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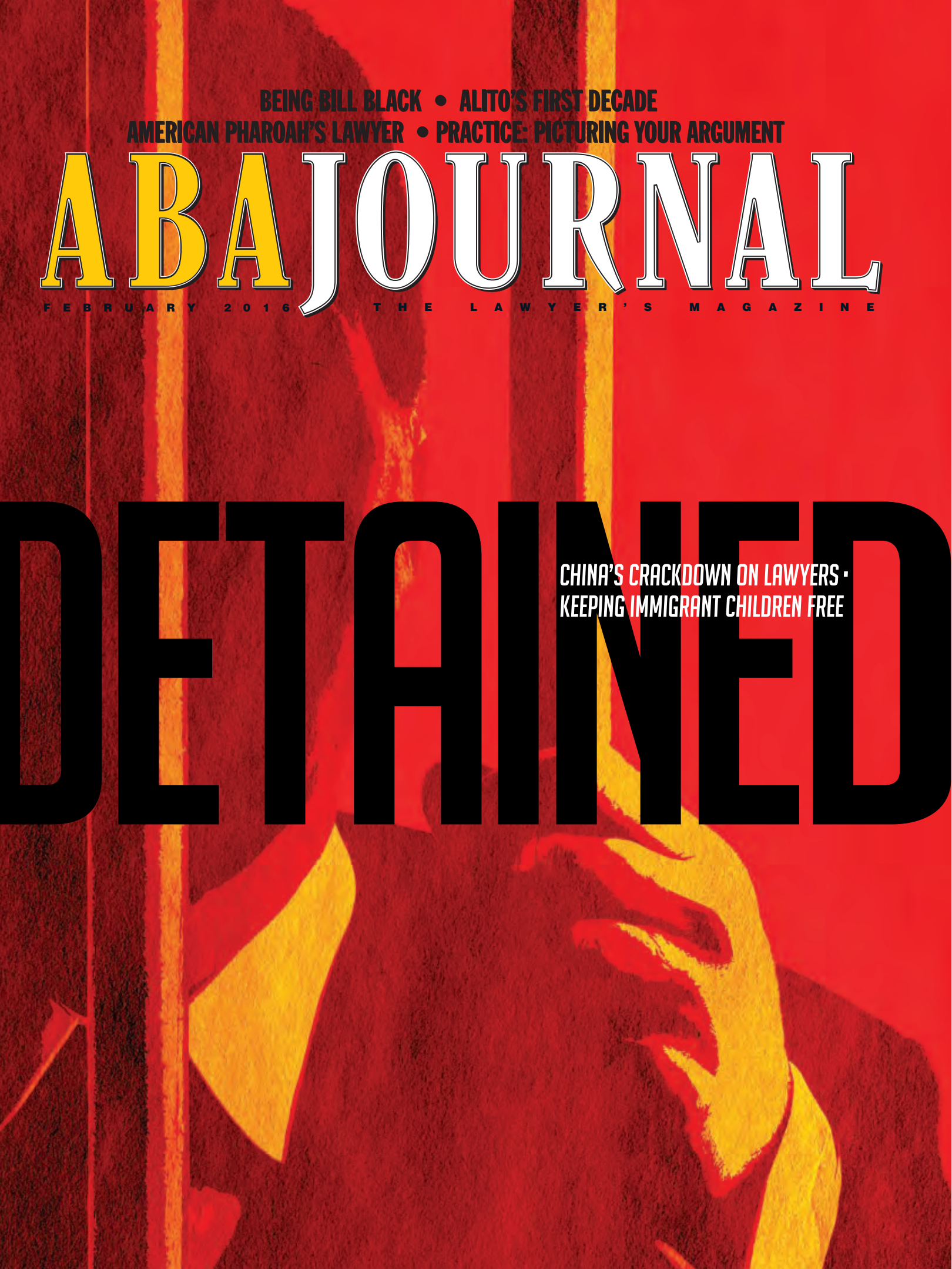
ABA JOURNAL

FEBRUARY 2016 THE LAWYER'S MAGAZINE



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KUDOS TO THE DEBUNKERS

Regarding "Badly Burned," December, page 36: Wrongs need to be corrected. If I were in jail for life for a crime I didn't commit, I would pray daily for someone to care. I would know that the government is heavily invested in my conviction—so invested it will not revisit my conviction until someone forces its hand. But who will take up my cause? The world at large considers me guilty. I had my day in court. The guilty as well as the innocent never cease claiming innocence. So I die in prison, unless by a miracle someone embraces my cause and gives me back my life.

As a society, we owe a debt of gratitude to the people who, through hard work, have debunked the junk arson science. Now let's review other arson convictions so that those who are behind bars because of this junk science can be freed (or, in some cases, retried). We owe that to the imprisoned.

As a former prosecutor, I applaud the ABA for bringing this matter to its membership's attention.

David G. Anderson
Albany, New York

Among lawyers, a widespread lack of qualification exists—not as to law, but as to science. To this end, the ABA recently published *The Science and Technology Guidebook for Lawyers* [co-authored by the writer], which aims to further the understanding of what constitutes good science.

Justice Stephen G. Breyer once wrote that reading a few dozen amicus briefs on a case involving a complex scientific issue served to educate him. One might come to believe one has an understanding after immersion in a case (and some do), but most lawyers don't have the chops to appreciate the subtleties and sometimes the obvious that may bear on a case's outcome. The rule on competence generally reads: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Imagine if the situation were reversed: A scientist who knows nothing about law serves as a judge in a matter in which the science applied is understood and without controversy, and the lawyers have to present to this judge, through experts, what the law is; each side is at odds of what law applies and its interpretation. Sounds absurd. Yet we assume the reverse is not true.

The profession should consider meeting the demands of the ever-expanding influence of science in the courtroom through bar-approved areas of lawyer specialization, analogous to Pennsylvania's capital case qualification; docket assignments, based on a judge's special science qualifications; the greater use of impartial, court-appointed experts; and expert juries.

Joe Carvalko
Milford, Connecticut

CORRECTIONS

In the Business of Law article "C-Sweet!" January, page 34, Paul McVoy was misidentified as a lawyer. McVoy, formerly Milberg's director of litigation support and now CEO of Meta-e Discovery, does not have a law degree.

We goofed. The cartoon we printed and sought captions for in January, page 13, is one we had used previously. The correct one can be found online at ABAJournal.com/contests. Because our readers have submitted captions for both the new and the old cartoons, we've decided to judge both; winning captions for both cartoons will run in the April issue.

The *Journal* regrets the errors.

AP PHOTO/MARC LEVY

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'Oh, the Places You'll See'

Main Street ABA combines member outreach, mentorship and visits to Boys & Girls Clubs

"The world is a book and those who do not travel read only one page."

These words of St. Augustine, the 4th-century Christian philosopher, carry great wisdom, even in today's world and specifically for the president of the American Bar Association.

As my term approaches its halfway point, I have traveled the world, from Bermuda to Beijing, but I have not lost sight of the fact that it is the *American* Bar Association.

As part of my Main Street ABA initiative and as a way to fulfill the ABA goal of serving membership, I have committed to visiting at least two states a month where ABA leadership has not had the opportunity to visit recently. There, I speak with members of the local bar associations and law schools. I am proud to say that I have surpassed my goal. In fact, since I began my quest during the 2014-15 president-elect year, I have visited bar associations and law schools in more than 30 states, including Mississippi, where I was told that no ABA president or president-elect had been in 23 years and Portland, Oregon, where no sitting president had ever been.

By meeting fellow lawyers in their communities and listening to their opinions and concerns, I have developed a greater understanding of the many issues affecting our legal profession.

ONLINE

ABA members can follow Paulette's progress through an interactive map at http://bit.ly/ABAPresTravel.

To build a pipeline for succeeding generations of lawyers, we must inspire young people. The Bible tells us to whom much is given, much will be required. Lawyers have a responsibility to give back, and that is why these Main Street ABA trips include visits to local Boys & Girls Clubs.

Growing up, I did not have a full appreciation for the ability of lawyers to make a difference and have an impact. I knew I wanted to do something meaningful, but the only lawyers I knew about were on TV. Being a lawyer was never something I considered until I was exposed to the possibility in college.

At every Boys & Girls Club I visit, there are young women and men yearning to do something important with their lives. But it can be difficult to aspire to be something you don't see. My aim is to open the windows they need to view new opportunities.

To help our youth see the diversity of our profession and to meet working lawyers, I have been inviting young lawyers and law students to join me for these Boys & Girls Club visits. These young lawyers and law students act as role models and mentors for the youths we meet. Many of the young lawyers walk away changed, too, and continue to work with the youths.

Three young ladies from the Boys & Girls Club of Houston joined me at our midyear meeting in Houston last year, meeting judges, lawyers, legal profession leaders and law students. When they first arrived, not one had any interest in the law. By the end of the day, they wanted to know what classes they needed to take in college to prepare for legal careers.

During our annual meeting in August, about 45 young people from the James R. Jordan Club in Chicago came to the ABA House of Delegates meeting to witness my inaugural speech and to meet with some of our wonderful young lawyers. It was a great experience for everyone.

I want my travels to broaden horizons, including my own. I want lawyers to know that the ABA cares deeply about all of its members. I want to see things in a new way. Instead of reading just one page, I want to read the entire book.

I will continue my outreach and travels and connect with as many members and young people as possible.

As the writer Susan Sontag once quipped, "I haven't been everywhere, but it's on my list!" ■

Follow President Brown on Twitter @Brown4Lawyers.

PHOTOGRAPH BY MITCH HIGGINS

Opening Statements

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

ILLUSTRATION BY STEPHEN WEBSTER

Happy Quasquicentennial!

NYC law firm buries a time capsule to celebrate its 125th birthday

The law firm of Seward & Kissel found a unique way to commemorate a rare milestone: In celebration of its 125th birthday, the firm buried a time capsule in Battery Park outside the firm's New York office.

"We thought it would be fun and draw some attention to our anniversary," says managing partner John Tavss. "It was offbeat and we figured the attorneys would get a kick out of it."

Tavss explains that Seward & Kissel was founded in 1890 under the name Smith & Martin and has operated continuously in downtown New York City since then. The firm got its start doing work for individuals and—as it acquired exiles from Wall Street

firms—it grew to 160 lawyers with offices in New York and Washington, D.C.

Seward & Kissel's time capsule is to be opened in another 125 years. Those unearthing it will discover legal items and law firm memorabilia, including a BlackBerry (which, Tavss quips, is already obsolete), documents from 1949 related to the first hedge fund, photos of all the firm's current personnel, a schedule of 2015 billing rates, a list of the firm's top 50 clients and another of today's top law schools, pictures documenting the impact of Superstorm Sandy, a 2015 Zagat restaurant guide for New York, and the *New York Times* obituary of George Seward from 2012. "Everyone agreed a time capsule would be a fun idea," Tavss says. "We're not taking ourselves all that seriously."

But in what could turn out to be serious cash, Seward & Kissel's time capsule also contains Fidelity documents establishing a $1,000 trust. Assuming the historic 7 percent annual return rate, that little nest egg could be worth more than $4 million when the capsule is opened in 2140. "In the off chance the firm is not around in 125 years," Tavss said in his remarks at the celebration, the New York City Bar Association is to retrieve the capsule, use some of that trust money to throw "a hell of a party" and keep the rest as a donation.

The firm also made a $125,000 donation to the Battery Conservancy, which is working to revitalize the lower Manhattan park near the firm's office.

—Leslie A. Gordon

ISTOCKPHOTO

Get SMART

Texas Tech adopts brain training for its 1Ls

THE FIRST YEAR OF LAW SCHOOL can be akin to middle school. Anxiety and self-doubt abound: How should I study? What do I need to remember? Why was that lady carrying scales onto a train again?

Texas Tech University School of Law is out to change that. Last year, the law school introduced its entering first-year class to SMART (strategic memory advanced reasoning training), a program developed by the Center for BrainHealth, a research division of the University of Texas at Dallas, to improve cognitive performance.

Texas Tech is the first law school to offer the program. "When you think about it, what's a lawyer's main tool? The brain," says law school dean Darby Dickerson.

SMART focuses on three cognitive processes, explains Lori Cook of the Center for BrainHealth, who helped develop the program. The first is strategic attention, which involves blocking and filtering information, limiting multitasking and determining priorities. The second is integrated reasoning or "big-picture thinking," Cook explains, and the third is innovation or "creative problem solving," with the goal of "mitigating shallow thinking and status quo approaches."

SMART initially was developed for adolescents with attention deficit hyperactivity disorder, Cook says. It was so successful that center clinicians soon expanded and customized it for diverse groups, including Navy SEALs and corporate executives.

Dallas lawyer and Texas Tech law alum Chad A. West had gone through the training several years ago when it was offered to military veterans. He brought the idea to the law school because he found the training so revolutionary and felt it could help aspiring lawyers, too.

Dickerson originally thought SMART would most benefit 3Ls who were moving into bar preparation, but then she changed her mind. "Once I saw how it ties into how you live your daily life, I thought: 'Why not give the first-years the advantage of having this all the way through?' "

The program didn't resonate with everyone, Dickerson admits. But she's undeterred and plans to continue to offer it with some tweaks, including timing.

This year's incoming 1L class will experience SMART after its first semester so students will have a better understanding of how the program's strategies mesh with their academic obligations and expectations. Plus, Dickerson says, "they'll have a semester of grades, and that may motivate people one way or another."

Meanwhile, the school is expanding the scope of its training to third-years, along with more faculty members and staffers.

"I really am convinced that this is something positive and impactful," Dickerson says. "In 10 years, everyone is going to know about this and be adopting these strategies."

—Jenny B. Davis

No Relief

Courts decline to extend bankruptcy laws to marijuana businesses

Recent decisions holding that state-compliant medical marijuana growers and dispensaries can't reorganize in bankruptcy are highlighting the sticky problems that result when federal and state marijuana laws conflict.

Most recently, a bankruptcy appellate panel of the 10th U.S. Circuit Court of Appeals at Denver held in August that marijuana businesses can't get relief in the bankruptcy system even if they're legal under Colorado state law. The debtors in *In re Arenas*, licensed marijuana growers and distributors, sought bankruptcy protection after losing a lawsuit against their tenants. But the court held that because their business violated federal law, they couldn't fund bankruptcy repayment plans with marijuana sales. Similarly, in 2012, a bankruptcy court in California dismissed the Chapter 11 petition of Mother Earth's Alternative Healing Cooperative, a medical marijuana dispensary, because the group violated the federal Controlled Substances Act.

"If a marijuana business fails, they can't turn to bankruptcy for a fresh start," says Jared Ellias, a bankruptcy professor at the University of California's Hastings College of the Law in San Francisco. "Normally, judges go to enormous lengths to help businesses to do as much as they can within the law to give relief to debtors. Judges constantly innovate within the confines of the law—such as recharacterizing sales transactions as secured loans—to give relief to debtors. There's no reason to think that bankruptcy judges in the aggregate wouldn't want to do this with a marijuana business, but there's a brick wall judges run into with these cases—there's nothing they can do." The *Arenas* court stated that the decision not to allow a reorganization plan "funded from the fruits of federal crimes" was "relatively straightforward," but at the same time acknowledged the result "is devastating for the debtors."

Conflicts between federal and state laws are extremely difficult for bankruptcy judges to navigate, and this is just another example of a broader trend, according to Ellias. "When governments decide not to enforce a law, what matters is what's on the books. This will increasingly intersect with bankruptcy law and continue to be murky."

So what's a state-legitimate pot business to do? Depending on the state, there may be avenues for relief in state receivership or insolvency proceedings, Ellias says. Also, lenders that fund these businesses should be aware that such companies cannot go into bankruptcy and then structure deals around that, similar to how some casino, media and airline companies are funded. Lenders could also seek collateral such as homes or cars from dispensary owners or require guarantees from people uninvolved in the business.

But marijuana businesses shouldn't expect different outcomes from bankruptcy judges. "It's the right result based on federal law; the Supreme Court would come to the same conclusion," Ellias says. And Congress is unlikely to amend the bankruptcy code to make an exception to the bad-faith requirement. "That would be a step towards legalization of marijuana, and I think that's unlikely." —*L.A.G.*

ISTOCKPHOTO

In the Scrum

Chicago team competes at Lawyers Rugby World Cup

RUGBY MIGHT NOT seem like a warm and fuzzy kind of sport. But Chicago lawyer Michael Young missed the camaraderie from his days playing it so much that he figured there must be other legal professionals pining to be back in the scrum.

Young tested his intuition through a LinkedIn notice, and in 2014 he and another friend organized what is thought to be the country's only all-lawyer rugby team. But the team isn't unique in the rugby world. It was invited last October to the Lawyers Rugby World Cup in London, which was held in conjunction with the professional Rugby World Cup. The Chicago Lawyers Rugby Football Club competed against eight other teams, including those from Australia, the Cayman Islands, England, France, Ireland, Italy and Scotland.

"Our club helps fill the void for those of us who still want to play rugby but aren't able to devote enough time to it to meet the demands of one of the full-time teams," Young says.

In Chicago, the team plays casually against other "social teams," including a team called Chicago Blue that is made up in part of police and a team of Japanese expats called Japanese RFC. "It's a physical outlet that we don't necessarily get from sitting behind a desk," says lawyer Dave Geerdes. "It's a social club. We meet up and have a good time."

The London trip opened Young's eyes to how rugby is played in a country where it's a major sport. "We don't have our own clubhouses," he says. "It's hard to find showers. We end up going to social events wearing muddy jerseys. There, we were hosted at a professional facility."

England's Law Society RFC is scheduled to visit Chicago in May, and Young says his team is gearing up to play host "and hopefully put on something half as good as they did for us."

—*Ed Finkel*

10 QUESTIONS

Horse Sense

Want to find the next Triple Crown winner? You may want to talk to this lawyer

LAST FALL, AMERICAN PHAROAH GALLOPED INTO history as horse racing's first-ever Grand Slam winner. For the uninitiated, that means a clean sweep of the Triple Crown plus the Breeders' Cup. But this legendary thoroughbred wasn't always a sure bet. He flubbed his first race, and his owner had even tried to sell him, until Coatesville, Pennsylvania, lawyer and racehorse expert Jeffrey A. Seder intervened.


Jeffrey Seder

Is it true you told American Pharoah's owner not to sell him?

That's true. We'd been working with American Pharoah's owner for about five or six years. He bred this horse. He's Egyptian, and when the Arab Spring came, his partnerships in Egypt froze his money. I suppose that's why he decided to sell this horse—he thought he might get a million bucks for him at the yearling auction. My job is to tell him what horses to buy and what to sell, and I told him that if he needed money, he should sell his house, not this horse.

The company you founded, Equine Biomechanics & Exercise Physiology Inc., applies high-tech sports medicine to racehorses. Did your evaluation of American Pharoah tell you he'd be a winner?

Of the very best horses—the ones with the best pedigrees, the ones that cost $1 million at auction—about 90 percent of them are no good. American Pharoah had a good pedigree, so that automatically gave him a 10 percent chance of being worth a damn. But he had passed all our biomedical and exercise physiology testing, so I knew this one was going to be really special.

How did you get involved with horses?

When I was in the JD-MBA program at Harvard, I took a ride with a friend who had horses at a rental stable, and I became obsessed. I bought my own horse and started competing in eventing. I even wrote my senior thesis on horse racing law.

Because you were into racing?

No. My thesis adviser was Archibald Cox of Nixon-era fame. It was late in the year, and I didn't have a topic yet. I had to meet with him; his office was in the Harvard library's stacks. I assumed he was going to ream me out. He said, "What are you interested in?" and I said, "Horses." I thought: Now I am really in trouble. But he reached over and pulled out this giant book on Massachusetts racing law and said, "Do it on this."

How did you parlay your passion for horses into founding EQB?

I was looking for something to do with horse racing, but I had no money, no contacts. What I did have was training in statistics and management, and that led to a job doing biomechanics work with Olympic athletes. This was 1976, and the Soviet Union and the U.S. had always been competing. But then East Germany burst on the scene and won all these medals, and no one could figure out how they did it. So the U.S. Olympic Committee started a sports medicine committee with research and technical help at official training centers. For two years, I worked with the luge team, with figure skaters, track and field athletes and equestrians, until I decided to take what I'd learned and apply it to racehorses.

Why did you think that would work?

One of the big lessons I got was that elite athletes are physically different from normal athletes. Modern medicine has a lot of data on injury and disease, but they didn't have data on the differences between normal and elite athletes, and they didn't understand the effects of training. So that's what I started out doing on horses.

How did you do that?

The equipment didn't exist to do what I wanted, so I created it. I made the first small heart-rate monitor for racehorses that measured and recorded the horse's heart rate and EKG. I also designed an ultrasonic bone scanner that won an international award and is still used today. We got a professor from MIT to help us write the code and used spare parts from defense contractors.

Were you always confident you'd succeed?

I was always sure it was going to work, even though the evidence was pretty thin for a long time. I had to have day jobs to fund my veterinary experiments, but I was too stubborn to quit.

Good thing you didn't!

Fast-forward 20 years, this is my only job, and we have a track record that is better than anyone else in the industry. We work with six of the top 10 racing stables in the country, and we make money for our clients—a lot of money. We've had horses that were world champions, but no one seemed to notice us before American Pharoah.

What's next for you?

I want to buy a racetrack. Horse racing is stuck in the 19th century, and all the racetracks are losing money. I want to bring everything I've learned from my 35 years in horse racing to this business. *—J.B.D.*

PHOTOGRAPH BY DAVID FONDA

Cartoon Caption Contest

WINNER! Congratulations to James A. Walker for garnering the most online votes for his cartoon caption. Walker's caption, right, was among more than 150 entries submitted in the *Journal*'s monthly cartoon caption-writing contest.

JOIN THE FUN Send us the best caption for the legal-themed cartoon below. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, Feb. 14, with "February Caption Contest" in the subject line.

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

"We agree that Old MacDonald had a farm, and that on his farm he had a cow. What we need to settle is in subparagraphs E.I., E.I. and O."

—James A. Walker

Chris Riddell
Munsch Hardt Kopf & Harr

"This was a unique opportunity for our attorneys and paralegals to work directly with software developers and address their needs as litigators as they manage ever-increasing amounts of discovery. Even the smallest clients can have complex discovery needs, and the most successful team will use tools that put control back in the hands of practitioners to manage that information efficiently."

— **Chris Riddell, Litigation Support Manager**
Munsch Hardt Kopf & Harr

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Ryan Petersen and Robert Caldwell
Kolesar & Leatham

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— **Robert Caldwell, Shareholder**
Kolesar & Leatham

"I believe the biggest benefit will be both in organization and saving time. This product can make our document review, retention, and organization more effective, which in turn makes us more effective as attorneys."

— **Ryan Petersen, Shareholder**
Kolesar & Leatham

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J.D. Anders and Douglas Gibson
Chaffetz Lindsey

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— Doug Gibson, IT Director
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— J.D. Anders, Associate
Chaffetz Lindsey

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Tom Barnett
Paul Hastings

"I have greatly enjoyed the experience and I have been very impressed by the team and their willingness to really work to understand the perspective of the law firm and our clients in attempting to create a solution that is more than just another pretty interface. I think the potential for innovation is vast and I look forward to collaborating in the future because the opportunities are only limited by our imaginations."

— Tom Barnett, Special Counsel, eDiscovery and Data Science
Paul Hastings

Paul Hastings has grown strategically to help its clients and people navigate new paths to growth. Tom Barnett leads the first real data science team, called eDiscovery and Data Science (eDDS), at a global law firm. Barnett's work heading Paul Hastings' industry-leading data science team is based on this premise: We should use the best, most advanced technological approaches to get the information we need to inform our guidance to clients – regardless of whether such technology or expertise comes from the legal industry or elsewhere.

