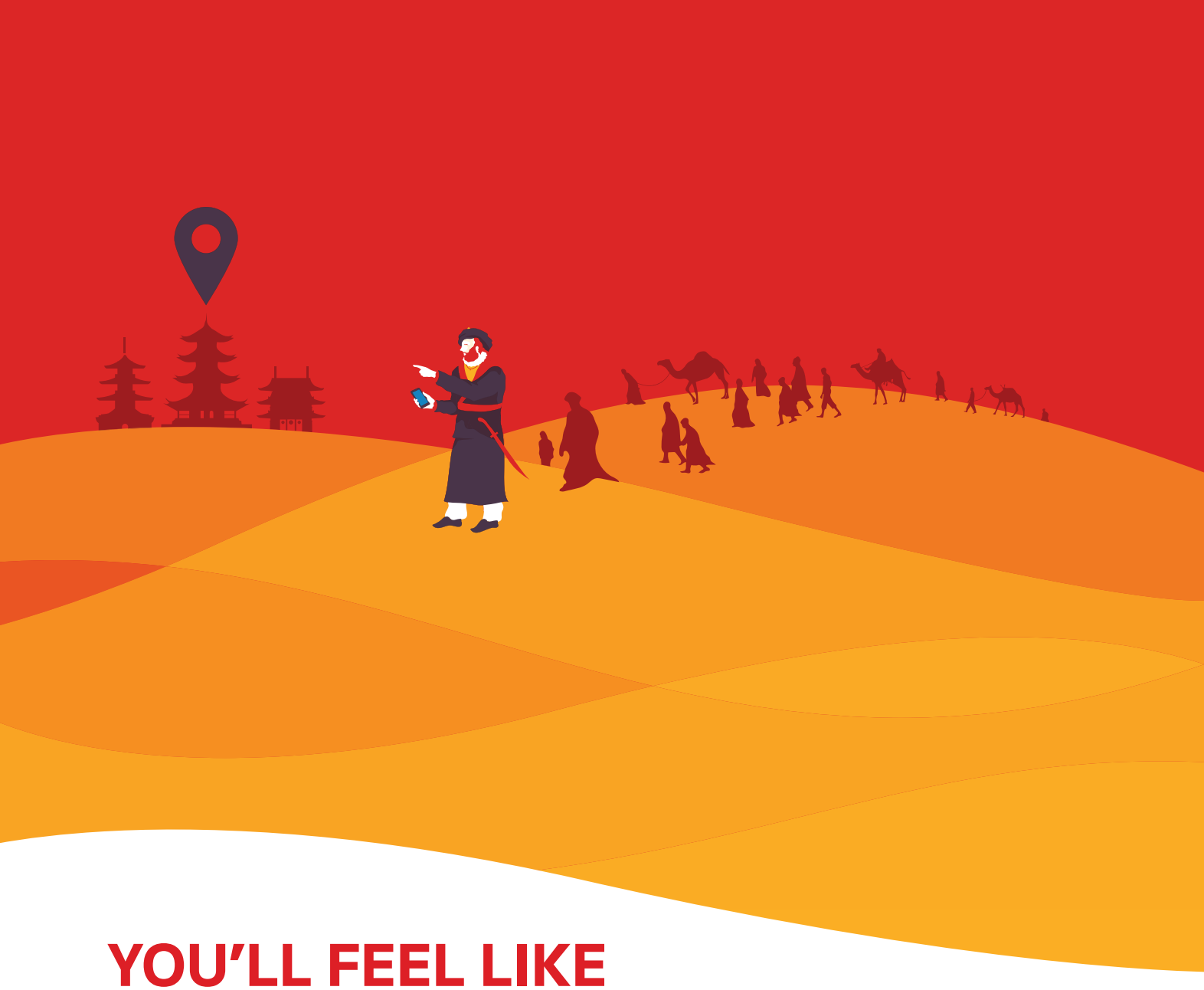
BAIL'S FAILINGS • JUSTICE SCALIA'S INFLUENCE ON LEGAL WRITING
LAW FIRMS INNOVATE TO AVOID 'KODAK MOMENT' • A JUROR'S UNSOLICITED ADVICE

ABAJOURNAL

APRIL 2016 THE LAWYER'S MAGAZINE

BEYOND IMAGINATION:

HOW ARTIFICIAL INTELLIGENCE IS ALREADY TRANSFORMING THE LEGAL PROFESSION



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ABA JOURNAL
VOL. 102, NO. 4 APRIL 2016

ZINA MAKAR
A false police report sent her client to jail for five days. The charges were dismissed, but Makar says she "should have gotten out a lot sooner and shouldn't have had to pay" bail costs she can't recoup.

