees or on a pro bono basis.

"What we are trying to do is raise awareness of the legal issues," says Hilary Hughes Young, a member of Joy & Young in Austin and a vice-chair of the Breast Cancer Initiatives Executive Committee who also serves as secretary of the Health Law Section.

Young says that, as a breast cancer survivor herself, she understands the stresses and legal issues that cancer patients often confront. "What struck me as a patient

Jennifer Rangel and Hilary Hughes Young are chair and vice-chair of the ABA Breast Cancer Task Force.

is that I had insurance and my insurance was very good, but I could not imagine going through it without insurance," she says. She also knows that she was fortunate in being able to continue working, even if it was at a slower pace than before her diagnosis, so she did not have to grapple with such employment issues as leave time, accommodations or job retention. "I was able to work it out with my [law] partner. I didn't have to deal with a large firm or company," she says.

THE IMPORTANCE OF PARTNERSHIPS

Task force representatives say the partnership with the Cancer Legal Resource Center is a significant step toward bringing lawyers and cancer patients together. A joint program of the Disability Rights Legal Center and Loyola Law School in Los Angeles, the Cancer Legal Resource Center provides information and education to the public through its national telephone assistance line. The center also conducts national education and outreach programs for community groups, employers and health care professionals. Lawyers who have taken the Breast Cancer Task Force's legal advocacy training are encouraged to join the center's legal panels, or any other cancer support/legal referral service set up by other organizations around the country, Rangel says.

Shawn Kravich, director of the legal resource center, welcomes the partnership. When inquiries come in, the center's panels conduct a complete intake and then refer people "to a very local attorney who specializes in a legal area they need," he says.

The Breast Cancer Task Force launched its series of free webinars last year with a program in April titled "Labor and Employment Issues Facing Cancer Patients." Panelists discussed how cancer patients are protected under such laws as the Americans with Disabilities Act and the Family Medical Leave Act. Other webinars held during the year focused on family law and end-of-life decision-making; employee benefits and insurance coverage issues; an overview of medical treatments available to cancer patients; the Food and Drug Administration's position on compassionate use for investigational drugs and the legal hurdles that cancer patients face in attempting to obtain them; and legal advocacy and social resources for cancer patients facing bankruptcy and financial issues.

In February, the Health Law Section sponsored a half-day program during the 2015 ABA Midyear Meeting in Houston that covered new developments involving the Breast Cancer Task Force.

The task force also has been seeking out law schools and medical schools to work with it to bring legal advocacy to breast cancer patients while, at the same time, educating health care providers about the legal issues their patients are facing. In October, the task force carried out a successful pilot project in conjunction with the University of Arkansas. First, a full-day breast cancer advocacy workshop was held at the William H. Bowen School of Law at the University of Arkansas at Little Rock. Several days later, a legal clinic was conducted at the university's Winthrop P. Rockefeller Cancer Institute.

Several teams, each made up of a supervising lawyer and two students, saw a total of 17 breast cancer patients during the clinic, says Janet L. Pulliam, of counsel to Watts, Donovan & Tilley in Little Rock and a member of the Breast Cancer Initiatives Executive Committee who helped organize the event. "It was a very good experience for the supervising lawyers—the students loved it; the patients loved it; the physicians said they want to do it again," she says. The program's most important accomplishment, she adds, is that it brought patients "to the place where what we're doing matters. It's easy to get to the lawyers, but not as easy to get to the patients." ■

FOR MORE **Link to the breast cancer webinars at ABAJournal.com/magazine.**

Another Shot

ABA section's white paper proposing controls for online piracy makes opponents of Internet regulation see red

BY STEVEN SEIDENBERG

The bills had been backed by influential members of Congress and supported by powerful lobbies. It seemed only a matter of time before they became law and provided potent new tools to stop online copyright infringement.

Then, on Jan. 18, 2012, an unprecedented online protest posted on more than 115,000 websites generated a huge public outcry against the bill in the House of Representatives known as the Stop Online Piracy Act and a Senate version called the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act. Before the day was over, Congress was flooded with millions of phone calls and emails. Key legislators—including co-sponsors of the bills—withdrew their support, and both measures died a quick death.

Three years later, Congress appears to still be haunted by that outburst of opposition to the bills. That has not, however, deterred the ABA Section of Intellectual Property Law. On July 7, 2014, after 2½ years of study, the section issued a white paper urging Congress to enact anti-infringement measures that largely echo those of SOPA and the PROTECT IP Act. Opponents of those bills say the white paper is an effort to revive a debate that already has been settled.

