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ABAJOURNAL

MARC 16 THE ER'S INE

Invisible... then Gone

MINORITY WOMEN ARE DISAPPEARING FROM BIGLAW —AND HERE'S WHY

ABAJOURNAL
VOL. 102, NO. 3 MARCH 2016

AMY TAYLOR is legal director of Make the Road New York, a nonprofit advocacy group for Latino communities. She has seen cases delayed for as much as a year because interpreters were not available on court dates.

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COVER PHOTOGRAPHS BY (L TO R) DOUG SCALETTA, WAYNE SLEZAK, LEN IRISH; PHOTO ILLUSTRATION BY STEPHEN WEBSTER

FEATURES

KAREN SARGENT says her firm has reined in health care costs by self-insuring.

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ABA JOURNAL
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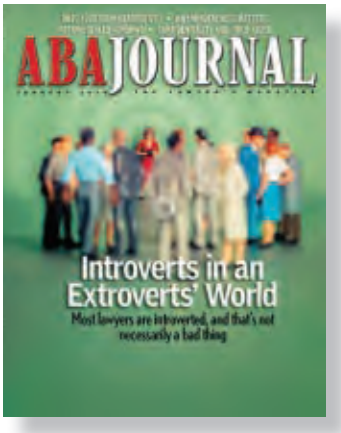
To Thine Own Self Be True

I'm an introvert and a ham. "Introverts in an Extroverts' World," January, page 36, is a great article.

I once took a two-week training course with about two dozen other students I did not know. Myers-Briggs was part of the training, and everyone thought it must be a useless tool because I was shown to be an introvert (as I have been every time I take the Myers-Briggs test). Our instructor just smiled and said he wasn't surprised at all because at lunch I always went off by myself with a book. I like people, but when lunch is either alone with a book or with a group of people I don't know well, I go for the book. It's all about what charges and discharges your battery. (And, yes, it's a spectrum: Everyone is unique.)

James Durkee
Tampa, Florida



IN GOOD COMPANY

I applaud Fox Rothschild for recognizing the importance of privacy and information security in law firms ("C-Sweet!" January, page 34), but in response to the author's comment that "although several corporations have CPOs, it appears that [Mark G.] McCreary is the first at a law firm," I'll point out that for the past five years, I have served as chief information security officer and privacy officer at Baker Donelson, an Am Law 100 firm with offices across the Southeast.

In that role, I have primary responsibility for the firm's compliance with various privacy regimes, such as HIPAA, and compliance with client-driven information security requirements, as well as overseeing the firm's information security management program. Like Mr. McCreary, I come from within the ranks of the firm's attorneys.

Steve Wood
Nashville, Tennessee

CORRECTIONS

Due to an editing error, "Legal Residency," February, page 35, misidentifies legal services outsourcing firm UnitedLex as a law firm.

"Killer Calculations," January, page 44, should have referred to Michael McKenney as the head of investment finance for Citi Private Bank's Law Firm Group.

The *Journal* regrets the errors.

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Justice for All … Who Can Afford It

Use of excessive fees, fines and bail results in unequal access to justice for the poor

What is the price of justice?

America is supposed to adhere to the principle of "equal justice under law," a concept dating back to ancient Greece and embedded in our society through the 14th Amendment. The phrase is so important to our legal system it is engraved on the U.S. Supreme Court building.

But today, in far too many instances, an individual's access to equal justice is based less on principle and more on ability to pay. Financial penalties—fees, fines and bail—have rendered justice unjust.

Fees and fines that ignore a defendant's ability to pay place an unfair burden on people of lesser means. Minor infractions can result in fees that spiral into thousands of dollars, and contribute to the United States incarcerating more individuals than any developed country. Bail set without consideration of financial circumstances results in the detention of the poorest, rather than most dangerous or highest flight risks as intended.

In December, I attended a White House meeting titled "A Cycle of Incarceration: Prison, Debt and Bail Practices." A bipartisan, eclectic group of academics and stakeholders were gathered to discuss the issue and develop an agenda for change. U.S. Attorney General Loretta Lynch spoke at the meeting about "the criminalization of poverty" where a person's financial standing, not actions or deeds, determines justice. She explained how this situation breeds mistrust and erodes faith in our government and law enforcement.

Former Attorney General Robert F. Kennedy said in 1962, "If justice is priced in the marketplace, individual liberty will be curtailed and respect for law diminished." We are seeing this respect diminished throughout our country. One such place, Ferguson, Mo., was the subject of a U.S. Department of Justice investigation.

In March 2015 the Justice Department's Civil Rights Division released its report on the Ferguson Police Department and found that the city focused its municipal court operations on revenue generation, not public safety. It routinely imposed excessive fines, arrested low-income residents for failure to appear or make payments, and used unlawful bail practices, resulting in unnecessary incarceration.

The report referenced the case of a 67-year-old woman who received two traffic tickets in 2007 totaling $152. After more than eight years of fines and penalties—including two arrests and six days in jail—she had paid the city $550 and owed $541 more.

Ferguson is not an anomaly. Across the country, nearly two thirds of all inmates in county jails are awaiting trial at a taxpayer cost of $9 billion. After release on bail or probation, many must pay private companies to monitor them. In South Carolina, a defendant has to pay almost $300 a month for an ankle-monitoring bracelet or return to jail.

The office of the public defender was formed to assist individuals unable to afford a private lawyer. Yet in too many instances, indigent defendants are required to pay a fee to utilize a public defender, placing the promises of *Gideon v. Wainwright* in a precarious position.

But there are alternatives. In Newark, New Jersey, Judge Victoria F. Pratt presides over Municipal Court Part Two and uses procedural justice rather than incarceration. She routinely orders individuals to write essays to examine why they committed an infraction and how they can change their lives.

Judge Alex Calabrese at the Red Hook Community Justice Center in Brooklyn, New York, concentrates on the underlying problem of a defendant's behavior and crafts solutions such as service to repay the community. These courts focus on fairness. Defendants respond when treated with dignity. These courts save money, reduce pretrial incarcerations—which can average $19,000 per case—and improve recidivism rates.

John Jay, the first Chief Justice of the United States, said, "Justice is indiscriminately due to all, without regard to numbers, wealth or rank." To live up to these words, courts need to save money through innovation rather than extracting it from poor defendants. Only then can justice truly be equal for all. ■

PHOTOGRAPH BY MARC HAUSER

Follow President Brown on Twitter @Brown4Lawyers.

Opening Statements

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

FEIH co-founders Jon Henes and Ramiro Ocasio (wearing glasses) share their pride with Honduran students outside their newly completed school.

PHOTOGRAPHS BY CATHERINE LOJO

The Learning Alliance

A law firm partner and clerk create a foundation to build schools in Honduras

A VILLAGE IN HONDURAS GOT A NEW SCHOOL this year thanks to an unlikely alliance between a high-powered lawyer and a firm staff member. The pair, both from Kirkland & Ellis in New York City, created the Foundation for Education in Honduras to build and refurbish schools there. It also supports the students at those schools by ensuring they have everything they need, from textbooks and blackboards to backpacks and sanitary bathrooms.

The foundation is the result of an inspiring and unusual partnership between Ramiro Ocasio, a records assistant at the firm who started in the mail room 10 years ago, and partner Jon Henes.

Helping in the Central American country wasn't new for Ocasio. The New Yorker, who was born in Boston but spent his childhood in his parents' native El Progreso, has been assisting there for years in an informal way, bringing food, toys, shoes and sundries to desperately poor villages across the countryside during his annual visits.

But a trip in 2012 led to an entirely new level of largesse. During a casual discussion of holiday plans, Ocasio told Henes about the upcoming trip to Honduras that he and his son were taking and what they planned to bring to the villages. Henes was immediately moved and knew he had to contribute. "Here's this guy in the mail room, earning whatever he's earning in New York City, and taking his savings from those earnings and going to Honduras to give back," Henes says.

Henes, a father of five, wrote Ocasio a check for his trip, but he also went one step further and sent an email to other lawyers in the firm, who pitched in quickly and generously.

The following December, Ocasio decided to change up his strategy from handout to hand-up. This time, he would bring friends and family with him to rebuild a school in Honduras. In no time at all, Henes and others throughout the office were able to pull together nearly $10,000. The money went a long way, Ocasio says. "We painted, we fixed the bathroom, we bought white boards and chairs and a lot of soccer balls."

Ocasio brought back a video to show everyone at Kirkland what their donations helped to achieve. What happened next, however, was astounding: That semester, for the first time ever, not a single child dropped out of school.

That's when Henes realized the Kirkland crew could offer much more than just money. "I said to Ramiro, 'I love you coming to my office and telling me at the last minute that you're going to do these great things, but I think it's time to establish this as a real foundation,' " Henes recalls. "Kirkland will do the legal work to set it up; I'll help you put together a board, and let's see if we can really make a difference."

The Foundation for Education in Honduras is now up and running. With a staff of three there, it's employing local workers, building and stocking schools, outfitting students and actively working with communities.

Henes credits Ocasio's passion for success in Honduras and at the firm. Since the organization, known as FEIH, launched in 2014, more than 200 Kirkland employees from corner office to cubicle have donated money and time. Even the Kirkland & Ellis Foundation, the Chicago-based firm's multimillion-dollar charitable giving initiative, has kicked in.

As a result of the firm's support, FEIH was able to break ground last October on its first new facility, the Santiago Morales primary school, which opened in January; Henes and Ocasio were both on hand for the ribbon-cutting.

It's the first of five primary schools FEIH plans to build across Honduras—which is considered the second-poorest country in Central America—over the next three years, a commitment it made at the 2015 Clinton Global Initiative annual meeting.

"This has been the most amazing thing—I am so humbled and honored," Ocasio says. "When Jon said, 'Let's put together a foundation and do bigger things,' I thought: 'This goes to show you that anything is possible in America.' "

—Jenny B. Davis

Rowing on the River

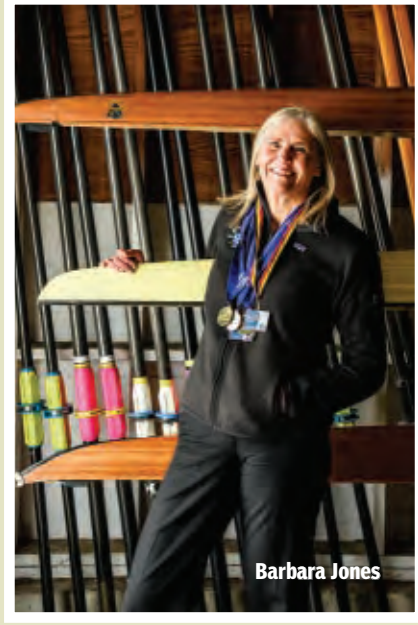
Boston lawyer rows to world championship

A few years ago, Greenberg Traurig partner Barbara Jones decided she needed a new form of exercise. Inspired by her son, who then rowed for his high school team, she picked up the oars for the first time.

Since then, Jones has used the same determination and stamina necessary to survive long days at the office to become a nationally recognized rower. Last year, she won championship titles in the women's double sculls and the women's coxed eights at the U.S. Rowing Masters National Championships. She also captured gold medals in the single and quadruple sculls at the World Rowing Masters Regatta in Belgium.

"I'm obviously a very competitive person in all aspects of my life," says Jones, who coordinates the firm's global securities practice group from its Boston office. "To have achieved such success so early on in my rowing career against former Olympians, national team members and others who have been rowing almost their whole lives is incredibly gratifying."

Jones heads to the Charles River just about every morning—unless, of course, the water is frozen. "It's a beautiful and peaceful time to be out on the river, watching the moon and the planets set," she says. "It helps me to reconnect with the world outside of the office."



Barbara Jones

PHOTOGRAPH BY DAVID HILLS

—Anna Stolley Persky

Works by members of the Pittsburgh Society of Illustrators and other local artists have been featured.

PHOTOGRAPH BY DAVID FONDA

Art in the Court

A federal courthouse draws the public in through lobby exhibitions

COURTHOUSES ARE NOT often thought of as the most welcoming of places, but a 6-year-old program in Pittsburgh is trying to change that perception, one framed piece of art at a time.

The courthouse on Grant Street in Pittsburgh was built in the 1930s, and as early as 1988 discussions began about renovations for a more modern age, including hanging work by local artists in the courthouse lobby, says Michael Palus, the deputy clerk of the Joseph F. Weis Jr. United States Courthouse.

The court committed to the program: It installed a museum-quality hanging apparatus at its expense to allow for easier installation of pieces, which began in 2010. There are about 60 linear feet of exhibition space, divided between four walls. The artworks displayed are mostly two-dimensional—they include textiles, paintings, drawings and photography—and have a connection to the area.

"I was here when the steel mills closed," Palus says of the economic shift that threatened the region. Now other industries such as technology and health care are thriving in this former Rust Belt area, and having art that connects to these kinds of experiences is meaningful. While most of the exhibitions feature local artists' creations, the court had one show of employees' (and their family members') works, including a quilt made by a judge's wife.

The courthouse hung its first installation in 2010 and is booked through 2017. Exhibitions change every quarter and are vetted by a community outreach committee. Palus admits that he wasn't much of an art connoisseur before the program began, but now he enjoys exploring local art openings and looking for new works to display.

Due to regulations in federal buildings, signage next to the works cannot include prices. But artists can provide information about where to buy them away from the courthouse.

Adds Palus: "We think this is a great avenue for courts interested in connecting to their community."

—Margaret Littman

10 QUESTIONS

Judging Talent

This D.C. lawyer is helping her firm attract U.S. Supreme Court clerks

BETH HEIFETZ KNOWS what judicial clerks want. As head of the Jones Day issues and appeals practice group and director of judicial clerk recruiting, it's her job to bring U.S. Supreme Court clerks on board—and she rocks it, writ large. For the past four years, the firm has welcomed more clerks than any other law firm in the nation. Last year, that number totaled 10, or more than one-fourth of all clerks coming off their stint at the high court. Exactly what kind of offer is Heifetz mixing up in her downtown Washington, D.C., office? Of course, there's a signing bonus (rumored to be $300,000 and rising). But Jones Day's winning bid seems to be a special blend of cutting-edge casework, camaraderie with other clerks and personal career guidance from Heifetz herself—a style of mentorship she honed during her own clerking stints, first for Judge Abner Mikva of the U.S. Court of Appeals for the District of Columbia Circuit and then for Justice Harry A. Blackmun of the Supreme Court.

Beth Heifetz

What do you think is behind Jones Day's judicial clerk recruiting record?

I think our best recruiters are the former clerks who have already begun here. They talk to the clerks we are recruiting about the kinds of opportunities they have and what their life will be like at the firm.

So clerks beget clerks?

That's a very nice way of saying it. But I think it helps for the clerks to see that the clerks who have come here are happy, and there's a steady stream of interesting work. We have six cases before the Supreme Court right now, and while former clerks can't do Supreme Court work immediately because of the two-year bar, our lawyers also bring their talent and experience to state and federal trial and appellate courts across the country.

Matters like the Detroit bankruptcy, right? You were very involved with that—what was it like?

It was truly remarkable. The legal issues were phenomenally interesting: Many of them were novel, and all of them were significant. It also felt significant to us to have this opportunity to help the city and its people get back on their feet.

I know you work closely with the clerks you recruit. Did you learn the importance of mentoring from your own clerkships?

I learned from both Judge Mikva and Justice Blackmun about what works for different people in moving through their careers, and I experienced firsthand the benefits not only of their guidance but also seeing up close how they lived their lives. From both I learned the value of having someone pay attention to you and your career—helping others make the most of every opportunity and being direct about it.

What was it like clerking for Blackmun?

It was a wonderful experience. We had breakfast with him every morning, and we would discuss openly the cases we were working on, and we'd discuss other things—our families, baseball, our plans. We really had the opportunity to get to know him well, to learn from him. He was a remarkably disciplined person, and that was a great lesson for us as young lawyers. There were four clerks, and three of us were women. I think that might have been the first year that any justice had had so many women clerks, so we were very proud of that.

What did you like best about working with Judge Mikva?

To be with him when he was looking at cases involving legislation and agency action was incredibly interesting. He'd been in Congress, writing legislation, and now he was on the other side as a judge, so he knew what went into the process.

You and Judge Mikva are both from Wisconsin. Do you think that there was a connection there?

I always felt it.

You were recently named by President Barack Obama

PHOTOGRAPH BY DAVID HILLS

to the governing body of the United States Holocaust Memorial Museum. Do you have a personal connection to the museum?

I got involved in the museum through its Washington lawyers committee, but sadly I have many family members who were killed in the Holocaust. They were Polish and Russian; they weren't murdered in concentration camps—they were herded from ghettos, taken to pits and shot. My grandfather had already come to America by then, but two of his brothers in what is now Belarus escaped from the ghetto and survived by living in the forest for two years. When I was growing up, one of these great-uncles lived down the street with his wife, who he met in the forest. I knew the stories, but only in the shadows. I wish they had talked about it more.

Are there any perks that you get as a SCOTUS clerk alum?

If there are, no one has told me.

Although Justice Blackmun presided over your wedding, so that could be a perk—the most amazing perk ever.

Yes! He performed our marriage ceremony along with a rabbi. The justice truly was such a genuine and modest person. He had been married for decades—a beautiful, long-lasting and devoted marriage with three children—and he started off by saying, "I don't know why they've asked me to speak about marriage here." —*J.B.D.*

Cartoon Caption Contest

WINNER! Congratulations to James A. Walker of Wichita, Kansas, 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, March 13, with "March Caption Contest" in the subject line.

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

OK, OK! I admit that literally he has a point, but come on, judge.
—*James A. Walker of Wichita, Kansas*

Hearsay

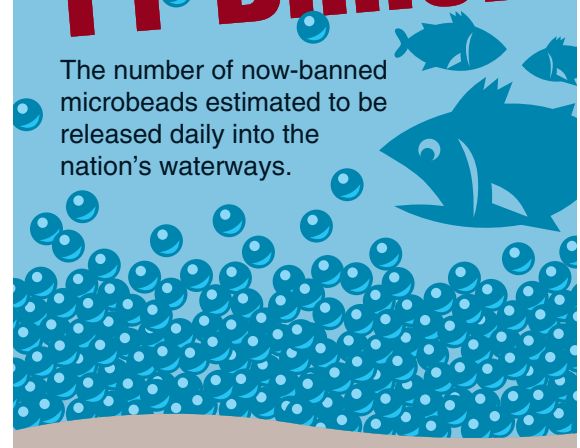
DID YOU KNOW?

Washington is proposing legislation requiring judges to disqualify themselves if any party in front of them, any party's lawyer or the law firm of a party's lawyer has made a campaign contribution of $50 or more within three years.

Source: SB 6255 (introduced Jan. 13).

11 Billion

The number of now-banned microbeads estimated to be released daily into the nation's waterways.



Source: "Ban on Microbeads Proves Easy to Pass Through Pipeline," nytimes.com (Dec. 22, 2015).

TRUE OR FALSE?

In the United Kingdom:

1. It is illegal to enter the Houses of Parliament wearing a suit of armor.
2. It is legal to beat or shake any carpet or rug in the street.
3. It is illegal to handle salmon in suspicious circumstances.
4. It is illegal to die in Parliament.
5. It is legal to place a stamp of the Queen upside down on a letter.

Answers: 1—true, 2—false, 3—true, 4—false, 5—true.

Source: "Legal Curiosities: Fact or Fable?" by the U.K.'s Law Commission.

SURVEY SAYS

Litigation is the practice area most likely to offer the greatest number of legal job opportunities in 2016.

Business/commercial law will offer the second-highest number of opportunities.

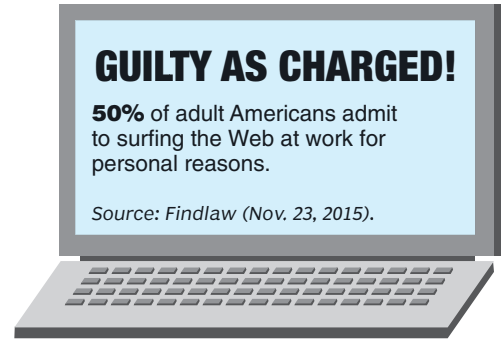
Health care law comes in third.

Source: Robert Half Legal's 2016 Salary Guide *(Sept. 22, 2015).*

GUILTY AS CHARGED!

50% of adult Americans admit to surfing the Web at work for personal reasons.

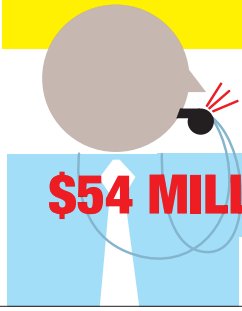
Source: Findlaw (Nov. 23, 2015).