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has devised a program to help lawyers network with potential clients.

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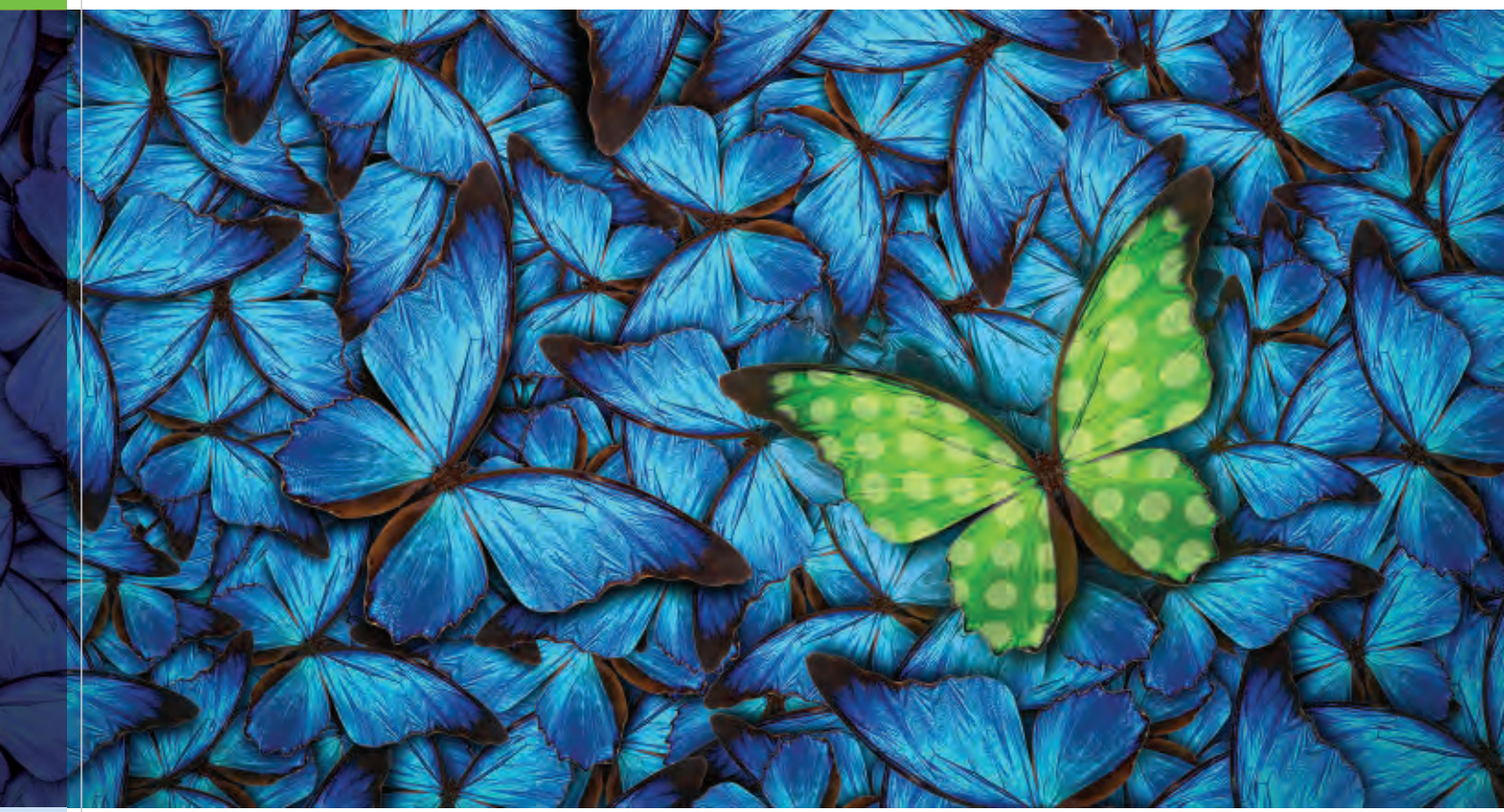
A different kind of retirement plan.