"The white paper itself makes clear it is a retread of SOPA and PIPA. It goes through those bills point by point and essentially intends to revive them," says Mitch Stoltz, an attorney at the San Francisco-based Electronic Frontier Foundation, whose mission is "defending civil liberties in the digital world." The white paper "is essentially raising the same arguments that failed spectacularly several years ago," he says. "It is beyond controversial. It is almost in the realm of the absurd."

ILLUSTRATION BY LARS LEETARU

The similarities between SOPA/PIPA and the section's white paper are not accidental. While Congress was considering those ill-fated bills, the Intellectual Property Law Section formed a working group, which eventually became known as the Joint Task Force on Online Piracy and Counterfeiting Legislation, to evaluate the legislation.

After SOPA and PIPA went down in flames, the group continued working, because "we knew the problem of online piracy and counterfeiting wasn't going away," says Robert O. Lindefjeld of Pittsburgh, the general counsel and chief intellectual property counsel for Nantero Inc., who is immediate-past chair of the IP section.

Lindefjeld was one of the task force's co-chairs, along with Christina D. Frangiosa, an attorney at Semanoff Ormsby Greenberg & Torchia in Huntingdon Valley, Pennsylvania, who is vice-chair of the section's Trademarks and Unfair Competition Division; and Chris J. Katopis, the executive administrator of Licensing Executives Society International in Washington, D.C., who is vice-chair of the section's Copyright Legislation Committee.

REVIEW PROCESS

The task force eventually produced a document, *A Section White Paper: A Call for Action for Online Piracy and Counterfeiting Legislation,* which included two policy resolutions as well as an in-depth analysis of issues that might be addressed in legislation. The white paper was adopted by the section's council.

Under the ABA's blanket authority procedure, the Intellectual Property Law Section sent the white paper to the association's other sections, which had 10 business days to review and object to the paper. Blanket authority allows a section to submit comments, prepare testimony or produce position papers in its primary area of expertise for consideration by government entities. Blanket authority bypasses the more formal and time-consuming process of submitting policy recommendations to the ABA House of Delegates, but positions developed by sections under blanket authority do not represent association policy. In this case, no other sections objected to the white paper.

> "The white paper does not recommend blocking the websites of accused infringers." *—Mitch Stoltz*

The white paper urges Congress to enact legislation that, like SOPA and PIPA, would provide new remedies against foreign websites that infringe works with U.S. copyrights. The white paper then goes further, recommending that these new legal remedies also should apply to foreign websites that infringe U.S. trademarks.

In an effort to make its proposals more attractive to groups that opposed the legislation considered by Congress, however, the white paper pulls back from some of its most controversial elements. "SOPA/PIPA placed on Internet search providers a lot of burden of policing against online infringement," Lindefjeld says. "In the white paper, we took the approach that the burden should be placed on the IP owners. We want a regime where a foreign website would have notice and an opportunity to defend itself, which is another big difference from SOPA/PIPA."

The white paper also omits one of the acts' toughest remedies. "The white paper does not recommend blocking the websites of accused infringers, which was probably one of the most odious features of SOPA," Stoltz says.

Nevertheless, there are strong similarities between the white paper and the legislation, according to many experts. "The white paper largely echoes the proposals of SOPA and PIPA," says Jonathan Rubens, a partner in the San Francisco law firm of Javid Rubens who is a council member for the ABA's Business Law Section and immediate-past chair of its Cyberspace Law Committee.

Both the white paper and SOPA/PIPA would create private rights of action against allegedly infringing foreign websites, and they both would allow IP owners to obtain injunctions against innocent third parties to prevent such infringements.

"The white paper basically repackages SOPA and PIPA's proposals as expansions to courts' injunctive relief powers," says Matthew Schruers, vice president for law and policy at the Computer and Communications Industry Association in Washington, D.C., a lobbying group for the IT industry.

TOO BIG TO IGNORE

Lindefjeld maintains that the white paper is "the best workable solution" to a serious problem. But many in the industry say the paper fails to resolve at least three of the concerns that sank SOPA/PIPA.