96,000

The number of same-sex couples who married in the four months following the U.S. Supreme Court's decision in *Obergefell v. Hodges*.

Source: The Williams Institute (Nov. 5, 2015).



$54 MILLION

The amount of money the Securities and Exchange Commission has paid out to whistleblowers since the inception of its whistleblower program in 2011.

Source: sec.gov (Nov. 4, 2015).

ISTOCKPHOTO, ILLUSTRATIONS BY SAM WARD

The Docket

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

Alan Curtis: In prior-appropriation states such as Colorado, "water decrees are not worth anything if the water isn't there."

PHOTOGRAPH BY MCCORY JAMES

Longest Straw Wins

California's 'pumper-take-all frenzy' is worsening the effects of its drought and shedding light on the state's water law deficiencies

By Susan Kostal

National Pulse

It's a classic case of ignoring a problem until forced to face it.

In the midst of a four-year drought, when the state had its lowest rainfall ever, California finally established a regulatory regime, the Sustainable Groundwater Management Act of 2014, to control who gets what groundwater.

Still in its infancy, the new law won't have any real effect, California water lawyers say, until 2020 or 2021. Meanwhile, it's a dangerous pumper-take-all frenzy—if you can find an overbooked driller to actually dig you a well.

Lawyers outside the state who specialize in environmental law and water rights are baffled by why it took California so long, when states such as Colorado have had water laws for 150 years, predating the state constitution. Water laws not only vary by state but are also governed by

aquifer, groundwater and subsidence districts, as well as other state and county agencies.

Even in states where landowners own the water beneath their property, they're not truly protected, as water does not respect property boundaries. The landowner with the longest straw wins. And in California, that's perfectly legal.

CRAZY QUILT OF LAWS

Water law can be an overlapping crazy quilt that means, along with scarcity and the rise of fracking, that the field will provide work in perpetuity. "I've never seen more people talking about water law than they are now," says water lawyer Sue Snyder, a partner at Vinson & Elkins' Austin, Texas, office. The Lone Star State, the second-to-last Western state to regulate groundwater, has established its own set of county districts, groundwater management districts, aquifer districts and subsidence districts, many of which regulate the same aquifers.

Every few years the Texas legislature creates new water districts and laws, "which makes for a very disjointed regulatory scheme," Snyder says. "We've had groundwater conservation districts on the books since the 1950s, but we are still figuring it out, still litigating takings cases."

In 2012, the Texas Supreme Court confirmed the private ownership of groundwater in *Edwards Aquifer Authority v. Day*. "However, it clearly leaves the door open to regulation by groundwater conservation districts, including regulation that protects existing and historical use," says Drew Miller of Kemp Smith in Austin, who represented the aquifer authority. "But just how far a groundwater district may go to protect historical use, especially at the expense of landowners with little or no historical use, is unclear."

Miller represents local government entities fighting oil baron and former gubernatorial candidate Clayton Williams Jr., who is seeking to pump and transport 48,000 acre-feet (a measure of volume) of water from the Fort Stockton area northeast to the thirsty Midland-Odessa region for municipal and industrial use. The groundwater district denied the permit, the trial court upheld it, and the case is now on appeal.

LACK OF FEDERAL OVERSIGHT

There is no single federal standard to guide how water is allocated, says James O'Reilly, a professor at the University of Cincinnati College of Law. "Each state's laws relate to the history of the agricultural powers that governed state legislatures."

In some states, such as Idaho, it's a farmer vs. farmer fight. In other states, it's a more traditional farm vs. city battle. But the new players in the water wars—domestic and international energy companies extracting shale gas, a process known as fracking—have changed the landscape, in part by skyrocketing the price of water.

"Water regulatory regimes have not kept up to adapt to this new dynamic," O'Reilly says.

Water lawyers across the country find it incredible that California does not require pumpers to measure the amount of water they extract. "It's unusual for a state of the size and sophistication of California to have no code or legislation addressing the use of groundwater, which has been a mainstay in Florida for decades, if not hundreds of years," says water and environmental lawyer Roger Sims, a partner at Holland & Knight in Orlando.

In Florida, water rights do not exist in perpetuity. Water-use permits have specified terms and must be renewed. They can be revoked by the issuing agency. Even legal pumpers with permits for a determined number of acre-feet can be forced to pump less if an aquifer is in danger. Pumpers violating permits can face substantial civil monetary fines, Sims says. And those who pump without a permit face possible criminal penalties.

Alan Curtis, who practices water law in Utah and Colorado as a partner with White & Jankowski in Denver, notes that Colorado has seven water courts dedicated to water rights disputes—and a right of direct appeal to the Colorado Supreme Court. And for good reason. "We put people in jail for stealing water," Curtis says.

Unlike many other states, Colorado works under a prior-appropriation system, on essentially a first-come, first-served basis. Senior holders of water rights have priority over subsequent rights holders. This allows the most-senior holder of rights on a stream to take all the water it needs before the next-most-senior rights holder is allowed to divert water, and so on until the supply runs out. In dry years, junior rights holders have diversion curtailed, so their water is severely limited or nonexistent.

And there's the rub. As Curtis says, "Legal water is not something you can irrigate with. You need the wet stuff. Water decrees are not worth anything if the water isn't there."

This regime has dominated how the state developed, Curtis says. "The person who has the water rights gets all of their water before the next person in line gets any." And hoarding is strictly verboten. "If you don't use your water for a period of 10 years or more, Colorado law allows the water court to rescind your water right, so that others who actually do need the water can use it."

Fracking has completely changed the Western water landscape, says O'Reilly. Energy companies are drilling for shale gas, which requires an immense amount of water, which is then contaminated and leaves the ecosystem permanently. Companies can also afford to buy water at vastly inflated prices. Previously the price of water was relatively stable.

"Prior to 2010, you could buy an acre-foot of water at auction for $35. In parts of Colorado, that water is going for $2,000 to $6,000 per acre-foot," Curtis points out. Frackers can also afford to drill and buy water when oil and gas prices are high, and to cease operations when prices dip, giving them a tremendous advantage over ranchers.

"You can't tell your cows to stay in a corner and not drink for the next few months until the price of beef goes up," O'Reilly says.

'WILLY-NILLY' REGULATION

In California, where pumping is neither regulated nor measured, only cities reliant on well water measure what they pump, and only then to determine how much chlorine to add to the water. In the Central Valley, which produces much of the country's fruits, vegetables and nuts, overpumping is causing subsidence, the sinking of land caused by extraction of groundwater. According to NASA satellite photos, parts of the Central Valley are sinking as much as 2 inches a month.

What's worse, says Richard Frank, a former environmental litigator with the California attorney general's office and now a law professor at the University of California at Davis, is that those areas of subsidence—which have a high concentration of what's called Corcoran clay—are destroying aquifers as they collapse from the weight of the ground above them. And since aquifers can be replenished by drainage of surface water and are the best way to store water, parts of California's water storage system will be destroyed forever.

"With our willy-nilly unregulated groundwater, we are slowly but surely destroying Mother Nature's water storage system," Frank says. "It is far more expensive to create replacement storage. And that's a liability question that's worth discussing."

Though California began receiving rain in January, there is no guarantee it will get enough snow and rain to replenish its water system. "There is a possibility our four-year drought will continue. In any event," he says, "what we are in is likely the new normal, due to changing climatic conditions."

As California's water needs continue to grow, O'Reilly says, "we are not at the peak of the water wars. There is a lot more to come." ■

Cash or Credit?

Federal appeals courts split over law on surcharges

By David L. Hudson Jr.

National Pulse

Merchants are prohibited by law in 10 states from imposing a surcharge on buyers who use credit cards for purchases. Yet those same laws allow merchants to offer discounts to those who pay with cash.

The result is that those who use credit cards are penalized by paying more than those who pay with cash, but you just can't call the higher-priced transaction a "surcharge."

Sound confusing? Well, these so-called no-surcharge laws have caused a conundrum of sorts in the federal courts. The laws have fared differently in federal appeals courts, setting the stage for possible future review by the U.S. Supreme Court.

Some merchants and consumer rights advocates believe such no-surcharge laws violate First Amendment free speech rights because they restrict the way merchants can describe transactions. They question why merchants can call something a "discount" but are limited in talking about higher fees for credit cards. State officials and the credit card industry counter that the laws merely regulate price controls and economic conduct. According to this view, the laws don't even implicate the First Amendment.

Florida's law, for example, prohibits sellers from imposing a surcharge "for electing to use a credit card in lieu of payment by cash, check or similar means, if the seller or lessor accepts payment by credit card." The law further states, however, that it "does not apply to the offering of a discount for the purpose of inducing payment by cash, check or other means not involving the use of a credit card, if the discount is offered to all consumers."

ISTOCKPHOTO

CONSUMER CONCERNS

Duana Palmer of Tallahassee Discount Furniture was one of the merchants who challenged Florida's law. She did so "because it is important to me to be able to give the lowest and fairest prices to my customers," Palmer said through her Washington, D.C.-based attorney, Deepak Gupta.

"Either we have to absorb the fee, or we would have to mark up the price for those using cash to cover those using credit cards—and that's not fair," she said. "Many of my customers don't have credit cards. In addition, people don't understand that the bad guy here is the credit card company, not the retailer. It will be business as usual until customers and retailers stand up to the credit card companies and until the public understands what's really going on."

States with similar laws include California, Colorado, Connecticut, Kansas, Maine, Massachusetts, New York, Oklahoma and Texas. Suits have been filed challenging the laws in four states: California, Florida, New York and Texas.

"These laws are important because

they protect consumers," says Henry Meier, deputy general counsel for the New York Credit Union Association. "We don't want our members to be penalized for using credit cards. These laws are important because if you can impose surcharges for credit card usage, the costs will go up for everyone."

"These lawsuits are important because these laws hide the cost of credit from consumers," explains Gupta, who has filed all four lawsuits on behalf of different merchants. "These laws were enacted at the behest of the credit card industry in the 1980s. The credit card companies initially fought dual pricing. When they lost that battle, they switched to a battle over labels."

"These laws definitely affect freedom of speech from at least two stakeholders' perspectives—the rights of the speakers/merchants and the rights of receivers/consumers," says Clay Calvert, director of the Marion B. Brechner First Amendment Project at the University of Florida. "I believe they do violate the First Amendment."

SEEING IT DIFFERENTLY

The 2nd and 11th circuits of the U.S. Court of Appeals have different interpretations with respect to the New York and Florida no-surcharge laws. Last September, a unanimous three-judge panel of the 2nd Circuit at New York City upheld the state's law in *Expressions Hair Design v. Schneiderman*. The law "regulates conduct, not speech," reasoned the court. "If prohibiting certain prices does not implicate the First Amendment, it follows that prohibiting certain relationships between prices also does not implicate the First Amendment."

"All the New York law does is ban the conduct of imposing a higher price for the use of a credit card," explains Meier, who wrote an amicus brief defending the law in the case. "The law regulates conduct, not speech. Imposing a control on price, a form of economic regulation, is not speech."

The plaintiffs have filed for full-panel review in the 2nd Circuit.

However, a different result came out from the 11th Circuit at Atlanta. In November, a divided three-judge panel of the appeals court invalidated Florida's law. The majority determined that the Florida law directly impacted speech. "The statute targets expression alone," the majority wrote. "More accurately, it should be a 'surcharges-are-fine-just-don't-call-them-that' law."

The 11th Circuit characterized a surcharge as nothing more than a "negative discount." The opinion noted: "If the same copy of Plato's *Republic* can be had for $30 in cash or $32 by credit card, absent any communication from the seller, does the customer incur a $2 surcharge or does he receive a $2 discount?"

Chief Judge Edward Carnes dissented, criticizing the panel majority for creating "a rewritten [law] with a great big First Amendment bull's-eye on it."

"The Supreme Court has long held that the government can regulate economic conduct—including the prices charged by merchants—without violating the First Amendment," Carnes wrote. He also noted that the "majority places our circuit in direct conflict with our sister circuit on this issue."

Whitney Ray, director of media relations for the Florida attorney general's office, said the attorney general filed for en banc review because "we disagreed with the panel majority's finding that [the law] is facially unconstitutional."

SPEECH OR CONDUCT?

The difference in approach reflects the importance of a threshold issue known as the speech-conduct dichotomy or speech-conduct defense. The idea is that the First Amendment protects speech, not conduct. While some forms of conduct are expressive, the idea is that economic regulation is a form of conduct that is not expressive enough to trigger First Amendment review.

One First Amendment authority lauds the 11th Circuit's approach to the speech-conduct dichotomy. "This decision is refreshing, given the court's intensive, granular analysis to determine whether the prohibited no-surcharge law involved conduct or speech," says Longwood, Florida-based attorney Lawrence G. Walters.

"Increasingly, the government runs to the conduct-not-speech defense in the face of just about any First Amendment challenge involving commercial activity," Walters says. "The court correctly identified the challenged law as involving a matter of speech—specifically mandating what must be said, and what must not be said."

"I think the 11th Circuit got it right, and it also did the right thing by addressing this only under intermediate scrutiny because it rendered unnecessary the application of strict scrutiny," Calvert says. "In other words, if it can be struck down under intermediate scrutiny, why bother reaching the more difficult choice calling it deserving of strict scrutiny?"

The constitutionality of one or more of these no-surcharge laws could wind up before the U.S. Supreme Court. "Taking up *Dana's Railroad Supply* and *Expressions Hair Design* as companion cases would give the court a great opportunity to resolve some key doctrinal problems lurking in both cases," says Calvert. "These include clarifying the fundamental line between speech and conduct."

Meier agrees. "I believe this issue will go to the U.S. Supreme Court because we have a classic circuit split," he says.

Gupta also sees the fate of the laws being decided by the high court. Petitions for en banc review have been filed in the 2nd and 11th Circuit cases. Cases are pending before the 5th and 9th circuits. In February 2015, a federal district judge in Texas upheld the state's no-surcharge law, while in March 2015, a federal court in California invalidated a similar law.

"Merchants don't want to have different prices and policies in different states," Gupta says. "There has to be a national answer to this problem." ■

Reproductive Rights Revisited

Court to consider abortion regulations and the contraception-coverage mandate

By Mark Walsh

Supreme Court Report

In a U.S. Supreme Court term full of hot-button issues—voting rights, affirmative action, union fees and immigration, to name a few—the month of March will stand out.

Early in the month, the justices will weigh their first major case on abortion in nearly a decade. Weeks later, arguments will come in a challenge by religious colleges and other faith organizations to the contraceptive-coverage mandate stemming from the Patient Protection and Affordable Care Act.

FLICKR CREATIVE COMMONS

"Both of these cases raise issues of enormous importance for women and women's health," says Marcia D. Greenberger, co-president of the Washington, D.C.-based National Women's Law Center. "They both deal with reproductive health care for women." But, she adds, "the legal issues are very different."

Zubik v. Burwell is a statutory case that touches a number of recent flashpoints: contraception, President Barack Obama's health care law and religious conscience. The abortion case, meanwhile, revives a debate that has been ongoing for more than 40 years.

A 'PIVOTAL MOMENT'

Whole Woman's Health v. Hellerstedt, set for argument on March 2, involves a constitutional challenge to a 2013 Texas law that adopted new abortion regulations. One measure requires that medical facilities where abortions are performed meet standards designed for "ambulatory surgery centers." Another demands that doctors who perform abortions have admitting privileges at a nearby hospital.

"This is a pivotal moment and a pivotal case" in the decadeslong national debate over the right to abortion, says Melissa Murray, a law professor at the University of California at Berkeley and faculty director of the law school's Center on Reproductive Rights and Justice.

Texas has defended the requirements on the grounds that they raise medical standards and promote patient safety. The state, along with others, acted partly in response to the case of a Pennsylvania abortion provider who ran a substandard clinic where a mother died in 2009.

The standard for ambulatory surgery centers provides more

accountability of practitioners, promotes better pain management and provides for a sterile operating environment for surgical abortions, the state says in court papers.

The admitting-privileges requirement, meanwhile, "ensures doctors are qualified, promotes continuity of care in the case of complications that require hospitalization, and reduces communication errors and time delays when a patient must be treated at a hospital."

An initial lawsuit brought by abortion providers challenged the admitting-privileges requirement on its face. A federal district court struck down the requirement, but the New Orleans-based 5th U.S. Circuit Court of Appeals upheld it.

Meanwhile, the implementation of the requirements, after rules were promulgated by state health authorities, forced all but the largest abortion providers in the state to close their doors, their advocates say.

A second lawsuit challenged the ambulatory-surgery-centers standard on its face and the admitting-privileges requirement as applied to abortion providers in El Paso and McAllen.

After a short trial, a federal district court struck down both provisions as an "undue burden" on women's right to abortion under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the 1992 decision that reaffirmed the court's central holding on abortion rights in 1973's *Roe v. Wade*.

The 5th Circuit largely reversed the district court. It ruled on the merits of the facial challenge to the requirement that facilities meet standards designed for ambulatory surgery centers, finding that an insufficiently large proportion of Texas women would have to travel long distances to obtain abortions. The court accepted the as-applied challenge for the McAllen clinic but rejected it for the El Paso facility, noting that women in that community could readily travel over the border to New Mexico to obtain an abortion.

Whole Woman's Health v. Hellerstedt

When applying the "undue-burden standard" of *Planned Parenthood v. Casey*, does a court err by refusing to consider whether and to what extent laws that restrict abortion for the purpose of promoting health actually serve the government's interest in promoting health? And did the 5th Circuit err in concluding that this standard permits Texas to enforce, in nearly all circumstances, laws that would cause a significant reduction in the availability of abortion services while failing to advance the state's interest in promoting health—or any other valid interest?

Zubik v. Burwell

Does the Department of Health and Human Services' contraceptive-coverage mandate and its "accommodation" violate the Religious Freedom Restoration Act by forcing religious nonprofits to act in violation of their sincerely held religious beliefs, when the government has not proven that this compulsion is the least-restrictive means of advancing any compelling interest?

The challengers tell the Supreme Court that the Texas requirements would close more than 75 percent of Texas abortion facilities and deter new ones from opening.

"The Texas requirements will not enhance abortion safety," says the merits brief on behalf of the clinics. "Those requirements will instead make it harder for women to end a pregnancy safely by reducing their access to legal abortion."

Murray, the Berkeley law professor, joined one of scores of amicus briefs on the abortion providers' side. "The idea that a woman would have to travel more than 150 miles," she says, "or go out of state to exercise a fundamental right is like being a refugee."

"When this bill passed, some Texas legislators tweeted a message to the effect that 'abortion is now over in Texas,' " she says. "It is not clear that this is all about women's health."

Mailee R. Smith, staff counsel for Americans United for Life, a D.C. legal organization that opposes abortion, says the case is about more than the Texas provisions on facility standards and admitting privileges.

"What is really at stake is whether the Supreme Court meant what it said as far back as *Roe* when it said the states may regulate abortion to protect maternal health," says Smith, who filed an amicus brief on Texas' side from legislators in several other states.

HOBBY LOBBY REVISITED

The *Zubik* case, to be argued March 23, stems from regulations under the Affordable Care Act, which generally requires most large employers to offer group health plans with "minimum essential coverage," which has been interpreted by the Department of Health and Human Services to include coverage of contraception.

Churches, associations of churches and the religious activities of religious orders are exempt from the contraceptive mandate, but the HHS declined to exempt many other religious employers, such as schools, colleges and nursing facilities.

President Obama's administration offered an accommodation to any nonprofit religious organization that objected to the contraceptive mandate. The accommodation requires third parties such as the insurer or the plan administrator to pay for the contraceptive coverage.

The government originally sought to have the religious organizations certify their religious objections using a Department of Labor form. But the Supreme Court intervened in an early stage in a case involving Wheaton College,

Members of the National Family Planning and Reproductive Health Association rally outside the Supreme Court.

AP IMAGES

a religious institution in Wheaton, Illinois, (and one of the parties now before the court) to mandate that the objecting employers need only inform the federal government in writing of their objections, not fill out the form.

The accommodation did little to quell the objections of a range of religious organizations to the contraceptive mandate. They sued all over the country under the Religious Freedom Restoration Act of 1993, which says that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."

Six out of seven federal appeals courts that considered the question sided with the government.

The religious employers contend that the Supreme Court, in its 2014 decision in *Burwell v. Hobby Lobby Stores Inc.*, already concluded that the fines for noncompliance threatened under the ACA imposed a burden on religious exercise of family-owned or closely held corporations.