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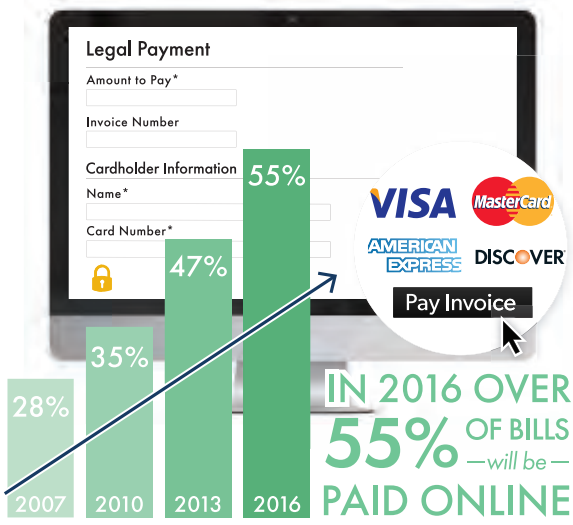

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CONCERN AND CONSEQUENCES

Regarding "China's Human Rights Lawyers," February, page 36: This attack on human rights through attorneys in China needs to be of concern to all attorneys, and all people. There must be consequences for the actions of China's governmental leadership.

David Deehl
Miami

CLEANING TIME

Regarding "Bill Black's Quest," February, page 56: Bill is my choice for U.S. attorney general for life, hands down. No one is better qualified to clean out the twin Augean stables of Wall and K streets.

Richard H. Caldwell
Annapolis, Maryland

A CALL FOR CONSERVATIVE ARTICLES

I've just opened up the February issue of the *ABA Journal*, which features a lead story about Chinese crackdowns on human rights lawyers. But once I get beyond the glossy red and orange cover, I find articles on lawyers who are trying to make sure illegal immigrant children get to stay in the U.S. ("The Passionate Pragmatist," page 48), lawyers who are prosecuting the continued hunt against corporate bankers allegedly responsible for the subprime mortgage crisis ("Bill Black's Quest"), an article decrying the unavailability of bankruptcy recourse for "legitimate" marijuana businesses ("No Relief," page 11), a piece trumpeting the availability of defense tools to use against our law enforcement officers in misconduct cases ("Clicking for Complaints," page 17), Microsoft's announcement that it continues to push "racial and gender diversity" programs with respect to recruitment and retention of inside and outside counsel ("Opening Doors," page 29), and, in the Your ABA section, a piece pushing even more diversity efforts within the ABA itself ("New Math," page 65).

Sure, there are a few pieces in there about topics like Supreme Court Justice Samuel A. Alito Jr. (which almost sounds a disappointed tone about the judge's consistent conservatism) and patent laws' impact on reselling of ink cartridges. There's the lead story about China. But where are conservative pieces pushing back on illegal immigration; balancing the liability of our banking institutions with the irresponsibility of borrowers who took out oversized loans; rejecting or limiting the legalization of marijuana; or pointing out that diversity programs are not only about advancing one group, but also inherently about excluding others? I submit they must be very rare indeed.

On the cover of the *Journal*, in very small black print, there is a little motto that reads "The Lawyer's Magazine." For some of us, I guess that's true. Perhaps this is all just a sign of the times.

Christopher M. Hinsley
Miami

CORRECTION

Because of an editing error, the subhead on Bryan Garner's February column, "Charting a Public Service Path," page 25, misidentifies as one and the same the aspiring library board member and the municipal charter drafter. They are separate individuals.

The *Journal* regrets the error.

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Working Together Makes a Difference

ABA Day 2016 marks 20 years of advocacy and lobbying for justice on Capitol Hill

"Ten people who speak make more noise than ten thousand who are silent."

That simple truth voiced by Napoleon Bonaparte identifies the key to the success of ABA Day on Capitol Hill, when association members from all jurisdictions show up in force to visit the offices of their elected representatives and other lawmakers. This year, I hope you can join me for the 20th Annual ABA Day in Washington, D.C., April 19-21, and make some noise on important issues.

Led by former House of Delegates Chair Robert Carlson and organized by the ABA's Governmental Affairs Office, ABA Day gives members an opportunity to join together and educate Congress on issues vital to the justice system. ABA Day allows our members to hone their skills in the art of persuasion and to level the justice playing field for everyone.

Through our advocacy, the ABA has been able to make a difference in the funding for the Legal Services Corp. At ABA Day 2015, more than 400 bar association volunteer leaders from around the country lobbied for increased funding. Thanks to their efforts, Congress appropriated $10 million more over the previous year to the LSC. But it's not enough.

Current funding levels may not meet the demand of the growing population of 1 in 3 Americans eligible for LSC legal aid. It is imperative that those eligible for aid be able to receive it.