First, there's the due process issue of requiring a foreign company, which may have few or no users in the United States, to defend itself in a U.S. court. "The general proposition of suing a foreign website and saying that due process is protected because the website owner can go to a hearing in the U.S.—some would say that is absurd," says Rubens. "Is a non-U.S. company supposed to show

FOR MORE Read the intellectual Property Law Section's white paper at ABAJournal.com/magazine.

up in a district court in Atlanta, Minneapolis or wherever the plaintiff chooses to sue? In some sense, that is due process, but I don't understand where the due process protection is for that foreign company."

Second, the white paper calls for a dramatic change in the way U.S. law treats innocent third parties. "In U.S. law, injunctions against third parties are generally not permitted," Schruers says. "Before you can get a third party enjoined, you need to show that the third party is complicit in the wrongdoing, that there is secondary liability. If you change civil procedure law to allow injunctions against innocent third parties, why do this just for IP? What makes IP so special?"

Third, there are thorny free speech issues. "There is fundamentally no way to make the remedies advocated by the white paper consistent with the First Amendment," Stoltz says. "If a website is deemed to be a bad actor, a 'predatory foreign website,' the goal is to make that site disappear from the Internet by attacking it via intermediaries. The effect is to silence speech."

In response, Lindefjeld says that "giving rights holders the tools to protect their rights is not at all the same as curbing free speech. We are trying to prevent theft."

Critics of the white paper also say it is vague about when a site should be considered a predatory foreign website. "Who decides which sites are predatory and which ones have free speech interests worthy of protection?" asks Stoltz. "The white paper doesn't articulate any standards. It slides over the heart of the problem."

Furthermore, critics assert, a U.S. law that makes it legal to drive foreign websites off the Internet would set a troubling precedent. "It promotes the idea that each country can censor the Internet for the benefit of whatever interests are favored in that country," Stoltz says.

The Intellectual Property Law Section sent the white paper to Congress in August, but it was essentially dead on arrival. "Congress won't touch this with a 10-foot gavel," Stoltz says. "Congress took a real beating on this last time, and they are afraid to do this again. The chance that anyone on the Hill will run with this is slim to none."

But the white paper's supporters say Congress must eventually tackle online infringement; the problem is too big to ignore. "I think the odds are high that Congress will act on this—not right now, but maybe one, two years down the road," Frangiosa says. "And when they are ready to return to the issue, the white paper is there." ■

Count Off

Law school enrollment continues to drop, and experts disagree on whether the bottom is in sight

BY MARK HANSEN

Given recent trends, it came as no surprise that enrollment at ABA-accredited law schools fell again in 2014, according to figures released in December by the Section of Legal Education and Admissions to the Bar. It was the fourth straight year in which law school enrollment dropped after peaking in 2010.

Total enrollment in JD programs (including both full-time and part-time students) at the nation's 204 ABA-approved law schools fell to 119,775 in 2014, down nearly 7 percent from 2013 and about 18.5 percent from its historic high of 147,525 in 2010, according to the data collected by the legal education section.

Enrollment data is included in the information reports that schools are required to file annually with the section, which is recognized by the U.S. Department of Education as the accrediting agency for JD programs in the United States.

The last time total enrollment was so low, states a Dec. 16 news release announcing the enrollment numbers, was 1987—when there were 29 fewer ABA-approved law schools than there are today.

Enrollment of first-year law students also fell in 2014 for the fourth straight year, to 37,924, down 4.4 percent from 2013 and nearly 28 percent off the all-time high of 52,488 1Ls in 2010, according to the numbers collected by the legal ed section. Enrollment of first-year students hasn't been that low since 1973, according to the section, when there were only 151 ABA-approved law schools in existence—53 fewer than the current count.

PHOTOGRAPH BY SHUTTERSTOCK.COM

Still, last year's enrollment decline was smaller than the dropoff in 2013, when first-year enrollment fell to 39,675, a decline of 11 percent from 2012 and a 24 percent drop from 2010.

The overall decline in enrollment did not, however, reflect what happened at every ABA-accredited law school during 2014. Nearly two-thirds of those schools, or 127, saw declines in first-year enrollment last year; at 64 of them, the declines exceeded 10 percent.