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Hearsay

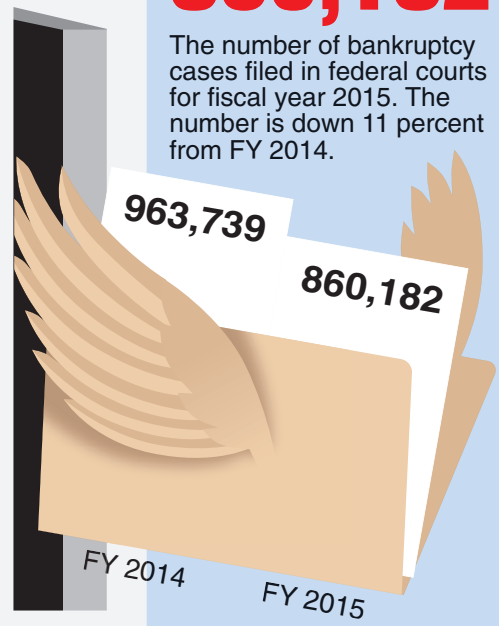
Say What?

"The only pertinent fact in this case is that plaintiff is a monkey suing for copyright infringement."

Source: Naruto v. Slater, *No. 15-CV- 4324-WHO, U.S. District Court for the Northern District of California (Nov. 6, 2015).*

860,182

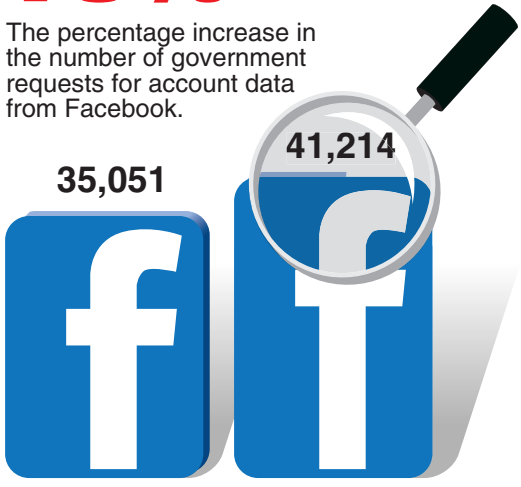
The number of bankruptcy cases filed in federal courts for fiscal year 2015. The number is down 11 percent from FY 2014.



Source: "Fiscal Year Bankruptcy Filings Continue Fall," uscourts.gov (Oct. 28, 2015).

18%

The percentage increase in the number of government requests for account data from Facebook.



Source: Facebook's Global Government Requests Report *(Nov. 11, 2015).*

300

The estimated number of veterans currently on death row in U.S. prisons.

Source: Battle Scars: Military Veterans and the Death Penalty, *Death Penalty Information Center (Nov. 11, 2015).*

$1,000

The amount a New York City woman was fined for posting details on Facebook about a trial in which she was a juror.

Source: New York Daily News *(Nov. 3, 2015).*

Survey Says

Businesses in New Mexico face the greatest risk of an employment lawsuit. The second-highest risk is in Washington, D.C., followed by Nevada and Alabama.

Source: Employee Charge Trends Across the United States, *Hiscox Inc. (Oct. 27, 2015).*

$16,536,492

The total amount of money spent in Pennsylvania's 2015 Supreme Court election. This tops the previous national record for such a state race: $15.19 million spent in Illinois in 2004.

Source: Justice at Stake (Nov. 6, 2015).

ISTOCKPHOTO/ILLUSTRATIONS BY SAM WARD

The Docket

EDITED BY KEVIN DAVIS/KEVIN.DAVIS@AMERICANBAR.ORG

Chicago police monitor demonstrators marching downtown on Dec. 12 after video showing the fatal shooting of teenager Laquan McDonald by officer Jason Van Dyke was released. Van Dyke was indicted on six counts of murder and one of official misconduct.

GETTY IMAGES

Clicking for Complaints

Databases create access to police misconduct cases and offer a handy tool for defense lawyers By Jason Tashea

National Pulse

Vidya Pappachan, an attorney for the Legal Aid Society in New York City, had little time to prepare for a client's arraignment on a felony drug charge. But she had a tool at her disposal that allowed her to quickly look up information about the arresting officers.

Pappachan asked her paralegal to search for the officers' names through a database called the Cop Accountability Project. The search proved fruitful. She learned the officers were named in misconduct cases that alleged, among other complaints, false arrests and cost New York City more than half a million dollars in settlement payouts.

Furthermore, the circumstances of the misconduct cases bore similarities to those under which Pappachan's client was arrested: There was no pre-marked "buy money," no drug stash found and no other evidence besides the arresting officers' account of the incident.

Because Pappachan showed the judge that the three officers involved in her client's arrest had prior misconduct cases, she was able to challenge the weight of the evidence against him. The judge agreed, and he was released without bail. Pappachan believes that without this information being available at the last minute, her client would not have been freed.

Sparked by the ongoing national discussion about police misconduct, there's been a movement among legal, government and media organizations to create databases that inform the public about misconduct allegations and shootings by officers. These databases also provide criminal defense attorneys with potentially valuable information.

GOING NATIONAL

Beyond New York, projects are cropping up around the country. Last year, the *Guardian* and the *Washington Post* newspapers created national databases tracking the deadly use of force by law enforcement. The Indianapolis Police Department created a public portal that tracks officer complaints, use of force and shooting incidents. In Chicago, there are two separate but complementary projects that track police misconduct complaints and their outcomes.

According to Michelle Bonner, the former chief counsel of defender legal services for the National Legal Aid and Defender Association, public defense organizations have been trying to track police misconduct information for decades. Bonner called the New York project "a great advance in the evolution for defender databases."

The New York City database houses information on more than 7,000 NYPD officers with a paper trail of alleged or proven misconduct. The files come from a number of sources, including the news, state and federal lawsuits, criminal decisions, the federal court's PACER database, New York City Civilian Complaint Review Board hearings, NYPD Internal Affairs complaints, social media, and Legal Aid Society attorneys' own experiences in court and with clients.

Cynthia Conti-Cook, a staff attorney at the society's Special Litigation Unit, says the impetus for the database was born out of "very strict public access laws around police records" and "bad discovery laws" that make it difficult for criminal defense lawyers in New York state.

Cynthia Conti-Cook

One of the nation's most ambitious projects of its kind, the Legal Aid Society database had modest beginnings. Before 1998, the database was a scrapbook consisting of paper documents and newspaper clippings. It evolved into a database in the form of a digital library catalog program called Inmagic and later into an Excel spreadsheet where documents were scanned or uploaded to a shared file. Conti-Cook admits this version was far from comprehensive and subject to human errors in providing content.

"There was often less information than an attorney needed," Conti-Cook recalls. For example, the spreadsheet lacked cross-referencing, leaving it up to attorneys to track down related cases and documents. The database might cite a lawsuit, but attorneys would have to make an independent PACER search for the source material.

The new version has relevant documents at the click of a button, and all documents will be standardized. There will also be easier access for attorneys. No longer will attorneys like Pappachan have to call their paralegal from court, because the password-protected database is accessible online by computer or smartphone. For the time being, the database is not public.

Even with these changes, the database provides mixed results in court, explains Tina Luongo, the Legal Aid Society's attorney in charge of criminal practice and vice-chair at large of the ABA Criminal Justice Section. At bail hearings, for example, "some judges are very open to hearing about this information," Luongo says. "Some judges say it's not relevant at this stage of the case."

While judges have mixed reactions to the information being used in court, the position of the New York City Patrolmen's Benevolent Association is unequivocal. In a written statement on the database, the president of the city's largest police union, Patrick Lynch, said, "Compiling a list of police officers who are alleged to be 'bad' based upon newspaper stories, quick-buck lawsuits and baseless complaints … does nothing more than soil the reputation of the men and women who do the difficult and dangerous job of keeping this city and its citizens safe."

The PBA declined to answer follow-up questions, and the NYPD did not respond to requests for comment.

THE CHICAGO WAY

Lawyers and journalists in Chicago have long faced difficulty in gaining access to misconduct records and dealing with a recalcitrant police union. This environment led the Invisible Institute—which focuses on accountability and transparency in public institutions—to create the Citizens Police Data Project, the country's largest public database of police misconduct allegations. It includes 56,000 allegations against 8,500 Chicago police officers and was launched in November. "This is the first time there has been a complete universe of this data," says Jamie Kalven, executive director of the Invisible Institute.

The Chicago database is the product of a decade of litigation regarding police abuse and public information. While the city of Chicago initially opposed these suits, it has now become a partner in the work.

"The city deserves credit," says Craig Futterman, clinical professor of law at the University of Chicago Law School and partner on the

PHOTO COURTESY OF CYNTHIA CONTI-COOK

database project. He notes that the local government worked at a "granular level" to ensure the court decision was appropriately implemented.

Futterman believes access to this information will open up public conversation about problems within the department. "This database provides a powerful tool for reform, but it's not self-executing," he says. "The release of this information doesn't ... make racism or sexism within the police department go away."

More recently, the city tried to release all misconduct data since 1967; however, the Fraternal Order of Police, the city's law enforcement union, has temporarily blocked this effort and now is seeking to destroy older records. The Chicago Police Department, the Fraternal Order of Police and the city's law department did not respond to requests for comment.

Victor Erbring, attorney supervisor at the Cook County Public Defender's Office, calls the new database "a huge step in the right direction." Public defenders in Cook County have often had difficulty obtaining police disciplinary records, just as lawyers have had trouble in New York, Erbring says.

However, with the new resource, he says that public defenders "will start routinely running the names through that database." Doing so, Erbring hopes, will secure more subpoenas for misconduct records.

Jo-Ann Wallace, president and CEO of the National Legal Aid and Defender Association, supports this new generation of data projects around the nation. "Transparency and accountability are crucial if we want a justice system that is fair and has the public trust," she says.

In New York City, this project will continue to evolve as the Legal Aid Society trains its attorneys to better integrate the database into their practice.

Looking forward, Conti-Cook says this project will meet its ambition when the police start to rethink who will be impeached and subsequently hold officers accountable. "I have high hopes it will," she says. ■

Unlimited Refills?

Federal Circuit considers whether patent laws can halt reselling of used ink cartridges

By Lorelei Laird

National Pulse

In the 17th century, British nobleman Sir Edward Coke set down some of the principles that still guide U.S. common law. Among them was his belief that sellers should not be able to direct how buyers use their goods. Any post-sale condition ought to be void, he believed, because buyers should be free to enter secondary markets.

In the 21st century, a Thai national named Supap Kirtsaeng put those ideals to the test before the U.S. Supreme Court. Throughout college and graduate school in the United States, he'd made money buying textbooks cheaply in Thailand and then reselling them in the States. In 2013's *Kirtsaeng v. John Wiley & Sons*, the court ruled that this was not copyright infringement because a first sale anywhere in the world is adequate to extinguish a copyright.

Now, both men's views are the subject of a dispute over another kind of importation: Should the U.S. Court of Appeals for the Federal Circuit adopt *Kirtsaeng*'s holding on international patent exhaustion—and, indirectly, Lord Coke's ideas on property generally—into patent law?

That's the question in *Lexmark International v. Impression Products*, which asks whether Lexmark can invoke patent law to stop third parties from refurbishing and reselling used ink cartridges. A panel of the U.S. Court of Appeals for the Federal Circuit heard oral arguments in the case last March—then, before it could rule, decided on its own initiative to rehear the case before the full court. It invited the federal government to weigh in as amicus curiae.

The court received the government's brief—and more than 30 others. The case has worried some of the country's biggest patent holders, whose business models could be radically changed by a decision on international patent exhaustion. The International Imaging Technology Council, a trade group for print cartridge remanufacturers, says refilled ink jet cartridges have $3.4 billion in annual sales.

Consumer advocates also weighed in, concerned that end users could be sued for repairing or modifying their own lawfully purchased property. Charles Duan, a staff attorney for amicus Public Knowledge, says this is already happening in copyrights—for example, the Library of Congress had to grant a copyright exemption last fall to permit repairs and safety research into automotive software.

"Ultimately, it really is about how much control consumers have over their own possessions," says Duan, whose Washington, D.C.-based nonprofit advocates for consumers in intellectual property policy.

CONTRACTS OR PATENTS?

Print cartridges, not the printers themselves, are typically the source of printer companies' profits. It shows in the prices. *Consumer Reports* magazine found in 2013 that you could buy 2,791 gallons of milk or 2,652 gallons of gasoline for the same price as a gallon of ink.

But ink isn't sold by the gallon—it's sold in cartridges with built-in legal and software safeguards to prevent reuse. One of these is Lexmark's "return program," which gives customers a 20 percent discount if they agree to return the spent cartridge to Lexmark. The company says this is a binding contract, with clear notice on the outside of the package, the cartridge and Lexmark's website.

But many customers ignore that

notice and resell the used cartridges to remanufacturers, often via online markets. The companies "hack" the software protections on used cartridges and refill them—and they're not bound by contracts between Lexmark and its customers. This led Lexmark to cite patent infringement when it sued Impression and other resellers in 2011.

All of the other defendants settled, but Impression moved to dismiss, arguing that the initial authorized sales exhausted Lexmark's patents. The U.S. District Court for the Southern District of Ohio ruled for Lexmark on foreign sales. Under a 2001 Federal Circuit ruling called *Jazz Photo v. U.S. International Trade Commission*, overseas sales do not exhaust U.S. patents because they are outside the scope of U.S. law.

The court also decided a domestic sales question for Impression. It said a 2008 Supreme Court decision, *Quanta Computer v. LG Electronics*, overturned an earlier Federal Circuit decision permitting restrictions even after a domestic sale.

QUESTIONABLE ANALOGY

The parties cross-appealed, so both types of sales were part of the case when it was argued on Oct. 2 before the en banc court. But much of the public interest has focused on the foreign sales aspect of the case.

On the law, one major source of disagreement was the basis for *Kirtsaeng*. Impression, and many third parties, argued that *Kirtsaeng* was based on common law, especially on Coke—whose writings addressed property rights generally. Edward F. O'Connor of Avyno Law in Los Angeles argued for Impression. He says the *Kirtsaeng* court analyzed the Copyright Act of 1976 only to look for an exception to the common law, and found none.

"And the common law makes no provision for place of sale as in any way being a distinguishing factor," he says. "That's the same common law that applies in patents."

But Lexmark and others argued that *Kirtsaeng* turned on a close interpretation of the Copyright Act's Section 109(a)—and never mentioned patent law. Lexmark's en banc brief says the Patent Act expressly applies patent rights "throughout the United States," while the Copyright Act is silent on geographic reach.

Lexmark lead attorney Constantine Trela Jr. of Sidley Austin in Chicago declined to comment. But Kristin Yohannan, special counsel to Cadwalader, Wickersham & Taft in Washington, D.C., made many of the same points in an amicus brief for the American Intellectual Property Law Association. She points out that patent law has no section analogous to the Copyright Act's Section 109(a)—in fact, patent exhaustion is a judge-made doctrine.

> *"The common law makes no provision for place of sale as in any way being a distinguishing factor. That's the same common law that applies in patents."*
> —Edward O'Connor

And the federal government, as amicus, charted a third course: It argued that by default, patents are exhausted by international sales, but patent holders may expressly reserve their rights. That was the "traditional rule" before *Jazz Photo*, it said, and the court should restore it. U.S. Department of Justice attorney Melissa Patterson, who argued for the United States, declined to comment.

Neither party cared for the government's position. O'Connor says the DOJ essentially "pulled that out of thin air," based on an 1897 case that isn't binding. Lexmark's brief said the government was supported only by "ancient case law" that doesn't require express reservation of rights.

WHAT'S AT STAKE

Meanwhile, the parties and amici were worried about practical effects. In particular, patent-holding businesses—including giants in biotechnology and computer hardware, as well as printer manufacturers and remanufacturers—were concerned about how a decision would affect their day-to-day operations.

Barbara Fiacco, a partner at Foley Hoag in Boston, gave oral arguments for amici CropLife International and the Biotechnology Industry Organization. She says her clients are concerned about maintaining regional pricing. With international exhaustion, they say, nothing would stop someone like Kirtsaeng from reselling foreign drugs inexpensively in the U.S. That could lead drugmakers to stop selling overseas, cutting off access to life-saving medicines.

Computer hardware companies tended to be on the other side. A group of amici, including LG Electronics and Intel, argued that manufacturers need international patent exhaustion because their devices are made with parts from all over the world. That means they'd need patent rights in the country of origin, the country of sale and any country where the device is partially assembled. Multiply that by dozens or hundreds of parts, they said, and it would quickly become hugely inefficient.

Others worried about unfair effects on consumers. Public Knowledge's brief said international patent exhaustion prevents price-gouging because it leaves consumers free to import patented goods from other countries. Thus, a ruling for international patent exhaustion could lower prices for Americans.

Duan is also concerned about the prospect of consumers being sued for tinkering with lawfully purchased items. This is already happening in copyrights, he says.

"In other areas of intellectual property, we actually see this quite often and to a pretty substantial detriment to consumers," Duan says. "Manufacturers are taking an intellectual property right that has one objective and using it to a completely different objective—namely, enforcing certain consumer restrictions on how they use devices." ■

Alito's First Decade

The justice is 'every bit as conservative as conservatives could have dreamed—and as liberals would have feared'

By Mark Walsh

Supreme Court Report

A crowd of several hundred people gathered in the auditorium of the National Archives building in Washington, D.C., last fall to hear a conversation with a member of the U.S. Supreme Court who usually remains far from the limelight.

Justice Samuel A. Alito Jr., who was approaching his 10th anniversary on the high court, recounted a story he likes to tell about attending a speech with his wife, Martha-Ann. They went to hear a judicial colleague talk about the Volstead Act, the federal law that implemented Prohibition.

After the event, "we got in the car and started to drive away, and my wife said, 'That was a very boring speech,' " Alito told the crowd. He agreed with her, but explained that there were many subjects that active members of the judiciary must avoid.

"They can't talk about what they did," Alito recounted telling his wife. "They can't talk about what they're going to do. And therefore it is very difficult for them to give an interesting speech."

"That's not really the explanation," Mrs. Alito told her husband. "Judges are very boring people."

AP PHOTO

HUMOR AND MODESTY

At the archives, Alito told the story in a way that suggests he not only agrees with his wife but is also fine with the idea of judges being perfectly boring in public. Yet in more than 90 minutes of being interviewed by Akhil Reed Amar, a liberal law professor at Yale Law School, Alito won over the crowd with his understated sense of humor and his modesty.

Amar, a former law clerk to Justice Stephen G. Breyer, has interviewed other justices in his wide-ranging, nonconfrontational style. Speaking at the Oct. 29 event, he called Alito "a hard nut … to crack," and he told the justice, "I've been trying to draw you out."

Alito may not be the most self-reflective justice, but in his 10 years on the court—he took his seat on Jan. 31, 2006—the 65-year-old New Jersey native has quietly helped move the court rightward on issues such as race in K-12 education, abortion rights, campaign finance, voting rights and religious accommodation.

On some of those issues, Alito's vote was a switch from how his predecessor, Justice Sandra Day O'Connor, had voted in related cases. (So much so that O'Connor publicly expressed her exasperation in 2010 that her legacy had been partially "dismantled.")

"Justice Alito has shown himself to be a reliable, consistent, principled 'judicial conservative,' in the sense of staying reliably close to the text, structure and historical evidence of the original meaning of the Constitution and striving to interpret and apply statutes in accordance with the words actually used by Congress," says Michael Stokes Paulsen, a professor at the University of St. Thomas School of Law in Minneapolis.

Paulsen, who was an intern in the U.S. solicitor general's office in the 1980s when Alito was an

assistant solicitor general, repeated an observation he had written earlier about the justice: "There are flashier stylists, purer purists, wittier wits and more poisonous pens, but in terms of consistency of methodology and results, there is probably no conservative on the court with a better record than Alito."

Erwin Chemerinsky, law school dean at the University of California at Irvine, says Alito "has been every bit as conservative as conservatives could have dreamed—and as liberals would have feared."

He notes that there have been at least a few instances in which Chief Justice John G. Roberts Jr., who joined the high court four months ahead of Alito, has disappointed conservatives, notably in the Affordable Care Act cases.

"But I can't think of an instance in which Alito has surprised," says Chemerinsky, a board member of the liberal American Constitution Society and regular contributor to ABAJournal.com.

TALKING POINTS

While the chief justice has spurned any contact with the Federalist Society, the conservative counterpart of the ACS, Alito has spoken frequently to the group and its affiliates. That includes a Texas event last September in which, according to one report, Alito reflected on his tenure and seemed to take some pleasure in the failed effort by Senate Democrats to filibuster his confirmation in 2006.

Josh Blackman, an associate professor at South Texas College of Law in Houston, attended the Sept. 19 Federalist Society Texas Chapters Conference in Dallas. The event was held at the institute of the president who appointed Alito to the Supreme Court, George W. Bush. Blackman posted a detailed account of the event, which included Alito dishing on some of the big cases of his tenure, including those in which he was in the majority and in dissent.

Blackman, a libertarian, said Alito seemed to relish appearances before conservative and libertarian crowds such as those attending Federalist Society events. "This is a crowd that will appreciate the constitutional perspective that he brings to the job," Blackman says. "That may not be the case when he speaks at a law school."

Christopher J. Paolella, a partner with Reich & Paolella in New York City, clerked for Alito both on the 3rd U.S. Circuit Court of Appeals at Philadelphia and, some years later, for the justice's roughly half-term in 2006 and the first full term that followed.

> *"A lot of people believe we decide very important issues, and the way those issues are decided is heavily dependent on who is on the Supreme Court rather than what is in the Constitution."*
> —Justice Samuel Alito

Paolella notes that both he and Michael S. Lee, one of Alito's other first Supreme Court clerks who had also served him on the 3rd Circuit, were well above the typical age of law clerks. "We were the world's oldest chamber of clerks," he said. Having familiar clerks with such experience can be particularly helpful for a justice joining the court in the middle of a term.

Paolella says that Alito has approached the job of Supreme Court justice the same way he did his job on the 3rd Circuit for 15 years. "He's never had any ambition to make policy," Paolella says. "He is a very humble judge."

BALLS & STRIKES

Alito hinted at that idea at the National Archives event when he was asked by Amar about whether the Supreme Court—currently composed of eight former federal appeals court judges—might benefit from someone with experience in elective office. (O'Connor, a former Arizona state legislator, was the last justice to bring such experience.)

"I don't really know whether that would be beneficial or not," Alito said. "I do know this, though: That if someone who has been a legislator is appointed to a court, that person, I think, has to flip a little switch ... and say, 'I'm not a lawmaker anymore. I'm now a judge,' and that's a different role."

Amar was smart enough to know that it never hurts to get Alito talking about baseball. The justice, who grew up in Trenton, New Jersey, chose the Philadelphia Phillies as his team as a youngster and once attended a Phillies fantasy camp.

Amar asked about the comparison of Supreme Court justices to baseball umpires, clearly cognizant of Chief Justice Roberts' assertion at his 2005 confirmation hearing that judges are mere impartial arbiters of balls and strikes.

Alito seemed to take a more refined view.

"If we were like a stereotyped idea of what umpires do," Alito said, then Supreme Court nominations would not be as controversial as they are, since "a lot of people believe we decide very important issues, and the way those issues are decided is heavily dependent on who is on the Supreme Court rather than what is in the Constitution."

"But the truth of the matter is there is a lot more discretion involved in being an umpire than you might think," Alito added, as he delved into some of the wiggle room that exists in baseball's rules on checked swings, the strike zone and the infield-fly rule.

"A lot of people think that it is very mechanical, and that eventually umpires can be replaced by machines, and maybe they will," Alito said. "But it is interesting to think about how much judgment goes into being an umpire." ■

EDITED BY
JAMES PODGERS,
MOLLY McDONOUGH

Practice

Something Special

A U.S. district court strikes down Florida rules prohibiting lawyers who are not certified from advertising as specialists

BY DAVID L. HUDSON JR.