They argue that the logic of the *Hobby Lobby* decision should also apply to them. And they contend the fight is not simply over the filing of a piece of paper declaring their objection.

"The government would like to portray [the religious employers] as objecting to the very process of opting out, like the impossible-to-satisfy conscientious objector who objects to even having to object," says a brief on behalf of some of the religious employers.

"The government is hijacking our health plans, which we created and that we maintain for the benefit of our people," says Gregory S. Baylor, senior counsel with the Alliance Defending Freedom, a legal group representing several religious colleges in the case. "The government is then seeking to use those plans to deliver drugs that we find morally objectionable."

The Obama administration argues that the accommodations it has offered are the least-restrictive means of achieving its compelling interest that women are able to get contraceptive coverage and they are consistent with the Religious Freedom Restoration Act.

"Although [the employers] sincerely believe that invoking the accommodation would make them complicit in objectionable conduct by others, RFRA does not permit them to collapse the legal distinction between requirements that apply to them and the government's arrangements with third parties," U.S. Solicitor General Donald B. Verrilli told the court in a brief.

Greenberger of the National Women's Law Center notes that the *Hobby Lobby* decision spoke approvingly of the government's accommodation. "We have a history in this country of trying to accommodate religious objectors in all kinds of ways, including for the draft," she says. "But someone has to notify the government that they are objecting. It's very hard for [the religious employers] to say that this is burdensome."

Ilya Shapiro, a senior fellow at the libertarian Cato Institute who co-authored an amicus brief on the side of the religious employers, says the federal government's entire regulatory approach to the contraceptive mandate was the result of "haphazard and unauthorized guesswork by anonymous bureaucrats."

Shapiro believes the court will extend its *Hobby Lobby* decision to the religious employers. "Treating religious organizations different from corporations," he says, "just doesn't make sense." ■

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Practice

We Need to Talk

ABA opinion provides guidelines for communicating with people receiving limited-scope representation By David L. Hudson Jr.

Ethics

As more individuals handle their cases pro se or hire lawyers to represent them on a limited basis, lawyers representing other parties in those matters often are left in a quandary about who they may talk to, and what parts of the case they may discuss.

The ABA Standing Committee on Ethics and Professional Responsibility recently issued an opinion that seeks to shed some light on these questions. But while the opinion offers extensive advice to lawyers on communicating with opposing parties and counsel in cases involving limited-scope representation, it acknowledges that the ABA Model Rules of Professional Conduct provide no hard-and-fast guidance that will apply in the same way to every case. Instead, the opinion advises lawyers to look to the circumstances of each case to help them decide how to proceed.

"Limited-scope representation is growing, and lawyers need guidance on how to proceed with what may be a new way of lawyering for them," says Peter A. Joy, who teaches ethics at Washington University School of Law in St. Louis. "The opinion provides solid guidance in a number of areas, and it may prompt more jurisdictions to enact rule changes to require that all limited-scope representation agreements be in writing."

Formal Ethics Opinion 472, issued Nov. 30, 2015, focuses on the interplay between Model Rules 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 4.2 (Communication with Person Represented by Counsel) and 4.3 (Dealing with Unrepresented Person).

(The Model Rules are the primary basis for binding ethics rules in almost every state. California sets forth its ethics rules using a format different from the Model Rules.)

Under Model Rule 1.2(c), "a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." This approach often is described as "unbundled" legal services.

WHEN RULES COLLIDE

Complications begin to arise when a lawyer representing one party in a matter seeks to communicate with the other side in the context of a limited-scope representation.

Model Rule 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The principle of "no contact" has been part of the ABA's ethics standards since the original Canons of Professional Ethics were adopted in 1908.

But neither Rule 4.2 nor Rule 4.3, which provides guidelines for communicating with a person who is not represented by counsel, prohibits such communications. As Opinion 472 states, a lawyer directly communicating with an individual "will only violate Rule 4.2 if the lawyer *knows* that the person is represented by another lawyer in the matter to be discussed." (Italics added by the ethics committee.)

"Knows" is defined in the Model Rules as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." That definition applies to communications with people when it's unclear whether they are represented by a lawyer, states Opinion 472. In such cases, "a lawyer's knowledge that the person has obtained some degree of legal representation may be inferred from the facts."

The opinion recognizes that making such inferences can be tricky. "Lawyers confronted with a person who appears to be managing a matter pro se, but may be receiving or have received legal

assistance, often are left in a quandary," states the opinion. "May the lawyer assume that such persons are proceeding without the aid of counsel and, therefore, speak directly to them about the matter under Model Rule 4.3, or should the lawyer first ask whether they are represented in the matter and then proceed accordingly under either Rule 4.2 or 4.3?"

The ethics committee thus recommends that "in the circumstances where it appears that a person on the opposing side has received limited-scope legal services, the lawyer begin the communication by asking whether the person is represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. ... It is not a violation of the Model Rules of Professional Conduct for the lawyer to make initial contact with a person to determine whether legal representation, limited or otherwise, exists." At the same time, the committee cautions that "a lawyer cannot evade the requirement of obtaining the consent of counsel before speaking with a represented person by 'closing eyes to the obvious.' "

If the person on the opposing side discloses representation under a limited-scope agreement, but does not clearly indicate that the representation has concluded or that the issue to be discussed is clearly outside the scope of the representation, "then the lawyer should contact opposing counsel to determine the issues on which the inquiring lawyer may not communicate directly with the client receiving limited-scope services."

If the person on the opposing side is not represented by counsel or the representation has been completed, a lawyer may communicate directly with the other person subject to Model Rule 4.3, the opinion states. But "when the communication concerns an issue, decision or action for which the person is represented, the lawyer must comply with Rule 4.2 and communicate with the person's counsel."

Joy endorses the opinion's advice. "The opinion correctly explains that if the person on the opposing side is being represented, then the lawyer should contact opposing counsel to determine the issues on which the person on the opposing side is being represented, and then only communicate with opposing counsel on those issues," he says. "One place where a lawyer can get tripped up is when a person on the opposing side initiates the contact with the lawyer and the lawyer assumes that the person is not represented. This usually happens over the phone or perhaps at court on the day of a hearing. Even when the person on the opposing side initiates the communication, the first thing the lawyer should ask is whether the person is represented."

PUT IT IN WRITING

The opinion recommends that "when lawyers provide limited-scope representation to a client, they confirm with the client the scope of the representation—including the tasks the lawyer will perform and not perform—in writing that the client can read, understand and refer to later."

Rule 1.2 does not mandate such correspondence, and there is no uniform rule among the states on the matter. A handful of states require written agreements for limited-scope representations, while some others prefer them. Accordingly, the opinion states, "lawyers providing limited-scope representation are advised to review their state rules to determine whether a written agreement is required for their limited-scope representation."

"Some states require a written agreement when a lawyer provides limited-scope agreements, and more states should follow suit," Joy says. "This is a best practice, and lawyers who do not have such agreements are unnecessarily exposing themselves to possible disputes with clients over whether the lawyer has met client expectations."

Ethics consultant Keith A. Swisher of Scottsdale, Arizona, concurs with that view. "A lawyer almost always should place the scope of the representation in writing," he says. "Placing the scope in writing prevents misunderstandings on the client's part and can protect the lawyer in the event of a later disciplinary, malpractice or disqualification proceeding.

"As one common example," he continues, "when a client hires a lawyer for DUI defense, the client might well assume that the lawyer is also representing the client in the corresponding driver's license suspension or revocation proceedings. The lawyer, however, might have no intent to take on such administrative matters, and thus the confused client's interests are not being protected in this related matter." ■

ILLUSTRATION BY SAM WARD

Immortal Utterances

A 'conversation' with the late, great author, lexicographer and letters writer Samuel Johnson By Bryan A. Garner

Bryan Garner on Words

Recently I had the opportunity to sit down with the great Samuel Johnson (1709–1784)—or rather with his books—to see what he had to say about lawyers, their profession and their writing. I essentially interviewed him through his known sayings.

Johnson was the greatest English writer ever to produce a dictionary—*A Dictionary of the English Language* (1755)—and among the greatest literary figures in the history of English letters. In fact, he wrote what is perhaps the greatest letter ever written. It's a comeuppance to Lord Chesterfield, who promised support for Johnson's dictionary but then never came through. In the end, months before the tome was to be published, Lord Chesterfield started claiming some credit for it. Johnson responded: "Seven years, my lord, have now passed … and [I] have brought it at last to the verge of publication without one act of assistance, one word of encouragement or one smile of favor." This immortal letter is worth reading in its entirety. You can easily find it by searching "letter to Chesterfield." You'll find that it's astonishingly good.

Johnson gave excellent answers to the questions I posed. The interview was held on New Year's Day 2016. I've lightly edited his remarks. Although Johnson wasn't a lawyer, he was highly regarded for his depth of legal knowledge. Most of these comments date from 260 years ago, but most are as applicable today as when he uttered them.

Is the study of law worthwhile?

"The study of law is copious and generous, and in adding your name to its professors you do exactly what I always wished when I wished you best. I hope that you will continue to pursue it vigorously and constantly. You gain, at least, what is no small advantage—security from those troublesome and wearisome discontents who are always obtruding themselves upon a mind vacant, unemployed and undetermined." [Letter to James Boswell, Aug. 21, 1766.]

But the profession can be hard!

"If the profession you have chosen has some unexpected inconveniences, console yourself by reflecting that no profession is without them and that all the importunities and perplexities of business are softness and luxury compared with the incessant cravings of vacancy and the unsatisfactory expedients of idleness." [*Ibid.*]

You're a lexicographer. How would you define law?

"The law is the last result of human wisdom acting upon human experience for the benefit of the public." [*"Sir," Said Dr. Johnson* at 51.]

Some people say that the law promotes dishonesty.

"Why no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion. You are not to tell lies to a judge." [4 Boswell's *The Life of Samuel Johnson* at 47.]

What do you think of a lawyer who supports a cause that he or she personally thinks to be bad?

"Sir, you do not know it to be good or bad till the judge determines it. You are to state facts fairly so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument that does not convince you may convince the judge to whom you urge it. If it does convince the judge—why then, sir, you are wrong, and he is right. It is his business to judge, and you are not to be confident in your own opinion that a cause is bad but to say all you can for your client and then hear the judge's opinion." [*Ibid.*]

Naysayers argue that it impairs your honesty to pretend to have zeal when you have no zeal—or when you appear to have one opinion when in fact you have another.

"Why no, sir. Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: The moment you come from the bar you resume your usual behavior. Sir, a man will no more carry the artifice of the bar into the common intercourse of society than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk upon his feet." [*Ibid.* at 47–48.]

In 1623, Prince Charles (Stuart) said that he couldn't be a lawyer because he couldn't "defend a bad nor yield in a good cause." Is that a fair criticism?

"Sir, this is false reasoning because every cause has a bad side. And a lawyer is not overcome though the cause that he has endeavored to support may be determined against him." [2 *Life of Johnson* at 214.]

What about the business side of being a lawyer? Lots of lawyers worry about how to get clients and develop their business.

"Sir, it is wrong to stir up lawsuits; but when once it is certain that a lawsuit is to go on, there is nothing wrong in a lawyer's endeavoring that he shall have the benefit

Follow Bryan Garner on Twitter @BryanAGarner.

ILLUSTRATION BY SAM WARD

rather than another." [2 *Life of Johnson* at 430–31.]

Can a person make a good living in law today?

"You must not indulge too sanguine hopes, should you be called to the bar. I was told, by a very sensible lawyer, that there are a great many chances against anyone's success in the profession of the law; the candidates are so numerous, and those who get large practice so few. He said it was by no means true that a man of good parts and application is sure of having business, though he indeed allowed that if such a lawyer could but appear in a few causes, his merit would be known and he would get forward. But that the great risk was that a man might pass half a lifetime in the courts and never have an opportunity of showing his abilities." [3 *Life of Johnson* at 179.]

A friend was told she might not be able to handle losing cases to lawyers she thought were fools.

"Why, sir, in the formulary and statutory part of law, a plodding blockhead may excel; but in the ingenious and rational part of it, a plodding blockhead can never excel." [2 *Life of Johnson* at 10.]

I heard the charge recently that lawyers can be too narrow in their thinking.

"Why no, sir; Judge Matthew Hale was a great lawyer, and wrote upon law and upon other things. John Selden, too." [*The Conversations of Dr. Johnson* at 96.]

That's true. And Francis Bacon as well. Some say that Lord Coke was narrow.

"Why, I am afraid he was; but he would have taken it very ill if you had told him so. He would have prosecuted you for scandal." [*Ibid.*]

Have you seen how repetitious lawyers can be in oral argument?

"It is unjust, sir, to censure lawyers for multiplying words when they argue; it is often necessary for them to multiply words. If you say it but once, the judges miss it in a moment of inattention." [4 *Life of Johnson* at 74.]

Do you think legislatures ought to pass more laws?

"A country is in a bad state if it is governed only by laws; because a thousand things occur for which laws cannot provide and where authority ought to interpose." [5 *Life of Johnson* at 177.]

What a pleasure it's been to talk with you.

"You are a lawyer. Lawyers know life practically. A bookish man should always have them to converse with. They have what he wants." [*Ibid.* at 306.]

We were soon joined at Ye Olde Cheshire Cheese (Johnson's favorite pub) by Johnson's friends: his biographer, Boswell; the writer Oliver Goldsmith; and Joshua Reynolds, the painter. At one point Boswell said that Johnson should have been a lawyer.

Boswell: "What a pity it is, sir, that you did not follow the profession of the law. You might have been lord chancellor of Great Britain and attained to the dignity of the peerage." [*Conversations of Dr. Johnson* at 294.]

Johnson: "Why will you vex me by suggesting this, when it is too late?" [*Ibid.*]

The conversation soon strayed from law, but it was fascinating throughout. The most remarkable thing Johnson said on New Year's Day was this: "When I review the last year, I am able to recollect so little done that shame and sorrow, though perhaps too weakly, come upon me." [*Everybody's Boswell* (1930) at 141.]

A modest man, he was. ■

BRYAN A. GARNER, *the president of LawProse Inc., is the author of many books, including* The Winning Brief *and* Legal Writing in Plain English. *He is the distinguished research professor of law at Southern Methodist University.*

Reflecting on Our Interconnectedness

MLK offers insight into 'justice for all'

By Rhonda V. Magee

Mindfulness

"In a real sense all life is interrelated. All men are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."
—Dr. Martin Luther King Jr.

Like many people, I have been more than a little outraged about the water crisis in Flint, Michigan, a calamity apparently caused by the deliberate decisions of public servants to switch the city's water supply from a safe source shared with Detroit to the noxious Flint River. The stated reason? To cut costs. The result? The people of Flint—an economically and politically depressed, deindustrializing city of about 100,000 people, the majority of whom are both black and poor —have been exposed to lead poisoning.

Although this crisis received national attention after more than two years of citizen complaints, other concerns raised by the residents of Flint over the same time period—about racially insensitive and excessive policing, echoing concerns raised by protesters across the country—have made fewer headlines.

Are the water crisis and complaints about policing in Flint unrelated? I wonder. As I reflect on the values and other conflicts that likely underlie each of these issues, a question arises: Might a culture that turns a blind eye to the regular use of excessive force against its citizens be all the more likely to enact both law and public policy that systematically render these same people vulnerable to much less visible harm?

Questions like these come up for me regularly as a consequence of my mindfulness meditation practice, a practice I see as a foundation for the work of helping face and solve problems. As part of this practice, I study the words of leaders and advocates of justice throughout history. As the Martin Luther King holiday came and went this year, I took another look at some of the lesser-known writings and speeches that Dr. King left behind.

EXPANDING CONCERN

While many are familiar with his work to promote racial equality in the U.S., fewer know of the advocacy in which he was deeply engaged, late in his tragically short life, on behalf of justice that included everyone and addressed all forms of threats to human dignity. Among that advocacy, we find meditations on the inequities of 50 years ago, conditions that were in some ways both more visible and less extreme than the inequalities of today.

As important as racial equality was for him, King also called upon us to expand our sense of compassion —moving beyond a parochial, tribelike focus on our own particular group and instead expanding our concern to all who suffer unnecessarily:

"This call for a worldwide fellowship that lifts neighborly concern beyond one's tribe, race, class and nation is in reality a call for an all-embracing and unconditional love for all men. This oft misunderstood and misinterpreted concept ... has now become an absolute necessity for the survival of man."

What drove Dr. King to this call for worldwide fellowship, at least in part, was his concern about the inequality and callousness to human suffering that hypercapitalist values and practices routinely produce. That same concern, however, led him to suggest that our system itself must be examined:

"I'm simply saying that more and more, we've got to begin to ask questions about the whole society. We are called upon to help the discouraged beggars in life's marketplace. But one day we must come to see that an edifice which produces beggars needs restructuring. It means that questions must be raised."

A Mindfulness Exercise

Simple awareness-of-breath exercises support not merely concentration and calming but may open the door to experiencing interconnection: Begin by settling into a position in a chair with your feet flat on the floor and your spine straight but not rigid. Take a few deep breaths and bring your attention to the sensations of breathing in and out. These sensations will be the focus of your attention over the next few moments. As you rest your attention on these sensations, you develop a sense of focus and may experience a calming of your mind. As you breathe in and out, see whether you can notice where "you" begin and the breath ends. Notice how a focus on the breath in this way is a reminder that we are not separate from the so-called environment: Indeed, we cannot exist without it. In that sense, may each breath be a reminder of inherent and fundamental interconnectedness with your environment, your community and the whole world.

More than 50 years ago, King understood the importance of seeing not only our interconnectedness as people but also seeing the interrelationship between actions and policies in one arena and outcomes in another. He saw inequality not merely as a problem of individual actions, but as a consequence of our institutions and social structures. He called on us to see the links, for example, between racism, capitalism and (expanding his gaze further to take in the whole world) imperialism. He asked us to see the ways that, when left unchecked, the values underlying each of these slowly diminish our capacity for compassion toward one another.

These shifts in perspective are not easy to imagine occurring in even one person, let alone on a larger scale. King understood this. Nevertheless, he made the case for change and, indeed, for change that must come quickly:

"We must rapidly begin the shift from a thing-oriented society to a person-oriented society. When machines and computers, profit motives and property rights, are considered more important than people, the giant triplets of racism, extreme materialism and militarism are incapable of being conquered."

The awareness of interconnectedness that inspired Dr. King's insights is something that arises to many who employ mindfulness meditation practices to examine today's crises—including sticky issues such as the need for criminal justice reform, the rebuilding of public infrastructure and accountability to the people, and the improvement of education for all our students. Indeed, as a team of researchers from Stanford, the University of California at Davis and UC Berkeley discussed in their 2015 article, "A Wandering Mind Is a Less Caring Mind: Daily Experience Sampling During Compassion Meditation Training," practices that aim to increase the mind's capacity to focus increase self-compassion and other compassion.

And an international team of researchers has found that a lack of compassion for self is associated with a tendency to view the world through the lens of social hierarchy as opposed to egalitarianism. Their findings are discussed in the 2014 article "Multiple Facets of Compassion: The Impact of Social Dominance Orientation and Economic Systems Justification."

GAINING APPRECIATION

To be sure, there's no rule that says someone must have a mindfulness meditation practice to be aware of and to act on a sense of our inherent interconnectedness. For many, however, appreciating these interconnections increases with mindfulness practice and exercises. I learned this again during the contemplative lawyering class I teach. During the class one of our students, a first-generation American and son of immigrant farmworkers, participated in a simple mindfulness reflection. At the end, he reported that the exercise reminded him of the people who pick raisins—the circumstances under which they live

PHOTOGRAPH COURTESY OF UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW

and struggle to survive and, through that, to the values and motivations that originally led him to law school. Such practices can be brought into our most besieged communities and applied to our most intractable problems, providing a foundation for social justice work that transforms individuals and the world around us.

A commitment to becoming more aware of our interconnectedness leads to deeper understanding of injustice in our midst. It leads to the will to closely examine inequality today—inviting a look beyond individuals to systems and structures, and providing a basis for law and policy that improves all our lives. It reveals, for example, that problems as seemingly disparate as a water quality crisis and the excessive use of police force are caused by the same lack of compassion for our fellow human beings, and can be redressed—and more importantly, prevented—by developing that very compassion.