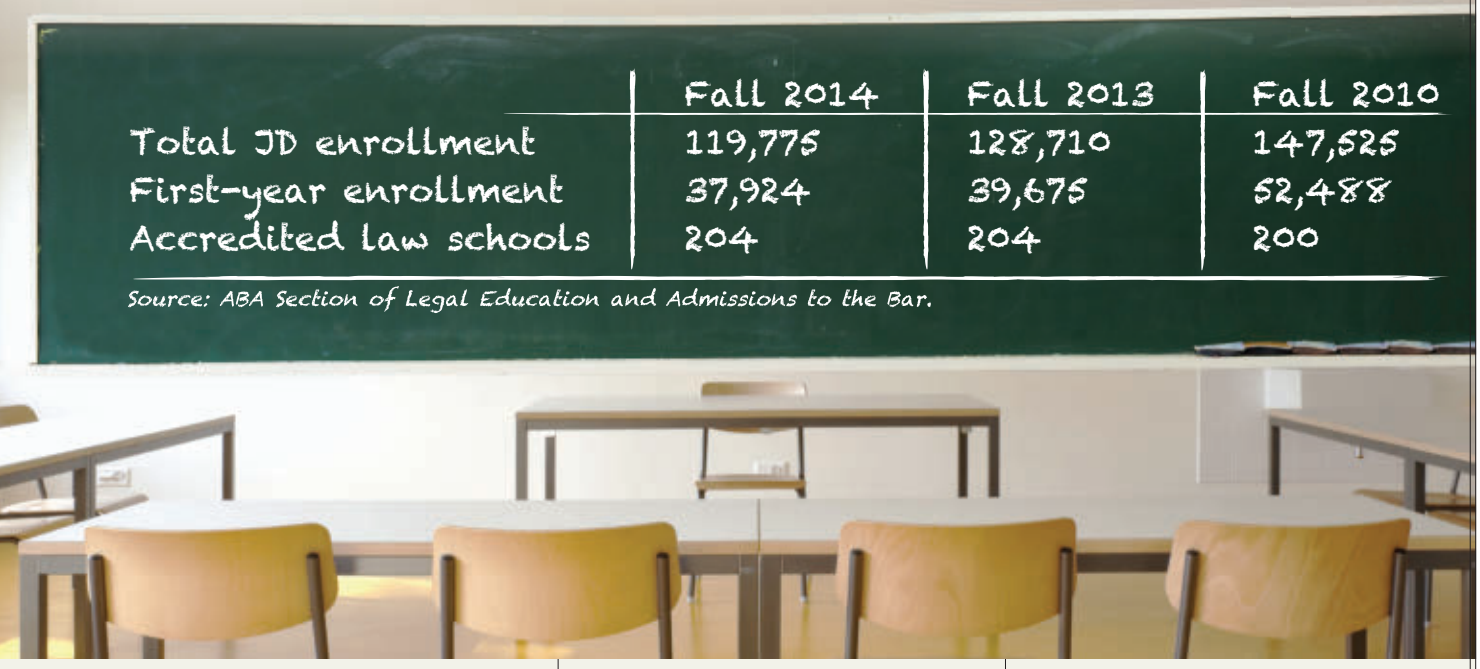
But 69 schools, or roughly a third of all ABA-accredited programs, reported increases in first-year enrollments last year. At 33 of those schools, enrollments were up by more than 10 percent. Eight schools saw little or no change in enrollment.

NO SURPRISES

The overall decline in first-year enrollment at ABA-accredited law schools was not unexpected, given the declines reported in 2014 in the numbers of prospective students who

How Low Can They Go?

Law school enrollment continued its four-year slide in 2014, according to numbers collected from ABA-accredited law schools. And experts can't agree on whether that trend will reverse anytime soon.



	Fall 2014	Fall 2013	Fall 2010
Total JD enrollment	119,775	128,710	147,525
First-year enrollment	37,924	39,675	52,488
Accredited law schools	204	204	200

Source: ABA Section of Legal Education and Admissions to the Bar.

took the Law School Admission Test, as well as law school applicants and applications.

The number of people taking the LSAT in October 2014 dropped 8.1 percent from 2013, following a 9.1 percent drop in the number who took the test in June compared to 2013, according to the Law School Admission Council, which administers the test.

The numbers of law school applicants and applications also fell in 2014, according to the council. The number of applicants dropped 8.4 percent, from 59,400 in the fall of 2013 to 54,500 in fall 2014. The number of applications dropped 8.5 percent, from 385,400 in the fall of 2013 to 352,400 in the fall of 2014.