Ethics

A federal district court has ruled that a Florida Bar prohibition against individual lawyers and law firms stating on their websites that they are specialists or experts in a practice field without being certified in that field violates the First Amendment of the U.S. Constitution. The ruling also applies to statements on blogs and social media.

Rule 4-7.14 of the Rules Regulating the Florida Bar prohibits "a statement that a lawyer is board-certified, a specialist, an expert or other variations of those terms" unless the lawyer has been certified under the Florida Bar's certification plan, or another certification plan that is accredited by either the Florida Bar or the ABA. The rule was adopted by the Florida Supreme Court in 2013.

Searcy Denney Scarola Barnhart & Shipley—a law firm that has offices in West Palm Beach and Tallahassee—and its five name partners challenged the constitutionality of the rule in a lawsuit filed in the U.S. District Court for the Northern District of Florida, which is based in Tallahassee. The firm concentrates its practice on representing plaintiffs in mass tort and product liability cases. Board certification is not available for these practice fields in Florida.

Searcy Denney's lawsuit also challenged Rule 4-7.13 of the Florida Bar Rules. That rule prohibits a lawyer from engaging in "deceptive or misleading" advertising, including "references to past results, unless such information is objectively verifiable, subject to Rule 4-7.14."

In an order on the merits issued Sept. 30 in *Searcy v. Florida Bar*, U.S. District Judge Robert L. Hinkle held that the challenge to Rule 4-7.13 was premature because the bar's board of governors had not interpreted it in an unconstitutional manner. He noted that the rule does not presume that all references to past results cannot be objectively verified, leaving open the possibility that such statements could be allowed.

But Hinkle determined that the challenge to Rule 4-7.14 was ripe for review. "The application of this rule is clear," wrote Hinkle in his order. "Searcy Denney cannot say it specializes or has expertise in mass tort or unsafe-product cases, or even in personal injury cases, even though the firm undeniably has expertise in these areas. Nor can any individual attorney claim to specialize or have expertise in mass tort or unsafe-product cases, even if the attorney handles only cases of that kind, and even if the attorney has successfully handled many such cases."

The Florida Bar had argued that Rule 4-7.14 furthered its substantial interest in ensuring that members of the public would not be misled into believing that a lawyer claiming to specialize or have expertise in an area is board-certified.

The bar also stated in its pleadings that "if the state were prohibited from establishing any standards as a basis for claiming specialization or expertise, lawyers would be able to self-certify and any lawyer could claim to be an expert or specialist in any field."

The problem, Hinkle wrote, is that Rule 4-7.14 "prohibits even truthful claims. Searcy Denney has expertise in mass tort and unsafe-product cases, as well as in personal injury cases generally. The bar has not denied it and could not reasonably do so. But Rule 4-7.14 prohibits Searcy Denney from noting on its website that it has expertise in those areas. Indeed, the bar prohibits every lawyer in the state from claiming expertise in mass tort or unsafe-product cases, because there is no board certification in these narrow fields. And the bar prohibits every law firm in the state from claiming expertise in personal injury cases, because law firms, as distinguished from individual lawyers, cannot be board-certified."

ILLUSTRATION BY SAM WARD

SIMILAR OUTCOME

Searcy is something of a companion to a ruling issued in December 2014 by the U.S. District Court for the Southern District of Florida, based in Miami. In *Rubenstein v. Florida Bar*, the court held that an ethics rule violated the First Amendment because it was interpreted by the bar to prohibit lawyers from citing results from past cases in radio and television commercials and indoor or outdoor display ads, unless those results were objectively verifiable. That rule was adopted by the Florida Supreme Court at the same time as Rules 4-7.13 and 4-7.14.

In both cases, the courts evaluated the restrictions under the test articulated by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* as a way of evaluating restrictions on commercial speech, including lawyer advertising. Under that test, the government may restrict commercial speech that is not false or misleading, or that does not concern unlawful activity, only if it shows a substantial governmental interest in the regulation; demonstrates that the regulations directly and materially advance that substantial interest; and tailors the regulations narrowly.

In *Searcy*, Judge Hinkle determined that Rule 4-7.14 failed the *Central Hudson* test. Hinkle wrote that the bar failed to provide any "empirical or even anecdotal evidence" to support its argument. He also noted that if the bar really is concerned about people being misled about certification, it could educate the public about what it means to be self-certified or require attorneys to include a disclaimer with their advertising and websites.

"Since this was a First Amendment case, the bar had the burden of proving that the rule would materially advance an important state interest," says Greg Beck, an attorney in Washington, D.C., who represented the plaintiffs in both *Searcy* and *Rubenstein*. "That the bar could produce no evidence to meet its burden was critical to the decision. In fact, the bar's rationale is not even backed up by common sense. There is no reason to believe that a consumer would think that a statement about a lawyer's specialization or expertise means that the lawyer has been certified by the Florida Bar. Lawyers who are certified by the Florida Bar can simply say so."

The case "is a good example of how overregulation of advertising in the name of consumer protection can end up harming, rather than protecting, consumers," Beck adds.

THE GOVERNMENT'S BURDEN

First Amendment experts reach a similar conclusion. "Under *Central Hudson*'s intermediate scrutiny test, the government bears the burden of explaining how prohibiting this speech furthers consumers' interests in receiving accurate information," says Helen Norton, a professor at the University of Colorado Law School. "Here the trial court found that the state 'offered no empirical or even anecdotal evidence' of such harm. It suggested instead that consumers might well find the contested speech helpful to their decision-making. Moreover, the court found that the government remained free to require lawyers to make truthful disclosures to inform consumers—e.g., to disclose whether they are or are not board-certified."

Clay Calvert, a First Amendment scholar at the University of Florida, says that "*Searcy* is a great example of applying *Central Hudson* with teeth. Judge Hinkle demanded proof, not suspect speculation or convenient conjecture, that the public will be misled by representations of expertise and specialization. Frankly, the term *board-certified* used by the Florida Bar seems far more appropriate for the medical professional than the legal one. The Searcy law firm does specialize in the areas it claimed, regardless of whether it was board-certified," Calvert says.

"The truth is," he adds, "as Judge Hinkle made evident, that the firm 'has expertise in mass tort and unsafe-product cases, as well as in personal injury cases.' Perhaps then, as in the movie *A Few Good Men*, for purpose of analogy, the Florida Bar can't handle the truth—unless it controls it."

The takeaway, Norton says, "is that when the government regulates truthful commercial speech, it bears the burden of demonstrating how its regulation actually serves consumers' interest in informed decision-making, and the trial court here found that the state did not meet that burden." ■

Charting a Public Service Path

How one lawyer went from aspiring library board member to municipal charter drafter

By Bryan A. Garner

Bryan Garner on Words

The moral of the story: Statutes, ordinances and rules are largely a mess in this country—and often highly misleading. Now for the story.

The year is 2012. You're a lawyer in Minneapolis. You learn that libraries everywhere are "deaccessioning" books to reduce the "clutter" on shelf space, and you're concerned. You're also committed to the idea that all politics is local. As a public-minded citizen, you discover late one night that the Minneapolis City Charter provides for a nine-member library board—three ex-officio members being the mayor, the president of the board of education and the president of the University of Minnesota.

If you could get on the board, this would be some fun. You'd be a hardworking member, and it would be significant public service. Hmm. Do you have to be appointed or elected? And how? You decide to do some preliminary checking.

The Minneapolis City Charter is long—some 70,000 words long (compared with slightly more than 4,500 in the U.S. Constitution). You find the operative provision in Chapter 2:

Except as in this chapter otherwise specifically provided, all ... officers provided for in this charter or deemed necessary for the proper management of the affairs of the city shall be appointed by the city council. The appointment of such officers shall require the affirmative vote of a majority of all members of the city council.

Fair enough. You know two new members of the city council, and they'd surely support an appointment for you. Perhaps you'll call one of them tomorrow.

COMPREHENDING THE INCOMPREHENSIBLE

Being a tenacious reader—why else would you want to be on the library board?—you discover, in Chapter 3, some 3,434 words later, this operative provision:

Notwithstanding any other provision of this charter or special law to the contrary, the executive committee shall have the exclusive power to appoint and remove during their terms of office the police chief, fire chief, city engineer, commissioner of health, city attorney, city assessor, city coordinator, civil service commissioner, and any officer in a department or agency who, by statute, charter or ordinance, is appointed by the mayor or city council or by any public board the majority of whose members are members of the city council.

Hmm. This "notwithstanding" clause overrides contrary provisions, and the main clause vests "exclusive power to appoint and remove" in the city council's executive committee. But wait a second. Is a library board member an "officer in a department or agency who, by statute, charter or ordinance, is appointed by the mayor or city council or by any public board the majority of whose members are members of the city council"? After close study and much syntactic reflection, you decide that library board membership is indeed covered by this provision.

So it's definitely an executive-committee decision. Good to know. You're feeling almost like a nominee-in-waiting.

But hold on. Because you're so thorough, and despite the late hour, you've found another relevant provision. It's still in Chapter 3, but it appears 19 sections and 2,507 words later: "The city council shall have power at any time ... to appoint such other officers as may be necessary to carry into effect the provisions of this chapter, and to prescribe their duties, unless herein otherwise provided for." It's more than a little unclear whether these officers are to be appointed by the city council or by its executive committee. Although both provisions in Chapter 3 cover the same topic, they do so inconsistently.

You begin to doubt that your friends on the city council, perspicacious though they are, have worked out precisely what the appointment procedures should be, according to the city charter.

Yet you're convinced that library board membership is undoubtedly "necessary for the proper management of the affairs of the city" (to use the words of the charter itself). Why else would the mayor and the UM president be obliged to serve on it? Your ambitions to bibliophilic public service have been only slightly dampened.

Because you know a thing or two about legal interpretation, you know that charters (like statutes and contracts) are to be read as a whole—not as isolated provisions. So you've soldiered on in your study of the city charter, only to find a fourth relevant provision—25 sections and 7,082 words later:

Whenever the mayor exercises the power of appointment or designation of persons to be members or occupants of any board, commission, department or office, and the city council approval of such appointment or designation is required, the appointment or designation will be deemed approved if the city council has not disapproved such an appointment or designation within a period of 60 days from and after the submission of the appointment or designation by the mayor to the city council.

Perhaps you might become a recess appointment by the mayor. But then again the mayor might not have the authority for this particular appointment. For that matter, the mayor doesn't seem from other provisions to have any authority to make solo appointments to any boards. That authority is vested in either the city council or its executive committee (we can't quite tell which).

Having spent five hours on this appointment conun-

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drum, you go to bed. Tomorrow you'll find out more about the current situation—and do some digging into what positions the mayor and the UM president have taken, not to mention the president of the education board.

But even before making any calls the next morning, you discover some extracharter ordinances that seem to change things further. For one thing, a 1965 special law reconstituted the board: one mayor-appointed trustee, one appointed by the city council and six elected by popular vote. In 1986, a special law changed the terms of trustees from six years to four. And in 2008, the library board itself was abolished altogether after the Minneapolis Public Library was merged into the Hennepin County Library.

So all this research—and fairly arduous reading of the charter—was for naught. When you recount this anecdote to a retired librarian, you learn that even from the earliest days, the UM president and the mayor had never actually participated in a single library board meeting, despite what the charter prescribes.

You've now spent eight hours to learn only how badly drafted and out of date the Minneapolis City Charter is.

SKILL AND MUCH PATIENCE REQUIRED

Enter the Minneapolis Charter Commission, which in 2002 undertook a stem-to-stern revision of the charter, which from its adoption by referendum in 1920 until the Plain-Language Charter Revision in 2013 had been amended 177 times—60 times by referendum and 117 times by ordinance. In the commission's words, the charter was "a highly impractical document: more than 70,000 words long; confusingly organized; full of redundant or conflicting provisions, or provisions long since overridden by statute; cluttered with detail better suited to ordinances; and written in a legalistic style that is more than a century out of date, and practically unintelligible to a nonlawyer (and exceptionally difficult even for lawyers)."

By 2013 the commission had completed its stellar work, which was next subject to approval by referendum. As the commission explained: "The proposed revision reorganizes and rewrites the entire charter, from start to finish, while preserving intact its substance. The revision reorganizes the charter in 10 articles and groups related provisions together. The revision uses plain English."

One example of the plain-language cleanup was eliminating the word *doth* (does), which had already become archaic English by the mid-1600s. Yet the word mysteriously appeared four times in the charter, probably because "some Minnesota legislator, in the early years of statehood (or perhaps as early as the territorial days), copied a form prepared by a lawyer from the older states on the Eastern seaboard, who had copied a form prepared by another lawyer ... and so forth, back to some common-law scrivener in Shakespearean England, whose words found their way into the charter of a modern American metropolis in the year 2013."

Gauged by modern drafting standards, the revision was a huge success. The word count went from 70,905 words to a mere 13,862—a reduction of more than 80 percent. The average sentence length plunged from 43.7 words to just 12.7. Passive-voice sentences dropped from 14 percent to only 3 percent. Some 1,848 instances of *shall* simply disappeared: The commission eliminated them because, of course, *shall* is a prime example of needless legalese.

There were several heroes in this story, but none greater than Brian Melendez, a Minneapolis lawyer who in 2002 offered to serve as the project's reporter and manage the process. During his work, he also served as the Minnesota State Bar Association president and as head of the statewide Democratic Party. Busy guy.

In the end, the voters approved the new city charter with almost 80 percent in favor, making it the seventh most popular charter amendment by referendum up to that point. For the first time, ordinary people (and therefore lawyers, too) have a realistic shot at understanding a legal document that affects their lives.

The effort required even more skill than it did time, but that's always the case with such revisions. How many other cities, associations, clubs and the like have board members with the skill, fortitude and patience to see such a project through? ■

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ILLUSTRATION BY SAM WARD

Picture This

Images can be powerful storytelling tools

By Philip N. Meyer

Storytelling

I often wonder why, assuming court rules permit it, lawyers don't incorporate more visual images—photographs and diagrams, including depictions of exhibits introduced at trial—directly into their briefs and court filings, especially after this type of evidence is introduced at trial.

The technology is readily available and in many instances a picture is truly worth a thousand words. Sometimes it may even be advantageous for lawyers to strategically introduce visual evidence at trial so that it can later be incorporated into appellate briefs.

Photographs, while shot from a particular perspective, are typically just as subjective as verbal descriptions. Yet at trial, they often seem incontrovertible because the intentions and, indeed, even the identity of the image-maker are not readily apparent. With photographic presentations, unlike testimonial presentations, the photographer stands outside of the frame of the image.

There is perhaps a more subtle reason why images are powerful tools of persuasion in legal storytelling. As film theorists have observed, images placed in sequence (in a montage) create an independent visual logic. And we all share a psychological predisposition to "see" causality when images are placed next to one another. We connect discrete yet related images placed in sequence into a story.

Educational psychologist and lawyering theorist Jerome Bruner noted that we are hardwired almost from birth to have impressions of, and predisposed to have beliefs in, causal relationships between events placed in sequence, particularly when these events are embodied and realized in visual images.

Daniel Kahneman, the Nobel Prize-winning behavioral economist I've written about in this column before, describes a classic experiment by psychologists Fritz Heider and Marianne Simmel: Subjects watched a short film (one minute and 40 seconds) of geometric shapes (a large triangle, a small triangle and a small circle) moving around a schematic diagram that appears to be a house with an open door. The subjects made up complex stories attributing character and identity to the various shapes, and intentionality and causality to their movements.

> "THE PERCEPTION OF INTENTION AND EMOTION IS IRRESISTIBLE."
>
> —DANIEL KAHNEMAN

PHOTOGRAPH BY AP IMAGES

Kahneman summarizes: "Viewers see an aggressive large triangle bullying a smaller triangle, a terrified circle, the circle and the small triangle joining forces to defeat the bully; they also observe much interaction around a door and then an explosive finale." That is, the subjects construct a complex causal plot as if they were an audience watching a movie at the cinema. Kahneman concludes, akin to Bruner, that "the perception of intention and emotion is irresistible."

FILLING IN THE GAPS

This clearly identified psychological predisposition to project stories upon visual images in sequence is, perhaps, one of the reasons why we so easily become lost in movies—just as we are transfixed by and often assign deep meanings to the images embodied in our dreams. How we connect images into narrative is the basis of montage theory in cinema: Moviemakers are especially adept at anticipating how viewers make causal leaps, filling in gaps between images and constructing a complex visual story logic.

Making the right visual editing "cuts" between images is crucial for successful filmic storytelling. A famous film editing dictum is "1+1 = 3." In other words, images placed into sequence are far more than merely the sum of their parts; movies link the imagination of the filmmaker with his or her audience.

Artful advocates typically attempt to evoke the power of images in creating a strong visual logic in the theater of courtroom advocacy. Likewise, in legal briefs, lawyers may emphasize visual imagery, evoking a narrative, without directly relying upon photographs or pictures. Sometimes the use of even a single, powerful visual image captured in language can make the story presented in a brief's statement of facts come alive. This image can then be recycled and transformed in the legal

argument itself. The power of vivid imagery once captured and presented can serve as what Barry Scheck, co-director of the Innocence Project, has referred to as "the emotional pivot" of an argument, transforming a flat description of facts into a compelling story.

For example, in a post-conviction brief in the 1992 U.S. Supreme Court case *Riggins v. Nevada*, the core issue was whether the defendant was denied due process when he was placed on trial after being "forced to ingest high dosages of the antipsychotic drug Mellaril" over the objections of his attorney. The brief begins evocatively:

"Petitioner David E. Riggins is presently under sentence of death after he was so heavily drugged by the state of Nevada that he appeared like a zombie throughout his trial. Despite Riggins' objection while competent to receiving medication during his trial, and despite substantial evidence that Riggins would have been competent to stand trial without medication, the state of Nevada forced Riggins to ingest extremely high dosages of the antipsychotic drug Mellaril each day of the trial. The medication sedated Riggins; it made him appear apathetic, uncaring and without remorse. Riggins was therefore prevented from presenting the best evidence he had—his unmedicated demeanor—to support his only defense: that he was legally insane at the time of his crime."

The story turns on the emotional pivot of the visual image of Riggins captured in a single word—zombie—in scenes shot from a limited third-person perspective of the jury watching Riggins. That is, the reader is placed in the jury box and the brief repeatedly returns to the recurring image of the heavily sedated and medicated Riggins as a zombie. This repetition does not seem forced or calculated, especially as it is presented in and matched with a hard-boiled "just the facts, ma'am" writing style that stays on the surface of events—merely re-presenting the facts and the testimony of the trial without extensive commentary. This is a voice or style well-suited to the construction of this particular type of story; a style that, as novelist David Lodge observes, "impassively tracks the characters as they move from moment to moment towards an unknown future."

PAINTING A PICTURE WITH WORDS

After providing the background to Riggins' illness and psychiatric diagnosis, the brief returns the reader to sit in the jury box, compelling the reader to regard Riggins as a zombie.

"Accordingly, Riggins was forced to ingest 800 milligrams of Mellaril each day of his trial, a dosage every psychiatrist considered excessive. Dr. Jurasky ... described this dosage as enough 'to tranquilize an elephant.' ... It was no surprise, therefore, that Riggins was seen closing his eyes during his hearing on a motion to terminate the medication and had a zombielike appearance throughout the trial."

The psychiatrist's phrase that describes Mellaril's effect on Riggins—he was given enough Mellaril to tranquilize an elephant—is especially vivid and visually arresting, fitting the image of Riggins as a zombie. The brief then quotes from the prosecutor's closing argument, emphasizing how the prosecution—including the state's expert witnesses—had focused on Riggins' demeanor at trial, contradicting their promise not to do so: "Does Riggins express sorrow? No. Does he express remorse? No." The statement of facts returns to the emotional pivot—the core image of the defendant as zombie, dipping effectively into Riggins' consciousness, observing that he wanted to express grief and sorrow for the victim, but was prevented by the drug from doing so:

"Rather than looking like the emotionally disturbed individual that he is, the heavily sedated Riggins sat calmly and impassively through the sentencing hearing. Although he wanted to express the grief and sorrow he felt for killing [Paul] Wade, the medication prevented him from doing so, and, in fact, prevented him from reading a statement he had prepared expressing these sentiments."

The image of Riggins as a zombie, I believe, was crucial to the argument's power, and ultimately to the successful outcome of his case at the Supreme Court.

The effective use of visual imagery has an important place in legal storytelling. It can be employed directly by using pictures or photographs, by placing images into purposeful sequences using the editing cuts of montage or sometimes, as in the petitioner's brief in *Riggins*, by employing visual images simply created through the use of a few well-chosen words. ■

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

ILLUSTRATION BY BRENAN SHARP

Opening Doors

Microsoft's legal chief trumpets diversity council's accomplishments

By Victor Li

Brad Smith

PHOTOGRAPH COURTESY OF MICROSOFT

Diversity

MICROSOFT CORP.'S PRESIDENT AND CHIEF LEGAL OFFICER, Brad Smith, has long been a champion for racial and gender diversity. Indeed, he says that he's believed in the benefits of diversity since he was in grade school.

"I had the opportunity in the sixth grade to leave the southeastern Wisconsin suburbs and go to an integrated school," says Smith, who was in Chicago last fall for the sixth annual meeting of the Leadership Council on Legal Diversity. "This was my first opportunity to sit in a classroom with students who were African-American, and it was a wonderful experience. It really opened my eyes as to what people can accomplish when we have the opportunity to learn from each other, and that has always stuck with me. I really do think that diversity doesn't just make everyone better—it's made me better."

Smith, who serves as the LCLD's board chairman, had plenty to be happy about. According to him, the council's diversity pipeline programs have grown dramatically during the organization's six years of existence.

Smith cites the LCLD Fellows Program, which allows firms and companies to hand-pick up-and-coming minority and female midcareer

attorneys to receive guidance and training to prepare them for leadership positions within those firms or companies. There were a record 209 fellows in 2015, he says, a number that has grown consistently since the program started in 2011 with 125 fellows.

The council's 1L Scholars Program, which allows students to work at a law firm or in-house department during the summer after completing their first year of law school, is also growing. Smith reports 190 1L Scholars in 2015, up considerably from 2011, when the program debuted with 46.

Meanwhile, the LCLD's law firm mentorship program has had 3,160 mentor/mentee pairs, and Smith hopes to increase that exponentially by the time the council celebrates its 10th anniversary. His goal is to have a direct impact on 10,000 people in the legal profession by 2020.

Additionally, the Leadership Council on Legal Diversity launched the Pathfinder program in 2014, which provides guidance, training and networking opportunities for early-career attorneys with three to five years of experience.

A New York City Bar Association study found that 23.6 percent of minority attorneys and 21.3 percent of women left their firms last year, compared to 14.7 percent of white men.

HOMEGROWN PROGRAMS

Some firms and schools have come up with their own pipeline programs. In October, K&L Gates announced a partnership with the University of Pittsburgh School of Law to create the K&L Gates Diversity Fellowship. Starting this fall, one qualifying student will receive three years' paid tuition to Pitt Law and a summer associate's job at K&L Gates after both the 1L and 2L years.

And in April, the University of Washington School of Law announced the Gregoire fellows program. The school chose 10 minority and female students to receive partial scholarships and paid summer jobs with top law firms and companies in the state, including Microsoft, Amazon and K&L Gates.

Despite the increase in diversity pipeline programs, diversity within the legal industry continues to lag behind comparable industries. In a study released in early October, the New York City Bar Association had good and bad news when it came to diversity at New York City law firms. The bar association reported that the number of female partners at the firms taking part in the survey hit a record high in 2014, and it also saw an improvement when it came to women in leadership roles at city firms. Other than that, it was mostly bad news as the study found that attrition rates for minorities and women continue to outpace those of white men.