In his book *The Price of Paradise: The Costs of Inequality and a Vision for a More Equitable America*, law professor David Dante Troutt argues persuasively that the problem of structural inequality affects all of us. Engaged mindfulness practices are just one way to increase our capacities to see a role for each of us in ameliorating inequality. They are one tool for building bridges between disparate causes, concerns and people, and for supporting the ongoing shifts in understanding that are necessary for law and policy that truly provides equal protection and justice for all. ■

RHONDA V. MAGEE, *a University of San Francisco law professor, teaches torts, race and law, and contemplative lawyering. She serves on the board of advisers of the University of Massachusetts Center for Mindfulness and is a research fellow with the Mind and Life Institute.*

A VISIBLE DIFFERENCE

READ "INVISIBLE, THEN GONE," PAGE 36.

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Renewals had become "a roller-coaster ride."
—Karen Sargent

Covered

More law firms find savings, stability through self-insurance

By Karen M. Kroll

Benefits

Several years ago Brooks, Pierce, McLendon, Humphrey & Leonard faced a 26 percent jump in its health insurance premiums. Renewals had become "a roller-coaster ride," says office manager Karen Sargent. "You'd never know what you'd get."

The firm now self-insures through the North Carolina Bar Association Health Benefit Trust. "We took a baby step," Sargent says, adding that self-insuring through a larger group—Brooks Pierce has about 100 attorneys—helps level spikes in claims utilization. And over the past four years, premiums have risen just 1.8 percent overall, she says.

PHOTOGRAPH BY RANDY PILAND

Like Brooks Pierce, a growing number of law firms are trying to rein in health care costs and customize their plans through self-funding or self-insurance.

The firms assume financial responsibility for the medical claims of employees enrolled in the plans. Many also purchase stop-loss coverage "to protect against larger, unexpected claims," says Lauren Stoddard, marketing product manager with Cigna in Bloomfield, Connecticut.

Most self-insured firms use third parties to process claims and administer their plans, says Mary Bauman, chair of the employee benefits practice with Miller Johnson, a law firm in Grand Rapids and Kalamazoo, Michigan, that self-insures. These administrators can process claims, issue identification cards, and arrange for networks of hospitals and providers at favorable rates, among other responsibilities.

Historically, fewer than 50 percent of law firms nationally are self-funded, says Adam Okun, executive vice president with Frenkel Benefits in New York City. "Recent data suggests nearly 65 percent of national law firms [self-fund], with the percentage steadily increasing."

(In September the American Bar Association confirmed plans to offer "a wide range of insurance products to its more than 400,000 members. ... Under a plan approved by the ABA's Board of Governors, the ABA will sell up to 20 different insurance products to ABA members and their families.")

to the mandates of state insurance law," Bauman says, "so you have a little more flexibility on plan design."

Self-insured plans generally are governed by the Employee Retirement Income Security Act. Each self-insurance plan is different because firms have different preferences, Okun says, so they're individually negotiated.

Although most law firms want to offer competitive benefits packages, their plans may depart from specific state regulations. For instance, New York requires many companies to offer outgoing employees health care coverage via the federal COBRA plan for 36 months, while the federal minimum is 18 months, Okun says. Some firms opt for the shorter period.

The firms may then enhance benefits for, say, out-of-network reimbursements for ordinary costs. "It gives you more power to design a benefit package relevant to your workforce," Okun says.

Self-funded firms also have greater access to information showing how plan dollars are spent, Stoddard says. "You can use the data to design a plan" that fits your firm.

While self-funding health care coverage can offer compelling benefits, it requires an investment of time and attention. For instance, firms need to ensure their procedures comply with the privacy provisions of the Health Insurance Portability and Accountability Act.

Another key step is reviewing stop-loss contracts to ensure they align with the plans, Bauman says. For example, transplant coverage may differ between the plan itself and the stop-loss contract. "I typically advise

Self-funding health care coverage requires time and attention. Procedures must comply with the privacy provisions of the Health Insurance Portability and Accountability Act.

CONTROLLING COSTS

Cost is one driver. Self-funding can trim the administrative expenses, reinsurance fees, taxes and profits in most fully insured plans. For instance, each state levies an insurance premium tax, generally ranging from 1 to 4 percent, Stoddard says. Self-insured firms pay this tax only on any stop-loss premiums.

The Affordable Care Act also imposes a sales tax on many health insurance plans, but not on self-funded plans. An analysis by management consulting firm Oliver Wyman projected this would increase premiums between 2.8 percent and 3.7 percent by 2023.

Together, fees, profits and taxes can range from about 15 to 20 percent of premiums on fully insured products, Okun says. Under self-funding, that can drop to about 8 to 10 percent. Self-insurance also allows firms more leeway in designing their plans. "You're not subject that the stop-loss has to honor the plan documents and honor coverage required by law," she says.

Self-funding also requires a certain level of risk tolerance. Most firms will experience higher-than-expected claims every few years, Bauman says. "It's a philosophy of 'I'm willing to bear that risk.' "

Doing so can pay off. Between 2010 and 2015, health insurance premiums rose about 65 percent, according to the *2015 Employer Health Benefits Survey* by the Henry J. Kaiser Family Foundation and the Health Research and Educational Trust. Miller Johnson's health care costs increased less than half that amount during that period.

Law firms interested in setting up their own self-insurance programs can get information from the Self-Insurance Institute of America, the Self-Insurance Educational Foundation or the National Association of Insurance Commissioners. ■

Bitcoin's Useful Backbone

Blockchain technology gains use in business, finance and contracts By Victor Li

Tech

FOR MANY PEOPLE, THEIR INTRODUCTION to the digital currency bitcoin came when federal agents shut down online black market Silk Road. The notorious website where users could indulge in all sorts of illicit activities—including drug trafficking, prostitution and hiring a hitman—landed its founder in prison for the rest of his life and gave bitcoin a horrendous reputation that it still hasn't shaken.

Yet the underlying technology behind bitcoin, known as blockchain, is being used by a growing number of companies, banks and financial institutions, and it could fundamentally change the legal industry in the coming years.

"Bitcoin was like Napster in a lot of ways," says John Alber, a former Bryan Cave partner now known as a "practical futurist" for the International Legal Technology Association. "Napster was used for illicit means, but it brought attention to the power of peer-to-peer file sharing. Bitcoin has an unsavory reputation because of Silk Road, but many, many people have seen the value of the underlying technology."

DECENTRALIZED LEDGER

What makes blockchain so valuable and adaptable to new, innovative services is that its central concept is fairly basic. "The simple answer is that blockchain is really just a ledger," says Dax Hansen, an electronic financial services partner at Perkins Coie. "Historically, ledgers have been centralized where one party keeps track of everything. The innovation with blockchain is that all interested parties run copies of the ledger and contribute to it and add entries to the ledger in a systematic way. That way, the ledger is decentralized, but in a way that's transparent and immutable."

While bitcoin is a relatively recent phenomenon, blockchain is old news and has been around since the 1990s. It wasn't really used for much until bitcoin came around, Alber says. Now many financial tech companies are using blockchain, and nearly every major bank is investing in it.

Nasdaq has started using blockchain applications, including Linq, a new platform for measuring shares of private companies, which debuted in late October. "There are many, many angel investors and venture capitalists that are beginning to work in this area," says Alber. "Mostly, it's thriving outside of the legal industry."

Because of its recording capabilities, blockchain can be used to create smart contracts that are self-enforcing.

Ethereum, the leading blockchain-based platform for smart contracts, is crowd-sourced and was formally launched in late July 2015. The platform uses what it calls "next generation bitcoins" (aka ethers) as its digital currency, and it can be used to create agreements so that parties will only get paid if they fulfill certain obligations.

Ethereum eliminates ambiguities and potential areas of confusion so that each party is kept aware of its obligations.

"Agreements are ambiguous. And enforcement is hard," the website EtherScripter, an Ethereum-based smart contract-generation platform, states. "Ethereum solves both these problems. It does this with the marriage of two special ingredients: a digital currency and a complete programming language."

"The government of Honduras is one of the first countries using blockchain to record real estate transactions," Alber says. In countries where notaries perform many legal services, particularly in South and Central America, he says, blockchain could take on a lot of those tasks.

Law firms, however, have yet to embrace blockchain for internal matters like time-keeping, billing or financial transactions. Hansen is confident that will change.

"Lawyers use ledgers," Hansen says. "If you use a ledger for something, then there's a use for blockchain."

So, should lawyers and legal service providers be worried about losing work to Ethereum and other blockchain-based platforms? Noah Waisberg, whose company, Kira Systems, uses technology to analyze and review existing contracts, isn't too worried about losing business.

"If everyone wrote their contracts in blockchain, then you probably wouldn't need a system like ours for newly executed agreements," he says. "Even if that were to happen, companies would still have plenty of legacy contracts that would need to have their data extrapolated, and that's where we would come in."

Waisberg says he's skeptical about whether smart contracts will catch on. "Many times, a dispute arises because of an unforeseen or unanticipated event," he says. "I don't see how contracts as code would be any different."

Even blockchain proponents caution that there are limits to what smart contracts can do. "I think they'll always be somewhat limited," Hansen says. "Would you buy a house based on a smart contract? Probably not. But would you buy something on Amazon where you'd agree to release money only after the delivery drone crosses a certain point? Maybe." ■

ILLUSTRATION BY J. MANZO

Showtime

ABA showcase enters its 30th year highlighting legal technology By Victor Li

ABA Techshow

YES, HISTORY AFFECTS US ALL—even lawyers "defending your rights in the digital world." Cindy Cohn, executive director of the Electronic Frontier Foundation, which takes on that task, recalls that when she began her career nearly 25 years ago, few lawyers had computers on their desks.

"Computers were something that only secretaries had back then," Cohn says. "Nowadays, almost all lawyers have computers on their desks, and the ones who don't probably have one in their pockets."

Cohn will be the keynote speaker at ABA Techshow 2016, taking place March 16-19 at the Chicago Hilton.

"The first Techshow came on the heels of paralegals being introduced into the ABA as associate members, which was very controversial," says Jeff Aresty, a Massachusetts business and e-commerce attorney who leads the nonprofit Internet Bar Organization. "All of a sudden, that opened up a big door and created a real connection between lawyers, paralegals and computers as the actual production of documents became front-and-center."

Aresty, along with two Texas-based lawyers, Don Hagans and Bruce Jaster, were inspired upon seeing the massive, multimillion-dollar Infomart building in Dallas. Back then, Infomart served as a permanent trade show for tech vendors, and the three attorneys wondered whether something like that could be adapted for lawyers.

They formed Techshow and held two events in 1987, in Dallas and Boston. Chicago became the permanent home of Techshow beginning with the 1989 show. Since then, innovations in technology have fundamentally changed the practice of law. For instance, it used to be easy keeping client information secure. But moving from a lockable file cabinet to electronic storage in the cloud has made cybersecurity and privacy essential issues for lawyers.

On March 18, Cohn is expected to address these issues. A plenary session will deal with mass surveillance.

"The Fourth Amendment is based on the presumption that people keep their most important documents and papers in their homes," Cohn says. "Nowadays we live in a world where most people give their documents to a third party, like the cloud or email. That creates a profound need to think about what we want the Fourth Amendment to mean in this digital age."

Cohn argues that the government has already decided this information is not private, and she plans to devote much of her address to talking about what lawyers can do to keep client information secure.

"This is especially important to lawyers," says Cohn, who is currently litigating cases against the National Security Agency and the Federal Bureau of Investigation. "You can't say you care about attorney-client privilege and then not protect your communications."

Other Techshow sessions will remain consistent with previous iterations of the event. There will be introductory tracks where lawyers can learn basic technological skills for Microsoft Office or getting the most out of your Mac. Other sessions include how to market your firm, use the cloud or manage your practice.

As Aresty points out, automation was a major theme of the first Techshow, and it has continued to be an important feature ever since. This year there will be an entire track called "The Productive and Efficient Lawyer" that will deal with issues such as running a paperless office and using "robot lawyers" to boost your firm's efficiency.

"The idea in 1987 was that Techshow was an agent of change and that we were out there to make access to justice much easier by making the job of lawyers much easier," says Aresty. "I think that change is something that is built into the fabric of Techshow. The question is how the profession as a whole deals with it." ■

Detective Work

Some firms swear by the use of private investigators By Marc Davis

Solos/ Small Firms

FANS OF *PERRY MASON*–THOSE WITH FOND MEMORIES of the TV show or recent admirers of the rereleased novels—will remember how private investigator Paul Drake helped the fictional lawyer solve crimes and defend the innocent.

PI Drake frequently discovered an exculpatory piece of evidence, located a long-lost witness, or used some form of legally acceptable trickery to help cinch a case for Perry.

Today's gumshoes can now do their sleuthing with smartphone technology, surveillance cameras, social media, DNA and other high-tech gizmos and techniques unheard of in Mason's day. And smaller firms are finding their services worth the cost.

"A private investigator is indispensable to a law firm," says attorney Rusty Hardin, founder of a small Houston law firm, Rusty Hardin & Associates. "Our firm employs a full-time investigator. It was the best hire I ever made."

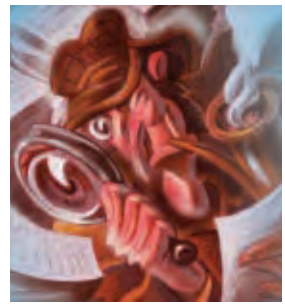
About 85 percent of Hardin's legal cases are civil actions, 15 percent are criminal matters; and Hardin's investigator, Jim Yarbrough, works on both.

Yarbrough, a former Houston homicide detective, does financial background checks, document searches and Internet quests for information and data. Locating witnesses and talking to them before discovery is another critical service he provides.

"Our investigator is a trained interviewer, and I'd prefer to have him talk to a witness, rather than a lawyer [doing it]," Hardin says. "Lawyers often have a predetermined view of things and of a case. But trials are about people, and my investigator is very good with people."

ALTERNATE METHODS

Although private investigators don't have access to banking or medical records, or classified government documents, they can nevertheless obtain hard-to-get information that attorneys may require, according to



Brian Willingham, a private investigator himself.

Willingham, president of Diligentia Group Inc. in Katonah, New York, cites as examples asset tracing and identifying, and locating and securing of potential witnesses, such as observers of corporate fraud.

"Understanding what a potential witness would say at trial, ... taking their statements ... and gauging their temperature" are among the many ways PIs can aid attorneys, Willingham says.

"We most frequently work on civil cases, including workers' compensation, breach of contract and fraud," Willingham says. "But I don't take every case that comes my way. I select my own clients." That excludes prospective clients who may want him to engage in unethical or illegal acts. "I tell these people that [our firm] is not a good fit."

Fees for private investigators, according to Willingham, range from less than $75 an hour in some rural areas to almost $1,000 an hour, charged by what he calls "white-shoe firms."

Kay Baxter of Cosmich Simmons & Brown in New Orleans uses investigators in her areas of law practice, which include toxic tort, tort and insurance litigation, product liability, occupational disease, environmental claims and construction litigation.

Baxter, a vice chair of the trial techniques and tactics committee of the International Association of Defense Counsel, says that "use of a PI can be done in a cost-effective manner, and the skills of someone who is devoting all of his time to track down the information and/or witnesses to support your theory of any case is money well spent." ■

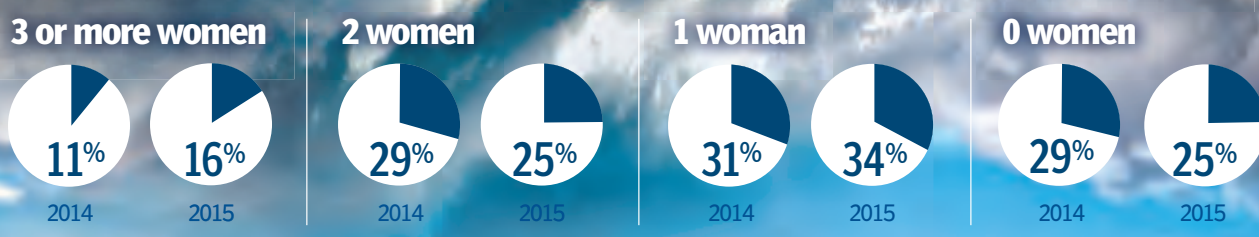
ILLUSTRATION BY J. MANZO

LAW BY THE NUMBERS

RAINING UP

MORE 'BEST FIRMS' HAVE FEMALES AS TOP RAINMAKERS

Of 2015's 50 best law firms for women, the percentage with women among their top 10 rainmakers:



Retention of female lawyers has long been a problem in America's top law firms, with the lack of promotions to partner and credit for revenue generation as major reasons for these lawyers' departure.

Working Mother Media and Flex-Time Lawyers have come up with ways to both assess the situation and help change it for the better. Their *Best Law Firms for Women* survey includes a detailed application that helps firms of 50 attorneys or more see where they stand on diversity for their female attorneys. The 2015 program brought in about 100 applicants, says Jennifer Owens, editorial director of *Working Mother* magazine.

The program chooses its top 50 firms from those applications. Participants receive a scorecard showing their rank in comparison with other applicants, and they can purchase more detailed analysis. A story on the program, "Learning—and Winning," is on page 41.

Among the details the survey provides is a percentage breakdown of the top 50 firms that have women among the top 10 generators of revenue. Though the numbers have their ups and downs from the previous surveys, perhaps the best sign of progress is the reduction in the number of firms with no women among their top 10 rainmakers, a drop of 4 percentage points.

LINK TO THE 2015 SURVEY'S EXECUTIVE SUMMARY AND A DETAILED LISTING OF THIS YEAR'S TOP 50 FIRMS @ **ABAJournal.com/lawbythenumbers.**

SOURCE: 2015 Working Mother and Flex-Time Lawyers *Best Law Firms for Women.*

GRAPHICS BY STEPHEN RAVENSCRAFT

Whys, not Whines

Use this simple exercise to solve the tech problems bugging you

By Dennis Kennedy

Kennedy on Tech

LAWYERS LIKE TO COMPLAIN ABOUT THE SHORTCOMINGS of the technology they use. A lot. What if we took the energy we spend on complaining and turned it into positive action? Could you take your technology annoyances and use them to create a truly beneficial tech strategy?

I once had a lawyer approach me after a technology presentation to ask what portable printer I used for travel. He had tried—very unsuccessfully—quite a few of them and had spent quite a bit of time and money. He was frustrated and hoped that I had the perfect answer.

It turned out that all he wanted was to print out articles and other information he found on the Web so he could read it later. I confessed that I didn't have a portable printer. For that purpose, I simply saved the articles as PDFs that I could read on the screen and print later.

It really looked like a lightbulb went on over his head. He saw the solution, his frustration went away and he planned to buy Adobe Acrobat the same day.

So I suggest this exercise to turn a big technology annoyance into a simple action plan that solves your problem. The key is getting to the heart of the issue and reframing the need. There's a concept you might hear about, called "root-cause analysis." For our purposes, that means drilling down into an issue far enough that we start to really understand what the need or problem is.

The "portable printer problem" became "How do I keep articles to read later?" That opens up many options, and the Acrobat choice was especially good because it allowed for reading on a screen later, printing later and making the articles searchable.

A common and simple approach to root-cause analysis is generally referred to as the "5 Whys." Start with something like "My email drives me crazy." Why is that? Answer that and ask "Why?" until you get to five of them. Odds are that you will reach an insight—sometimes a profound one.

For many lawyers, I'm guessing the final answer will be because your technology won't let you provide the level of client service you strive for.

Below is my simple exercise that should not take more than 30 minutes (known to lawyers as 0.5 hours). Try these steps and see what quick results you can get. Then enjoy how much your tech is helping you—until you hear yourself complaining again. ■

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

Hacking Tech Hassles

1. Throw out the demons. Take a piece of paper and spend 10 minutes listing every tech annoyance that is bothering you. Revel in the cathartic energy it gives you.
2. Look for patterns. It's possible that you will recognize that a new computer, solid state drive or second monitor would solve a cluster of annoyances. Pick two or three of the biggest annoyances and try the "5 Whys."
3. Make a quick plan. Take your best results from step No. 2 and write them as action steps, such as: "Take class on Outlook rules." Divide the list into long-term and short-term actions. To your surprise, you might have an actual written technology strategy to implement. At the least, you will have talking points for your technology consultant or IT director.
4. Take action. I've seen lawyers get big improvements very cheaply in a single day.

ILLUSTRATION BY SAM WARD


Invis
then
go

MINORITY WOMEN ARE DISAPPEARING FROM BIGLAW—AND HERE'S WHY

BY LIANE JACKSON
PHOTO ILLUSTRATIONS BY STEPHEN WEBSTER

Occasionally when Jenny Jones walks down the hall of her white-shoe law firm, a chairman emeritus will stop and ask how she's doing and about her work. These moments are a highlight because outside of this intermittent interaction, Jones feels largely ignored by the powers that be.