The overall drop in law school enrollment last year was "pretty predictable," David N. Yellen, dean of Loyola University Chicago School of Law, told the *ABA Journal*. "As long as the numbers of applicants and test-takers are going down, you know it's going to be a down year for enrollment."

Yellen, whose school posted a slight increase in enrollment last year, says the end of the current down cycle may be in sight, citing a gradual but continuing improvement in the job market during the past few years and a corresponding decline in the number of law school graduates.

"If the job market doesn't weaken," Yellen says, "it should lead to a better match in the next few years between the number of new graduates and the number of good-paying legal jobs."

But Alfred L. Brophy, a law professor at the University of North Carolina in Chapel Hill who tracks enrollment data, says he sees no evidence that first-year enrollment is close to bottoming out.

Brophy, who previously predicted that first-year enrollment for the 2015 academic year would be around 35,000, now thinks that number may go even lower, given enrollment declines for 2014. "I think the number may stabilize at somewhere in the low 30,000s," he says.

Kyle McEntee, co-founder and executive director of Law School Transparency, a Tennessee-based legal policy organization, sees two bits of good news in the data. One is that it will increase the economic pressure on law schools to implement reforms that will make them more accountable to students and the general public. The other is that it suggests prospective law students are responding to information that directly affects their future. "It makes me optimistic to see that people are acting in their own self-interest," he says.

But McEntee is also troubled by two underlying trends that he sees in law school enrollment patterns. First, he says that the overall quality of incoming students, based on undergraduate grade point averages and LSAT scores, continues to fall. Second, he says, some schools —which he declined to identify— continue to increase enrollment without regard for the needs of the students or communities they serve.

"They're doing it for one reason and one reason only," he says. "They need the revenue to stay open." ■

Set Sale

ABA ethics opinion holds that a lawyer selling a practice may take time to assist in the orderly transition of client matters to the purchaser

BY JAMES PODGERS

For many decades, ethics rules in the United States prohibited lawyers from selling any part of their law practices other than physical assets such as furniture, office equipment and books. That prohibition encompassed the intangible value of the lawyer's "goodwill"—essentially, his or her clients. As a result, those clients were often left to fend for themselves when their lawyer retired, died, became a judge or otherwise left practice.

Things changed starting in 1990, when the ABA House of Delegates approved a revision to the Model Rules of Professional Conduct. Under the new Rule 1.17, a lawyer or law firm may sell or purchase a law practice, or an area of law practice, including goodwill, subject to certain specific conditions: The seller must cease practicing in the area of practice being sold in the jurisdiction or geographic area in which the lawyer had conducted the practice; the entire practice, or area of practice, is sold; the seller gives appropriate notice to clients affected by the sale; and fees charged to clients may not increase because of the sale.

Since then, Rule 1.17 has been adopted in some version by state jurisdictions throughout the country. The Model Rules are the basis for binding professional conduct rules in every state, although California follows a different format.

But even after some 25 years on the books, Rule 1.17 still raised some unanswered questions. In October, however, the Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 468 to resolve one of those issues.

Despite the requirement that a seller stop taking cases in the area of practice being sold, the committee states in its opinion, "a question has arisen as to whether a selling lawyer or law firm may nevertheless continue to 'practice' to assist the buyer or buyers in the orderly transition of active client matters."

The answer, the committee concluded, is yes. "The requirement of Rule 1.17(a) that the seller of a law practice or area of practice must cease to engage in the private practice of law, or in the area of practice that has been sold, does not preclude the seller from assisting the buyer or buyers in the orderly transition of active client matters for a reasonable period of time after the closing of the sale," the opinion states. "However, neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent only on the transition of matters."

THE RIGHT AMOUNT OF TIME

The committee linked its finding to the underlying purpose of Model Rule 1.17. The primary purpose of the rule was to eliminate disparities in how clients of law firms and sole practitioners were affected by the departure from practice of a lawyer responsible for a client matter. Prior to adoption of Rule 1.17, a law firm could assign a client to another attorney at the firm. But "clients

PHOTOGRAPH BY SHUTTERSTOCK.COM

of sole practitioners were left to fend for themselves after their lawyer left the practice because the lawyer had no legal way to sell the practice," states the opinion. Model Rule 1.17 also allowed sole practitioners to transfer clients to a purchasing lawyer or firm through the "goodwill provision."

But Rule 1.17 did not address the timing of when a seller "ceases to engage" in the private practice of law for purposes of helping the purchasing lawyer and clients through the transition to new ownership of the practice.