Among all attorneys, the study found that 23.6 percent of minority attorneys and 21.3 percent of women left their firms last year, compared to 14.7 percent of white men. For associates, the attrition rates were 27.2 percent for minorities and 26 percent for women, both marks beating the 25 percent national average as reported by *The American Lawyer*.

For all his pride concerning the LCLD's efforts, Smith knows more needs to be done. "It remains sobering to see the relative dearth of African-Americans and Latinos entering law school," says Smith, who notes that those two groups make up about a quarter of all college grads but only 15 percent of law school students. "We do a good job moving women through law school, but we need to work on retaining them as their careers progress."

Smith hopes the legal profession will learn from others, particularly medicine and business. "I don't think that we're going to build a more diverse profession simply by working harder," he says. "We must innovate and work in new ways."

DIVERSITY BONUS

One new way of working might be for clients to force their outside counsel to embrace diversity. Microsoft has created a law firm diversity program for the 15 firms the company works with the most.

"We'll pay them a bonus equal to 2 percent of all the fees they bill us during the year if they meet defined diversity goals," says Smith. "During the six years we've done this, we mainly focused on promoting diversity within the composition of teams working for us or firms as a whole."

Beginning this year, however, Microsoft is starting to evaluate its outside firms based on diversity within their leadership ranks. Smith says that law firms can earn their diversity bonus by having minority or female partners manage Microsoft's account, have a diverse management committee, or tap minority or female partners to serve as first-chair litigators or lead deal attorneys.

"As we work with law firms, we need to partner together to create more diverse opportunities for lawyers at all levels," Smith adds. "The time has come for us to focus more squarely on leadership." ■

Foreign Aid

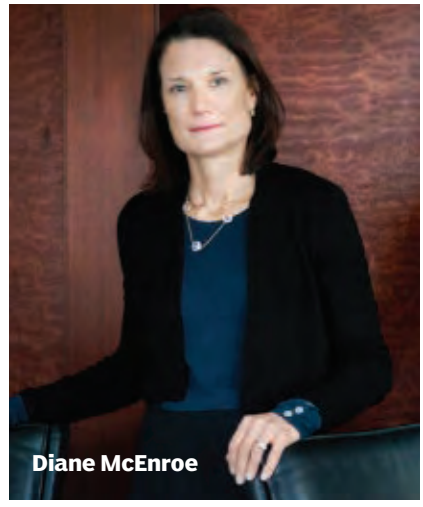
Sidley attorneys have provided free services in 25 countries By Jason Tashea

Pro Bono

SIDLEY AUSTIN, LIKE MANY MAJOR LAW FIRMS, has global offices, including London, New York City and Tokyo. And thanks to its Africa-Asia Agricultural Enterprise Pro Bono Program, Sidley's attorneys are also working in developing nations such as Liberia, Mongolia and Somalia.

Sidley's international effort was inspired by its work on a cotton trade case in Brazil, which prompted the firm to look at other ways it could help the rural poor.

Launched in 2012, the Africa-Asia program offers free legal services to small and midsize agricultural enterprises and nongovernmental organizations focused on development. Since it began, 285 Sidley attorneys have provided counsel to 80 projects in 25 countries, some of them the poorest on Earth.


Diane McEnroe

The program began with a focus on agriculture because the objective was "to assist the bottom of the pyramid in rural parts of Africa and Asia," explains Scott Andersen, co-managing partner of Sidley's Geneva office and managing partner of the Africa-Asia program.

Organizations that meet this criteria apply for pro bono services through Sidley's website. While the administration of the program is funded entirely by Sidley, clients are asked to retain local counsel out of pocket and to cover travel expenses if a Sidley attorney needs to make an in-country visit.

While the program has drifted slightly from its agrarian roots, the goal remains to help those at the bottom of the economic dog pile. The NGOs and enterprises the program helps are as diverse topically as they are geographically.

One client, Rent-to-Own, is a social enterprise in Zambia that provides high-scale equipment to low-scale businesspeople to jump-start economic growth. Another client is Splash Mobile Money in Sierra Leone—the country's first mobile payment platform to improve peer-to-peer money lending, something particularly helpful for the country's rural population.

ONE EXAMPLE

Another organization Sidley assists is the Global Shea Alliance, based in Accra, Ghana. The GSA works in 28 countries to promote the use of shea—known as shea butter when used in chocolate and cosmetics.

Sidley advises the GSA on how to dismantle trade barriers in the United States and India. Currently, both countries do not allow shea butter in chocolate. However, as Geneva-based Sidley attorney Colette van der Ven notes, the international standard allows for up to 5 percent of noncocoa vegetable fats in chocolate.

Van der Ven and other Sidley attorneys assist the alliance by providing legal analysis and justification for the rule change. This effort includes the drafting and filing of a citizen petition with the Food and Drug Administration to change the rule, as well as organizing a panel at the World Trade Organization Public Forum about shea butter and regulatory barriers, according to Diane McEnroe, a partner in Sidley's New York office.

"They are an incredibly passionate group of attorneys," explains Joseph Funt, the GSA's managing director. "They are not just interested in removing the trade barriers; they are interested in our sustainability projects and helping the GSA grow internationally."

Beyond helping the organizations themselves, this program is a way to improve the in-country law firms they partner with. According to Andersen, the partnership between Sidley and a Ghanaian firm improved that firm's capacity to take on pro bono legal work. This, he says, will position them to take on Western clients as more Western investment enters the country.

While the core goal of the program is to assist organizations abroad, Sidley attorneys are also reaping benefits. Van der Ven, a WTO litigator, says this work creates a perspective she would not otherwise have. "It helps you to better understand what the on-the-ground implications are of different trade provisions."

Similarly, McEnroe, whose practice area is FDA regulation, says that working on these pro bono projects provides a better understanding of how things get from the farm to a finished product. "We don't always see that with our packaged-food clients," she says.

Tommer Yoked, a sixth-year associate in Sidley's Houston office, says the breadth of experiences from the Africa-Asia program have given him more confidence.

One of Yoked's pro bono projects allowed him to take his experience structuring deals in the energy sector and apply it to rural farmers in East Africa. Ultimately, this effort helped farmers in Malawi and Tanzania improve the selling price of their product and decrease the cost they pay for seeds.

Even with the added hurdles in the developing world, Yoked says he feels this work is rewarding because "you are seeing the fruits of your labor." And of his work in Tanzania he says: "It was one of those moments that made me really glad I went to law school." ■

PHOTOGRAPH BY LEN IRISH

Taking Credit

'Plastic payments' have their risks and their rewards By Jason Krause

Billing/ Collecting

IF YOU ARE A MILLENNIAL, there's a good chance you're making payments with the digital wallet Venmo. Techies have a soft spot for bitcoins. And more than 100 million companies accept PayPal, Apple Pay or another electronic form of payment to run their businesses.

But if you're a lawyer, your preferred payment method is probably still a paper check.

While it may be a long time before lawyers move to mobile phones for their payment processing, law firms are finding it pays to accept credit cards from clients to operate in the 21st century.

Pankaj Raval started his own Los Angeles-based law firm several years ago to serve startup tech companies, among other clients. He says that getting paid was too slow and complicated for many of the young entrepreneurs he was trying to serve.

"It can be hard enough to get through an engagement letter and processing to bring in a new client," Raval says. "But then you have to get them to bring a check, which seems so clunky and last century. A lot of clients don't even really use checks anymore."

Law firms do not traditionally accept credit cards because, unlike checks, credit card payments don't just go into a trust account and remain, unmolested. Banks often require processing fees and other charges that force a law firm to either use trust account funds or business account funds to cover these fees.

Rule 1.15 of the ABA Model Rules of Professional Conduct requires that lawyers don't commingle funds of clients and third parties with those of the lawyer. Many state bar ethics opinions, including an ABA opinion, have approved of credit card payments for legal services, but with reservations. In particular, there is concern that credit card fees and the difficulty in reversing charges lead law firms to commingle business and trust accounts.

"Within the legal field there is still a stigma around accepting credit cards," says Amy Porter, CEO of LawPay, a credit card processing service for law firms. "It's not just complicated and ethically risky, but there is the concern that clients are going into debt to pay for legal services."

If funds can be processed with less risk, firms may be able to accept credit card payments, which can improve cash flow and client intake.

"Lawyers need to learn that if you can accept payments up front," Porter says, "there is less discounting when you have to chase after clients to get paid later."

And large corporate clients increasingly rely on procurement or corporate purchase cards to make big payments, Porter says. Using a purchase card, large organizations can authorize a one-time payment. If a law firm can process these credit payments, it is possible to accept more payments from large organizations.

According to a recent report from the Mercator Advisory Group, small businesses increasingly find it difficult to obtain flexible lines of credit or credit card processing from the financial services industry.

"It's not just law firms," says Alex Johnson, a Mercator senior analyst. "The banking industry is not interested in providing flexibility or special allowances for small businesses."

In response, businesses such as Lex/Actum Merchant Services, PayPros Legal and LawPay have sprung up to handle law firms' credit card needs.

WEIGHING LIABILITY

To provide flexible credit card processing that prevents commingling, LawPay deposits funds into the appropriate operating or trust account for a law firm, and it will cover processing fees so funds are never moved from a trust account.

Of course, credit card processing opens law firms to additional risk if client data is stolen or credit card information is misused. However, Johnson says some services allow businesses to process payments without collecting or storing any credit card data from clients. If no one in an office handles a client credit card, the risk for card fraud is minimized. Accepting credit card payments is one way for law firms to get paid more easily. Raval works with LawPay to accept credit cards, but says he believes it is also important to provide alternative payment arrangements. He has accepted payment via PayPal and thinks bitcoin is an "interesting option."

More flexible payment options, he adds, allow him to accept payments and get on with the work of serving his clients.

"In some situations we streamline payments by accepting a flat fee or some sort of upfront arrangement so we don't have to worry about commingling," he says. "I want things to be as simple as possible, not just for the clients, but for me as well." ■

ILLUSTRATION BY SAM WARD

FINANCIAL AID ABOUNDS

When it comes to investment strategy, you don't have to go it alone

Solos/ Small Firms

BY MARC DAVIS

Real estate and estate planning attorney Eleonora di Liscia had good reason to leave her former financial adviser: "They had a one-size-fits-all approach to investing," says the solo practice attorney based in Skokie, Illinois.

"I didn't have a person [to talk with], so it wasn't hard to leave."

Attorneys like di Liscia, without the time or expertise to invest on their own, might consider hiring a personal financial adviser. Di Liscia chose one who had been "thoroughly vetted previously by my friend, and so I hired him," she says. The new adviser, retained two years ago, created a customized investment portfolio with low to medium risk, she says.

For high-quality financial planning, look for a certified financial planner or an adviser affiliated with a reputable financial services and investment firm. These professionals can recommend appropriate investments for a client's age, financial circumstances, objectives and tolerance for risk, and they can continually monitor a client's portfolio.

Dennis Skorewicz, a financial adviser with Edward Jones in Ponte Vedra Beach, Florida, develops an investor profile before advising a new client on investments.

"We first establish an investor's needs and goals," Skorewicz says. "What is the client's income, debt, net worth? Also important is the client's age," he says, because a younger investor can afford to assume more risk since there's a longer time to recover any losses that might occur.

When all the client information is accumulated and analyzed, Skorewicz designs a customized investment portfolio. He ensures that it is sufficiently diversified so it's not too damaged in the event of a market sector downturn.

NOTHING FANCY

A typical investment portfolio might include mutual funds (a basket of various stocks in diversified market sectors), U.S. Treasury bonds, bank certificates of deposit and exchange-traded funds—a collection of stocks or bonds whose prices fluctuate in accord with the collective underlying value of holdings of the fund. ETFs can be traded on the stock market.

With investment options ranging from simple stocks and bonds to complex derivatives, Linda Leitz, a certified financial planner at It's Not Just Money Inc., says, "Don't invest in anything fancy."

Leitz, based in Colorado Springs, Colorado, says that mutual funds and ETFs are good options. "Buy and hold is a good strategy. Buy when the market is low. When it goes up, take some profit and buy [U.S. Treasury] bonds or CDs to lock in those profits."

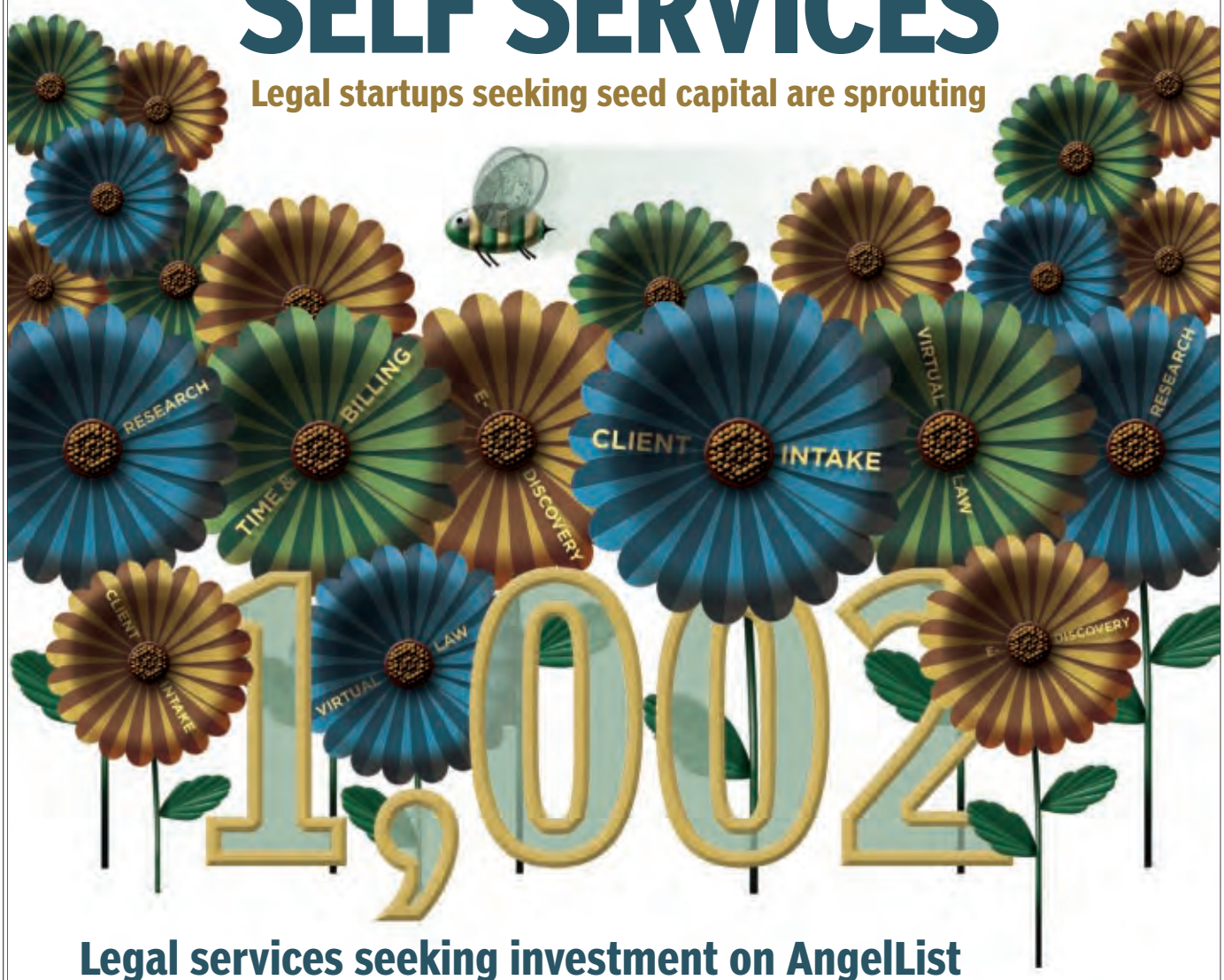
As for the risk, both Skorewicz

(Continued on page 70)

LAW BY THE NUMBERS

SELF SERVICES

Legal startups seeking seed capital are sprouting



Legal services seeking investment on AngelList

WITH ALL THE NEW NAMES FLASHING AROUND in press releases, it may seem like everyone is trying to start a legal services business.

Well, it may not be *every*one, but a look at the legal startups page on the AngelList website shows a big number: At the end of last year, more than 1,000 startups picked the legal category as one of their markets. Firms seen in the pages of the *ABA Journal* appear, including Lex Machina, Modria and Wevorce, along with other, far less familiar businesses, including Clerky, Filey and Lawfty.

AngelList, which itself started in 2010, is an online service where startup businesses and potential investors match up. It also allows job seekers to apply for tens of thousands of positions at startups through one application.

As an indicator of interest in new legal businesses, AngelList is an aid. But it must be noted that being on this list does not mean the business received investments. The list also does not include legal service units that were self-financed or did not seek investors on the site.

GET MORE DETAILS AT **ABAJOURNAL.COM/LAWBYTHENUMBERS**.

GRAPHICS BY STEPHEN RAVENSCRAFT

Legal Residency

UnitedLex partners with law schools to give new grads work experience

By David L. Hudson Jr.

Training

THE CONCEPT OF A RESIDENCY program for law school grads is far from new, but one new law firm is turning concept into reality.

UnitedLex—a legal services outsourcing firm with 22 centers of operation worldwide, including North America, the United Kingdom, Israel and India—is supporting a legal residency program at five law schools that allows recent law graduates to work with corporate legal departments and law firms. The two-year program places graduates squarely in the worlds of litigation management, e-discovery, contract management, intellectual property, cybersecurity, compliance, ethics and immigration law.

Daniel Reed, CEO of UnitedLex, says it is reasonable to ask "why is it that law schools do not have similar types of residency training programs as found in medical and engineering schools? Those schools are progressive in how they interact with their respective professions.

"Traditionally, law schools have been less aggressive in partnering with the commercial world to provide students every possible advantage. The time is now for change."

UnitedLex partners with five law schools in the program. The initial four are Emory University School of Law, the University of Miami School of Law, the Ohio State University Moritz College of Law and Vanderbilt Law School. The University of Southern California's Gould School of Law became the fifth site in November.

JOB-PREPARED

Stephen Shaw graduated from the Florida law school and joined the UnitedLex residency program in September 2013. He now works at UnitedLex as a project manager embedded at the Sedgwick law firm.

"I've not only learned the complexities of e-discovery," Shaw says, "but also developed people-management skills overseeing attorneys. I interface with partners, associates and clients on a daily basis."

Cassandra Groves entered a UnitedLex residency after graduating from Moritz law school in May 2013. "In this program, you get an intensive, hands-on training that you don't receive in law school," she says. "I'm now managing my own client accounts, and I worked with the UnitedLex office in India on behalf of a client in the U.K. You learn very quickly and learn to manage things on your own. You also learn how to work collaboratively with others in a team-oriented environment."

UnitedLex residency training consists of a litigation core curriculum, an advanced core curriculum, advanced discipline training modules, practicums and certifications. Residents learn the basics of e-discovery, computer forensics, the dangers of cyberthreats, patent licensing and how to avoid malpractice claims.

"The curriculum is challenging and mind-expanding," says Shaw. "I developed whole new skill sets and learned a whole new language."

Robb Hern, director of global litigation services, oversees training at UnitedLex's Columbus, Ohio, facility. "I teach classroom-style courses in e-discovery and a class on the Federal Rules of Civil Procedure as part of the core curriculum," he says. "But we then incorporate our residents into actual cases. Nothing beats real-case exposure. Because of our diversity of clients and capital investment, we have a broad range of exposure and serve different industries."

Many senior executives at UnitedLex teach the residents, and some also teach as adjuncts at the participating law schools.

The law schools say they welcome the residency program because of the benefits it will bestow on their graduates.

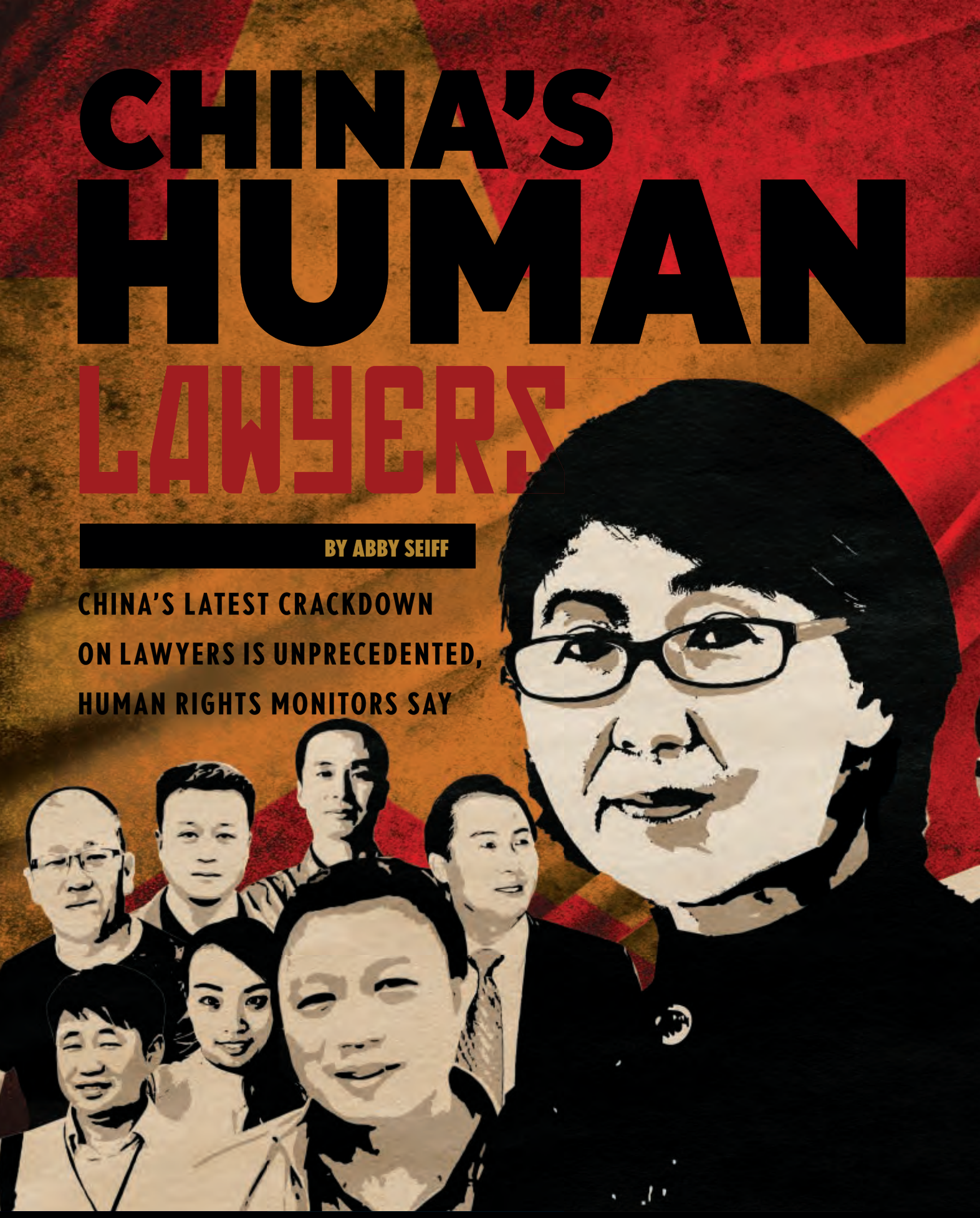
"The legal residency program is an innovative and exciting program that offers a select group of graduates a pipeline to employment at the intersection of law, data and technology," says Chris Guthrie, dean of Vanderbilt Law School. "The program places graduates at the center of innovation in the delivery of legal services." ■

ISTOCKPHOTO

CHINA'S HUMAN LAWYERS

BY ABBY SEIFF

CHINA'S LATEST CRACKDOWN ON LAWYERS IS UNPRECEDENTED, HUMAN RIGHTS MONITORS SAY



RIGHTS

The attacks published in China's state-sponsored news media pulled no punches. Wang Yu is an "arrogant convict of a woman," screamed an op-ed article in one major newspaper. Wang Yu is a "hypocritical and false lawyer." Wang Yu is a "shrew."