Through its advocacy efforts, the ABA can make a difference assisting Congress with criminal justice reform. We want to continue encouraging bipartisan efforts. The United States has the highest incarceration rate and largest prison population in the free world. The ABA's support for federal sentencing reform that could eliminate mandatory minimum sentences and expand alternatives to incarceration exemplifies the principles that make our association great.

ABA support for reauthorizing the Juvenile Justice and Delinquency Prevention Act, as well as the Second Chance Act, represents concrete ways to eliminate barriers produced by the collateral consequences of conviction and to deal with racial disparities in the justice system. This legislation can help slow the school-to-prison pipeline, a problem that the ABA's Coalition on Racial and Ethnic Justice, chaired by Leigh-Ann Buchanan, has been addressing and helped bring to light.

ABA Day also includes events recognizing members of Congress and grassroots advocates for their support of the legal profession and justice system. This year, Senators Cory Booker, D-NJ, and Charles Grassley, R-Iowa, will receive our Justice Awards for leadership on the Sentencing Reform and Corrections Act and juvenile justice reform. Justice Awards will also be presented to Rep. James Sensenbrenner Jr., R-Wis., for introducing the Voting Rights Act and Second Chance Reauthorization Act, and Rep. Joyce Beatty, D-Ohio, for support of equal rights and efforts to bring affordable housing to distressed communities of color.

Grassroots advocacy awards will be presented to Neal Sonnett of Miami for his years of service on issues concerning civil liberties and criminal justice reform, and to the Military Spouse JD Network, which has advocated for licensing accommodations for military spouse attorneys. A special Presidential Citation will be given to Wade Henderson of Washington, D.C., who for decades has been an ally and advocate for civil and human rights.

ABA Day is the ideal opportunity to leverage the power of our more than 400,000 members to make our justice system one that everyone believes is fair and available to them. The ABA does important work. We develop policies through our House of Delegates that improve the justice system and people's lives. ABA Day is our opportunity to persuade members of Congress to make those ideals live.

As President Franklin D. Roosevelt once told a business delegation after a meeting, "Okay, you've convinced me. Now go out there and bring pressure on me."

I am looking forward to this April, when we all can demonstrate just how convincing we, as members of the ABA, can be applying that pressure to lawmakers to effectuate positive change. We *can* make a difference. ■

Follow President Brown on Twitter @Brown4Lawyers.

PHOTOGRAPH BY MARC HAUSER

Opening Statements

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

ILLUSTRATION BY SAM WARD

Yicky Yak

Do anonymous social media apps create Title IX violations?

LAST YEAR, STUDENTS AT THE UNIVERSITY OF MARY WASHINGTON in Fredericksburg, Virginia, used Yik Yak, an anonymous social media app, to spew hatred and violence against their classmates.

Posters lobbed more than 700 comments at members of Feminists United, a student-run organization that had spoken out against bringing fraternities onto campus and against the school's rugby club for a vulgar chant.

The anonymous posters used crude, demeaning and sexually explicit language in reference to the feminist group and its individual members. One comment included tying "these feminists to the radiator" and raping them, according to Feminists United members. The targeted women asked their school administration to get control of the situation, but say they failed to get an adequate response.

Debra Katz, a Washington, D.C.-based civil rights attorney for Feminists United, argues that universities have a duty to investigate cyberthreats, harassment and bullying against students.

"Students across the country are being targeted online based on gender and race," Katz says. "When people are allowed to say horrible, sexist and racist things, and do it with impunity, it creates a classically hostile environment."

In October a coalition of feminist and civil rights advocacy groups asked the U.S. Department of Education's Office for Civil Rights to remind universities and colleges of their legal obligations under Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964. The groups asked the OCR to issue guidance to academic institutions on their "legal obligations to prevent and remedy all forms of prohibited harassment, including harassment through anonymous social media applications."

The groups also urged the office to provide "concrete examples of what kinds of actions might be appropriate."

But Michael Cooney, a partner at Nixon Peabody in Washington, D.C., says universities can't prevent students from anonymously posting hateful speech. Nor do they have an obligation to monitor third-party platforms.

A person who posts on Yik Yak is equivalent to "someone putting graffiti on a wall," says Cooney. "If the wall is on your campus, you can wipe it clean. But by analogy, the wall here isn't even located on campus. It's someone else's wall."

Yik Yak is one of a growing number of apps that allow smartphone users to post messages anonymously. It is considered particularly compatible with campus life as it allows posters to communicate in real time to other Yik Yak users within a relatively small geographic location.