FOR MORE
Read ABA Formal Opinion 468 at ABAJournal.com/magazine.

In its opinion, the ethics committee states that, under the rule, "the selling lawyer may no longer accept new matters in the relevant practice or area of practice, and that prohibition should logically take effect immediately upon the closing of the sale. However, given the history and purpose of the rule, as well as the black-letter provisions and comments to the rule, it seems reasonable to conclude that the transition of pending or active client matters from a selling lawyer or firm to a purchasing lawyer or firm need not be immediate or abrupt."

Just how long any transition should take in any particular client representation "will necessarily depend on the circumstances," the opinion states. "It is therefore impractical to propose any prescriptive time limitation for when the selling lawyer 'ceases to engage' in the private practice of law in the relevant practice area or jurisdiction following the sale of a law practice or area of law practice."

But regardless of how long the transition takes, the opinion emphasizes that "clients should not experience any adverse economic impact from the sale of a practice or area of practice." ■

DELEGATE-AT-LARGE ELECTION

Pursuant to § 6.5 of the ABA Constitution, six Delegates-at-Large to the House of Delegates will be elected at the 2015 Annual Meeting for three-year terms beginning with the adjournment of that meeting and ending with the adjournment of the 2018 Annual Meeting. Candidates for election as Delegate-at-Large are to be nominated by written petition. The deadline for filing nominating petitions for the 2015 election in Chicago, Illinois, is Tuesday, May 19, 2015. For rules and procedures on filing petitions, visit ABAJournal.com/magazine.

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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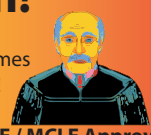

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Beelzebub Beckons

The devil is in the details when the fallen angel demands his due

In a progressive society, people are tolerant of myriad viewpoints and lifestyles. Same-sex marriage? Most would agree that two people loving one another is hardly a scourge on our existence. Legal marijuana? It might not be everyone's cup of tea (figuratively or otherwise), but it's not been shown to be any worse than alcohol. Satanism? Whoa, now, just hold on a minute.

Yes, it's no surprise that last one is a hard sell. But just as the other two examples have come to be accepted, if not always embraced, recent occurrences indicate that Satanism is horning its way into the national consciousness as well, even though some are doing a slow burn over it.

According to the website of the Church of Satan, the movement espouses pride, liberty, individualism and carnality—not exactly the lurid, violent, ghastly stuff that is generally depicted in books and movies. Members put themselves at the center of their own universe, as their own highest value. And the FAQ on the site of another group, the Satanic Temple, states that "beliefs should conform to our best scientific understanding of the world. We should take care never to distort scientific facts to fit our beliefs."

Both organizations reject nonhuman deities and raise challenges to religious displays, especially those appearing on government property. Nativity scenes at Christmastime, for instance.

In December 2013, the Satanic Temple wanted to put up a holiday diorama at the Florida State Capitol. It carried a greeting from the temple and depicted an angel falling into hell. It was rejected as "grossly offensive" by the state's Department of Management Services, according to the *Tampa Tribune*.

But last December, after invoking the U.S. Supreme Court's *Hobby Lobby* decision allowing religious beliefs to trump a portion of the Affordable Care Act, the temple threatened legal action—and the diorama was allowed to be shown for seven days, along with various other nontraditional displays on the same time schedule. When the display was intentionally damaged, Satanic Temple spokesman Lucien Greaves told news media the organization would leave it that way "as a testament to the intolerance of some people."

And earlier in 2014—also in Florida—after a different high court ruling allowed municipalities to open government meetings with a prayer, activist and longtime gadfly Chaz Stevens announced his intention to open government meetings all over the state with a Satanic prayer.

One city—Lake Worth—said it would allow him to give an invocation, but then decided to do away with the practice altogether. Stevens stated on his website that he hoped other municipalities would abolish the practice as well.

And, lastly, once again in Florida—apparently ground zero for Satanic flare-ups—the Orange County school district allowed Christian-oriented as well as atheistic materials to be distributed in its schools. In September, the Satanic Temple submitted some of its materials for inclusion. The school board has reportedly moved to change its policy so that no religious materials will be allowed in the schools.