In retrospect, the media assault against Wang, one of China's leading human rights lawyers, should have come as no surprise—and it foreshadowed things to come.

Three weeks before the start of a large-scale government crackdown against the country's increasingly restive community of human rights lawyers and other activists, China's official news agency, Xinhua, issued a bizarre pair of articles. In one, the agency attacked Wang for having allegedly beaten a railway ticket collector until he became permanently deaf. In another, Xinhua declared that Wang's credentials had been falsified, and that she had beaten up two people.

Xinhua warned that Wang had to be "exposed" for what she was.

In the dead of the night on July 9, state security forces moved in. After she dropped off her son and husband at the airport, Wang returned to her Beijing home to discover the power and Internet cut off. In a social media post, she wrote that she

ILLUSTRATION BY STEPHEN WEBSTER

"CALLS TO MY HUSBAND'S AND SON'S CELLPHONES ARE RINGING UNANSWERED."

–WANG YU

In April 2015, three months before she disappeared, human rights lawyer Wang protested against expropriations of farmland and properties in Suzhou, northwest of Shanghai.

"heard someone trying to force the doors open," and that "calls to my husband's and son's cellphones are ringing unanswered."

Both Wang and her husband, human rights attorney Bao Longjun, were detained July 9 and accused of inciting subversion of state power. In early January, they were formally arrested, their lawyer told the *New York Times* on Jan. 13.

The pair have been incommunicado since July, when they began languishing under "residential surveillance"—a status sometimes interpreted to be the equivalent of house arrest but that is actually akin to a "black jail." There, detainees are held in solitary confinement and subjected to extreme interrogation, forced confessions and even torture. Family members, friends and colleagues have been denied access or even knowledge of their whereabouts.

The arrests of Wang and Bao are just the tip of the iceberg. By mid-November, more than 300 people had been swept up in what human rights monitors describe as an unprecedented crackdown on Chinese lawyers. Those detained or questioned include not only some of the most active rights lawyers but also their support staff, associates and even family members. At least three have seen their children's passports confiscated and their movements curtailed; Wang and Bao's 16-year-old son was stopped from flying to his boarding school in Australia and detained at his grandmother's house after trying to sneak out of the country.

By early December,

PHOTOGRAPHS BY AP PHOTO/MARK SCHIEFELBEIN; AP IMAGES/KYODO

Samantha Power, U.S. ambassador to the United Nations, launched the Free the 20 campaign on Sept. 1, marking the 20th anniversary of the Beijing Declaration and Platform for Action and highlighting 20 female political prisoners around the world.

most of them had been released, but at least 41 still were detained or missing, according to the China Human Rights Lawyers Concern Group, which is based in Hong Kong.

After a one-day trial Dec. 14, a people's court in Beijing convicted one of China's most prominent rights lawyers of "inciting ethnic hatred" and "picking quarrels and provoking trouble" for comments posted online. Pu Zhiqiang's three-year suspended sentence would allow him to go free as long as he does not commit another offense. But the conviction also means Pu will never be allowed to practice law again, according to reports by Western news outlets. Pu was detained in May 2014 and imprisoned for more than 18 months before being tried.

"It is positive that Pu Zhiqiang is unlikely to spend another night in jail, yet that cannot hide the gross injustice against him," said William Nee, the China researcher at Amnesty International, in a statement. "He is no criminal, and this guilty verdict effectively shackles one of China's bravest champions of human rights from practicing law."

The arrests have been accompanied by what is possibly the biggest state media smear campaign in recent history. "Confessions" have been broadcast alongside TV programs highlighting alleged criminal activities of lawyers or their poor general behavior. (A video of Wang aired a week after her detention shows her "raising her voice and pointing at officials in court during a hearing," Agence France-Presse reported.) Newspapers have disseminated the confessions as well and carried extensive denunciatory commentary.

"THIS IS CLEARLY A MASS ATTACK ON LAWYERS THAT'S MISUSING LEGAL PROCESS, USING PROPAGANDA AND THEN BRINGING BACK THE COLLECTIVE PUNISHMENT OF CHINA'S PAST BY TARGETING THE FAMILIES."

–SHARON HOM

Sharon Hom, the executive director of Human Rights in China and a law professor emerita at the City University of New York, says the action has no analogues in modern Chinese history.

"This mass crackdown on lawyers is the broadest in terms of location, and clearly coordinated because of the timing of the initial crackdown," says Hom, who is based in the group's New York City office. "It included more than 23 provinces. It was a combination of detentions, disappearances and targeting family members, together with a very clear propaganda smear campaign in the *People's Daily*. This is clearly a mass attack on lawyers that's misusing legal process, using propaganda and then bringing back the collective punishment of China's past by targeting the families."

THE 'GREAT FIREWALL' OF CHINA

The crackdown comes amid a changing human rights environment in China. A decade ago, there were a few dozen rights lawyers there. Today, there are hundreds. As their ranks have swelled, so too has their power to appeal to a wider audience. The greater reach has come not simply because of greater numbers,

PHOTOGRAPH BY CHIP SOMODEVILLA; ILLUSTRATION BY STEPHEN WEBSTER

but because of the power of the Internet in China.

In spite of the "great firewall"—government efforts to limit access to sites considered subversive—Chinese citizens have access to more information and more varied sources than ever. Nearly 700 million people use the Internet today compared with about 150 million a decade ago. Microblogging services such as Weibo (212 million active users a month), messaging apps like WeChat (600M), and search and forum sites including Baidu (590M) have changed the landscape dramatically. "Netizens," an engaged force of Internet users numbering in the hundreds of millions, move faster than the government—using the Web as a potent tool to fight corruption, petty crime and policy.

Lawyers and activists have tapped into this digital environment with great success. Online forums and messaging services have made large-scale organization possible while social media has allowed mass dissemination of narratives countering government propaganda. For a government intensely focused on controlling its narratives, the growing power of dissident groups on the Internet poses a grave threat.


William Nee

In the government's view, "this was an organized group of individuals who had grouped together to oppose government policy—the exact nightmare situation for the communist regime," says Frances Eve, researcher for the Network of Chinese Human Rights Defenders, a coalition of international human rights NGOs headquartered in Washington, D.C.

"It's something you always see when you look at civil society," Eve says. "When an organization becomes too organized or a group of people becomes organized, that's what scares them. An individual

PHOTOGRAPH COURTESY OF WILLIAM NEE; ILLUSTRATION BY STEPHEN WEBSTER

IN SPITE OF THE "GREAT FIREWALL"—THE GOVERNMENT'S EFFORTS TO LIMIT ACCESS TO SITES IT CONSIDERS SUBVERSIVE—CHINESE CITIZENS HAVE ACCESS TO MORE INFORMATION AND MORE VARIED SOURCES THAN EVER.

The Fengrui law firm in Beijing is a primary target of the Chinese government.

PHOTOGRAPH BY AP PHOTO/MARK SCHIEFELBEIN

criticizing the government could be lost in the wave of information that is out there, but once you become more organized, that's more of a threat."

Nee agrees that this organized presence made lawyers a hazard the government couldn't leave unaddressed. "Many of the cases they take are related to holding the government accountable for human rights violations or human rights abuses, and many have a substantial following on social media. They have a degree of professional networking—solidarity among fellow lawyers who are aware of the cases—and the government sees this as a political threat," Nee says.

One of the government's primary targets has been the Fengrui law firm in Beijing; its director and numerous employees, including Wang, were picked up in the earliest days of the crackdown. Fengrui is a midsize, general practice firm that has taken on some of the biggest human rights cases of the past decade, including those of dissident artist Ai Weiwei and Ilham Tohti, an academic and advocate for the Muslim Uighur minority in the Xinjiang region who was sentenced to life in prison in September 2014 on charges of being a separatist. While those cases alone might have been enough to make the firm a target, it drew further government ire by taking great pains to publicize unjust cases. One of those arrested was an activist with the handle "Super Vulgar Butcher," whom Fengrui employed to draw attention to cases.

"He would work with this law firm to do research and also ... go outside the courtroom with a banner, with some signs, take photos of it and put it on the Internet," Nee explains. "It would be retweeted massively and also retweeted on Weibo, and it would ... shift the public narrative about some of these cases and bring attention to it domestically—put pressure on the judges, put pressure on the courts and also bring international attention to the cases."

That attention has translated into severe criminal allegations. Fengrui was accused of "disrupting public order, seeking illegal profits, illegally hiring protesters and attempting to unfairly influence the courts," stated reports in Xinhua. "Since July 2012, the group has allegedly organized more than 40 such controversial incidents."

Days after his July detention, Fengrui head Zhou Shifeng reportedly confessed, saying in state media that he had knowingly broken

the law. In such articles, Fengrui is invariably referred to as a "criminal gang." The articles are part of a larger government effort to counter the work of the lawyers and regain the public narrative through a campaign of both information and erasure. Zhou was among several activists, including Wang and Bao, formally arrested last month.

On the censorship front, websites have been blocked and search results edited. Fei Chang Dao, a blog monitoring China's Internet controls, recorded that after the detentions, Weibo blocked search results for "rights defense lawyers" while search engine giant Baidu refused to permit forums on the topic of rights lawyers. A few days later, Baidu expunged results so that a search for Wang would find only state media articles.

In October, state television aired footage of Wang and Bao denouncing their son's attempted escape from China. In the videos, Bao weeps uncontrollably and an exhausted-looking Wang says she "strongly condemns" the actions as a plot by those with "ulterior motives."

Eva Pils of King's College in London has extensively researched Chinese law and the status of the country's human rights lawyers. She says the media campaign was an integral part of the crackdown. "The intended impact is clearly intimidation," Pils says. "I would call that visual repression—using images of persecuted lawyers to signal to the rest of society: 'Make sure this is not you. You don't want to end up in this place.'

Fengrui law firm head Zhou Shifeng was formally arrested in January.

Consider the effect these reports and broadcasts have on other members of the legal profession. You might be scared; you might think about exactly how much you would be prepared to use social media to discuss your case or reach out to colleagues," she says.

UNEXPECTED RESULTS

Even while the rights community is reeling from the government actions, many say they are hopeful such intimidation will not work in the long run. "What happens when repression leads to resentment within wider circles of society?" Pils asks. "Even if it doesn't lead to widely felt resentment or resistance, it might invite sympathy."

One media smear campaign out of a historical playbook suggests that the government narrative is not selling well. Hom of Human Rights in China says, "Even though the online space is being controlled, regulated, monitored, what was interesting was that in the aftermath of that smear campaign, we saw posts ... where it was not only family members who spoke out," she says. In spite of the "ecosystem of intimidation," a range of messages surfaced questioning the state's account.

Former clients wrote messages denying the state media claims. "They said, 'It's not true that I was manipulated by my lawyer. My lawyer represented me,' " Hom says. "Individuals not connected in any way to the lawyers wrote things like this: 'A criminal syndicate? Was there a trial? Have they been found guilty?' There were also comments like: 'Well, even if they were guilty in the end, shouldn't they have legal representation?' They're not taking it silently, lying down."

There is precedent for the Chinese

ILLUSTRATIONS BY STEPHEN WEBSTER

government's current campaign against human rights lawyers. In 2011, dozens of lawyers, activists and human rights workers were targeted. Many, such as prominent rights lawyer Teng Biao, were kidnapped, held incommunicado and tortured. (See "The Most Dangerous Job in Law," *ABA Journal*, February 2015, page 56.) Then, as now, the government aimed to send a strong message to those considering "subversive" acts.

But the 2011 action also showed how "repression produces effects that are unintended from the perspective of those in charge," Pils says. "There was a broad expectation that it would have a very, very bad chilling effect," she says. "What happened was the movement grew. More and more lawyers were joining these groups, were holding meetings ... and taking on cases together with more experienced human rights lawyers—even just joining signature campaigns or a social media group discussing a human rights issue was a meaningful first step that could lead to further involvement down the line. This is how the number of human rights lawyers grew from a few dozen or so five years ago to some 200-300 today. It's too early to say what will happen from the effect of current repression."

"I WOULD CALL THAT VISUAL REPRESSION —USING IMAGES OF PERSECUTED LAWYERS TO SIGNAL TO THE REST OF SOCIETY: 'MAKE SURE THIS IS NOT YOU. YOU DON'T WANT TO END UP IN THIS PLACE.' "

-EVA PILS

PHOTOGRAPH COURTESY OF EVA PILS

A POLICY OF TORTURE

For those who remain out of contact, meanwhile, detention is likely to include abuse and torture. In November, Amnesty International published *No End in Sight: Torture and Forced Confessions in China,* addressing the systematic use of the methods in the Chinese criminal justice system.

"Torture and other cruel, inhuman or degrading treatment or punishment ... have long been prevalent in all situations where authorities deprive individuals of their liberty," states the executive summary. "The Chinese government itself has acknowledged the extent of the problem and has increased attempts to address it." Moreover, China in 1988 ratified the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the report points out.

Nevertheless, the report states, the government "has failed to bring domestic legislation in line with the obligations of the treaty." As a result, "extracting 'confessions' through torture is a serious human rights issue which the Chinese government needs to continue to address, by further bringing its domestic legal restrictions on prevention and prohibition of torture into line with international law and standards, in particular the Convention Against Torture, which binds China legally as a state party. In addition, other improvements in the legal system and improved implementation of these laws and standards are needed to effectively eradicate torture and other ill treatment."

Amnesty International's report relies heavily on interviews with lawyers who have experienced torture at the hands of

government security agents. "I know from personal experience how widespread torture is in China's current law-enforcement environment. I hope one day to see torture classified in China as a crime against humanity," a lawyer named Yu Wensheng told researchers last summer. He described the 99 days in 2014 when he was accused of having aided democracy protesters in Hong Kong. His hands, bound behind an iron chair, caused "so much pain that I didn't want to live." A month after his interview, Yu was swept up in the current crackdown and imprisoned for 24 hours.

Yu Wensheng told Amnesty International about his torture during a 99-day detention.

ATTENTION DROP

As the crackdown continues, rights activists have struggled to keep pressure on the government. In late October, German Chancellor Angela Merkel met with activists during a trade mission, but few other heads of state have followed her lead. When Xi Jinping, China's president and general secretary of the Communist Party, visited the United Kingdom to discuss trade deals, Prime Minister David Cameron ducked any public discussion of China's rights record. The U.S. government has been more outspoken on the issue, routinely voicing concerns over the arrests, but it has not sought to put strong pressure on China to change its policies.

"The overall tendency has been one of weakening statements and pressure," says Pils. "It's a very difficult time for human rights in general: The rise of the surveillance state not just in China but the U.S. and Europe, the national security debate, leads to general weakening of human rights arguments."

In an interview with the *ABA Journal* in October, Eve from the Network of Chinese Human Rights Defenders expressed concern that media attention had already "drifted away" from the plight of Chinese human rights lawyers. "There's occasionally some statements from governments, but they're still quite weak and they don't take into account the scale of what this crackdown has entailed, the number of individuals who have been detained, the number of families who have been targeted, which is a really ugly form of collective punishment."

Eve and other human rights advocates also expressed a desire to see the organized bar in the United States speak out more forcefully on the issue.

In August, the ABA issued a statement by then-President William Hubbard that "encourages the Chinese government to permit lawyers to discharge their professional duty to assure achievement of the fair and just legal system that the Communist Party has promised to all its citizens." But the statement also emphasized that improvements to the rule of law in China can only be made through collaboration between the Chinese government and outside groups. Since 2004, the ABA has played an active role in those efforts through a number of initiatives being conducted in China through its Rule of Law Initiative.

"The development of a just rule of law is a continuing struggle in every nation, including the United States," said Hubbard, who pointed out that the ABA highlighted at its annual meeting "the importance of supporting Chinese lawyers, maintaining progress on rule of law reform in China and continuing the ABA's collaboration on that agenda."

The ABA statement "urges the many foreign legal organizations, universities, NGOs and government agencies that have been cooperating with Chinese counterparts in advancing the rule of law to continue their collaboration, and encourages other foreign institutions that are objecting to the current treatment of lawyers in China to join in supporting those lawyers and cooperating with China."

In a *Washington Post* op-ed published Sept. 6, Robert Edward Precht, president of the legal think tank Justice Labs, said ABA members who pushed for a more critical statement "were met with strong opposition."

"ABA members who are supporters of the Chinese lawyers were bitterly disappointed," he wrote.

A few days later, the *Post* published a letter from ABA President Paulette Brown stating that the association "is concerned about recent legal developments in China and is following them closely,

Some of the tools of China's "Netizens" are the search engine Baidu, mobile app WeChat, censorship monitoring blog Fei Chang Dao, and microblogging site Weibo.

PHOTOGRAPHS BY AP PHOTO/NG HAN GUAN; SHUTTERSTOCK.COM

hoping that conditions will evolve to allow for ongoing international collaboration with Chinese lawyers, which has been mutually beneficial. The ABA is proud of its long-standing commitment to the rule of law and human rights," she wrote.

"There was a real obligation there for the ABA to speak out for our colleagues who are lawyers and who are targeted for being lawyers. I'm with the camp that is rather distressed about that," says Hom. "Why does this require the international community to speak out? If you care about rule of law in China, this is clearly an attack on one of the strongest pillars in China to build a rule of law or respect rule of law."

ORGANIZED IMPACT

Nee says the influence of organized bar groups should not be underestimated. "If lawyers and lawyers' associations are able to forcefully and in a principled way speak out against what's happening now, that will have a very important effect because it's the opinion and professional advice of colleagues in the field," he says. "In some ways that will have as much or more impact as governments speaking out."

Brown discussed these issues directly with Chinese government officials during a trip in mid-November to address the Asia Forum, sponsored by the ABA Section of International Law. She described her activities in a letter prepared for release to members with questions.

"Our approach has paired public statements of concern about the arrests and mistreatment of lawyers with private advocacy through third parties, particularly the U.S. government, and through direct dialogue with our Chinese counterparts," Brown states in her letter. "In opening remarks at the Asia Forum, I underscored the importance of 'the independence of the legal profession and the ability of lawyers to represent their clients without fear of reprisal,' noting further that 'around the world, this basic principle is too often disregarded,' and 'it's imperative that we, as global lawyers, work together to promote the independence of the legal profession here in China and across the globe, so that all individuals will have equal access to the justice system.' "

In addition to her speech at the forum, Brown reported, "I also raised our concerns and the importance of the independence of the legal profession in lengthy meetings with officials of the All China Lawyers Association, the China Law Society, the Supreme People's Court and the National People's Congress." Brown also held meetings with the ABA's Beijing-based Rule of Law Initiative staff, including U.S. and Chinese lawyers, "and with the lawyers and advocates with whom they partner in providing legal aid to migrants, training criminal defense lawyers to take advantage of new criminal procedure reforms, expanding protection for victims of domestic violence and the LGBT community, and improving environmental governance and protection."

In sum, Brown states in her letter, "I believe that by continuing to support these reform leaders at the same time that we advocate for high-level bilateral U.S. government engagement on human rights issues and look for appropriate opportunities to directly raise our concerns with Chinese officials, we are most effective in upholding our principles and our commitment to promoting the rule of law abroad."

"DEAR FATHER AND MOTHER, PLEASE FEEL PROUD OF ME. ALSO, NO MATTER HOW HORRIBLE THE ENVIRONMENT IS, YOU MUST HANG ON AND LIVE, AND WAIT FOR THE DAY WHEN THE CLOUDS WILL DISPERSE AND THE SUN WILL COME OUT."

–WANG QUANZHANG

A LETTER TO THE FAMILY

One of those in "residential surveillance" was Wang Quanzhang, a Fengrui lawyer who left a prescient letter to his family in the event of his arrest, which occurred in January.

"No matter how despicable and ridiculous we appear to be in the portrayal by the manipulated media, Mother, Father, please believe your son," he wrote in a letter translated by Human Rights in China.

"My taking up the work—and walking down the path—of defending human rights wasn't just a sudden impulse. Instead, it came from a hidden part of my nature, a calling that has intensified over the years—and has always been slowly reaching up like the ivy.

"This kind of path is doomed to be thorny, tortuous, rocky.

"But when I think of the difficult road we have gone through together, this path seems commonplace.

"Dear Father and Mother, please feel proud of me. Also, no matter how horrible the environment is, you must hang on and live, and wait for the day when the clouds will disperse and the sun will come out.

"Your son, I kowtow once more.

"(Please publish after I have lost my freedom.)" ■

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

ILLUSTRATION BY STEPHEN WEBSTER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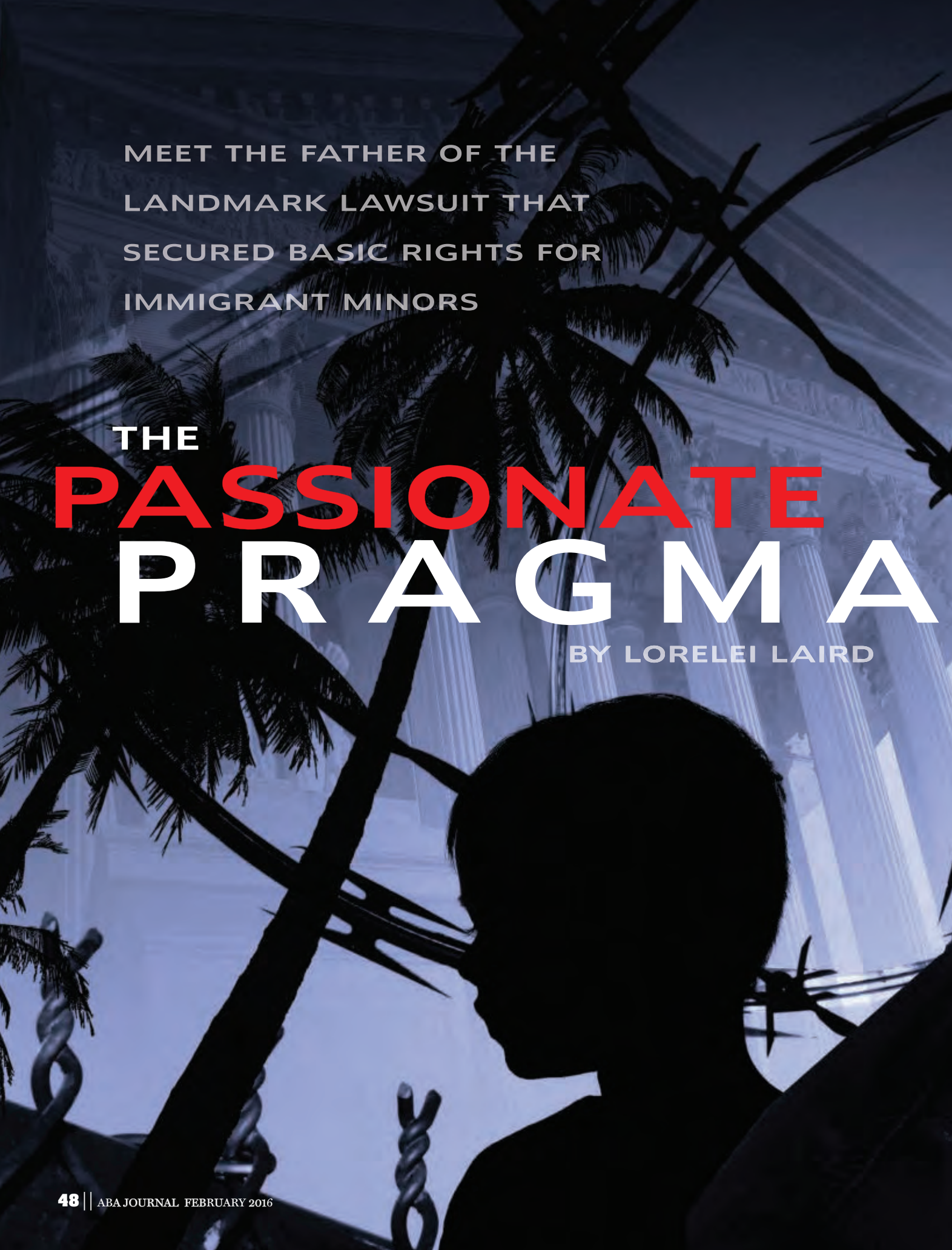


MEET THE FATHER OF THE LANDMARK LAWSUIT THAT SECURED BASIC RIGHTS FOR IMMIGRANT MINORS

THE PASSIONATE PRAGMA

BY LORELEI LAIRD

TIST

At first, Carlos Holguín was skeptical. A well-known actor in Hollywood called seeking help for his housekeeper's daughter after immigration authorities arrested and detained the girl for being in the country illegally.