Idling in her career, unable to hit the billable-hour requirements, Jones (her real name is not used due to the sensitivity of the issue) is a fifth-year associate busy planning an exit strategy. But hers is not an isolated tale of personal failure; it is the all-too-common story of women of color struggling to thrive at large law firms—and leaving in droves.

Statistically, Jones faces a grim career outlook. Eighty-five percent of minority female attorneys in the U.S. will quit large firms within seven years of starting their practice. According to the research and personal stories these women share, it's not because they want to leave, or because they "can't cut it." It's because they feel they have no choice.

"When you find ways to exclude and make people feel invisible in their environment, it's hostile," Jones says. "Women face these silent hostilities in ways that men will never have to. It's very silent, very subtle and you, as a woman of color—people will say you're too sensitive. So you learn not to say anything because you know that could be a complete career killer. You make it as well as you can until you decide to leave."

Disturbing sentiments like these led the ABA Commission on Women in the Profession to undertake the Women of Color Research Initiative in 2003. Findings concluded that, in both law firms and corporate legal departments, women of color receive less compensation than men and white women; are denied equal access to significant assignments, mentoring and sponsorship opportunities; receive fewer promotions; and have the highest rate of attrition.

"If you look at the women-of-color research, the numbers are abysmal," says the New York Public Library's general counsel, Michele Mayes, who chairs the ABA commission. "When you lose any ground, you lose a lot because you never had that much in the first place."

Studies and surveys by groups such as the ABA and the National Association of Women Lawyers show that law firms have made limited progress in promoting female lawyers over the course of decades, and women of color are at the bottom.

"We're still a profession less diverse than doctors or engineers and that is 88 percent white," notes Danielle Holley-Walker, dean of Howard University School of Law. "We've been at this for 40-plus years—firms have been recruiting lawyers of color since the late '60s.

"There should be no mystery about how you create a diverse workforce. It's just a commitment," Holley-Walker says. "There's a refusal to acknowledge that meritocracy goes hand in hand with diversity. But we have to have a group of lawyers that are both excellent and diverse."

DECADES OF PIPELINE

The trajectory of women of color entering BigLaw dovetails with the progress of women entering the profession over time.

In the 1980s, as chair of the ABA's newly formed women's commission, Hillary Clinton signed off on the first-ever ABA report on the status of women in the profession. The prescient, but dire, conclusion? That the passage of time and the increase of women in the field would not erase the barriers to practice or solve problems that female lawyers face.

"That was the mid-'80s," observes Laurel Bellows, co-chair of the ABA Task Force on Gender Equity and principal at the Bellows Law Group in Chicago. "When I chaired the commission six to eight years later, we came up with another report, and the conclusion was the same."

According to the National Association of Women Lawyers, since the mid-1980s, more than 40 percent of law school graduates have been women. But despite a decades-old pipeline of female grads, there remains a disproportionately low number of women who stay in BigLaw, and even fewer who advance to the highest ranks. The ninth annual NAWL survey, released in 2015, shows that women account for only 18 percent of equity partners in the Am Law 200 and earn 80 percent of what their male counterparts do for comparable work, hours and revenue generation.

"We have a pay gap in our own profession," Bellows says. "And let's remember, 80 percent is very significant when you're talking about equity partners because that could mean millions of dollars in terms of retirement."

Data released last year by the National Association for Law Placement show the overall percentage of female associates decreased over most of the previous five years, although women and minorities continue to make marginal gains in representation among law firm partners.

Buoyed by increases in Asian-American and Hispanic women on staff, the percentage of minority female associates rose from about 11 percent between 2009 and 2012 to 11.78 percent in 2015. And those in the trenches say snapshot statistics don't tell the full story. For example, NALP also reports that representation of African-American associates in the profession has been declining every year since 2009—from 4.66 percent to 3.95 percent.

And according to a November NALP press release, at just 2.55 percent of partners in 2015, minority women "continue to be the most dramatically underrepresented group at the partnership level, a pattern that holds across all firm sizes and most jurisdictions."

Tiffany Harper recently transitioned from law firm life to a post as associate counsel for Grant Thornton in Chicago; she also co-founded Uncolorblind, a diversity blog and consulting company. Previously, she worked in corporate bankruptcy and restructuring at Schiff Hardin and, most recently, Polsinelli. Harper saw an in-house position as a chance to broaden her skill set, but she says she also saw the writing on the wall.

"I didn't see a path for me to partnership at a large law firm. For women of color, there has to be a synergy for you to make partner," says Harper, who has also served as president of the Black Women Lawyers' Association of Greater Chicago. "You have to have everything working in your favor at the time you go up for a vote: a practice group that is thriving, the billable hours, people singing your praises, a client base. That has to all come together for you in a way it doesn't have to for other people."

Greenspoon Marder shareholder Evett Simmons knows all too well how tough it can get. Based on the statistics, she's already an outlier. She joined a Florida law firm as a lateral equity partner in 2000 that was later partially absorbed by Greenspoon Marder, where she is currently the only female shareholder of color.

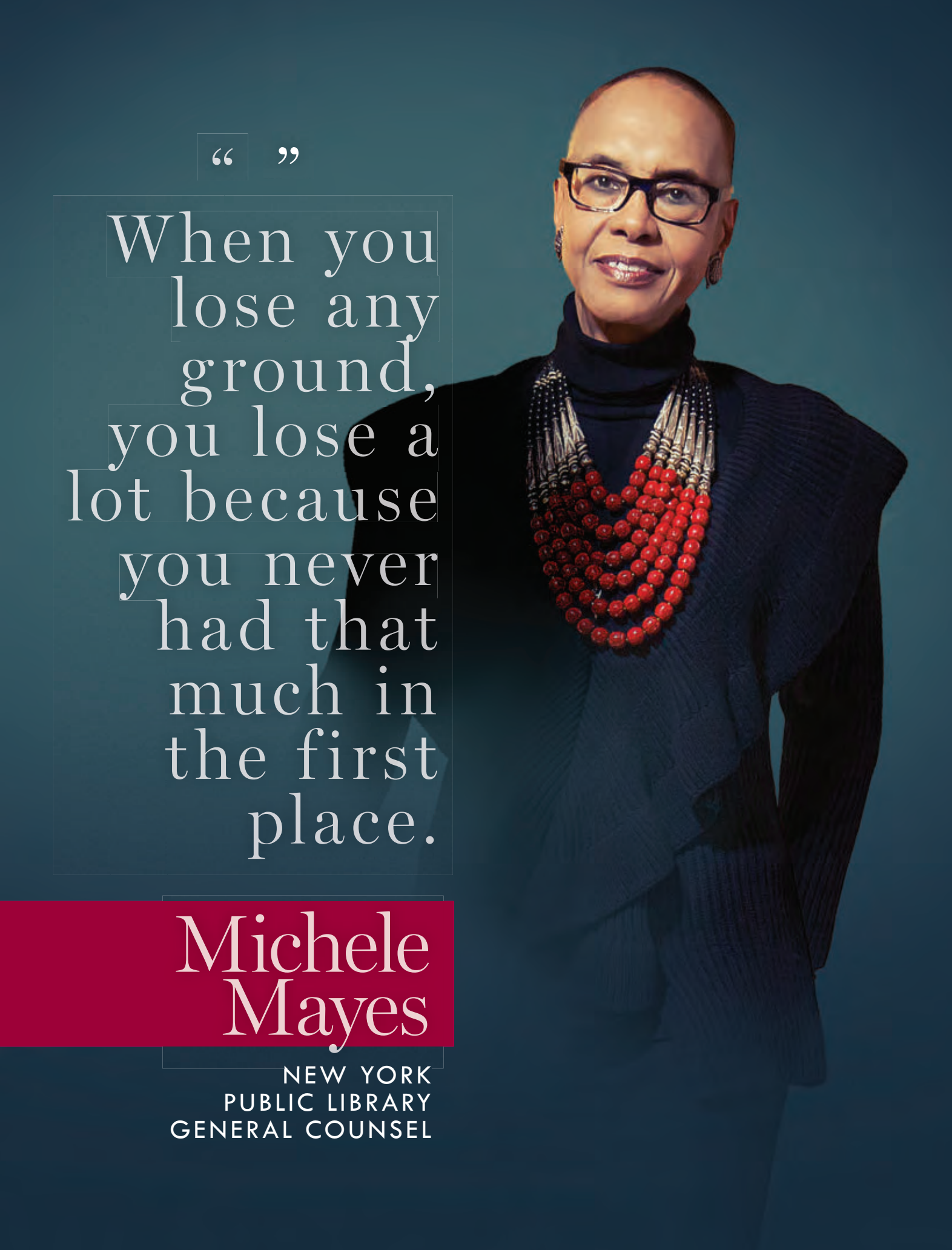
Simmons grew up in the Jim Crow South, where as part of the demoralizing impact of segregation, she "didn't believe black folks were as good as white folks." That is, until she got to college and was the student frequently tapped to help white students complete their term papers. From there, Simmons continued to expand her horizons, attending law school and eventually rising to partner and chief diversity officer at Greenspoon Marder.

"I started at a time when it was difficult for women to get positions, let alone African-American women," Simmons notes. "I started with legal services, went to a small firm, opened up my own firm, merged with another firm."

With 33 years of practice under her belt, Simmons has seen the effort it takes for minority lawyers to succeed. In many ways, it's a numbers game.

"My focus has been the pipeline," she says, with the goal of expanding the existing pool of minority female

PHOTOGRAPH BY LEN IRISH


“ ”
When you lose any ground, you lose a lot because you never had that much in the first place.
Michele Mayes
NEW YORK PUBLIC LIBRARY GENERAL COUNSEL

> We can't talk about diversity generically; we have to talk about women of color specifically in order to make a difference.

Arin Reeves

FORMER LAWYER AND PRESIDENT OF THE CONSULTING FIRM NEXTIONS

law grads. To that end, Simmons started a law camp with the National Bar Association, based at Howard University. Some camp graduates are now practicing lawyers. But that's just the first step.

"We need to make sure they have business and are fairly treated," Simmons says. "This is the next phase in my work with the ABA."

Like many working on recruitment and retention issues, Simmons recognizes that getting minority female candidates in the door isn't the same as keeping them there. And each ethnic group faces its own challenges.

In the first study of its kind, the National Native American Bar Association found that Native Americans often feel invisible and are "systematically excluded from the legal profession." The NNABA study, *The Pursuit of Inclusion,* found that "diversity and inclusion initiatives have largely ignored the issues and concerns of Native American attorneys." Not surprisingly, women were more likely than men to report demeaning comments, harassment and discrimination based on gender.

"We can't talk about diversity generically; we have to talk about women of color specifically in order to make a difference," says Arin Reeves, president of the Chicago-based consulting firm Nextions, who studies unconscious bias and has pioneered research on women of color at large law firms and in corporate America.

"Most gender strategies affect the majority of people in that gender category, which are white women," Reeves says. "Racial and ethnic strategies are created around biases involving minority men. But women of color have the highest attrition rate. This is a group impacted by both gender and racial bias, so they will be impacted at twice the rates."

NOT JUST A U.S. PROBLEM

As the only black female attorney in a 200-lawyer office of a multinational firm based in Toronto, fifth-year associate Indi Smith (her

PHOTOGRAPH BY WAYNE SLEZAK

real name is not used due to the sensitivity of the issue) faces a stark reality. The lack of diversity coupled with a macho firm culture has left her feeling isolated and demoralized.

At her firm, common interests like hockey—a sport she doesn't follow—are crucial for relationship building. Instead of continuing to fight an uphill career battle, Smith is exploring her options. She calls her experience at the firm "unhealthy" and says it has drastically affected her self-confidence.

"In order to advance you need to get work, show your progress in terms of complexity of the work—but it's an environment where you only get work based on the relationships with partners," Smith says. "There's no one here who I can commiserate with or who is a source of work for me. Just being able to see someone who looks like you would help."

Smith says her request to join her firm's diversity committee was rejected, and the lip service given to more inclusion hasn't translated into action. But she notes that even if there were more attorneys of color on board, hiring diverse attorneys isn't enough without creating a culture of inclusiveness.

"A lot of law firms have jumped on the diversity and inclusion bandwagon, but none of them are really diverse in a way that truly matters," Smith says.

The Law Society of Upper Canada is trying to bring more attention to issues of diversity and equity in the profession through a working group and reports such as *Challenges Faced by Racialized Licensees*. A number of survey respondents told LSUC researchers they were forced to enter solo practice because of barriers faced in obtaining employment or because they were unable to advance in other practice environments. According to one anonymous respondent:

"Most of us are sole practitioners because we could not get into large firms because of racial barriers; the ones I know who got into firms ended up leaving because of feelings of discrimination, and ostracizing and alienation [such as] not being invited to firm dinners and outings. Some black lawyers feel suicidal because of repeatedly running into racial barriers—not academic performance—trying to enter large firms."

Jones, who is also a Toronto-based attorney—can commiserate, although she was one of a lucky few to receive an offer from an elite firm out of law school. Still, as one of the only women of color at her office, her experience over the years has not been positive.

"We've had so many great female associates leave, and I don't see anyone on the path to become a partner—black,

LEARNING— & WINNING

Law firms tend to be opaque operations, with limited details available on pay, policies and perks. But if you're a female attorney looking to lateral or a female law student on interview rounds, there is a resource that offers a window into what you can expect from BigLaw.

The annual list of the 50 best law firms for women from Working Mother Media and Flex-Time Lawyers showcases what some of the top firms are doing to attract and retain female talent. Law firms that make the cut are recognized for their family-friendly policies along with career and business development initiatives.

Making the list is a competitive process the founders view as an instrument of change. The firms "learn lessons about themselves," says Jennifer Owens, editorial director of *Working Mother* magazine and director of the Working Mother Research Institute. "The initiative was founded for the competition, but also for the learning. The act of filling out [the application] is learning. We hope the carrot is: You're trying to get on this list where we'll laud you as a best law firm for women."

Participation in the survey is free and voluntary. Firms complete an extensive, confidential questionnaire and receive a scorecard that shows how they rank alongside other participants. Additional reports with in-depth analysis of the results are available for purchase. And the winners' list is disseminated to general counsel and law schools across the country.

Drinker Biddle & Reath has made the 50-best list four times. Partner Lynne Anderson is proud of the firm's recognition and focus on women's initiatives, which she says requires intention and support from the top.

"I think any firm has to have more than just the trappings," Anderson says. "They have to have a roll-up-your-sleeves commitment to the advancement of women in the firm. That takes financial commitment, time commitment—including from the senior levels of the firm."

Anderson says some of the policies and programs that helped propel Drinker Biddle onto the list include compensation transparency, a 12-week paid parental leave policy, flex-time and reduced-hours work options, and a strong women's leadership committee that includes the firm chairman.

"What does it take to have a firm that's supportive of women? It's not just helicoptering in and out of the issue. It's sustained and ongoing programs—a committee, a budget and policies that make this work," Anderson says. "And to be willing to take a hard look at the metrics on a regular basis."

Top firms on the 2015 list employ more female equity partners than the national average—20 percent vs. 17 percent. And 96 percent allow reduced-hour lawyers to be eligible for equity partnership promotion. Other elements taken into account include compensation, pro bono work, benefits, flex-time options, paid leave and workplace culture. The list also looks at the rates of women of color in leadership roles.

The 50-best list was founded in 2007 by Flex-Time Lawyers' Deborah Epstein Henry in partnership with Working Mother Media. According to Henry, the best law firms are those that focus both on retention and promotion, by cultivating and investing in female talent.

"I think a lot of women's initiatives make the mistake of not understanding the link between work-life issues and power and leadership. They think they have to advocate for one or the other," Henry says. "We have the philosophy that if you don't support women in their early years, we're never going to have the critical mass of women we need in order to fill leadership roles like equity partner."

white, you name it," Jones says.

"I don't see women being placed into positions where they can become rainmakers," she says. "Unless you have a really good champion, a white male who will protect you in a certain way, it's a tough fight. It's a losing battle. If you want to make it to partnership, it's at what cost? And then when you make it to partner, what are you going to do then?"

DEFEATING DEFEATISM

Helping law firms understand how they can support the careers of women of color is Reeves' focus. She says partners need to ask themselves very specific questions about their actions in the diversity realm and determine whether their efforts are truly proactive. Instead of succumbing to a defeatist perspective, the question should be "How can we fix this?" not "Can it be fixed?"

"People think because they're committed to diversity and inclusion that they are creating diversity and inclusion. But partners need to ask themselves: How am I mentoring women of color and how can I do so?" says Reeves, a former lawyer who has a doctorate in sociology.

Latina attorney Gray Mateo-Harris says that after eight years practicing labor and employment defense, she's finally found a firm focused on growing diversity and the unique needs of attorneys who are women of color. Mateo-Harris says Ogletree, Deakins, Nash, Smoak & Stewart in Chicago has provided an environment where she can thrive and find balance.

"You don't realize early in your career how critical it is to have the support that will develop you as an attorney and help your career blossom," Mateo-Harris says. "The reality is, as a woman of color I can't necessarily count on inheriting a partner's book of business. That's not usually an option for people of color—and especially women."

Mateo-Harris has worked at a smaller firm and in BigLaw and notes that too often, minority women are lost in the shuffle of incoming classes, left to sink or swim.

"You really need to be at a firm where the culture sees attorneys as an asset to be invested in, not as fungible," she says. "It doesn't bode well for women of color to be thrown in and see if someone takes an interest in them and mentors them. Those chances don't usually end up favorably for women of color."

To help women of color navigate the law firm dynamic, the ABA Commission on Women in the Profession published a brochure in 2008, *From Visible Invisibility to Visibly Successful*, which offers success strategies based on advice gathered from dozens of female minority partners.

"It takes a village to raise a lawyer" was one insight provided by a study participant, explaining how she learned to find a support system outside of the firm in addition to one within.

Another partner described how she hired a coach to give her business development training in order to grow her book of business.

"Success in law firms is one part intellect and four parts stamina," said another respondent, warning that the challenges of isolation and racial and gender bias could take a physical and mental toll.

"There's a lot to be said for going in knowing you're going to be treated differently, so I need to work twice as hard," Reeves advises. "Understand that it's not in your head. It is real, it is happening and it's not easy."

She adds: "Most women of color at law firms have phenomenal survival strategies, but we think it's going to be fair and we kind of get sideswiped. But if you're well-prepared for it, then I think you're steady on your feet and no one can shake you with craziness."

The 2008 report, which was prepared by Reeves, also urges young attorneys to "show up" and "speak up" at social events and meetings, and notes that even if you're shy or don't like to schmooze, you should actively seek out mentors inside and outside your law firm by joining organizations and networking.

And law firm mentors need to be "situated in the sphere of influence within the firm." Several contributors stressed that mentoring is crucial to developing a client base and more critical to a lawyer's success and mobility than the number of billable hours one generates.

Many successful female attorneys, including Simmons of Greenspoon Marder, talk about the male partners and mentors who were advocates and allies and helped their careers advance. Bringing men to the table and capturing the attention and stories of men who "get it" is often cited as essential to continued progress.

Holley-Walker, the Howard law dean who enjoyed a successful career in commercial litigation at a large law firm before going into academia, says young lawyers must get good work and continue to get better work as they progress in their practice. And that means having influential partners at the firm take an interest in their career, which isn't often the case for women of color.

"That move from mentorship to sponsorship" is key, says Holley-Walker. "People who will know your work intricately and give you honest feedback—and when it comes time, will basically go to bat for you."

To encourage partners to become mentors and sponsors, the brochure concludes that practice group leaders need to be held accountable for ensuring that work is distributed in an equitable and unbiased way. Associates are judged on their ability to get assignments from partners, but partners aren't held accountable or required to work with a variety of associates. That puts the most vulnerable attorneys at risk for failure.

CHANGING THE PARADIGM

Simmons believes a climate of inclusiveness for women and minorities, where differences are acknowledged and valued, can only occur once firms change the entrenched paradigm on delivery and individual contributions.

"We need to be able to recognize that a woman has some value other than getting a book of business. Maybe she can assist you with managing a book of business," Simmons says. "We need to measure success on more than whether a person brought a client into the room. There are other intrinsic values that can grow the firm besides bringing in money." These tangible benefits to

> We need to be able to recognize that a woman has some value other than getting a book of business.

Evett Simmons

SHAREHOLDER AT GREENSPOON MARDER

PHOTOGRAPH BY DOUG SCALETTA

the firm's business can include client services and committee work, Simmons says.