It's a hell of a thing to consider new viewpoints, and many people have a devil of a time doing so. But at least these battles were waged with words, not weapons. *Nous sommes Charlie.* ■

ILLUSTRATION BY JEFF DIONISE

A State Secrets Doctrine Is Born

March 9, 1953

A B-29 Superfortress bomber took off from Robins Air Force Base on Oct. 6, 1948. As it reached 18,500 feet, an engine caught fire and the plane crashed 2 miles south of Waycross, Georgia. Of the 13 men on board, nine were killed, including three civilian employees of the Radio Corporation of America who were testing electronics. The B-29 had been a formidable weapon in World War II, but it had a reputation for high maintenance and failed engines. The widows of the three dead civilians, suspicious of negligence, filed suit against the U.S. Air Force under the Federal Tort Claims Act.

When the widows asked, under the Federal Rules of Civil Procedure, to see the results of the official accident investigation, the Air Force moved to quash the request, claiming that the nature of the aircraft's mission could not be disclosed. In an affidavit, the judge advocate general argued that the investigative files could not be handed over "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." The Air Force even refused to allow the trial judge to review the documents in camera, maintaining that only the government, not the judiciary, could determine what should be withheld to protect state secrets. The trial judge, William H. Kirkpatrick, entered a judgment in favor of the widows. And when the 3rd U.S. Circuit Court of Appeals at Philadelphia affirmed the judge's ruling, the government headed to the Supreme Court.

For more than 150 years, the nation had survived without a state secrets doctrine. Though the courts treated the government with deference on issues of obvious military secrecy, in tort claims they treated it like any other individual. But on March 9, 1953, in a 6-3 decision in *U.S. v. Reynolds*, the Vinson court ruled that a government had an established right to privilege, and—comparing it to constitutional limits on self-incrimination—that it could assert that privilege without revealing "the very thing the privilege is designed to protect." When the matter returned to the lower court, the widows reluctantly settled with the Air Force for a total of $170,000.

In 1996, the Air Force declassified the Waycross crash investigation reports. The documents revealed little about the mission of the aircraft but showed that the fire in the engine was the result of poor maintenance. Though the state secrets doctrine has been widely asserted, especially in the post-9/11 environment, critics contend that the very case that produced the doctrine reveals its potential for abuse.

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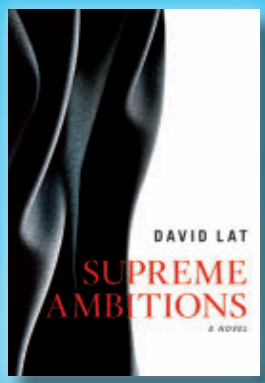

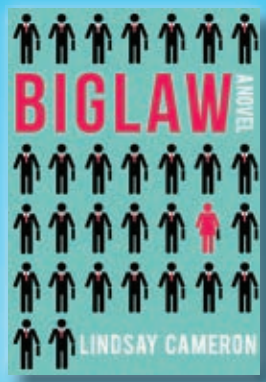

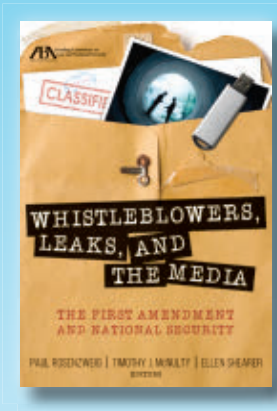

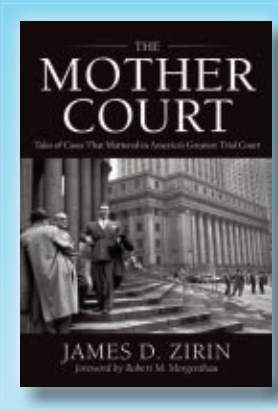

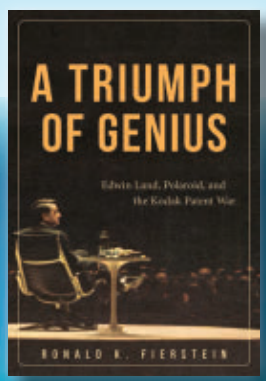

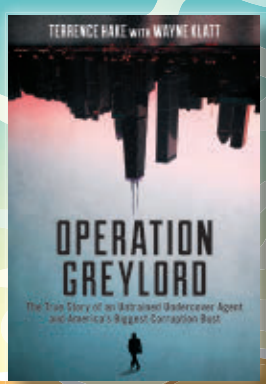

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