That wasn't unusual. Holguín represented such people often as an attorney at the Center for Human Rights and Constitutional Law, a public interest firm in Los Angeles. And it was 1984, a time when migrants from El Salvador, like this 15-year-old girl, were coming to the U.S. in droves to escape their country's brutal civil war.

PHOTO ILLUSTRATION BY BRENAN SHARP & TONY AVELAR

What was unusual was the caller's concern: The Immigration and Naturalization Service (a precursor to today's Immigration and Customs Enforcement) wouldn't release the girl to anyone but a parent or guardian, a policy created for children's safety. The problem was that parents without legal status, like the girl's mother, would be arrested and deported if they came for their children. Civil rights attorneys were starting to believe the policy's real purpose was to use the kids as bait.

Holguín wasn't sure it was a good idea to challenge a policy intended to protect minors. But then he saw where they were being kept. In the Hollywood neighborhood of Los Angeles, authorities had taken over a 1950s-style motel. Though it was surrounded by single-family homes, the motel had been an eyesore and was frequented by prostitutes and drug users. The INS contractor Behavioral Systems Southwest had drained the swimming pool, covered the front of the property with chain-link fence and strung up concertina wire.

"Visually, it was the worst facility I've ever seen," says Holguín, still general counsel at the center. "It was an extremely makeshift situation for a facility, especially to be holding children."

It wasn't much better inside. The detainees had no right to visitation, no recreation, no education for the minors and little to do. Unaccompanied minors were often informally adopted by older women who shared their rooms, Holguín says. But during the day, kids mixed freely with adults of both sexes, with no evident concern about safety.

"That treatment and those conditions were completely inconsistent with any real concern for their welfare," says Holguín. "It certainly persuaded me, and I think it ultimately persuaded the court, that the ostensible concern that the agency had for the well-being of the minors was not sincere."

"It was horrifying, coming from the child welfare and even the juvenile justice world, to see how these kids were treated," recalls Alice Bussiere, who eventually became Holguín's co-counsel on the matter. Then an attorney at the National Center for Youth Law, she works today for the Youth Law Center in San Francisco.

Children also were subject to arbitrary strip searches. John Hagar, who was then an attorney for the American Civil Liberties Union of Southern California, recalls that staff at one big INS facility would bring minors into the gym every morning, erect a screen between boys and girls, and search everyone. Hagar, now a solo attorney in Sacramento, says authorities never found anything in body cavities, though they found broken mirrors on two girls.

A woman grieves for her son killed in a guerrilla attack in El Salvador, 1984.

PHOTOGRAPH BY AP PHOTO/LUIS ROMERO

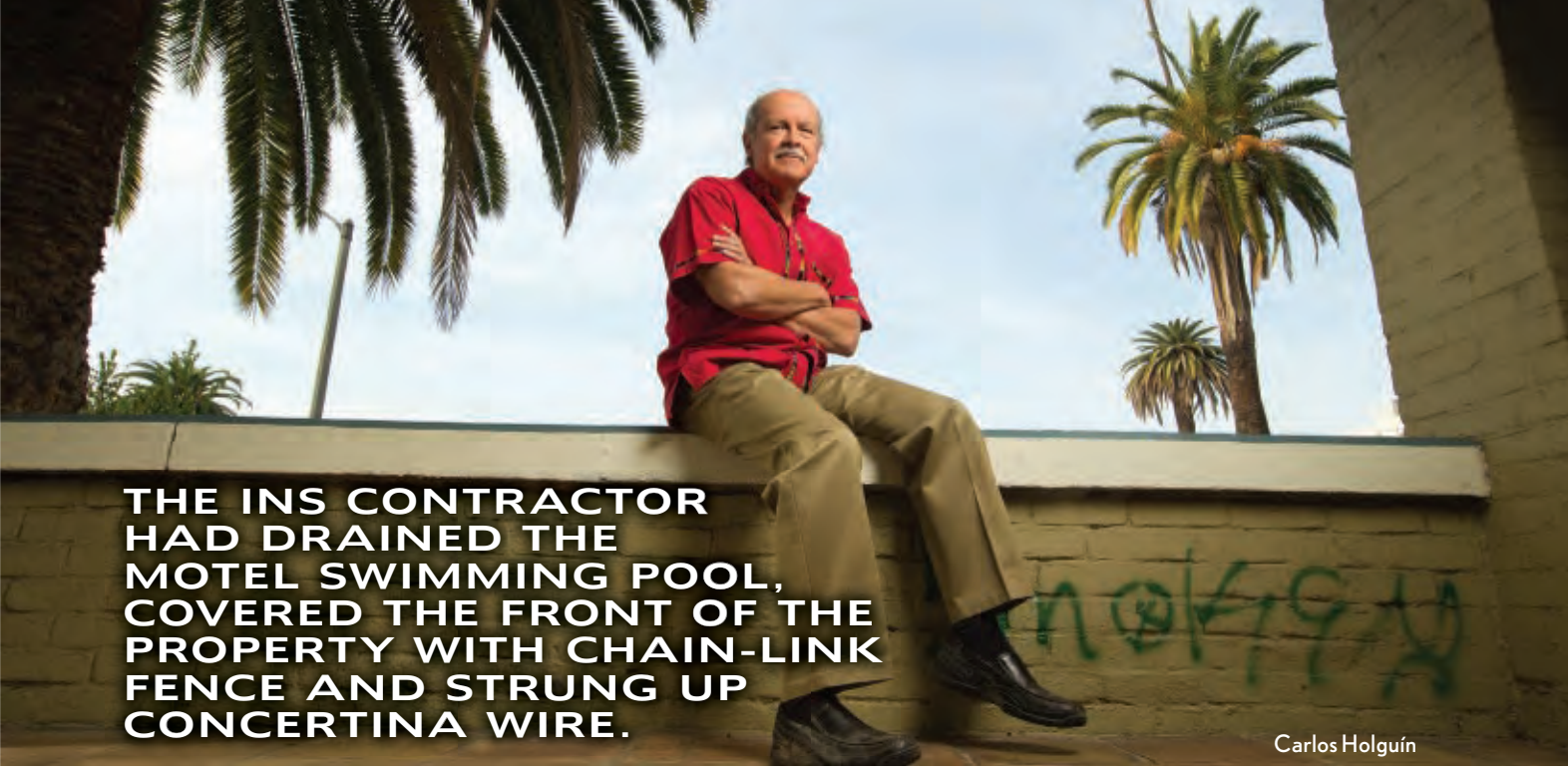
In an effort to keep children from living in such conditions, Holguín and his co-counsel sued—and changed the legal landscape surrounding the rights of immigrant minors. The 1985 class action lawsuit they filed to strike down the parents-only release policy became *Flores v. Meese* (for Edwin Meese, the U.S. attorney general at the time, and lead plaintiff Jenny Lisette Flores, a 15-year-old detainee). The suit ended in a settlement that's still among the most powerful legal tools available to immigrant children's advocates.

"The *Flores* case overall is a crucial landmark case in U.S. immigration history and, frankly, in the treatment of children under U.S. law generally," says Denise Gilman, director of the University of Texas School of Law's Immigration Clinic and current vice-chair of the Committee on Rights of Immigrants in the ABA Section of Civil Rights and Social Justice.

"The difference today, where the [federal government] is putting people in foster care and looking at other avenues to house these kids, as opposed to putting them in detention centers, is really remarkable," says Steve Schulman, leader of the pro bono practice at Akin Gump Strauss Hauer & Feld in Washington, D.C., and another former co-counsel.

The *Flores* settlement has been invoked in at least four enforcement actions and numerous individual petitions, and it continues to make a difference today. Last year, the settlement formed the basis for a strongly worded federal court order stopping Immigration and Customs Enforcement from detaining all immigrant mothers with children. Now styled *Flores v. Lynch*—the case has outlasted eight attorneys general—it's currently pending before the 9th U.S. Circuit Court of Appeals at San Francisco.

Throughout the case's convoluted



THE INS CONTRACTOR HAD DRAINED THE MOTEL SWIMMING POOL, COVERED THE FRONT OF THE PROPERTY WITH CHAIN-LINK FENCE AND STRUNG UP CONCERTINA WIRE.

Carlos Holguín

history—which includes a trip to the U.S. Supreme Court and yearslong settlement negotiations—Holguín has been its lead counsel and shepherd.

"No question that he is the driving force behind this litigation for a long, long time," says Peter Schey, who—as president and executive director of the Center for Human Rights and Constitutional Law—has been Holguín's boss for more than 30 years. "We wouldn't be where we are today without his creative development of strategies and legal brief-writing."

UNWELCOME MESSAGE

The *Flores* case garnered widespread media attention because of the 2014 surge of Central Americans seeking refuge from rampant gang violence in their home countries. Much of the publicity focused on unaccompanied minors, whose numbers had been increasing dramatically over the past few years. Federal authorities, trying to keep up, established temporary shelters and "rocket dockets" in immigration court for the minors.

However, the media paid less attention to the increase in apprehensions of mothers with small children in tow. Immigrant adults, even those with children, have fewer legal protections than unaccompanied minors—whose treatment by authorities is prescribed by the *Flores* settlement and federal law.

As a result, the federal government could quietly adopt a policy of detaining all immigrant women with children, which was expressly intended to deter would-be migrants. Upon the opening of the South Texas Family Residential Center in Dilley, Homeland Security Secretary Jeh Johnson told a press conference: "Frankly, we want to send a message that our border is not open to illegal migration; and if you come here, you should not expect to simply be released."

Immigrant advocates picked up on that message, and they were not pleased. Holguín, who as *Flores* class counsel has a limited right to enter detention facilities, went to visit the Artesia, New Mexico, temporary family detention center. (The center was closed in fall 2014 to shift inmates to more permanent facilities.)

There he was surprised and disturbed to see "very, very young children"—nursing babies to maybe 6 years old—in secure lockdown facilities. He was used to seeing minors in prisonlike conditions, but they'd typically been 12 to 17. It was disconcerting to see so many babies, he says, particularly since there were complaints about poor medical care.

Holguín came away saddened at first—and then motivated by anger to do something about it. It's a progression he's felt over and over throughout his career.

"There's just no way to describe what it's like to sit across the table from [people] like the women who are being held in Texas, and not come away with an intense emotional experience," he says. "I'm not one to wear my emotions on my sleeve, but I'm not going to deny that I've been very moved by a lot of the suffering of the people I've dealt with and defended over the years."

Holguín's closest colleagues say this kind of quiet passion is not unusual for him—especially on issues affecting immigrant kids. "He seems to be very motivated by correcting injustices, particularly, in my experience, those that affect children," says Bussiere of the Youth Law Center, one of the few *Flores* co-counsel who has stayed involved throughout the case's history.

"He's clearly motivated by his strong commitment to social justice," says Schey, "and much of that time has been dedicated to the plight of immigrant children."

He's also a very practical lawyer, Bussiere says. "I think he starts with 'What is the problem we're trying to solve?' and moves to 'What is the legal mechanism for solving that problem?' " she says. "In other words, he's not always immediately going to litigation."

Holguín himself illustrates that

PHOTOGRAPH BY SHUTTERSTOCK.COM

The Center for Human Rights and Constitutional Law in Los Angeles

with a story about California's Proposition 187, a 1994 ballot initiative intended to deny eligibility for most state services to immigrants in the country without papers. Holguín and Schey were counsel in one of the four lawsuits—which were consolidated before the 9th Circuit—challenging the measure. The state had been fighting those cases until 1999, when Gov. Gray Davis was elected and pushed for a settlement.

Holguín and Schey were particularly concerned about minors being denied the right to go to public schools, in part because they'd worked on *Plyler v. Doe*, a 1982 case in which the Supreme Court said children without papers may attend public schools. Holguín says one of the other attorneys on the case resisted settling, arguing that they should keep appealing so the court would revisit *Plyler*. But Holguín felt he had an obligation to his clients.

"I said no, we're not going to place the education of thousands of kids at risk," Holguín says. "I'd just as soon get the win. If kids go to school, move on to something else."

In the end, he says, he was "tickled pink" when the state settled the matter with mediation. What remained of Proposition 187 was later repealed.

JUSTICE YOU SHALL PURSUE

Holguín says activism is a family business. His grandfather, who left Mexico during the country's 1910-1920 revolution, was a union organizer who "used to make speeches to the organizing workers in the *plazita*" in Los Angeles. His father, a teacher in the heavily Latino public schools of East Los Angeles, was involved in the Los Angeles Unified School District's 1968 student walkouts protesting open racism and substandard education for Mexican-Americans. The district asked the elder Holguín to organize the parents into advisory councils intended to mollify them; instead, he encouraged sit-ins and confrontations with administrators.

The focus on social justice has carried on to Holguín's own children. His son, a recent law graduate, had volunteered with the ACLU, the Inner City Law Center and other public interest organizations throughout law school. His daughter, a baby in his desktop photo, was working on a master's degree in social work last fall. After graduation, she planned to work for the Los Angeles County child welfare agency, just like Holguín's wife.

Though Holguín is from the second generation of his family born in the United States, he believes his heritage plays a part in his focus on immigration. He has plenty of relatives in Mexico and even recalls an uncle from Chihuahua, who had no papers, living with his family when he was young. "The differences between us, when you've got family ties and so forth, are not that great," he says. "And when you see people who are 'but for the grace of God, there go I,' it definitely is key to the things that one thinks are important."

In his spare time, Holguín is still focused on social justice. For years, he's played with a band performing *nueva canción*—the Latin American genre of politically aware folk music. (One of its most famous artists was the Chilean Víctor Jara, who wrote his last poem just before his torture and execution by Augusto Pinochet's forces.) Over the years, he says, they've played at events for unions and other causes.

He has a vacation house in Mexico, and even when he goes there for time off, he's

PHOTOGRAPHS BY TONY AVELAR

working to help migrants. His house happens to be near a rail line that carries Central American migrants north. Sympathetic locals regularly wait for trains, then drive alongside and throw bags of food to the migrants huddled on top. Holguín took a trip in November that included meeting up with those migrants, as well as taking a trip to migrant camps in the state of San Luis Potosí.

"It's killing two birds with one stone," he says. "There's the musicians I play with down there. I've got artist friends, but everyone's kind of mixed up in trying to do something, particularly recently with respect to the Central American migrants."

LAW AS ENTRÉE TO POWER

As a young adult in the late 1970s, Holguín decided law school was the best way to pursue justice. "It seemed to me, and I think this has proven to be a correct assumption, that the courts and the law offer us an entrée point to political power that is very difficult to get through other means," he says. "It always struck me that as long as the U.S. judicial system is inclined to intervene on behalf of disadvantaged people, that we ought to be taking advantage of that opportunity."

The law school he chose was not one of the prestigious programs at LA's major universities, but the People's College of Law, a school founded to train lawyers—particularly lawyers of color—"dedicated to securing progressive social change and justice."

In the late 1970s, Holguín says, the school attracted students who turned down Harvard. And it provided experiences he "wouldn't change for anything," he says, including courses taught by working civil rights lawyers. One, Ben Margolis, had famously defended blacklisted entertainment writers and directors who refused to testify before the House Un-American Activities Committee in 1947.

"There was an environment of 'We're here to learn how to have social impact and political impact through the practice of law,' " Holguín says.

While he was still in law school, Holguín started working at the National Center for Immigrants' Rights (today called the National Immigration Law Center), a backup facility for legal aid workers dealing with immigration law. It was housed at the Legal Aid Foundation of Los Angeles. After passing the bar in 1979, he worked there full time under Schey.

"I'M NOT ONE TO WEAR MY EMOTIONS ON MY SLEEVE, BUT I'M NOT GOING TO DENY THAT I'VE BEEN VERY MOVED BY A LOT OF THE SUFFERING OF THE PEOPLE I'VE DEALT WITH AND DEFENDED OVER THE YEARS."

—CARLOS HOLGUÍN

The first case Holguín felt was his own was *Orantes-Hernandez v. Meese*, a class action on behalf of Salvadoran nationals alleging mistreatment by U.S. immigration authorities. The Border Patrol was used to getting Mexican nationals to sign voluntary departure forms, he says—but for Salvadorans, going home could be fatal.

"The Salvadorans were refusing to sign the voluntary departure forms, and the Border Patrol just didn't know what to do," he says. "So they started in all sorts of shenanigans. They lied to them,

"WE WOULDN'T BE WHERE WE ARE TODAY WITHOUT [HOLGUIN'S] CREATIVE DEVELOPMENT OF STRATEGIES AND LEGAL BRIEF-WRITING."

—PETER SCHEY

they would choke them, they would deprive them of food."

SLOW START

It was an uphill struggle, Holguín says—a major, fact-intensive class action case. He'd only been admitted to practice law for about a year at that point, but he was lead counsel.

Looking for more information on the allegations of abuse, Holguín drove down to El Centro, a small city east of San Diego and near the border, where the INS had a detention facility. His employer couldn't afford a motel, so he slept in his van outside the facility.

There, he got the names of a few detainees, then filed entries of appearance as their attorney and interviewed them. Each time he spoke to someone, he asked for the names of other detainees willing to tell him about abuses.

Then, he says, it snowballed to 50 or 60 declarations. One migrant told him INS agents ambushed him in the street, beat him and shoved him in a van during his arrest. Another, a woman, said INS officials implied that if she didn't sign a voluntary departure form, they'd permit male detainees to rape her. Migrants said INS agents routinely told them they would be imprisoned for a long time if they refused to sign, that signing was mandatory, and that they would be deported no matter what.

Back in LA, Holguín went to federal court to ask for an injunction against abuses. After making his argument, he was surprised to see the government's attorney addressing the judge in a way that seemed overly familiar. His co-counsel, a pro bono attorney from Munger, Tolles & Olson, told him the government's attorney played golf with the judge. Holguín saw it as a transparent attempt by the INS to win by networking instead of on the merits—but ultimately, the judge sided with him, giving him his first major victory.

In 1988, *Orantes-Hernandez* led to a permanent injunction from the Central California district court, forbidding the INS from using threats, intimidation and misrepresentations to pressure Salvadorans into signing the forms.

But by then, Holguín was off the case. In 1982 and 1983, when the Legal Services Corp. became politicized, Congress forbade LSC-funded organizations from pursuing class actions or representing immigrants present illegally. That was essentially all Holguín and Schey did, so they left.

Schey founded the Center for Human Rights and Constitutional Law, but Holguín didn't immediately follow. Rather, he spent 1983-1984 at Westside Legal Services, a legal aid center that closed in 1994. There, he discovered that he was burning out from too many 70-hour workweeks. Looking for a position where he could work more reasonable hours—but still make a difference—he rejoined Schey at the center.

THE CALL THAT CHANGED IT ALL

Shortly after he started at the center, Holguín got the call from the Hollywood actor (whom he declines to name for attorney-client privilege reasons)—and launched into what became the *Flores* case that, more than 30 years later, is still one of the most important of his career.

Holguín started out by visiting immigration detention facilities to talk to the minors about the parents-only release policy. After seeing the Hollywood facility and others, he grew concerned about the conditions of their detention as well. He enlisted Bussiere, Hagar and others for their expertise in youth law.

Bussiere says their original strategy illustrates Holguín's practical approach to problem-solving. The goal was to get the kids out, not file headline-grabbing impact litigation—so they started by trying to get a court to appoint nonparents as guardians. Immigration judges sent them to federal court, which Holguín says eventually appointed guardians, despite a lack of clear authority to do so.

But, looking for a broader solution, Holguín and his co-counsel filed a class action lawsuit, seeking to end both the parents-only rule and the poor conditions in the facilities. Holguín says he can no longer remember why Flores was chosen as lead plaintiff. But her story is not unusual: She came to the United States at the age of 15, intending to reunite with her mother in Los Angeles. But because her mother wasn't there legally, she was stuck in INS detention in Pasadena.

The case had some early victories: The court certified a class, then struck down the strip-search policy. Not long afterward, the federal government entered into a partial settlement—a memorandum of understanding covering the conditions of detention.

But the real fight was about detaining the minors in the first place. Holguín's team wanted kids to be released to any responsible adult who would claim them, provided he or she had received the kind of vetting a child welfare agency would use.

PHOTOGRAPH BY TONY AVELAR

The INS had never done that and claimed it couldn't afford to.

It was a lengthy fight. The plaintiffs eventually won at the district court on due process grounds, but the case was reversed at every stage: a 9th Circuit panel found for the government, the en banc 9th Circuit found for the plaintiffs, and the U.S. Supreme Court found for the government.

Holguín argued the case before the Supreme Court—his first argument, though he'd been there three times before with Schey. "It was a remarkable experience," he says. "It's an honor to be able to go to the court and argue, and you've got the history that's there. In some way, you're in the shadow of Justice Marshall when he was working for the NAACP."

But from a practical standpoint, a trip to the court was bad news for his clients. "I felt that the only way to go after the 9th Circuit's en banc decision was down, which is exactly what happened," he says. "I think as a lawyer, your first duty is to your clients; and if your clients have won, you don't want that win exposed and jeopardized by taking it to the Supreme Court."

'GOOD ENOUGH'

That apprehension was borne out by the 1993 Supreme Court decision, which was a defeat on the law. Writing for the seven-justice majority, Justice Antonin Scalia framed the issue as the right to be released to a nonparent adult—then said there was no such right. He also found no requirement in the Constitution for a hearing on alternative placement "so long as institutional custody is (as we readily find it to be, assuming compliance with the requirements of the consent decree) good enough," he wrote.

Holguín wasn't surprised. From the questions asked at oral argument, he'd figured Justice John Paul Stevens was on his side, but he wouldn't be able to enlist enough support to form a majority. (Indeed, Stevens dissented, joined by Justice Harry Blackmun.)

"The real question was: 'Would the court leave enough for us to be able to salvage something?' " Holguín says.

It did. Over the next four years, Holguín and his co-counsel persisted, negotiating a settlement that Bussiere says "achieved all our goals." Holguín says public pressure on the INS—which had "taken a beating in the press"—was a major factor, along with the Supreme Court's "good-enough language."

"When it was remanded, we began to marshal evidence showing that conditions weren't quote-unquote good enough," he says. "They continued to violate even the memorandum of understanding to keep kids in substandard conditions."

The result was the 1997 *Flores* settlement. Today, it's one of the key legal protections for unaccompanied immigrant minors who are detained by the federal government. The settlement requires minors to be released promptly or, if that's not possible, placed in the least restrictive setting appropriate for their situations. It lays out the right to basics like adequate food, water, sinks, toilets and medical care. Holguín says it was the basis for a provision in the 2002 Homeland Security Act that took detained minors out of INS custody.

And it's been a powerful tool for immigrant children's advocates.

In front of the U.S. Supreme Court building, circa 1991: attorneys Peter Schey, Robert Gibbs and Carlos Holguín.