As law firms reassess their business models under the "new normal" of law practice, many hope external change will open up paths for minority female attorneys to succeed.

"The billable hour was the altar at which [law firms] prayed," says Mayes, the women's commission chair. "That altar is being seriously challenged. As a young person looking at the profession, many would say, 'My investment ain't that great here.' Too many lawyers in the job market, not enough return on investment."

Mayes points to other industries that have changed their profit-sharing and partnership models to be more inclusive and to reflect the times. "If you look at Deloitte or KPMG, they've gotten better at cultivating talent and not just having one way to do it. It's more of a team model than an individual model."

Reeves says part of the problem is that firms measure, recognize and reward business development primarily based on how men develop business. According to a 2014 survey by the National Association of Women Lawyers, lack of business development and high attrition rates are the two main reasons the number of female equity partners has not significantly increased.

"They need to see you as profitable," says Harper. "Either you have to have brought in smaller matters, RFPs, you're in the community—how do you bring in dollars? It's been too long that firms have not been able to make this work [for women of color]. I think it will take a structural change, and I don't know that firms are ready and willing to make a difference in how they do things."

While little has changed in BigLaw as to how the pie is divvied up or how assignments are passed out, Reeves points out that the law doesn't pivot fast.

"The law generally has lagged behind its corporate counterparts, and it's the most risk-averse profession," she says. "Even with technology—law firms were the last to adopt email. When we keep all this in mind, we depersonalize the issue a little bit and we can actually pursue change with a little more stamina.

"I don't think it's that law firms see the problem and don't want to do anything about it," Reeves says. "It will change. It's just going to take longer here than it does in other places." ■

Liane Jackson is a lawyer and freelance writer based in Chicago.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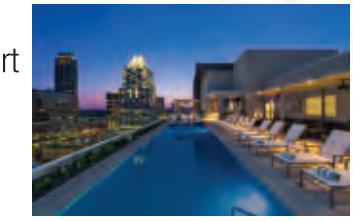


Specific benefits subject to change.

How Badly Does It Hurt?

PERSONAL INJURY LAWYERS TURN TO NEUROSCIENCE TO BACK CLAIMS OF CHRONIC PAIN

BY KEVIN DAVIS

On a blistering summer afternoon in Tucson, Arizona, nearly 11 years ago, a truck driver named Carl Koch stood near the back of his tanker as it was being filled with molten tar at an asphalt plant. Suddenly a hose connection broke loose, spraying him with hot, gooey liquid.

Blobs of 300-degree tar hit Koch, 36, on the right side of his face and ear, and adhered to his right arm, causing first- and second-degree burns. The pain was so severe that doctors had to give him several doses of morphine.

Koch's burns eventually healed, but more than a year after the accident, he complained that he continued to feel pain in his right arm, which prevented him from working or helping around the house.

He sued his employer, Western Emulsions, for damages, claiming that the nerves beneath his right arm never fully healed, and that he suffered from chronic neuropathic pain. The company's attorney alleged that Koch was faking.

Koch's lawyer, Roger Strassburg, needed to prove that his client really was in pain. But that was going to be tough. There was no such thing as a pain meter to measure or confirm its existence. Pain is subjective, its sensations and intensity known only to the person experiencing it.

"I asked my clients' chronic pain manager if there was any evidence I could use to show whether my client was in pain or not," Strassburg says. "And he mentioned fMRI brain scanning."

Functional magnetic resonance imaging is used to measure activity in the brain by detecting blood flow. When certain parts of the brain

ILLUSTRATIONS BY SAM WARD

Roger Strassburg

PHOTOGRAPH BY BOB TORREZ

are active, blood flows to those regions and can be detected by the scanner through a complex process in which the scanner's powerful magnet tracks blood oxygen levels. Researchers have been using fMRI to test theories that they could pinpoint locations in the brain that become active with pain.

While some early studies identified areas of the brain that became active when people experienced pain, the research was far from definitive. Still, Strassburg was willing to give fMRI a try. "I think I must have called every fMRI lab in the country," he says.

The labs kept turning him down, until he reached Joy Hirsch, then a professor in the departments of neuroscience, radiology and psychology at Columbia University in New York City and director of its fMRI research center. One of Hirsch's specialties was mapping the brain for neurosurgeons so they could avoid damaging essential functions during surgery.

Hirsch told Strassburg that she would scan Koch's brain at no cost because she was interested in the case as a scientist. Strassburg arranged for his client to visit New York.

PUTTING A PRICE ON PAIN

Chronic pain is a national public health problem and an expensive one. It's typically characterized as pain that's persistent and lingering, as opposed to acute pain, which is sudden and sharp. Chronic pain often continues after injuries have healed, lasting for months or years, and can be debilitating. According to a 2011 report from the Institute of Medicine, about 100 million Americans suffer from chronic pain, costing society as much as $635 billion annually for everything from health care expenses to lost productivity at work. Pain is frequently cited as a factor in assessing damages in personal injury litigation and workers' compensation cases, and can significantly boost the size of awards, depending on its severity.

That's where things get tricky. Because there are no standardized or widely accepted diagnostic tools that can accurately or objectively measure pain, lawyers can easily challenge it. Patients are usually asked to rate their pain on a scale of 1 to 10 and sometimes are shown a poster of cartoon faces whose expressions indicate the severity of pain. The problem is that one person's 5 might be another's 10.

Some people do indeed exaggerate pain, which leads defense lawyers to be initially suspicious of claims for damages. It's also the reason many physicians are cautious about how they treat pain, concerned that they might be complicit in creating or feeding addictions to painkillers for those who may not really need them.

Because of the magnitude of chronic pain's impact, researchers have been seeking ways to better identify, understand and treat it. Neuroscientists in particular have been working to identify patterns of brain activity associated with pain that might help lead to better targeted treatments.

But personal injury lawyers see

Michael Flomenhaft

another potential value to neuroscience —as a way to document their clients' pain if and when it might be contested. The problem, many scientists say, is that the research, while showing much promise, is still in its nascent stage.

MEASURING PAIN

In May 2007, nearly two years after the tar accident, Koch met with neuroscience specialist Hirsch and prepared to have his brain scanned with an fMRI machine while performing simple motor tasks.

Hirsch took images during tests in which Koch squeezed a rubber ball using his right hand (the injured, painful side) and his left hand. The theory was that the images would show patterns of brain activity associated with pain when the right side was stimulated, but not the left.

Koch said that before the test, as he was resting, the pain he felt in his right arm rated between 3 and 4 on a scale of 1 to 10. But when he squeezed the ball, his pain rose to a 9.5. He reported feeling no pain in his left arm. From the images, Hirsch reported increased activity (blood flow) in the bilateral superior frontal gyrus, bilateral cingulate gyrus and the primary motor areas—all of which she described as "a component of a well-known pain-mediating neural circuit."

Hirsch explained in her report that functional brain mapping is based on the fundamental principle that specific functions and sensations are mediated by specific regions of the brain—including visual, sensory and motor functions—and is routinely used prior to neurosurgery to protect those regions. Her readings on the scans, she said, were consistent with Koch's rating of pain intensity when he squeezed the ball with his right hand.

Hirsch said the fMRI exam offered the perfect, built-in control to bolster Koch's contention that his pain was not imagined. The movement of Koch's right arm caused pain, which was indicated in activity of the brain scan, while the other did not trigger similar activity in that part of the brain.

Attorney Strassburg was ready to take his evidence to court.

BILLIONS AT STAKE

Around the time of the Koch case, law professor Adam Kolber was doing some of his own investigating into the use of neuroscience for documenting pain. He published a paper in the *American Journal of Law & Medicine* that offered a look at how neuroscience might be valuable in the courtroom —not right away, but someday. It raised the legal and ethical issues that would likely result from using the science in court.

Kolber, now at Brooklyn Law School, noted that pain is one of the easiest medical complaints to feign, which makes it a problem because pain and suffering awards represent about half of all personal injury damage awards. "Even if a small percentage of those awards involve feigned or grossly exaggerated symptoms, billions of dollars may be redistributed each year to malingering plaintiffs," he wrote.

PHOTOGRAPH BY ARNIE ADLER

"On the other hand, if litigants raise genuine claims that we fail to recognize, billions of dollars may fail to reach those who properly deserve compensation for injuries."

Researchers have tested methods to document pain since at least the 1960s, according to Kolber. Some employed a process known as thermography, which used infrared radiation to measure surface body temperatures. The temperature was supposed to be an indicator of soft-tissue injuries or other painful conditions. But thermography had a high rate of false positives and mixed results in being admitted as evidence.

With the advent of positron emission tomography scanning in the 1980s and, more recently, fMRI scanning, researchers have been better able to record brain activity and have done a number of studies seeking to link the experience of pain to specific regions in the brain. The debate remains over whether that brain activity can be directly correlated to pain.

Kolber points out that while malingerers may fabricate their pain, it's far more common for people who are in pain to modestly exaggerate its intensity in legal proceedings. Even plaintiffs who don't exaggerate their symptoms may have difficulty expressing the nature of their pain. That's where brain scanning may help those who need it.

DISPUTING THE FINDINGS

Attorneys for Western Emulsions were not willing to accept Hirsch's claim that a brain scan could show Koch had chronic pain. They filed a motion seeking to keep her from testifying, describing the science behind her opinion as "highly questionable, speculative and unproven."

The motion also sought a *Frye* hearing before Judge Javier Chon-Lopez of the Arizona Superior Court in Pima County to determine whether Hirsch's testimony would even be admissible under Arizona law. Under the *Frye* standard, Hirsch's expert opinion would be admissible only if the technique was generally accepted as reliable in the relevant scientific community.

Western Emulsions hired a well-regarded pain researcher to challenge Hirsch's claims. Dr. Sean Mackey, a pain expert and neurologist at Stanford University, said that the brain activity shown in Hirsch's scans could have been triggered by any number of factors, including the possibility that Koch was simply thinking about pain.

Mackey also suggested that people can "cheat" the scan by imagining their pain was more severe than it was. He had conducted earlier experiments in which volunteers touching a hot plate while in a scanner were able to conjure more intense pain, and thus brain activity, when they watched a video of flames.

Hirsch countered in her deposition that cheating is not possible because re-creating sensation in the mind is all but impossible. She also said that she detected no signals indicating imagined pain.

The critical issue in the case, Mackey said, was the subjectivity of pain. "This is akin to using fMRI to detect the presence of love, hate, anxiety, anger or any other human emotion or cognition," Mackey said in a deposition. "In essence, we are attempting to read someone's mind with fMRI. We just cannot do that at this time."

Judge Chon-Lopez denied the motion, stating that Hirsch's testimony "will be based on a combination of generally accepted scientific principles (fMRI) and inductive reasoning from her own research and calculations involving patients with chronic pain, including plaintiff Koch." The judge noted that a *Frye* hearing was inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation or research. "In this case, the validity of Hirsch's testimony can be tested by interrogating her."

Hirsch never had to take the stand. A short time later, Western Emulsions agreed to settle the case for $800,000. The attorney who handled the case for the company did not respond to *ABA Journal* requests to discuss it.

NEUROSCIENTISTS IN DEMAND

News of the settlement circulated among personal injury lawyers, and Hirsch began to get requests to perform similar scans to document pain. "The judge sided with me on the substance and validity of the technique," says Hirsch, now a professor at Yale University. "This was similar to, but not exactly the same as, what we do with neurosurgical planning."

Hirsch says that by accident, she became known as a brain and pain imager. "It's not something I really wanted to do," she says. Since then, she has scanned dozens of people, though she's rarely had to appear in court because most of the cases were settled.

One of the lawyers she's worked with is Michael Flomenhaft of the Flomenhaft Law Firm in New York City, which bills itself as "a neuroscience-focused firm." Flomenhaft began using neuroscientific evidence more than a decade ago while representing plaintiffs who had traumatic brain injuries from concussions.

Defense attorneys, he says, often disputed his clients' head injury claims and invariably found physicians who would testify that they found no evidence of brain damage. "It was the invisible injury," Flomenhaft says. "I couldn't accept early in my career what was being pronounced to me by physicians."

Flomenhaft began studying neurology, which led him to neuroscience and brain imaging. He met Hirsch when he taught a course in neurolaw at Columbia and began to learn about brain imaging for pain.

He was particularly struck by the work of Northwestern University researcher Vania Apkarian, who also has used fMRI to document pain. In one of his studies, Apkarian scanned the brains of people shortly after their back injuries, and again later. Apkarian found they developed chronic back pain but, interestingly, the locations that signaled pain in their brains shifted from areas associated with acute pain to areas where the brain regulates emotions.

"He explained that chronic pain is a brain injury," Flomenhaft says.

Joy Hirsch

PHOTOGRAPH BY DAVID FONDA

"Case by case, I began to see the neuroscience implications of things."

While fMRI has not been embraced by the scientific community as a comprehensive diagnostic tool to show the presence, or absence, of pain, Flomenhaft says it can show brain activation when a person is experiencing pain, which should be enough for the courts. "We are trying to show a jury what's there, not make a diagnosis," he says. "This is validating, objectively, that there is pain and the neuroscience has a really good foundation," he adds.

Scientists, by nature, are cautious, Flomenhaft says. "The confidence level is different in the law," he says. "When you're dealing with elite scientists, you're always dealing with their confidence level. Their language is always different. They use words like 'may,' 'suggest,' or 'could.' "

He believes brain scans are going to be seen more frequently in the courtroom. "The doors are opening, but they're opening very slowly," he says. "Neuroscience can recast all kinds of things about law. It's revolutionary, and there's all kinds of resistance to neuroscience. It's for judges to decide what's ready for the courtroom, not scientists. Judges decide what's admissible."

"There are many people who really, really deserve compensation for injuries, like Mr. Koch." —Joy Hirsch

Hirsch also believes the science will and should have value in the legal setting. "Why after all this time are there no techniques to use this in a credible way to assist people who really, really need assistance in terms of the law, in terms of personal injury?" she asks. "Personal injury often has a bad reputation, but there are many people who really, really deserve compensation for injuries, like Mr. Koch."

The doors are indeed opening, albeit slowly, and creating opportunities for private companies to offer brain scanning for lawyers. A Ridgefield, Connecticut-based company called Millennium Magnetic Technologies advertises, among other diagnostic services, brain scanning to validate the presence of pain.

"We're working with people who have pain and documenting that pain objectively for legal purposes," says Dr. Steven Levy, the company's CEO. "It can also be used to quantify the amount of pain, and this can be helpful in determining what is just compensation based on something objective."

The procedure costs $4,850 and includes three scans required for the pain study. Levy says clients should consider it a smart investment to support their cases. The company uses fMRI scans taken before, during and after staff induce pain in the patient's troubled areas. The scans are then analyzed through the company's "Rosetta technology," which it says "involves specialized imaging

algorithms, customized sensory input, computational neuroimaging processes, and utilizes pre-certified imaging centers."

The Rosetta process was created by Dr. Donald H. Marks, MMT's chief science officer and founder. While Marks has not published studies that tested large groups of patients at their clinic, he and Levy point to a list of studies dating back decades that have linked fMRI with pain detection.

In 2009, Marks was the lead author of a paper in *The Internet Journal of Pain, Symptom Control and Palliative Care* that used fMRI to document pain in a 50-year-old patient with chronic neck issues. It concluded that "neuroimaging can play a useful confirmatory role in documenting the presence or absence of the sensation of pain in patients complaining of a pain syndrome."

Though critics say that single case studies don't equate with studies of larger groups with controls, Marks says that the body of pain-imaging research validates his work on individuals. And defense attorneys are taking it seriously. MMT has provided pain imaging reports for about a dozen plaintiffs so far, and all the cases have ended in settlements.

"We're really at the cusp of where this is going to become standard," says MMT's attorney, Carlton Chen. "And as we demonstrate the reliability and standards of these tests, that they've been embraced by the scientific community, it is going to meet the *Frye* and the *Daubert* criteria."

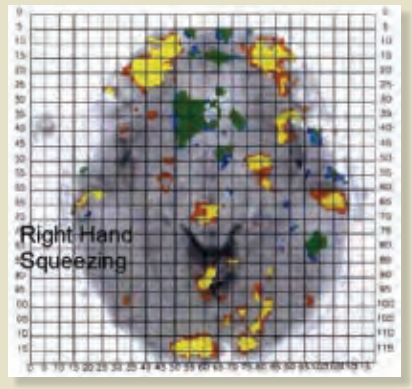
The *Daubert* criteria Chen refers to is a federal standard (adopted by some states) that requires judges to serve as gatekeepers to determine whether expert testimony is based on valid science, whereas *Frye* relies on the general acceptance of the science by the relevant scientific community.

NOT READY FOR COURT ... YET

In the years since Koch's case, researchers say, they're even closer to reliably documenting pain through brain images. Mackey at Stanford has done studies using fMRI to detect brain activity in people who were subjected to varying degrees of heat on their forearms.

In 2010, Mackey had eight volunteers lie in an fMRI scanner while subjecting them to a heat probe, and he used an algorithm machine to identify patterns of brain activity when the heat was high or low. He then got 16 more people to lie in the scanner who were stimulated with either high or low heat, and the images were run through the algorithm, which was able to determine whether someone was experiencing pain with 80 percent accuracy.

FUNCTIONAL MAGNETIC RESONANCE IMAGING



Carl Koch's brain scan nearly two years after the accident shows that he experienced extreme pain when moving the injured side of his body, according to neuroscience specialist Joy Hirsch.

But he cautioned that the findings were preliminary, and that the experiment was with a small group of participants only in a controlled laboratory setting.

In 2013, neuroscientist Tor Wager at the University of Colorado at Boulder led a study in which volunteers were placed in an fMRI scanner while they touched a hot plate. Wager and his team would turn the plate's temperature up and down and record brain activity associated with the changes in temperature.

Then, using another group of volunteers subjected to the hot plate, Wager reported that they were able to predict with better than 90 percent accuracy whether the plate was warm or painfully hot by looking at the brain activity on the scan. But they were measuring acute pain under controlled laboratory settings, which is not the same as trying to measure chronic pain.

Wager agrees with his colleagues that objective pain detection—for acute pain and chronic pain—is not ready for court, but it's close. But also like many scientists, Wager says his work is not to serve the courts. "That wasn't the intention," he says. "I get the picture that people in legal settings need objective corroboration of pain."

Wager believes that companies offering scans to document pain should be held to standards for accuracy and reliability in the same way that laboratories offering DNA evidence have been vetted by the courts. In addition, much broader studies are needed to test large populations against controls, instead of basing claims on the outcome of individual cases.

"That's the thing we need to grapple with if these things are going to be used," Wager says. "I think there is a lot of pressure ... to use brain imagery in court now, but there are more things that need to be done."

Chronic pain is especially difficult to identify in the brain. "The thing about chronic pain is that it comes in many variations," Wager says. "We're trying to figure out which brain systems track that. It's not always clear when they say they're in pain."

Wager also says that emotional and physical pain appear to trigger activity in similar regions of the brain, including the anterior insula and anterior cingulate. "Romantic rejection looks similar to physical pain," he says. "We're working on studies to disentangle those things."

Amanda Pustilnik, a law professor at the University of Maryland and a faculty member of Harvard University's Center for Law, Brain & Behavior, believes legal doctrine needs to be changed to reflect that chronic

PHOTOGRAPH BY TONY AVELAR

Hank Greely

pain is a neurological condition that is very real, even if you can't prove it with a brain scan. "You can look at an X-ray of a broken leg, but we don't have that yet for pain," she says.

While neuroscience may not be ready to show an individual has chronic pain, Pustilnik says it has value in the legal setting. She says that experts should be allowed to testify about brain imaging—but that such testimony be limited to educating judges and jurors about the nature and causes of chronic pain—not to suggest that brain images can prove its existence or absence.

"Brain scanning technology is not a fraud-o-meter, pain-o-meter or mind-reading machine, but a tool for increasing understanding about these complex phenomena," she says. "If what we're really concerned about in the law is whether a person is lying about whether they have chronic pain, maybe we don't need a pain detector but rather a lie detector. It's an honesty question."

Pustilnik recently joined a working group of the International Association for the Study of Pain to develop international standards for the legal uses of brain imaging. "I'm not against the use of individual brain images, but it's still so speculative," she says. "But the science of pain can help the legal system understand the scope of its harm."

Hank Greely, a law professor and director of the Stanford Program in Neuroscience and Society, is optimistic that pain documentation through brain imaging is close at hand, but he says it will require passing a *Frye* or *Daubert* test for admissibility before it's routinely accepted in the courts.

"We need to be setting up structured standards and protocols," Greely says. "In science, we think of it as replicability."