Generally, Yik Yak users post messages about school complaints, drinking and campus gossip. But there have been cases across the country of the app becoming a forum for racist, misogynistic and homophobic comments, according to civil rights and feminist groups.

A handful of universities have blocked the app on their Wi-Fi networks. Some students are calling for blocking Yik Yak more completely by setting up a "geofence" around the ZIP codes of a specific campus. There has also been increasing pressure on the developers of social networking platforms to consider the apps' potential for harassment and abuse. Yik Yak did not return a request for comment.

Eugene Volokh, who teaches free speech law at UCLA, says comments that specifically target individuals or institutions with violence could be considered criminal in nature. He says universities may have some ability to help identify people who make legally punishable threats, with the assistance of police departments.

However, Volokh emphasizes that colleges and universities do not have a duty or even an ability to control merely hurtful speech on social media. "You are entitled to say derogatory things," he says. "This is constitutionally protected speech. Even advocacy of violence in the abstract is protected."

But Katz argues that race- or gender-based harassment has no place on campus. Last May UMW feminists filed a Title IX complaint with the Office of Civil Rights. The complaint alleges that the university administration subjected students to a hostile environment by failing to properly respond to sexual harassment on Yik Yak. The OCR has since launched an investigation into the university.

University spokeswoman Marty Morrison says the school does not feel it is appropriate to comment at this time, but a previously released statement said UMW welcomed the investigation and guidance.

—Anna Stolley Persky

Art in Fact

Synthetic DNA may help reduce fraud in the art community

ART HAS LONG BEEN USED FOR NEFARIOUS PURPOSES, including money laundering and tax evasion. And the art market is increasingly plagued by fakes and sophisticated forgeries, which not only cost unsuspecting buyers millions each year but also result in

ISTOCKPHOTO

the plummeting confidence of potential buyers.

The Global Center of Innovation at the State University of New York at Albany is working to combat those issues by building a system of transparency in art sales through synthetic DNA. The system would use lab-created molecules—not the personal DNA of artists—that would be inserted into artworks as a secure way of verifying both authenticity and ownership. The tags would be invisible and not easily subject to tampering, but they'd be easily read by a scanner linked to a database with definitive information about the piece, thereby thwarting theft and forgery. With all sales traced, itwould be far more difficult to use artworks for unlawful deals, and developers are hoping this new authentication system will transform the art market.

"From a financing perspective, advances in synthetic DNA lower the risk in this asset class and theoretically encourage more use of art as a tradable commodity," says Washington, D.C., lawyer Cari Stinebower of Crowell & Moring. "The illicit trade in antiquities and art has survived because of the opacity of deals, but the potential for tagging and tracking a work brings more confidence that the transactions are above board and permissible."

The art industry is the largest lawful, unregulated industry in the world, generating $60 billion to $1.25 trillion in annual sales worldwide, according to Lawrence Shindell, chairman of Aris Title Insurance

Corp., which specializes in underwriting art and is helping to fund the SUNY project. "Art is important as the cultural record of society, and in the art industry, high-value objects move around the world frequently."

As a result, art touches many segments of the law, including trusts and estates, governmental authority (such as border control), financial institutions (which lend against art as collateral) and political treaty enforcement (related to terrorist financing), explains Shindell, who is also a lawyer. "All stakeholders must be able to interact reliably around art objects so they have a common interest in asset integrity."

The synthetic DNA will offer value akin to what vehicle identification numbers give to the automobile industry, he adds. "The entire global supply and distribution chain in the automotive industry works effectively because VIN numbers uniquely identify each automobile. Cars without VIN numbers present risk and negative market opportunities such as money laundering. VIN numbers create a means of systemic and interoperable interaction" and the synthetic DNA will work similarly.

> "Art is important as the cultural record of society, and in the art industry, high-value objects move around the world frquently."
>
> —*Lawrence Shindell*

While the specifics are vague, synthetic DNA markers will work across the range of media—from textiles to photographs, from paintings and sculptures to antiquities such as a 3,000-year-old Native American arrowhead, according to Shindell. The process, he says, will involve several technologies functioning together "in the same way that someone using an iPhone can speak to another person using a Samsung phone."

Right now, SUNY is working with a group of first-adopting artists and museums, and the system should be up and running in beta form later this year. By design, the developers are following an unhurried developmental process in an effort to generate market engagement and confidence. "This dynamic will work because it approaches solutions systemically and not in a vacuum," Shindell says. "Each ecosystem participant must have the confidence that other stakeholders will similarly be confident in the standards-based technologies."