During the most recent wave of immigration, students at the University of Texas immigration law clinic regularly invoked *Flores* when arguing for releasing mothers with children, says the clinic's Gilman. During a prior wave, it was the basis for civil rights lawsuits against a now-closed family detention facility in Texas.

Flores itself has been reopened at least three times—in 2001, 2004 and 2014—because of alleged violations of the settlement's guarantee of safe conditions and prompt release. The most current reopening ended with an order giving the federal government until October to release minors and their mothers from immigration jails. The government has done so, but advocates are still concerned about conditions for those who remain.

PROUD COMPARISON

Though three decades of litigation haven't eradicated bad conditions for detained immigrant minors, Holguín says he's proud of what he's been able to accomplish, in the face of "very, very macro political forces" that have stymied current immigration reform efforts, even under a Democratic president.

"The power of argument, which is all we lawyers have—it's just a weak tool given these global forces," he says. "So when I stop and think about what our office has accomplished in that context, then I'm quite proud."

The changes they've won have permitted thousands of kids every year to be released from custody, improving their chances of winning asylum. Holguín has met just a few of them—that's the nature of "impact litigation," he says. Even Flores and her co-plaintiffs fell out of touch in the 1990s. But he knows he's made a difference.

"I know people who are sort of new to this, and they go into the facilities and they say, 'This is horrendous,' " Holguín says. "And they're right. But the truth of the matter is that if they would have gone in and seen how these kids were being treated in 1985 and 1986, you would see it's like night and day, how much better things are." ■

PHOTOGRAPH BY TONY AVELAR

BILL BLACK'S QUEST

WILL THOSE WHO LED THE FINANCIAL SYSTEM INTO CRISIS EVER FACE CHARGES?

BY TERRY CARTER

PHOTOGRAPH BY WAYNE SLEZAK

When federal prosecutors presented their evidence against real estate agent Yevgeniy Charikov and three others accused of bank fraud and money laundering in Sacramento, California, they had every reason to believe they had a pretty good case. They wove a story of brazen criminal greed, piecing together a scam in which the four lied on mortgage documents, set up straw buyers to purchase homes at inflated prices, and then walked away from the residential loans, leaving lenders $710,000 in the hole.

Then Bill Black took the stand for the defense and he made the jury laugh.

It was August 2014, and by then many if not most potential jurors likely knew that major financial institutions had been implicated in residential mortgage-backed securities fraud that played a big role in the global collapse of financial markets in 2008. But now the bankers themselves were in effect put on trial. Defense lawyers projected a flier on the screen in the courtroom that indicated the mortgage company the conspirators were accused of bilking was itself involved in the overall scheme.

The flier had been circulated by the alleged fraud victim, GreenPoint Mortgage Funding. A subsidiary of Capital One Financial Corp., GreenPoint specialized in making loans without verifying a borrower's ability to pay—"stated income loans" in the language of regulators; "liar's loans" in the wake of the 2008 financial collapse.

Under a drawing of the proverbial three wise monkeys, the ad's text paralleled the original message of willful ignorance. But it did so touting the lack of scrutiny prospective borrowers could expect in getting a loan: "Hear no income, speak no asset, see no employment: Don't disclose your income, assets or employment on this hot, new, flexible adjustable rate mortgage!"

As an expert witness for the defense, Black went straight at GreenPoint and the bankers behind them on direct examination. He was asked about the intended audience for the flier. "They were using it for subprime [borrowers], and that means people who have known credit defects, which means they have a history of not repaying their loans," Black told the jury.

That got the laughs.

Black's expertise long preceded the scandal at hand, making his defense testimony in *U.S. v. Charikov* all the more ironic. He made his bones prosecuting fraud back in the savings and loan crisis during the 1980s and early '90s. As a senior financial regulator, he was a leader in bringing criminal and civil cases against individuals to clean up a then-unprecedented scandal involving officials looting their own financial institutions, largely through self-dealing and extreme risk-taking. More than 1,000 were convicted, many of them high-level.

When the defense team asked Black to be their expert, he not only agreed; he did so at no charge and spent two weeks in Sacramento and hundreds of hours on the case.

Black has been a constant critic of the Justice Department's failure to prosecute lenders with the same verve they've gone after borrowers, and his testimony reflected that concern. The lenders didn't care about misstatements on loan documents, Black testified and the defense argued, because they intended to make the loans no matter what. They wanted to push through as many mortgages as possible and collect their fees and bonuses, and then claim the loans met rigorous underwriting standards, selling them in large lots to other financial institutions and investors.

Black's message was effective. The four defendants were acquitted.

"When the defense has the jury literally laughing at the government, it's powerful," says John Balazs, a Sacramento lawyer who represented defendant Vitaliy Tuzman. "You could just see it in the looks on the faces of prosecutors and FBI agents."

In the years since the crash, federal prosecutors have used splashy press conferences to announce top banks' multibillion-dollar settlements (typically paid by shareholders) in cases arising from the subprime mortgage mess. But criminal prosecutions have been reserved almost exclusively for the borrowers. And in *Charikov,* which Black believes is the only case in which the defense has been allowed to show that lenders could also be culpable, the jury reaction indicates that the issue hits a nerve.

"Not to excuse wrongdoing by some borrowers, but clearly these were the business plans of large financial institutions, undertaken by human beings within them and, I presume, at the direction of senior executives in furthering the business plan," says Phil Angelides, a former California state treasurer who chaired the federal Financial Crisis Inquiry Commission's probe of the causes of the meltdown of 2007-2010.

The *Financial Crisis Inquiry Report*, released in 2011, was particularly pointed in its criticism of Wall Street, which it found had taken advantage of unprepared regulatory agencies that had been methodically defanged through deregulation over several years. The report noted a term coined on Wall Street that captured the carefree wheeling and dealing in the run-up to the meltdown: "IBGYBG"—"I'll be gone, you'll be gone." The term, the

report states, "referred to deals that brought in big fees up front while risking much larger losses in the future."

The report also pointed out that the three credit rating agencies failed to properly evaluate mortgage-backed securities, partly under pressure from the financial institutions that were paying for their own products to be rated. When many of the securities had to be downgraded in 2007 and 2008, the economic state of siege began. The FCIC report called the credit rating agencies "key enablers of the financial meltdown," having allowed loans that were beyond risky.

For years the DOJ has come under withering criticism for not going after high-level executives and other officials in top banks and lending institutions. Black put it succinctly while discussing the Sacramento acquittals: "They've been chasing mice—in this case Russian-American mice—while watching the lions roam free."

Last September, the department in effect admitted that it had been wrong all along when it announced a new policy prioritizing prosecution of individuals in corporations who might have engaged in criminal acts, and requiring the companies to provide any pertinent evidence before receiving credit in settlement negotiations for cooperating.

Then in November, news reports suggested that federal prosecutors were considering criminal cases against executives from two banks for selling toxic residential mortgage-backed securities in the years leading up to the 2008 financial meltdown. They are the Royal Bank of Scotland and JPMorgan Chase & Co. The latter entered into a $13 billion civil settlement in 2013 with the DOJ, the Securities and Exchange Commission and a host of other entities. Though the accompanying statement of facts didn't say so, the investigation was built in part on internal documents from 2006 concerning bad GreenPoint loans.

Yet for many critics, questions remain: Why no criminal prosecutions? And if some now are in the works, what took so long?

"There should have been a serious investigative effort by prosecutors to see who made what decisions at what time and whether those individuals, from line personnel to the most senior executives, crossed a legal line," Angelides says. "It's like Bill Black says: If you don't look, you won't find."

BLACK'S LONG LOOK

William K. Black, 64, got a sweet mix of validation and vindication in Sacramento. He suppressed glee on the witness stand, even as he made the jury laugh.

PHOTOGRAPH BY DAVID HILLS

PHIL ANGELIDES

But Black is bemused that the hard lessons learned in the S&L crisis were lost—or, more precisely, suppressed down the memory hole—through resumption of deregulation of the financial industry by the mid-1990s, just as banks began to turn to more complex forms of structured finance. He had left his regulatory work with the Office of Thrift Supervision, which replaced the Federal Home Loan Bank Board, and moved to academia in 1993. Black did so, he says, soon after "we were told in an affirmative order that we were to refer to and think of the industry we regulate as our customers."

As part of the renewed deregulation regime, criminal referrals were no longer deemed acceptable tools, he says, and thus there have been virtually none in the aftermath of the residential mortgage-backed securities debacle. The much smaller S&L crisis had accumulated more than 30,000 such referrals.

Black, having become an expert criminologist (albeit noncredentialed at the time) through hands-on experience in the S&L cleanup, decided to get a doctorate in the field and now is an associate professor teaching both economics and law at the University of Missouri at Kansas City. He and his wife, June Carbone, had gone there in a package deal, but in 2013 she took a position at the University of Minnesota Law School. Black regularly drives 6½ hours on Interstate Highway 35 between Kansas City and their home in Minneapolis, where he is also a scholar-in-residence at Minnesota Law.

In 2005, when the impending financial crisis was obvious to some and under the radar to many, he published a book, *The Best Way to Rob a Bank Is to Own One: How Corporate Executives and Politicians Looted the S&L Industry*. It lays out Black's theory of control fraud, his

PHOTOGRAPH COURTESY OF PHIL ANGELIDES

criminological term for looting a corporation from the inside, and details the recipe that he believes diagnosed the subprime mortgage debacle early on.

For years Black has explained control fraud in news stories and scholarly articles, on television, by blogging, in court and through legislative testimony—and, given his passion and gift of gab, probably in elevators as well. In Black's view, high-level executives receiving compensation based on short-term profits are able to devise ways to inflate assets while hiding risk—creating an illusion of profitability while often ensuring the inevitable collapse of those assets.

His basic recipe for mortgage-backed securities fraud includes rapid growth as the yeast (and likely telltale ingredient of crime):

• Appraisal fraud: Appraisers complained that from 2000 through 2007, lenders would blacklist them if they refused to inflate values of homes, with 11,000 of them signing petitions—including printed names and addresses—presented to government officials.

• Liar's loans: These first surfaced during the S&L crisis under the name "low documentation" and caused some losses. They grew as if on steroids in the early 2000s as lending took on more and riskier features, and seemingly everyone got caught up in the fast-expanding bubble of home sales.

• Unsafe securities: Toxic loans were packaged into securities for sale to investors and, through fraudulent warranties and representations, marketed as high quality.

BLACKBALLED

While his expertise gained purchase in the FCIC report and the Sacramento trial, Black has largely been on the sidelines over the past decade—though with a prominent perch as a knowing expert in news stories and analysis, watching a catastrophe unfold in patterns and practices he recognized early on.

In the late 1980s and early '90s, he was suing, and sometimes liquidating, financial institutions and was also training regulators—agents from the FBI, the IRS criminal investigation division, the Secret Service, and state and federal prosecutors.

These are just a few of Black's various jobs and titles during those years: Federal Home Loan Bank Board litigation director, deputy director of the Federal Savings and Loan Insurance Corp., and senior deputy chief counsel of the Office of Thrift Supervision.

Today, Black is better received elsewhere as an adviser to countries such as Ecuador, France, Iceland and Ireland, where they've picked his brain for ways to handle their own financial crises. "I'm a serial whistleblower," Black says in a verbal shrug, explaining that he was advised as an associate in the early 1980s at Squire Sanders & Dempsey (now Squire Patton Boggs) in Washington, D.C., to avoid career-limiting gestures, or CLGs.

Black mentions an example: After getting his PhD, he taught at a major university graduate school. The faculty voted to grant him tenure, Black says, but a former boss on an S&L commission sent in a galley review of his then-forthcoming book that got him blackballed. That former boss held fast to the theory that it was the moral hazard of deposit insurance that led to the crisis, and Black's book refuted that idea.

For a while, events served to buffer him from more immediate consequences of CLGs. The need to both end and clean up the S&L crisis was important to many of those in power who otherwise might limit one's career. Black says his efforts were aided by the fact that one high-level regulator had the ear of deregulator No. 1: President Ronald Reagan.

Though the Reagan administration pushed governmentwide deregulation as a top priority, the S&L crisis was getting so bad by the mid-1980s, Black says, that the president acceded to the wishes of the chairman of the Federal Home Loan Bank Board, Edwin Gray, who wanted to reregulate the industry and root out its problems. Black attributes this to the fact that Gray was a personal friend of the Reagans.

Black and other regulators at the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corp. worked with the Justice Department to create a top-100 list of the worst S&L fraud schemes, and the prosecutions flowed. But the recent crisis began to take root soon after the Sept. 11 terrorist attacks, which led the FBI to reassign hundreds of white-collar crime investigators to antiterrorism efforts.

"You just don't have as many competent FBI agents as there used to be doing white-collar," says Solomon Wisenberg, who practices that specialty in the D.C. office of Nelson Mullins Riley & Scarborough. "It takes a few years for them to develop expertise. And you don't have prosecutors with this experience."

During the S&L crisis, Wisenberg was the chief of financial fraud investigations for the U.S. attorney's office in the Western District of Texas, leading as many as 100 criminal investigations there and in North Carolina. He won the DOJ Director's Award for work on the Victoria Savings Association scandal, which was on the top-100 list and in which he got nine convictions in 1993.

"Bill Black was my expert in that," says Wisenberg. "It was my biggest case ever as a prosecutor."

Another of Black's possible CLGs brought him and his work into the public's eye. He played a major role in revealing the Keating Five scandal, in which five U.S. senators tried to prevent regulators from taking Charles Keating's Lincoln Savings and Loan into receivership. Keating had given significant campaign contributions to all of them; all were heavily criticized in an ethics investigation and one was formally reprimanded.

Keating, who wanted Black fired, went to prison and taxpayers spent more than $3 billion bailing out the financial institution he and others ran into the ground.

In a similar dustup, then-House Speaker Jim Wright of Texas tried to get Black fired for cracking down on Vernon Savings and Loan, which had a 96 percent default rate on its loans and later failed, requiring a $1.3 billion bailout. Wright resigned in disgrace after

an ethics investigation that had included a look at his move against Black.

COMPLAINTS RAIN

Little more than a month after the not-guilty verdict in Sacramento, a similar case in Minnesota was dropped a couple of days before trial—just after Black was listed as a witness for the defense.

"It was going to be funny," says Jordan Kushner, a Minneapolis lawyer who represented defendant Patrick Henry Adams. The government's expert witness worked for Bank of America, which in January 2008 had acquired Countrywide Financial (which had made the loans in question). Pretrial disclosures indicated she would testify that liar's loans are appropriate for borrowers who are self-employed because their incomes are hard to verify.

"And Bill Black was going to turn that around and say, 'All you have to do is look at their tax returns. Who exaggerates income on their tax returns?' "

Complaints about the failure to prosecute bank executives have come from many quarters: Congress, the public, former prosecutors, FCIC chairman Angelides, and in edgy essays by federal judge Jed Rakoff in the *New York Review of Books*. The DOJ's own Office of the Inspector General, in a 2014 audit report, noted the agency fell short in its investigations, which were not "prioritized at a level commensurate with its public statements," and had significantly inflated numbers in its claims of actions against individuals and in money settlements with financial institutions.

There has been just one conviction of a bank executive in the subprime scandal: Credit Suisse's Kareem Serageldin, who pleaded guilty in 2013 to a scheme of hiding more than $100 million in losses on mortgage-backed securities. Judge Alvin Hellerstein of the Southern District of New York sentenced him to 30 months in prison, but in doing so suggested that Serageldin was a scapegoat for "an overall evil climate inside that bank."

That same year, then-Attorney General Eric Holder told the Senate Judiciary Committee that criminal charges against a big financial institution might harm an already weak economy, launching the derisive "too big to jail" meme.

Though the government has secured a reported $190 billion in civil settlements, Black points out that this is a tiny fraction of the likely tens of trillions in losses. But within each settlement has been a tantalizing detail: no waiver of possible criminal charges, including against individuals.

In February 2015, not long before announcing he would resign and in an apparent attempt to bolster his flagging legacy, Holder made his boldest statement about pursuing individuals responsible for the subprime mortgage crisis. It came during the Q&A session after he spoke on criminal justice and sentencing reform at a National Press Club luncheon.

"I don't know if I'm making news now or not," Holder began, telling the audience that he'd asked prosecutors to re-examine pending cases "and report back in 90 days" on whether they might bring civil or criminal cases against individuals.

Though made as an aside, the announcement became the main story. But given the soft-touch approach to bankers as the mortgage scandal unfolded, Holder's claim to increased aggressiveness was eclipsed immediately by here-we-go-again pessimism.

The 90-day period ended in May and went largely unnoticed, with no announcements and few if any news stories or follow-up.

"One would hope that having settled cases with the entity, DOJ would already have received an enormous amount of information on who did what," says Brandon Garrett, who finds it odd that the attorney general would ask prosecutors to look in their closets to see if they had missed anything huge. Garrett's 2014 book, *Too Big to Jail: How Prosecutors Compromise with Corporations*, details how federal prosecutors have largely ceased bringing criminal cases against individuals, instead offering deferred prosecution agreements to the corporations where the potential defendants work.

"So no small fish are charged and no big fish are charged, but there's a deal with the aquarium," Garrett says. "The agreement describes specific actions by individual fish: Middle Manager A or Supervisor B. You'd think the prosecutors know who they are."

It was widely thought that a five-year statute of limitations on criminal fraud now trumps any possible criminal prosecutions. But a little-used statute enacted during the S&L crisis can stretch the time limit to 10 years.

Under FIRREA—the Financial Institutions Reform, Recovery and Enforcement Act of 1989—both civil money

SEPTEMBER**1990**

Charles Keating confers with one of his attorneys in a Los Angeles courtroom. Charged in a 42-count fraud indictment, Keating served nearly five years in prison for misdeeds tied to the collapse of Lincoln Savings and Loan, which was bailed out at a cost to taxpayers of more than $3 billion.

AP PHOTO

penalties and criminal charges can be brought under a 10-year statute of limitations against individuals whose actions "affected a financial institution." In June, in *U.S. v. Heinz,* the 2nd U.S. Circuit Court of Appeals at New York City affirmed a trial judge's ruling against defendants in a matter that closely tracked what happened in the subprime mortgage scandal. It knocked down some major questions about how broadly the statute can reach.

Three executives with UBS AG, a Swiss financial services firm, were convicted of rigging bids for municipal bond contracts. They argued that their employer, UBS, was a co-conspirator and had paid $160 million in a civil settlement with the Justice Department. But the judge ruled their individual actions affected the financial institution, and thus fell under the FIRREA exception.

On the heels of that ruling, the DOJ announced in September that it would be prioritizing white-collar crime, marking Attorney General Loretta Lynch's first major policy initiative after succeeding Holder. In a guidance memorandum sent to federal prosecutors, Deputy Attorney General Sally Yates said that culpable individuals, as well as corporations, need to be a focus in any civil or criminal investigation. "Such accountability is important for several reasons," she noted. "It deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."

But now, even that longer 10-year window is closing fast: The busiest period for packaging and selling residential mortgage-backed securities came in 2005 and 2006.

BLOWING THE WHISTLE

Even without fact-loaded criminal referrals, there still is one way to build cases against individuals, Black says, and that involves whistleblowers. While not necessarily optimal, it's the best available option and could lead to major criminal cases.

He ticks off the names of several whistleblowers. One is Richard Bowen, who ran Citigroup's underwriting for purchasing mortgage loans. Bowen wrote a memo in 2007 warning several of the bank's highest executives about shoddy loans—and was eventually eased out of the job. The following year he testified before the SEC about the problems and provided documents.

From S&L to RMBS

There are many differences between the S&L crisis and the residential mortgage-backed securities scandal: While S&L losses totaled about $150 billion, those from subprime mortgages are believed to be in the tens of trillions of dollars. And the S&L problems often arose because owners and executives of financial institutions treated them as personal piggy banks. The more recent mortgage mess came about as executives and lower-level functionaries in lending institutions acted as fee-and-bonus fetching cogs—of varying importance and knowledge—along big, moneymaking mechanisms in loan origination, processing, securitizing and subsequent sales.

U.S. Attorney Benjamin Wagner of the Eastern District of California acknowledges there was "a lot of recklessness in the real estate market in the 2000s and plenty of blame to go around," but he defends his office's targeting of hundreds of borrowers and no lending executives.

"It's easy to generalize that bankers or appraisers are at fault, but in a criminal case you have to look at the facts of each case to see if you can determine who was intentionally committing fraud beyond a reasonable doubt," Wagner says. "In every case you make difficult calls on who you can show committed fraud."

SELF-DEFRAUDING?

In a 2010 Huffington Post story, Wagner was quoted as saying that, in part because lenders lose money when loans prove fraudulent, it would be difficult to convince a jury they are guilty: "It doesn't make any sense to me that they would be deliberately defrauding themselves."

That notion has proved significant in stemming indictments of lending executives. It had been the view of Alan Greenspan, chair of the Federal Reserve for nearly 19 years. In October 2008, two years after he stepped down, Greenspan told a congressional hearing that he had believed bankers would not engage in such practices, but he admitted later he could see a flaw in his reasoning.

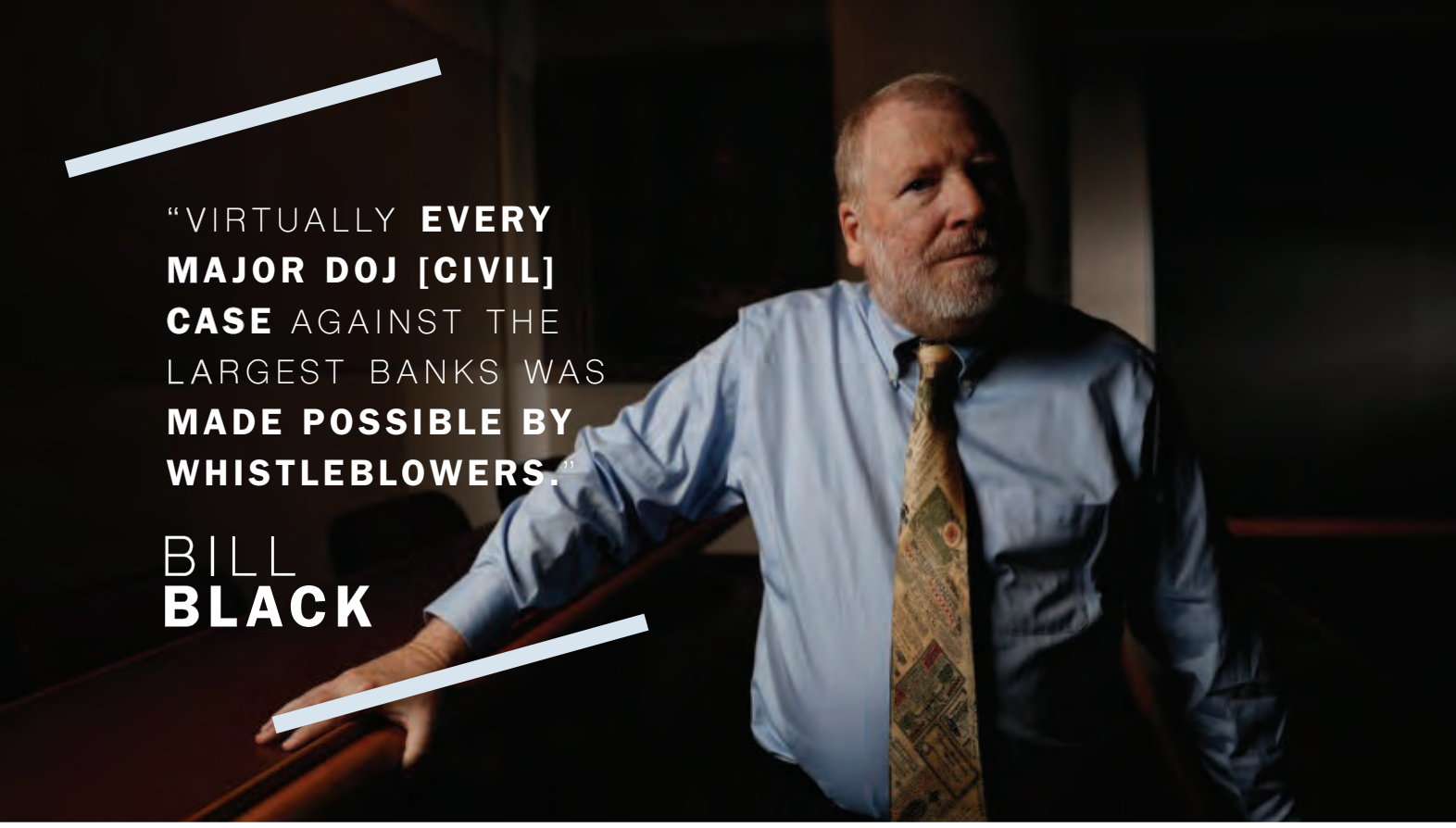
"This modern risk-management paradigm held sway for decades," Greenspan explained. "The whole intellectual edifice, however, collapsed in the summer of last year." That was in the summer of 2007; the intellectual edifice may have crumbled at that point, but it would take another year before the chickens came home to roost with the collapse of Lehman Bros. in mid-September and the subsequent $710 billion bank bailout, which was announced by Treasury Secretary Hank Paulson on Oct. 13, 2008.