As these cases move to the courts, Greely says it's essential that judges become quick studies in complex science. "Very few judges are scientists. It's not a comfortable position for judges to be in, but they need to educate themselves in the science," he says.

Greely believes that brain images will likely serve to buttress other clinical findings of pain, but they

may not rise to the level of completely reliable. "I don't envision a pain-o-meter," he says. And even though companies like MMT state that their brain images work, Greely says it's wise to be skeptical. "There needs to be transparency to how it works."

WHAT ABOUT PHANTOM PAIN?

Professor Kolber from Brooklyn Law School raises some vital questions about the future of brain imaging for pain detection. If, indeed, brain scanning can one day objectively document pain, will that data offer a window into how the client will feel in the future? Will its duration and intensity decrease? How should it be compensated?

"You're supposed to get damages that are associated with the actual amount of pain you're experiencing. But we're just so bad at doing that we have to rely on rough proxies, many times, for pain," Kolber says.

Another key question is: Should the tort system impose penalties for those who wrongfully cause pain to others as a deterrent in the future? Kolber believes the true test of the technology will come when physicians accept it as a reliable clinical tool on which to base treatment and medication decisions. "If that were to occur, I think courts will start to accept the technology," he says. "Billions of dollars are changing hands for pain and suffering claims, and we don't have a lot of real good evidence about when it should and shouldn't transfer; and it seems there would be a huge market for this if the technology gets good enough."

University of Wyoming law professor Stephen Easton, a former trial lawyer and assistant U.S. attorney, has concerns as well. "When a case goes to trial, very often the key issue is whose testimony is believable," he says. "We have this desire to seek a more scientific, more reliable, more precise way to define which testimony can be believed."

There is also the concept of phantom pain to consider. "Would your brain react in the same way?" he says. "Would we compensate someone who says, 'I have a phantom pain in my missing left foot and here's a brain map showing it'?"

The legal system still seems to be wavering about embracing the technology. "We want more and more science. But at what point will we be comfortable to introduce the science?" Easton asks. "It's incredibly powerful if handled well. I do think there are reasons to be cautious. What if it turns out that it's not quite as good as we thought it was?"

The prospect of showing Carl Koch's brain scan to a jury was apparently enough to prompt the settlement. In fact, viewing brain scans has been known to influence jurors regardless of the science behind it, and it leaves some attorneys nervous. Until the scientific evidence of pain detection is considered by higher courts, it's still a frontier out there.

"The trouble for lawyers, jurors and judges is that we have to make a decision at a particular time," Easton says. "My sense is that we have a ways to go before this is really available. I think this can still be very persuasive. At least the appearance of certainty is going to be very alluring, very tempting." ■

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LANGUAGE BARRIERS

JUSTICE MOVES SLOWLY FOR THOSE WHO NEED INTERPRETERS

BY WENDY N. DAVIS

ON A WINTER MORNING IN NEW YORK CITY LAST YEAR, a mother had to leave her 10-year-old son home alone so she could go to work. The bus that normally takes her child to a school for students with special needs failed to appear. Pema Tsomo, a 52-year-old single mother who came to New York from Nepal in 2002, didn't want to lose her job as a dumpling cook. While she was at work, Tsomo's son wandered out of the house and was picked up by the police. The authorities took him to a nearby hospital and then placed him in foster care.

Later that day, the police came to Tsomo's home and arrested her for leaving her son alone.

Social worker Vanessa Finley (left) and her Tibetan client Pema Tsomo.

PHOTOGRAPHY BY LEN IRISH

"HISTORICALLY, STATES DID NOT PRIORITIZE THIS WORK."

–DAVID UDELL

Tsomo speaks fluent Tibetan and Nepali, but she doesn't speak enough English to be able to understand a court proceeding without an interpreter. New York City employs 357 interpreters, who speak a collective 14 languages. However, the city doesn't have a Tibetan interpreter on staff.

Instead, the court system had to hire an interpreter on a per diem basis. It took three days for a Tibetan interpreter to appear in court for Tsomo's arraignment, according to Vanessa Finley, Tsomo's social worker and the program coordinator at Adhikaar, a nonprofit in the Jackson Heights section of Queens.

During that time, Tsomo was held at the police precinct in the Elmhurst section of Queens and then transported several miles to Central Booking, in the basement of the criminal courthouse in the Kew Gardens neighborhood, where she spent the night in jail awaiting an interpreter.

Speaking through an interpreter provided by Adhikaar, Tsomo says she remembers being hungry and eating nothing but cold cereal and milk while awaiting arraignment. "There were a lot of other women around me," she says. "They were crying."

She was released, and the criminal case was adjourned in contemplation of dismissal. Her son also was returned home after several months, though a family court case remains pending, according to Finley.

Tsomo believes her ordeal, and her son's, could have ended sooner if she had been able to communicate with the authorities. "I would have been better able to explain my situation and what had happened," she says. "Maybe there would have been a solution."

SPEAKING IN MANY TONGUES

Advocates around the country say that people like Tsomo, who need interpreters for less commonly spoken languages in the U.S., often face significant hurdles in court, including being detained longer than others while awaiting someone who can interpret for them.

Nationwide, almost 21 percent of the country's residents speak a language other than English at home, according to an October 2015 report by the U.S. Census Bureau. That figure has been rising steadily since 1980, when only 11 percent of residents spoke a language other than English at home.

In states with large immigrant populations, that proportion is even higher. In California, more than 40 percent of residents speak a language other than English at home, while in New York that figure is around 30 percent.

But courts have not yet caught up to the shifting demographics. As of 2014, 10 states—Alaska, California, Illinois, Nevada, New Hampshire, North Carolina, Oklahoma, South Dakota, Vermont and Wyoming—don't require interpreters in all criminal and civil cases, according to the National Center for Access to Justice at the Benjamin N. Cardozo School of Law at Yeshiva University.

Even where states require interpreters, actually obtaining them can be problematic. Many states simply don't have people on staff who can interpret in less-common languages. In New York City, for instance, staff interpreters speak Spanish and 13 other languages, including Arabic, Cantonese, Mandarin and Polish.

But a host of other languages are spoken in the city. In Bronx County alone, the court system has had to arrange for interpreters in 74 languages, including Albanian, Yoruba (Nigeria), Mixtec (Mexico) and Garifuna (Central America).

Cases involving criminal defendants who require interpreters are a priority, according to Ann Ryan, the statewide coordinator for the New York state courts' Office of Language Access. She says that the state arranges for interpreters as quickly as possible. A court representative says whether delays occur depends on "a variety of factors," including how much advance notice was provided to the court, and the availability of interpreters.

But despite the court's efforts, advocates say their clients often experience delays and other hurdles when awaiting interpreters.

Amy Taylor, director of legal services for Make the Road New York, a nonprofit advocacy group for Latinos, says it isn't uncommon for some cases to be delayed for up to a year because interpreters aren't available on the court dates.

Lina Lee, an attorney with the nonprofit MinKwon Center for Community Action in New York, adds that many of her Korean- and Mandarin-speaking clients face adjournments because the interpreters are busy with other cases. "I've waited with clients the whole day," she says, "from 10 a.m. to 4 p.m."

Lee adds that even though the Queens housing court has an office with pamphlets and other material in a variety of languages, people who don't speak English often don't make their way to that office. "Nobody goes to that room," she says,

PHOTOGRAPH COURTESY OF NATIONAL CENTER FOR ACCESS TO JUSTICE

"because nobody knows it exists."

A court representative says the court conducts quarterly reviews of language usage "to determine if signage or other tools" should be updated or expanded.

WHO'S RESPONSIBLE?

"Historically, states did not prioritize this work," says David Udell, executive director of the National Center for Access to Justice at Cardozo law school. He says that in the past, some state courts would simply post signs telling people to bring their own interpreters.

One reason for that approach is that it wasn't always clear in the past that courts had an obligation to provide interpreters, Udell says.

In California, for instance, the state's highest court ruled in 1978 that litigants were not entitled to free interpreters in civil cases.

The court said that people who don't speak English have "access to a variety of sources for language assistance," including family members, friends, neighbors and private immigrant-assistance organizations.

Even in criminal cases, not all states provided interpreters for defendants who struggled with English. In Georgia, for instance, it wasn't until 2010 that the state supreme court ruled that people who spoke limited English had a right

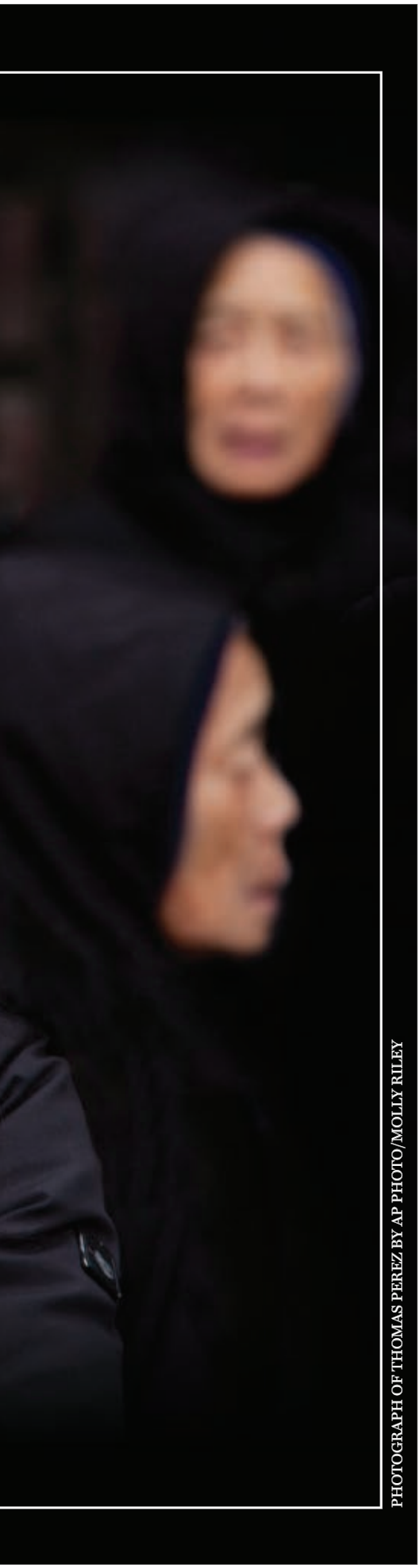
It took three days for a Tibetan interpreter to appear in court for Tsomo's arraignment, according to Finley.

"I WOULD HAVE BEEN BETTER ABLE TO EXPLAIN MY SITUATION AND WHAT HAD HAPPENED. MAYBE THERE WOULD HAVE BEEN A SOLUTION."

–PEMA TSOMO

"I'VE WAITED WITH CLIENTS THE WHOLE DAY, FROM 10 A.M. TO 4 P.M."

–LINA LEE



PHOTOGRAPH OF THOMAS PEREZ BY AP PHOTO/MOLLY RILEY

"BUDGETING ADEQUATE FUNDS TO ENSURE LANGUAGE ACCESS IS FUNDAMENTAL TO THE BUSINESS OF THE COURTS." *–THOMAS PEREZ*

Thomas Perez

to an interpreter.

The court said in that case that people who can't "communicate effectively in English may be effectively incompetent to proceed in a criminal matter and rendered effectively absent at trial if no interpreter is provided."

The case involved Mandarin speaker Annie Ling, who was convicted of one count of cruelty to a child. Ling argued that her trial lawyer was ineffective for failing to arrange for an interpreter for trial, and for using Ling's husband to convey the prosecutor's offer of a plea bargain.

The Georgia Supreme Court remanded the matter to the trial judge, with instructions to decide whether Ling could communicate in English well enough to understand the nature of the proceedings and assist in preparing her defense.

JUSTICE STEPS IN

Nationwide, the attitude toward interpreters started changing about six years ago, when the U.S. Department of Justice took a more aggressive approach in enforcing a Clinton-era executive order stating that federal agencies and recipients of federal funds must make sure their programs are accessible to people who don't speak English.

In 2010, then-Assistant Attorney General Thomas Perez spelled out in a letter to courts that failing to provide interpreters in all cases was a form of national origin discrimination. Title VI prohibits state agencies that accept federal funds from discriminating based on national origin.

"Language services expenses should be treated as a basic and essential operating expense, not as an ancillary cost," Perez wrote.

He added that courts throughout the country have recently seen a substantial increase in the number of people with limited English skills, as well as the "diversity of languages they speak."

"Budgeting adequate funds to ensure language access is fundamental to the business of the courts," Perez wrote.

Since then, the DOJ forged agreements with officials in states such as Colorado, New Jersey and Rhode Island, which agreed to provide comprehensive language assistance in court to people with limited proficiency in English.

The DOJ also said in a 2012 letter to the North Carolina Administrative Office of the Courts that the state is failing to provide non-English speakers with "meaningful access" to court.

"Among the harms we identified in the course of our investigation are longer incarceration as a result of continuances caused by the failure to locate an interpreter; serious conflicts of interest caused by allowing state prosecutors to interpret for defendants in criminal proceedings; requiring pro se and indigent litigants to proceed with domestic violence, child custody, housing eviction, wage dispute and other

important proceedings without an interpreter; and other barriers to accessing court proceedings and other court operations," the letter states.

State officials subsequently developed a plan to make interpreters available in a wide range of cases.

UNEQUAL ACCESS

Steven Brown, executive director of the American Civil Liberties Union of Rhode Island, says that before the state's agreement with the DOJ, the interpretation situation was capricious, at best. Often, he says, judges would simply enlist people in the court gallery to serve as interpreters. "It was completely makeshift and not an appropriate or fair system of justice," Brown says.

Attorney Laura Abel, who began studying the issue when she served as deputy director of the Justice Program at the Brennan Center for Justice at New York University School of Law, says she frequently came across situations where judges asked abusers in domestic violence cases to interpret for the victims.

In other situations, including domestic abuse cases, judges would ask young children to interpret for their parents. That's problematic for many reasons, including that parents often don't want their children to know about the activity that brought them to court.

"There are many things a parent won't say in front of a child, like 'He hit me,' " Abel says.

Abel's work on interpreters grew from her research into whether people were receiving adequate legal assistance in court. As she delved into the topic, she realized that an even more fundamental problem than the lack of qualified counsel was a lack of trained interpreters.

"Here we had been focused on lawyers, but there were people without lawyers who couldn't even communicate with anybody in the court system," Abel says.

Without that basic ability, people with legitimate grievances have no way of getting their day in court.

"Our whole system of justice depends on the adjudication of facts, and you want that to be accurate," says District of Columbia Court of Appeals Judge Vanessa Ruiz, herself a native Spanish speaker.

Ruiz, who chaired the ABA's Standing Committee on Legal Aid and Indigent Defendants, which created the Standards for Language Access in Courts, says she became acutely aware of problems obtaining interpreters when she was first appointed to the bench.

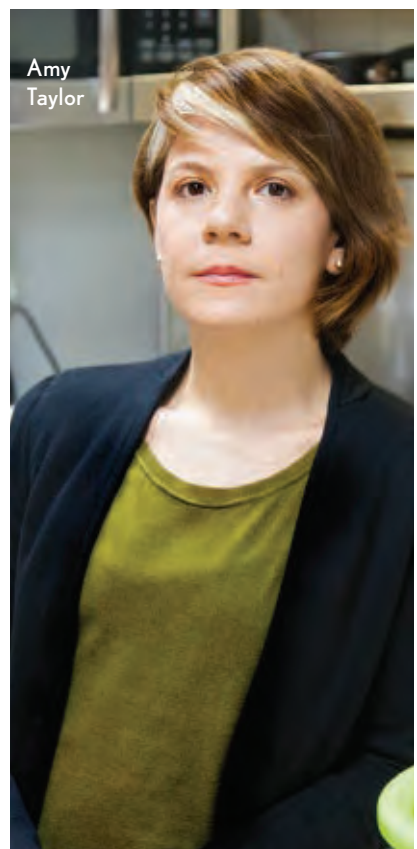
She says that Spanish-speaking cleaning staff in the courthouse used to bring her notices from their children's schools, or from other courts, and ask her to translate.

"It was an eye-opener for me—and heartbreaking," she says.

"Could anybody think that it's fair for a parent to fight for custody of a child," she asked, "in a proceeding where the parent doesn't understand what's going on?"

CALIFORNIA'S CHALLENGE

California, which has the highest proportion of non-English speakers in the country, also has some of the biggest challenges.


Amy Taylor

An estimated 220 languages are spoken in Los Angeles County alone; the most common ones are Spanish, Mandarin, Tagalog (Philippines), Korean and Armenian, but Angelenos also speak others, such as Urdu (spoken on the Indian subcontinent), Gujarati (India) and Laotian.

As an attorney representing indigent people in Los Angeles, Joann Lee has worked with numerous clients who struggled to make themselves understood when they came to court seeking orders of protection, battling for custody of their children or fighting eviction proceedings.

"We would request interpreters for civil cases, and sometimes we would get them and sometimes not," says Lee, a lawyer with the Legal Aid Foundation of Los Angeles.

In the latter situation, judges sometimes would adjourn cases and instruct litigants to bring their own interpreters—who often ended up being friends or family. On other occasions, judges would proceed without an interpreter, leaving the parties to "stumble through" in broken English, Lee says.

In late 2010, Lee made a formal complaint to the DOJ on behalf of two Korean speakers who were denied interpreters in court. One, a grandmother, had gone to court for a restraining order after she had been sexually assaulted by a maintenance worker. The other was fighting the father of her children for custody and child support payments.

After the DOJ began investigating, the judicial system in California promised to revise its approach.

In January 2015, the California Judicial Council approved a plan calling for interpreters in civil cases by 2017. (California has long required interpreters in criminal cases.)

Also that January, California Evidence Code § 756 took effect. That provision authorizes judges to provide interpreters in civil matters and gives priority to

Criminal defendants requiring interpreters are a priority, says Ann Ryan of New York's Office of Language Access.

indigent people. The law also says that if there isn't enough money to provide interpreters in 100 percent of the cases, judges should prioritize certain types of matters, including cases involving domestic violence, termination of parental rights, and custody and visitation.

The plan also calls for language assistance (though not necessarily interpreters) at all "points of contact"—such as the clerk's office or cashier—by 2020. Among other types of assistance, the plan contemplates translated information brochures and instructions, multilingual signage, and kiosks with touchscreen computers that can offer information in various languages.

Implementing the plan won't be easy, considering the vast number of languages spoken in the state. Also—with 58 counties spread out over nearly 164,000 square miles—arranging for, say, a Vietnamese interpreter to travel as needed from the southern portion of the state to the northern can present logistical problems.

"We have some terrific certified interpreters, but we need more interpreters and more language access without sacrificing quality," says Justice Mariano-Florentino Cuéllar of the California Supreme Court, who chairs the Language Access Plan Implementation Task Force of the Judicial Council of California.

Not everyone who speaks a language is qualified to interpret in court, says Esther Navarro-Hall, chair of the National Association of Judiciary Interpreters & Translators. That's because interpretation involves a lot more than mere translation: It requires people to listen in one language and contemporaneously translate into another. "That's a different skill than speaking normally in conversation," Navarro-Hall says.

MEANING MATTERS

Each state has its own system of vetting court interpreters. In New York, for instance, interpreters who pass a multiple-choice test of English proficiency and knowledge of basic legal terms are eligible to take an oral interpretation exam, which currently is given in 21 languages, including Albanian, Bengali, Greek and Urdu.

Navarro-Hall adds that interpreters are supposed to always interpret in the first person and are supposed to convey everything that's said. For instance, she says, if an interpreter is translating for a Spanish speaker, and a witness says, "Well, you know, I'm not sure," the interpreter must make clear that the witness is hedging.

"You're not going to imitate the person, but you have to include some of the doubt that the person is expressing," she says. "You must sound like you're embodying the person."

Interpreters, unlike translators, also need to be able to convey meaning without doing literal translations, Navarro-Hall says. For example, the phrase "It's raining cats and dogs" would sound awkward in Spanish, so an interpreter would probably say "It's raining by the bucketful," she says.

Despite the hurdles, Cuéllar says he believes the court system will be able to meet the plan's goals of providing interpreters in all cases by 2017. "We have to turn our ingenuity and our human resources—and our interpreters and our judges—into [assets], so that language access is not a bottleneck," he says.

"This is about rights," Cuéllar adds. "We can't simply say it's optional." ■

Lawyer and journalist Wendy N. Davis lives in New York City.