—Leslie A. Gordon

10 QUESTIONS

Moving Forward

From recession to motherhood, this Chicago lawyer has driven her career to adapt to the challenges of change

A YEAR INTO HER NEW POSITION AS ATTORNEY-IN-RESIDENCE at Nextpoint, a litigation management software and support company, Julianne Walsh faces none of the challenges of her last gig.

Leading advanced cybersecurity webinars does not involve singing the ABCs. The lawyer-clients she strategizes with generally remember to say "please" and "thank you." And she has yet to pick up a sippy cup in a corner office or boardroom. Returning to work after five years as a stay-at-home mom wasn't easy, but this Chicago lawyer made it work, as she has in the past.

From country music marketing to law school, from BigLaw to solo practice and on to the legal tech sector, Walsh has always been driven by professional challenges and steered her career to grow and thrive in the face of change.

JULIANNE WALSH

"There's a lot of judgment, especially when you have a law degree. People think you're wasting your education if you're not actively using your degree."

Let's start with what seems like your most drastic career transition: re-entering the workforce after five years at home with your children. How did you do it?

I started by talking to people. Everyone I met, even moms at the playground, I asked what they did. I wanted to know what was out there—I was waiting for something to connect. Then a friend from my kids' school mentioned she used to work for a legal technology company and that I should get in touch with her former colleague. I reached out and set up a casual, informational interview to learn about her industry and experience. Most people, especially women, are willing to help each other, and everyone's willing to talk about themselves. We chatted, and she passed on some names of companies and contacts in the legal tech industry. Later that day, I got an email from her that said, 'Don't call anyone on that list until I talk to my boss, because we may have a position for you.'

And they did! What was it like going back to work?

My job is supportive and flexible, but in the beginning I was overwhelmed. Every time I felt like I had the work-life schedule down, something would change. But there are so many parents who work and figure it out. You quickly realize that everything doesn't have to be lined up ahead of time—you master the art of balancing everything.

What made you leave the law in the first place?

It was 2008, and the real estate market crashed. When you're a real estate attorney, you only get paid when the deal closes. And nothing was closing. At the time, I had a 2-year-old at home and was pregnant with my second, so I finished up my last deal in the delivery room and signed on as a full-time, stay-at-home mom.

Did you always intend to go back to work?

Yes, I knew I wanted to go back to work, but I did not know what my next challenge would be.

There's been much written about the tension between working moms and stay-at-home moms. Did you ever experience that?

Definitely. There's a lot of judgment, especially when you have a law degree. People think you're wasting your education if you're not actively using your degree. Who knows why people think that? Maybe they wish they could stay home. But I'm happy with my life, and I am not going to justify any of my choices for those folks. I learned better multitasking and negotiation skills from my kids than any job I have ever had.

In country music marketing you worked with stars like Clint Black and Alan Jackson. What

PHOTOGRAPH BY WAYNE SLEZAK

made you become a lawyer?

Marketing was a great job right after college. I met a lot of talented artists and went to a lot of state fairs. But I knew there was a glass ceiling in marketing at the distribution company, and I wanted more structure in the workplace. As far as structure, I went from one extreme to the other.

Why did you focus on IP?

It bridged my experience in the music industry, but I also grew up with it: My father is a patent attorney. When we were younger, he would put a "TM" or "©" on everything my sisters and I created.

While you were at a big firm, you changed practice groups. How did that happen?

I started in the firm's IP group, but then I began doing some transactions with a lawyer in the real estate group. He became my mentor, so I started working more and more with him, and that's how I ended up moving into real estate.

Why did you leave the firm to go solo?

I started doing some house deals on the side. I really loved the connection with people. When you're an associate in a big law firm, you're working with paper, not people. You very rarely get the opportunity to interact with clients. That's the piece I was missing.

What's it like being in your 40s and entering the youth-dominated tech sector?

One of the first things a 20-something colleague said to me was: 'When I'm older, I want to be just like you.' I said, 'If you meant that as a compliment, it wasn't.' Yes, I am older, but it gives me credibility. I am a lawyer, and I have deep experience in the workforce. So we're bridging gaps and learning together: You show me how to navigate the settings panel in GoToWebinar, and I'll help you understand what's important to practicing lawyers.

—Jenny B. Davis

Cartoon Caption

CONGRATULATIONS to Paul Agathen of Washington, Missouri, for garnering the most online votes for his cartoon caption. Agathen's caption was among the 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, April 10th, with "April Caption Contest" in the subject line.