Greenspan seemingly would have learned a similar lesson in the '80s. Before taking over at the Fed in 1987, he had represented Charles Keating in efforts to get regulators to back off from Lincoln Savings and Loan. As a consultant, Greenspan produced a report saying the lender posed "no foreseeable risk" for depositors. Keating was using S&L depositors' money for direct investments in real estate projects.

Greenspan also put his name on a study approving of such direct investments by S&Ls, looking at 34 of them that were doing so and were reporting greater profits than others.

"A year later," Bill Black says, "half those S&Ls were dead; 20 months after the study, all 34 were dead. So these direct investments were not just riskier; they were cyanide."

"The S&L crisis was completely different from this more recent one, where the regulatory agencies were paralyzed by reports of high profits," Black explains. "Back then we realized the profits were too good to be true and prioritized that as the problem, so we used receiverships, lawsuits and criminal referrals."



Citigroup paid $7 billion in a settlement with the DOJ in July 2014, and the statement of facts squared with what Bowen told the SEC.

"Bowen handed [the DOJ] that on a platinum platter, and they never credited him," Black says.

Likewise, a significant piece of the investigation that JPMorgan Chase paid billions of dollars in 2013 to make go away came from a whistleblower. The scenario was sketched out in the statement of facts accompanying the agreement.

The statement noted that an employee involved in a purchase of loans had warned an executive in charge of due diligence, as well as a managing director in trading, about a $900 million package of loans. The employee warned that the underlying loans were of such poor quality that they should neither be bought nor securitized. After the bank purchased them anyway, "she submitted a letter memorializing her concerns to another managing director, which was distributed to other managing directors. JPMorgan nonetheless securitized many of the loans. None of this was disclosed to investors."

The whistleblower and the loan originator, GreenPoint Mortgage Funding, were not named in the statement of facts, nor were any of the bankers. But eventually Alayne Fleischmann's whistleblower story was told and retold in news and opinion pieces that asked why there had been no indictments. Although she has freely discussed the issues before, Fleischmann has now withdrawn from the media spotlight. She declined to be quoted for this article.

For four years Fleischmann was an associate in the capital markets department at Cadwalader, Wickersham & Taft, a major New York City law firm that dealt with securities work for JPMorgan Chase. In 2006, she took a nonlawyer job with JPMorgan Chase handling quality control over mortgage-backed securities.

Two months after she started, her boss instituted a policy forbidding emails between the bank's compliance and due diligence offices. To her, the order seemed designed to help push through bad loans.

Fleischmann's warnings to the bank's directors about the problems with GreenPoint loans became a crucial bargaining chip in the $13 billion settlement, and no doubt would loom large in any criminal investigation.

The negative reaction of a mock jury put together by a law firm working for JPMorgan Chase reportedly helped move the bank to settle. That jury read Fleischmann's internal correspondence and knew of the email policy.

Fleischmann was let go in early 2008, along with other JPMorgan Chase employees in a layoff. A native of Canada, she now lives in Vancouver, British Columbia. Fleischmann is likely to be the DOJ's star witness for possible criminal charges—should they ever happen.

BLACK'S BLASTS

Black is quick to vent about how little recognition and how much hassle befell several whistleblowers, despite the fact that "virtually every major DOJ [civil] case against the largest banks was made possible by whistleblowers," he says.

"The most obvious way they can aid prosecutors is as fact witnesses about the actions of their bosses and reactions to the whistleblower's warnings," he says. "These were not disaffected employees. They were trying to protect their banks from harm. The retaliation they suffered should be a prosecutor's dream for showing the guilty minds of senior people."

Just ask Bill Black. ■

PHOTOGRAPH BY WAYNE SLEZAK

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NOMINATING COMMITTEE

600 NEW MATH

Diversity is the primary reason for the ABA's decision to increase the size of its leadership ranks

BY JAMES PODGERS

When the ABA House of Delegates considered a number of proposals in August to revise the association's governance structure, the process resulted in a familiar outcome: The existing structure was left pretty much intact, while the size of all three of the association's key leadership entities grew.

But in keeping with the overall tone of the proposed amendments to the ABA's constitution and bylaws that were developed by the Commission on Governance, the increases in the size of the House, the Board of Governors and the Nominating Committee were relatively modest.

The amendments approved by the House will increase the size of the Board of Governors—which oversees the management of the ABA—from 38 members to 42 members. The Nominating Committee, which selects candidates for ABA president, chair of the House, secretary, treasurer and members of the Board, will increase in size from 68 members to 70 members. The House, which sets ABA policy and formally elects the president and other officers, will grow from 559 members to 600.

But while those numbers are not dramatic, they are significant. In presenting the proposed amendments to the House during its session at the 2015 annual meeting in Chicago, members of the Governance Commission emphasized that opening the membership of the ABA's governing entities, even slightly, will enhance the association's commitment to diversity.

The Governance Commission began its work in 2013. It was then co-chaired by Roberta D. Liebenberg, a senior partner at Fine, Kaplan and Black in Philadelphia; and James Dimos, a partner at Frost Brown Todd in Indianapolis. Dimos became deputy executive director of the ABA on Aug. 31. Palmer G. Vance II, a member of Stoll Keenon Ogden in Lexington, Kentucky, now is serving as Liebenberg's co-chair.

BOLSTERING A COMMITMENT

The commitment to diversity in the ABA's governance dates back to 1995, when the House approved governance amendments to the constitution and bylaws that created six new positions on the Nominating Committee to be filled by women and minorities appointed by the president. The House also created four new at-large seats on the Board of Governors, two to be filled by women and two to be filled by minorities. The amendments called for those candidates to be elected by the House. (The House also mandated that the association review its governance structure every 10 years.)

Those positions on the Board and the Nominating Committee still exist in accordance with Goal III—to eliminate bias and enhance diversity—of the ABA's mission statement. But in August, the House gave the diversity provisions even more teeth.

In one action, the House eliminated sunset provisions applying to the Goal III seats on the Nominating Committee and Board of Governors, making those positions essentially permanent.

In addition, the House amended Article 9 of the constitution to add two more Goal III seats on the Nominating Committee—one to be filled by an association member who self-identifies as lesbian, gay, bisexual or transgender and the other to be filled by a member

who self-identifies as having a disability. The amendments call for the president to consult a wide range of ABA entities—including the association's diversity commissions, sections and divisions, and the general membership—in making appointments. Also, Goal III members of the Nominating Committee will be members of the House of Delegates as well. (Goal III members serve three-year terms.)

Similarly, the House amended Article 7 of the constitution to add a fifth Goal III seat to the Board of Governors, to be filled by a member who self-identifies either as LGBT or as having a disability. The amendments also added three section members-at-large, bringing the number of that segment on the Board to nine. Members of the Board are selected by the Nominating Committee and formally elected by the House.

All of the amendments adopted by the House were approved in voice votes with little or no discernible opposition. Amendments to the constitution and bylaws must be approved by a two-thirds majority of the House members present and voting.

ROOM AT THE TABLE

Members of the Governance Commission and other proponents of bringing greater diversity to the ABA's leadership ranks pushed hard for the amendments. Women in particular have made inroads into the association's ranks of officers. Paulette Brown, a partner at Locke Lord in Morristown, New Jersey, is at the midpoint of her one-year term as the first African-American woman to serve as ABA president, and she will likely be followed in the position by two other women: Linda A. Klein of Atlanta, who is managing shareholder in the Georgia offices of Baker, Donelson, Bearman, Caldwell & Berkowitz, will become president in August at the close of the 2016 ABA Annual Meeting in San Francisco. And Hilarie Bass, a shareholder and co-president of Greenberg Traurig in Miami, is running unopposed to become president in 2017. Meanwhile, Patricia Lee Refo, a partner at Snell & Wilmer in Phoenix, currently is chair of the House of Delegates, the second-highest post in the ABA.

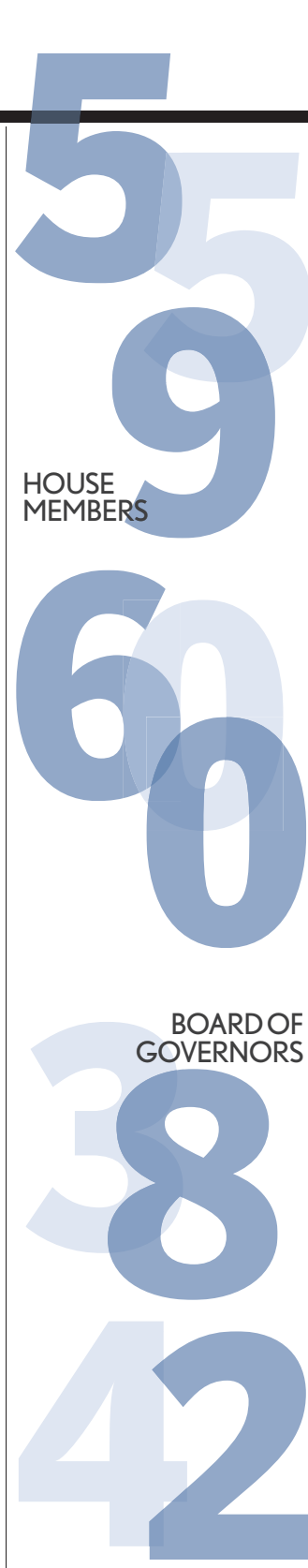
But only 12 members of the Board of Governors are women. Meanwhile, 28 members of the Nominating Committee are women. And minorities have even less representation in those entities.

"There still isn't equality for women or minorities in the profession and the ABA," said Laurel G. Bellows, founding principal of the Bellows Law Group in Chicago who has served as the association's president and chair of the House, during the debate on the governance amendments. "We need the continuity of a laser focus on diversity."

The ABA's efforts at building diversity also need to include the community of lawyers with disabilities, said Mark D. Agrast, who chairs the Commission on Disability Rights. The Governance Commission's proposals send a "much-needed message of inclusion" and give the ABA the benefit of input "from a remarkable group of lawyers," said Agrast, who is executive vice president and executive director of the American Society of International Law in Washington, D.C.

"If one is not at the table, one is on the menu," said Laura V. Farber, a liaison to the Governance Commission from the Board of Governors. She is a partner at Hahn & Hahn in Pasadena, California.

The amendments the House approved in August also create more room for young lawyers at the table. The constitution and bylaws define a young lawyer as a member who is younger than 36 years old or who has been admitted to his or her first bar within the past five years.



Paulette Brown

Linda Klein

The key change affecting young lawyers amends Article 6 of the constitution to allow each state delegation to have one additional young lawyer delegate. In essence, the amendments will ensure that all state delegations include at least one young lawyer, said commission member Tommy D. Preston Jr. "This is a way to give young lawyers a seat at the table," said Preston, director of national strategy and engagement at Boeing South Carolina.

Most of the additional delegates in the House will be the result of the amendments relating to young lawyers, as well as new membership formulas that will make it easier for states and ABA sections to add delegates.

There were a few setbacks for the Governance Commission. In one action, for example, the House rejected its proposal to eliminate the position of treasurer-elect after several delegates, including some past treasurers, argued that the position is critical to taking on the difficult tasks of that post.

But overall, Dimos said after the close of debate on the governance package, "we are very satisfied that the House approved a vast majority of what we proposed." He said the commission worked hard during the run-up to the House debate on building consensus on the proposals that wasn't always part of the process during past reviews of the ABA governance structure. In particular, the process unfolded with little of the squabbling between sections and states over delegate numbers. This time around, each camp got something.

"The tone that was set got us away from an 'us versus them' approach to 'What's best for the association?' " said Dimos. "The consensus among the constituent groups was that the ABA has many important issues to contend with, and we shouldn't let governance distract us from addressing them." ■

PHOTOGRAPHS BY KATHY ANDERSON PHOTOGRAPHY

Healthy Actions

Congress and the administration are taking steps to help patients plan for their end-of-life medical care

BY RHONDA McMILLION

ISTOCK PHOTO

Starting this year, physicians and other health professionals are being reimbursed by Medicare for providing advance care-planning services, a step the ABA believes will help patients make informed decisions about their end-of-life care and help ensure that their wishes are honored.

The reimbursements are included in a rule announced last fall by the Centers for Medicare and Medicaid Services that sets physician payment fees for calendar year 2016. The rule created two new reimbursement codes. The first code pays approximately $86 for an initial 30-minute advance care-planning consultation in a doctor's office and $80 for consultation in a hospital. The second code pays about $75 for each additional 30-minute consultation.

The consultations include an explanation of various advance care-planning options, including health care advance directives, which are documents that provide instructions about a patient's health care wishes. Those documents include living wills, which address preferences about end-of-life medical treatments, and durable powers of attorney, in which patients appoint family members or others to make medical decisions for them when they are unable to do so themselves.

Another protocol is the physician orders for life-sustaining treatment, aka POLST, a set of medical orders in a standardized format designed to facilitate shared, informed medical decision-making and communication between health care professionals and patients with advanced illnesses. The orders address key critical-care decisions and are designed to be portable so that the appropriate care may be given across care settings.

The ABA has a long history of promoting the value of advance care planning and patient self-determination. Since 1986, the association's House of Delegates has adopted nine policy positions developed primarily by the Commission on Law and Aging. The most recent policy, adopted last February, supports legislation promoting access to and financing of high-quality, comprehensive long-term supportive services for individuals with advanced illnesses, including advance care planning through counseling, disclosure and meaningful discussion of prognosis, goals of care, personal values and treatment preferences.

The process of advance care planning can begin at any time, and can be made more specific as a person's health status changes.

TOO LITTLE TALK

A recent study conducted by the Kaiser Family Foundation revealed that, while nine out of 10 adults responding to a foundation survey said doctors should discuss end-of-life care issues with their patients, only 17 percent of the respondents said they have had such discussions.

The ABA supports the Care Planning Act of 2015 (S. 1549), sponsored by Sens. Mark R. Warner, D-Va., and Johnny Isakson, R-Ga. The legislation, in addition to authorizing Medicare to reimburse health care professionals who provide planning consultations, would amend the Public Health Service Act to require the Department of Health and Human Services to give priority to the development of quality metrics to assess the effectiveness of advance care plans. The HHS secretary also would be authorized to award grants for training, disseminating resources, and conducting a national public education campaign to raise awareness of advance care planning and advanced illness care.

Other pending legislation would encourage Medicare beneficiaries to create electronic advance directives by offering them a one-time financial incentive.

Sen. Richard Blumenthal, D-Conn., is expected to introduce a bill this Congress to enhance public and professional education in advance care planning, provide support for POLST programs, and implement studies on the feasibility of a national uniform policy on advance directives, including creation of a national registry.

Summing up the impact of these developments, Charles P. Sabatino, director of the ABA Commission on Law and Aging, says, "The growing willingness of Congress and the administration to support advance care planning reflects a realization that meaningful discussions between patients and health care professionals are absolutely essential to ensuring that patients understand their options, and that care plans are made that respect the patient's personal values, wishes and goals of care." ■

► This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillion is editor of *ABA Washington Letter*, a Governmental Affairs Office publication.

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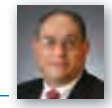

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ABA Notices

ELECTION RESULTS: 2015 VACANCY AND 2016 REGULAR STATE DELEGATE SEATS

On December 14, 2015, the Board of Elections certified the results of the 2016 State Delegate Elections and the 2015 State Delegate Vacancy Election. For a complete list of State Delegates (2016-2019) visit ABAJournal.com/magazine and scroll down to ABA Announcements.

GOAL III MEMBERS-AT-LARGE ON THE NOMINATING COMMITTEE

The ABA president will appoint one Goal III minority member-at-large and one Goal III woman member-at-large to the Nominating Committee for the term 2016-2019. These appointments will be broadly solicited nominations from the diversity commissions, sections, divisions and forums, state and local bar associations, and the membership at large. If you are interested in submitting a nomination, or if you have any questions, please contact Leticia Spencer (leticia.spencer@americanbar.org; 312.988.5160) c/o Office of the Secretary.

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 held August 8-9, 2016, in San Francisco, California. See the full text of this notice at ABAJournal.com/magazine.

FINANCIAL AID ABOUNDS

(Continued from page 33)

and Leitz say it involves more than just a decline in the value of an investment. A major risk is inflation, which reduces the purchasing power of the dollar. Interest rate activity either up or down also poses a risk in terms of bond and CD yields, mortgage rates, credit card rates, and the cost of borrowing money or financing the purchase of goods and services.

Financial planners and advisers are compensated in several ways. Leitz is paid on a fee-only, retainer basis and receives no compensation on commissions from the sale of investment products such as mutual funds. Others may charge an hourly rate or a percentage of the assets being managed. Skorewicz offers clients two methods of payment: fee-based and commission-based.

"I pay my adviser about $40 annually and a low percentage based on performance," di Liscia says.

And is her adviser (who also handles the investment portfolio of her husband, Matt Keenan, an attorney running a separate criminal defense and school-law practice) worth the money?

He's very helpful, she says, and his advice turned out to be profitable. ■

INDEX TO ADVERTISERS

'Just Kidding' ;)

What's the evidentiary standard for social media symbols?

SHORTHAND HAS BEEN around in one form or another since Xenophon described the trial of Socrates with papyrus and a feather. It's a way to convey information in the shortest, easiest way possible.

Today, with keyboards and social media having supplanted handwriting as preferred methods of communication, shorthand often takes the form of what is known as the text-based emoticon, such as :) or the more widely used graphical symbol known as the emoji, which looks like 😂.

These symbols are typically used as ways to convey emotion 😡, though sometimes they function as realistic representations of objects ⏳. Many folks—especially the under-30 crowd—make heavy use of them in their text messages and social media postings (email is so last decade, you know). But should those symbols be interpreted as literal portrayals of the sender's thoughts and intentions for purposes of criminal conviction? That's the question that has been coming up in courtrooms over the last year or so, including one high-profile case.

In a trial that got underway in January 2015, Ross William Ulbricht (known online as Dread Pirate Roberts) was convicted of seven charges related to running the Internet marketplace of illicit goods known as Silk Road. As emails, chat logs and forum posts were read aloud by prosecutors, Ulbricht's legal team argued the emoticons within those communiqués provided context and should be seen by jurors. Judge Katherine B. Forrest of the U.S. District Court for the Southern District of New York agreed and instructed prosecutors to mention the symbols from that point forward.

While the Silk Road trial was unfolding, New York City teen Osiris Aristy posted a message on Facebook that seemed to imply violence against police. And for emphasis, the 17-year-old added 👮🔫🔫🔫. Three days later, on the basis of those emojis, he was arrested and charged with making a terrorist threat. Last February, however, a grand jury declined to indict him and the charge was dropped.

Such symbols have figured in other cases across the country, from Elko, Nevada, to Baton Rouge, Louisiana. Defendants who post violent threats try to downplay those threats because they're accompanied by something like 😊. And prosecutors zero in on emojis of guns, knives and explosions as evidence of intent to commit mayhem.

In Pittsburgh, text messages sent by shooting victim Michael St. Clair in November 2014 led police to believe he was more than just a victim; they believe he was wounded during the commission of a crime. The messages seemed to indicate that St. Clair was intending to take part in a robbery, during which two men were killed. And the fact that they contained 🏃, 💥 and 🔫 seemed to indicate that he was prepared to use violence. Partially based on that, St. Clair has been charged with criminal homicide and other offenses in what prosecutors—according to triblive.com—have called an "emoji-cide" case.

While emojis might not be central to the outcomes of these cases, they nevertheless represent a sort of new frontier for courts to grapple with. Should their meaning be considered so unequivocal that they can be entered into evidence?

For now, the answer appears to be ¯_(ツ)_/¯. ■

ISTOCKPHOTO

The World Trade Center Is Bombed

Feb. 26, 1993

Long before they became a symbol of national grief and anger, the twin towers of the World Trade Center in south Manhattan were tourist landmarks in New York City's skyline—the most conspicuous two buildings of seven that composed a colossal hive of capitalism dwarfing the surrounding neighborhood.

So it was little noticed when, on a Friday in February 1993, two men pulled into the center's underground garage in a rented Ford Econoline. They parked the van, lit a 20-foot fuse and walked out of the garage. When the 1,300-pound bomb erupted a few minutes later, it left a crater more than six stories deep in the north tower of the complex, gutting the lobby of the Vista Hotel and sending an acrid plume through 46 floors of the 110-floor building. Six died and more than 1,000 were injured, many in the mayhem of an uncoordinated escape.

One of the two men was Ramzi Yousef, a well-trained and well-traveled terrorist who specialized in explosives. Yousef had arrived in New York in September on a flight from Pakistan, carrying an Iraqi passport and claiming to have been born in Kuwait. He had no visa but was allowed to enter the U.S. after he requested political asylum.

Shortly after arriving, Yousef pulled together a small cadre of like-minded Middle Eastern immigrants, several of them followers of Sheikh Omar Abdel-Rahman, a radical Muslim cleric from Egypt who openly espoused violence against Westerners from his mosque in New Jersey.

Working from two apartments and a storage unit in nearby Jersey City, Yousef's band of jihadists began to gather the chemical and mechanical elements of a homemade bomb. They masked their purchases through Nidal Ayyad, a local chemical engineer, and it took two months to procure enough chemicals to create the volatile urea-nitrate device.

Within hours of the blast, Yousef fled to Pakistan. Mahmud Abouhalima, who had helped with logistics, fled to Saudi Arabia. But arrests began within a week when conspirator Mohammed Salameh requested a refund for renting the van. His arrest led to the storage unit, the apartments and the subsequent arrests of Ayyad and Abdul Rahman Yasin. Abouhalima was tracked to Egypt, where he was arrested and extradited to the United States.

Though the bombing was a clear act of terrorism, the conspiracy was treated as a criminal investigation. On March 17, a federal grand jury indicted Ayyad and Salameh. On March 31, Yousef and Abouhalima were added. And as the reach and depth of the conspiracy began to emerge, investigators added new plots and plotters who spanned the globe. By the time Yousef was arrested in Pakistan in February 1995, four of the conspirators had been convicted, Abdel-Rahman and his acolytes had been indicted, and Yousef had been implicated in another spectacular plot in the Philippines to bomb as many as 11 American airliners simultaneously.

Through three different trials resulting in three separate convictions and life in prison for his far-flung conspiracies, Yousef remained unrepentant. He confided to investigators that his bomb had failed to do what it was designed to do: topple one tower into the other, bringing both down. When it was pointed out that the World Trade Center was still standing, Yousef is said to have remarked: "It wouldn't be, if we had had more money."

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