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yourABA

The Last Holdout

The ABA adds its voice to calls for the United States to ratify the Convention on the Rights of the Child

BY MARTHA MIDDLETON

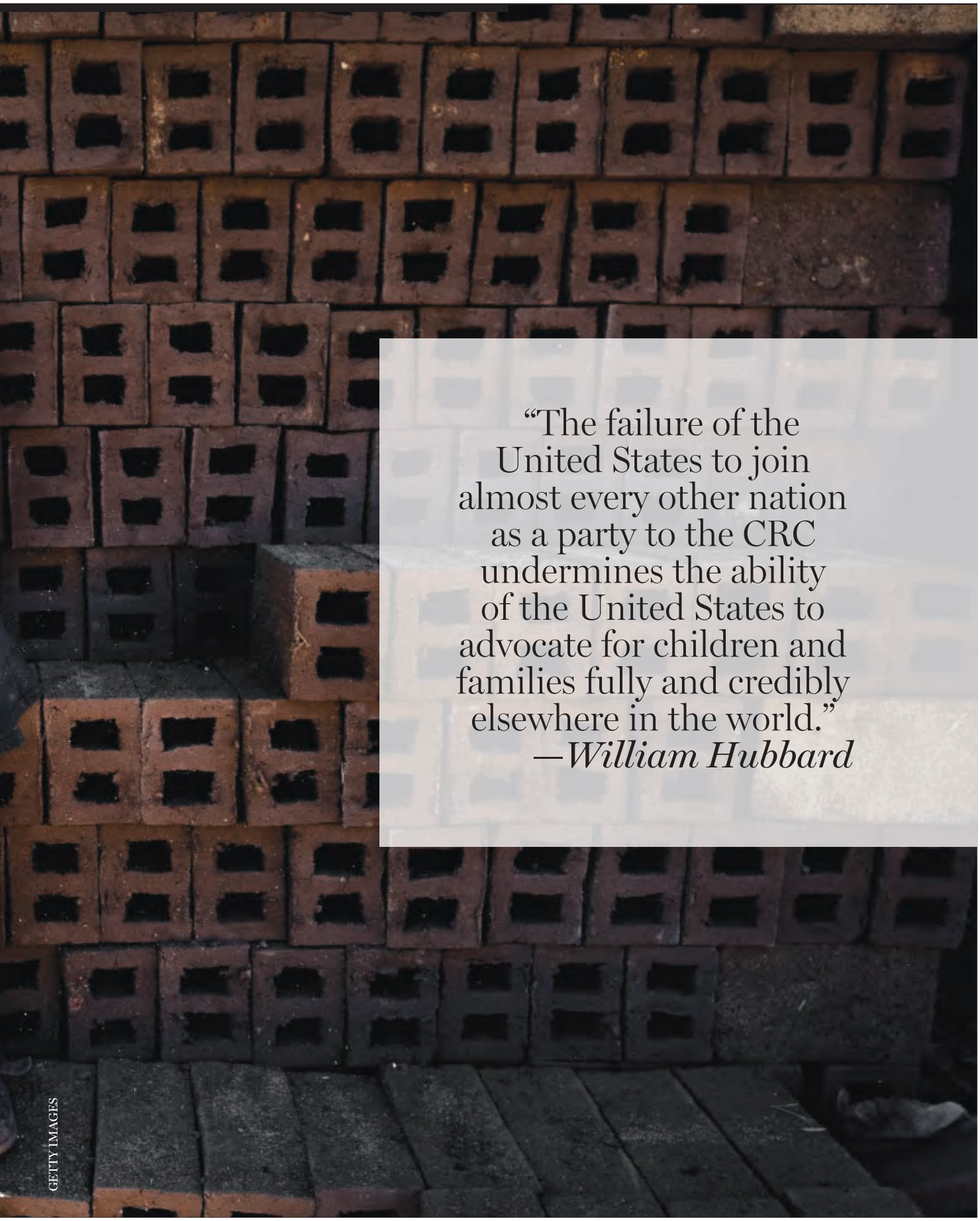
The Convention on the Rights of the Child reached an important milestone in 2015, when Somalia and South Sudan completed the ratification process. Their actions leave only one of the 197 member states and parties of the United Nations as a holdout against ratifying the treaty: the United States.

The CRC was adopted by the U.N. General Assembly in 1989 and went into force in 1990 after being ratified initially by 20 countries. According to the Campaign for U.S. Ratification of the Convention on the Rights of the Child based in New York City, the CRC has become the most widely ratified international treaty in history, and only the U.S. government's inaction is keeping the convention from becoming the first-ever universally ratified human rights treaty.

The CRC is built on ambitious goals by incorporating the full range of human rights into one text to promote the rights of children worldwide. The convention also affirms the primary role of parents in providing appropriate guidance to their children, including how to exercise their rights, and describes the family as the fundamental unit of society.

The convention lays out the civil, political, economic, social and cultural rights of children in four main areas: survival, including basic health care and disease prevention, nutrition, safe water and environmental health; development, through access to education and cultural activities; protection from risks to their mental, physical and emotional well-being; and participation in decisions and actions that affect them and their futures.

The irony of the U.S. government's failure to ratify the CRC is that the administration of President Ronald Reagan actively participated in negotiations that produced it, and several key provisions in the convention were initially proposed by the United States. The Clinton administration signed the CRC



"The failure of the United States to join almost every other nation as a party to the CRC undermines the ability of the United States to advocate for children and families fully and credibly elsewhere in the world."
—*William Hubbard*

GETTY IMAGES

in 1995—an action that normally indicates an intention to send a treaty to the Senate for ratification (which requires a two-thirds majority)—but neither President Bill Clinton nor any of his successors have taken that step, although the Senate in 2003 (during President George W. Bush's administration) did ratify two optional protocols to the treaty that specifically address the role of children in armed conflicts and the issue of trafficking in children. The Senate has not ratified a third optional protocol adopted by the U.N. in 2014 that allows children to bring complaints of serious violations of their rights to the Committee on the Rights of the Child, an independent panel of experts that oversees the CRC and monitors compliance among signatory nations.

HOW FRUSTRATING

The U.S. government's failure to ratify the Convention on the Rights of the Child has been a cause of frustration among many human rights groups. "The U.S. cares about children; Americans care about children worldwide," says Mark Engman, director of public policy and advocacy at the U.S. Fund for UNICEF in New York City. But because the United States has not ratified the CRC, he says, "we can't partner" with signatory countries in implementing and applying it to help children around the world.

Recently, there has been a renewed effort by human rights organizations and other groups in the United States to spur movement by the administration and the Senate toward ratification. In late 2014, the Campaign for U.S. Ratification of the CRC wrote a letter, signed by the leaders of more than 100 U.S.-based organizations, urging President Barack Obama to send the treaty to the Senate for ratification. "Our nation's failure to join almost every other nation in the world as a party to the CRC tarnishes our global reputation as a defender of children and family," the letter stated.

At about the same time, the ABA made a separate pitch calling on the administration to submit the CRC to the Senate for consideration. The ABA and its Center on Children and the Law "have multiple policies and projects relating to enhancing access to justice for children and families, and we view ratification of the CRC as critical to this objective," wrote then-ABA President William C. Hubbard in a letter sent to Secretary of State John Kerry on Oct. 22, 2014. Since its adoption in 1989, "the CRC has proven a powerful tool to improve laws and policies for children and families around the world," wrote Hubbard of Columbia, South Carolina. He noted that the ABA House of Delegates adopted a recommendation in 1991. The recommendation "supports in principle the ratification by the United States" of the CRC.

"The failure of the United States to join almost every other nation as a party to the CRC undermines the ability of the United States to advocate for children and families fully and credibly elsewhere in the world," Hubbard wrote. And on the home front, he wrote, "the CRC would provide the United States with a comprehensive framework to analyze, document and report on conditions for children, including how government agencies consider the views of parents and youth. That framework would in turn help officials at all levels of government develop policies and programs that better meet the needs of children and families."

The ABA is a longtime advocate of children's rights in the United States and abroad. In 1978, it created the Center on Children and the Law, which now coordinates much of the association's efforts to improve child protection laws, judicial practices and legal advocacy for the country's most vulnerable children, including those in foster care. The center also works with members of the justice system at the state level to provide technical assistance and training.

A NEW PUSH

With Obama in the final year of his presidency, proponents of the Convention on the Rights of the Child believe the time for action may finally be at hand. "We think that it is doable," says Meg E. Gardinier, secretary general of the ChildFund Alliance in New York City, who chairs the steering committee for the Campaign for U.S. Ratification of the CRC. "It is work, but the campaign is solidly committed to help. We are not afraid to take some heavy lifting."

Within the U.S., ratifying the CRC "could provide a framework to improve the well-being of all children," says professor Jonathan Todres of Georgia State University College of Law in Atlanta, an expert on children and the law. In the international realm, he says, "a common refrain heard by U.S. human rights advocates, including myself, is: 'How can the U.S. expect other countries to do more when it won't even participate at all?' "

But the U.S. government's reluctance to move toward ratification of the CRC reflects a wariness about international treaties in general, even those it supports in principle. Among the treaties the Senate still has not ratified are the Convention on the Elimination of All Forms of Discrimination Against Women, which was adopted by the United Nations in 1979 and signed by the United States in 1980; the Convention on the Law of the Sea (adopted in 1982, signed in 1994); the Convention on the Rights of Persons with Disabilities (adopted in 2006, signed in 2009); and the Rome Statute of the International Criminal Court (adopted in 1998), which was signed by President Clinton shortly before he left office, then "unsigned" by President Bush in 2002.

The CRC also has its share of opponents. Michael P. Farris, a lawyer and chair of the Home School Legal Defense Association in Purcellville, Virginia, says many object not only to the CRC but also to other international treaties, because they threaten American sovereignty, defying "the principle of self-government." Countries that are signatories to the convention have only political obligations to it, he argues, while the U.S. would have legal obligations under the Constitution's supremacy clause, making the treaty "the supreme law of the land." Farris' group has called the CRC "the most dangerous attack on parental rights in the history of the United States" because home-schoolers perceive that it would threaten their choices as parents.

Intrusion into family life is also a concern of Allan C. Carlson, president of the Howard Center for Family, Religion and Society in Rockford, Illinois, who has written that the CRC "contains measures that subvert the authority of parents over their children; strip away the authority of religious faith and tradition in favor of a politicized and radical social science; and prevent nations and peoples from sheltering their own unique cultures."

But Todres says that much of the opposition to the CRC is based on inflammatory rhetoric that doesn't reflect either the language of the convention or the way human rights treaties are incorporated into domestic law in the United States.

"The language of the treaty and evidence from other countries' implementation of the CRC demonstrate that the CRC can be a wonderful tool that supports children and their families," Todres says. Unfortunately, the convention "has been used as a pawn in a much broader political and cultural battle in the U.S., to the detriment of many children in need." ■

Hard-Won Victories

Increased funding for the LSC tops the list of the ABA's 2015 successes on Capitol Hill

BY RHONDA McMILLION

Despite the intense partisanship that has bogged down much of the legislative business on Capitol Hill these days, the ABA achieved some notable successes in its advocacy efforts during 2015.

At the top of the list is an increase in the allocation approved by Congress for the Legal Services Corp., the primary source of funding for civil legal assistance to low-income Americans through grants to 134 programs in every state, the District of Columbia and Puerto Rico. The LSC will receive $385 million in federal funding under the omnibus appropriations package that Congress approved for fiscal year 2016, which began Oct. 1, 2015. That amount reflects a $10 million increase in funding over what the LSC received in fiscal 2015.

ABA President Paulette Brown, a partner at Locke Lord in Morristown, New Jersey, said in a December statement that "this appropriation is most welcome at a time when the population eligible for LSC-funded assistance has grown to an all-time high."

Other ABA priorities that will receive increased funding from Congress this year include the federal judiciary, which will receive $6.78 billion, an increase of $80.4 million over 2015; grants awarded under the Violence Against Women Act, which are increasing by $50 million to $480 million, including $45 million for civil legal assistance; immigration courts, which will add 55 judge teams supported by a $76 million increase to $427 million; and elder justice and adult protective services, for which funding doubled from $4 million to $8 million.

The omnibus appropriations legislation that passed as the first session of the 114th Congress came to a close also included the Cybersecurity Act of 2015, which creates a voluntary cybersecurity information-sharing process between private companies and the federal government; provides liability protection for companies that share cyberthreat data with the government; and requires the departments of Homeland Security, Defense and Justice, along with the director of national intelligence, to develop procedures for sharing cyberthreat information with other government entities that may be affected by cyberattacks.

The ABA emphasized to Congress that robust information sharing and collaboration are needed between government agencies and private industry to manage global cybersecurity risks.

PROGRESS ON SEVERAL FRONTS

Other actions by Congress and federal regulatory agencies during the past year also reflect the ABA's priorities and advocacy efforts.

Reauthorization of the Terrorism Risk Insurance Act requires commercial property and casualty insurers to offer terrorism coverage in the policies they are selling.

The Every Student Achieves Act of 2015 includes ABA-supported steps to promote school stability and success for homeless and foster children.

On the regulatory front, the Centers for Medicare & Medicaid Services authorized, for the first time, reimbursement to health care professionals who provide advance care-planning services.

ISTOCKPHOTO

A new rule issued by the Department of Labor prohibits federal contractors from retaliating against employees who ask about or share salary information. The ABA submitted comments emphasizing that the new rule is critical to advancing pay equity in the workforce.

In the criminal justice area, the Federal Communications Commission responded to calls from the ABA and numerous other groups by issuing a rule setting caps on rates and fees charged to inmates for making telephone calls from prisons and jails.

At the end of the first session, an agreement was reached in the Senate not to return to the president 31 pending judicial nominations, and plans were made to vote on one circuit court nominee and four district court nominees early in the second session. Brown had urged Senate leaders to act before the first session ended on the 15 nominees whose confirmations had been delayed despite unanimous approval by the Judiciary Committee. "We know from the daily experience of our more than 400,000 members that vacancies must be filled promptly so that courts have the resources to deliver timely, impartial justice," she said. ■

► 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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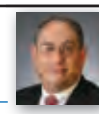

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ABA Notices

DELEGATE-AT-LARGE ELECTIONS

Pursuant to § 6.5 of the ABA Constitution, six Delegates-at-Large to the House of Delegates will be elected for three-year terms at the 2016 Annual Meeting. The deadline for filing nominating petitions is May 19, 2016. For rules and procedures, visit ABAJournal.com/magazine and scroll down to ABA Announcements.

UTAH STATE DELEGATE VACANCY ELECTION

Pursuant to § 6.3(e) of the ABA Constitution, the state of Utah will elect a State Delegate to fill a vacancy due to the resignation of Lawrence E. Stevens. The term commences upon certification by the Board of Elections. For rules and procedures, 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 2016-2019 term. 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, no later than March 31, 2016.

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.

INDEX TO ADVERTISERS

Look! Up in the Sky!

Courts must decide whether new high-tech toys can also be targets

YOU KNOW HOW sometimes it feels like you're being watched while on a bus or in line at the supermarket? You look to your left and right to see whose peepers are peering at you. But these days you might want to shoot a glance upward, as it's possible that you're being surveilled by one of the multitudes of drones that are starting to chip away at what is left of our modern-day privacy.

Drones—those flying gizmos with all the propellers—are often equipped with cameras and have been put to various uses by the military, police, firefighters, filmmakers, real estate agents and others. Online retailer Amazon has announced its intention to begin making 30-minute deliveries via drones. But they can be used for nefarious purposes as well. That's why people tend to have a negative reaction when they see one hovering around their property.

In November 2014 in Modesto, California, Eric Joe was flying his homemade drone on his parents' property when a shot rang out and the craft fell from the sky, according to a report by Ars Technica. Joe stated that it was shot by neighbor Brett McBay, who suspected it was "a CIA surveillance device." When the two failed to agree on terms of restitution, Joe brought the matter to Stanislaus County small claims court, which in May ruled in his favor to the tune of $850.

Last July a similar incident occurred in Kentucky when Hillview resident William Merideth's daughters told him a drone was flying over his and a neighbor's yards. His neighbor, Kim VanMeter, told WDRB News she has a 16-year-old daughter who likes to lay out by their pool. Merideth reportedly got his shotgun and waited for the camera-equipped drone to hover above his property.

Then—*bam!*—down it went.

Merideth was arrested and charged with wanton endangerment and criminal mischief. In October, a district judge in aptly named Bullitt County dismissed the charges.

And the anti-drone uprising continued in October when Ascension Parish, Louisiana, resident Derek Vidrine was hunting squirrels and finally decided to shoot down the drone—also equipped with a camera—his wife had been complaining about. Vidrine told the *Advocate* newspaper that the drone appeared at an outdoor family event and also while Mrs. Vidrine was riding her horse. Drone owner Aaron Hernandez was quoted as saying that he was merely snapping aerial photographs of the areas surrounding his father's home.

Because drone use is largely unregulated, the Federal Aviation Administration issued a requirement in December that all UAS (unmanned aircraft systems) weighing more than 0.55 pounds and less than 55 pounds at takeoff need to be registered. Those registered after Jan. 21 had to pay a $5 fee. Registered aircraft will be allowed to fly no higher than 400 feet and must avoid airports, open-air stadiums, groups of people and emergency response areas.

Drones have become the subject of multiple legal blogs and will only gain prominence in the law as they further insinuate themselves into our lives So, drone operators, let's be careful out there. Your fellow citizens have an aversion to being spied upon—and they're often armed to the teeth. ■

ILLUSTRATION BY JEFF DIONISE

The Savings and Loan Crisis Begins

March 14, 1984

Chairman Spencer Blain at a congressional hearing on the failure of Empire Savings and Loan.

On the morning of March 14, 1984, a team of federal regulators arrived at an inconspicuous strip mall in the eastern Dallas suburb of Mesquite to seize control of what had been one of the nation's fastest-growing thrift institutions, Empire Savings and Loan.

Taking advantage of federal deregulation in the industry, Empire had built a highly profitable portfolio of real estate loans by all but ignoring traditional due diligence and long-term lending in favor of high-interest construction loans. But as they became more familiar with the dynamics of Empire's success, regulators came to realize that it was based on what one later called "one of the most reckless and fraudulent land-investment schemes this agency has ever seen."

The early '80s had been unkind to traditional savings institutions. Since the Great Depression, thrifts had been confined to low-interest home mortgages. But a three-year surge in inflation that soared as high as 14 percent left the highly regulated thrifts whipsawed by federal restrictions—both on interest paid to depositors and the kinds of loans available to borrowers.

In 1982, in an effort to help savings institutions grow out of their plight, Congress passed the Garn-St. Germain Depository Institutions Act, freeing federally insured thrifts from many of those limits. Almost immediately, Empire chairman Spencer Blain initiated a frenzied program of high-interest commercial lending for thousands of units of condominium construction, mostly concentrated in the nearby I-30 corridor. And over the next year, an ever-expanding group of borrowers passed through Empire, signing to take on millions in debt in a highly organized paper-passing process designed to fuel the ongoing construction bubble.

The fundamental elements of the process were simple. A developer would option a piece of undeveloped land, then inflate its value by passing the parcel through a string of insider sales to a small group of developers—as many as eight in a single day. Meanwhile, the land was subdivided into smaller, 2-acre parcels and ultimately sold off to a string of straw buyers at highly inflated prices, all financed by Empire at interest rates as high as 18 or 19 percent. Empire earned millions in lending fees and commissions. The developers earned millions from the "land flips." Even the straw buyers walked away with cash—proceeds from their Empire loans.

By the time the pyramid-style scheme came to a halt, more than $300 million had vaporized from Empire. Hundreds of unfinished condo units littered the landscape of eastern Dallas County. About 120 participants were prosecuted and convicted. And Empire became the first-ever savings institution closed due to fraud.

But the damage was only beginning. The fraudulent Empire loans had already metastasized to other institutions. Even worse, the ease with which the fraud had developed at Empire exposed to regulators the potential for abuse elsewhere. It took nearly five years for the extent of widespread savings and loan fraud to become fully appreciated, but by 1989 nearly a third of the nation's 3,234 thrift institutions worth more than $400 billion had been closed or merged; their governing agency, the Federal Home Loan Bank Board, had been dissolved; and more than $160 billion—most of it taxpayer-supported—had been spent to resolve the plague of fraud in the deregulated thrifts.

Empire Savings and Loan's reckless and fraudulent high-interest commercial lending practices paved the way for the construction of thousands of condominium units in Texas, most of which had to be bulldozed.

PHOTOGRAPHS BY DAVID WOO/DALLAS MORNING NEWS; DMN FILE PHOTO; KEN GEIGER/DALLAS MORNING NEWS

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