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

"Take me to your lawyer."
—Paul Agathen of Washington, Missouri

Hearsay

In January, the U.S. Senate confirmed the first African-American woman to be a federal judge in the U.S. District Court for the District of Minnesota.

Source: Brennan Center for Justice (Jan. 22).

Down, Down, Down

At the end of **2014**, some **6.8** million people were under the supervision of U.S. adult correctional systems. This is the lowest number since **1996**, when **5.5** million people were under correctional supervision.

Source: U.S. Bureau of Justice Statistics (Jan. 21).

Did You Know?

In the last year, 35 percent of consumers have made purchasing decisions based upon privacy concerns.

Source: Consumer Outlooks on Privacy, *Morrison & Foerster (Jan. 26).*

10 Years

The amount of time that elapsed between Justice Clarence Thomas' last question asked on the bench and those that occurred this year.

Source: Associated Press (Feb. 29).

27

The number of states that have been able to reduce by 50 percent the number of youths committed to juvenile detention centers between 2001 and 2013.

Source: Declines in Youth Commitments and Facilities in the 21st Century, *The Sentencing Project (Dec. 14, 2015).*

The amount of money donated last year to universities in the United States.

Source: bloomberg.com (Jan. 26).

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The Docket

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PHOTO ILLUSTRATION BY STEPHEN WEBSTER

Driving Exam

How much privacy are drivers willing to give up for better car insurance rates?

By Ellen Rooney Martin

National Pulse

Drivers who want to lower their car insurance rates may someday have to allow Big Brother to ride shotgun—and that has some legal and privacy experts concerned.

Insurance giant Allstate has raised eyebrows after being granted patents for a proposed high-tech surveillance system that could track a driver's every move. The company won patents for technology that, through the use of cameras and sensors, could monitor whether a driver is speeding, peeling rubber or turning without signaling. Sensors could even record a driver's heart rate and blood pressure and gather information about passengers.

Not only could Allstate use that data to set insurance rates and analyze driver behavior, the company could be free to sell it to third parties such as life and health insurance companies, potential employers, credit rating agencies and advertisers.

As with other types of data companies collect from consumers, drivers are unlikely to know what's done with it, how it's stored, and who winds up with the information for what purpose. And though Allstate's new technology would require consent for those willing to give up such details, privacy experts worry about the unintended consequences.

"It's impossible for individuals to monitor what companies are doing with personal data or to exercise meaningful control over most data," says Fred Cate, director of Indiana University's Center for Law, Ethics and Applied Research in Health Information. Even though many companies provide consumers with their privacy policies, Cate argues they do little for the consumer, "however well-intentioned they may be."

PRIVACY IN PERIL?

If Allstate installs its new sensor system, the company would be able to monitor behavior behind the wheel, such as aggressiveness or patience, caution or recklessness, and compliance with laws. In fact, its patent application mentions that such characteristics "are relevant to each individual's behavior in other situations, including performance of job duties, behavior in stress and meeting obligations owed to others."

Allstate declined to comment for this story. In a statement, however, a representative wrote, "Intellectual property we develop as part of our connect car program is geared toward improving safety, value, underwriting fairness and the driving experience of our customers." The company also said it may not use all the patents, but it didn't rule that out either.

In a speech last May, Allstate chief executive Thomas J. Wilson talked about "monetizing data," but downplayed privacy concerns about data collection technology the company already uses. "We're not seeing any huge consumer pushback on it," he said. When offered a 10 to 20 percent discount on insurance, consumers typically opt in without a second thought, he added.

Allstate already uses a form of data collection with three-quarters of a million drivers through "telematics," a technology that transmits data in real time between the car and the company, Wilson said in his speech. Allstate's Drivewise and Drivesense monitors collect data on mileage, hours on the road, speed and brake activation. "We're connected with you while you're in your car so we can tell how you're driving," Wilson said.

In recent years, Geico and other insurers have also used telematics, offering to place devices in cars with the lure of lowering rates.

In addition to documenting who's driving a vehicle, insurance companies want to know where drivers stop, how fast they're going, how many passengers are in the car and what they're doing. All of this could be used to lower—or raise—insurance premiums. Insurers already get notified when drivers are issued speeding tickets; but through on-board sensors, they might also discover whether drivers are speeding their kids to hockey practice or rolling through a stop sign in the middle of the night—even if they don't get nabbed by the police.

Allstate's patent application indicates that the company would collect data including time stamps of trips drivers make, maps of driving distances, projected times between distances, traffic signals, local speed laws and weather. Once that data is collected, it's possible that it may be of interest to law enforcement, which raises a host of new issues.

LEGAL CHALLENGES

Courts already have challenged police for gathering data from vehicles, particularly from GPS technology. In 2012, the Supreme Court held in *U.S. v. Jones* that installing a GPS device to monitor a vehicle's movements constitutes a search under the Fourth Amendment. Though the case involved police installing the device to track a suspected drug trafficker, it raised the broader question of how far the government can go in monitoring a person's movements through such a device, whether the police installed it or not. A year later, the Massachusetts Supreme Judicial Court ruled on a similar case, saying that the government must have probable cause and provide judicial oversight before tracking vehicles by GPS for extended periods.

Such cases are closely watched by the nonprofit Electronic Privacy Information Center. "There is an urgent need to establish meaningful and enforceable privacy and safety protections," says Khaliah Barnes, associate director of the center.

Barnes testified in November before the U.S. House's Committee on Oversight and Government Reform during a hearing on the "Internet of cars," a term that refers to the many ways in which vehicles are connected through digital technology. During the hearings, Barnes urged Congress to establish safeguards for drivers of connected vehicles. "Consumers are grossly unaware and privacy policies are opaque," Barnes says. "People aren't aware of the level of detail of the data collected."

OnStar, the company behind the in-car communication system from General Motors, raised a stir in 2011 after it proposed changing user agreements. The changes would have allowed it to continue collecting information from customers who stopped their subscriptions and sell the data to third parties. Facing a wave of protest and a congressional investigation over its practices, the company withdrew the plan.

In his speech, Allstate CEO Wilson made clear that the insurer was considering its options with the data it gathers, including selling it. "Could we, should we sell this information we get from people driving around to various people and capture some additional profit sources and perhaps give a better value proposition to our customers?" Wilson asked. "It's a long-term gain."

The lure of a free vehicle and $100 gas card was enough for Eva Krcmarik to agree to drive a car with sensors as part of a study by

the University of Michigan's Transportation Research Institute, which studies safety and transit issues for federal and state agencies, insurance companies and automakers.

Krcmarik, who was in high school at the time, got a car equipped with small cameras aimed at the driver's seat and mounted in the front and back seats, as well as under the side-view mirrors. "After a while I just forgot them," she says. "I'm a pretty safe driver, and it didn't restrict what I did or how I drove."

Krcmarik says she didn't have any privacy concerns. "At the time I don't think I cared what they were looking for," she says. She later learned she was part of the control group and no video was used in the study. "I never thought much about what they would use the information for because I was just 16 years old and happy to have a free car for 15 weeks," she says.

While there are undoubtedly benefits to consumers, experts worry that ubiquitous data collection has illuminated a practice that could have many consequences. "Especially when data collected for one purpose are used for something very different, and especially when the data aren't appropriate to the use," Cate says. He suggests that new laws are needed to create frameworks for defining permitted uses for data. Current regulations focus on notice and consent, paying little heed to the risks and uses of the collected data, he says.

"It's not just that the law is outdated—it certainly is—but even more so that it is all too often focused on the wrong issue, consent, instead of the harms and benefits and their likelihood of resulting from a particular use," Cate says. ■

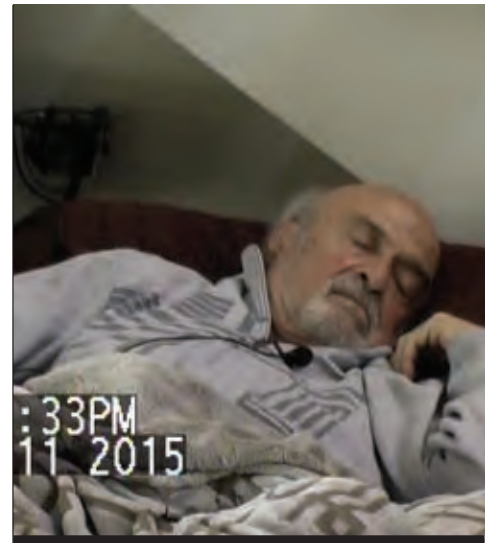
PHOTO COURTESY OF BENNO ASHRAFI

Dying Depositions

Plaintiffs in California asbestos cases feel they're being questioned to death

By Jie Jenny Zou

National Pulse



Nader Kordestani

Grainy video shot last August shows 75-year-old Nader Kordestani lying in a padded recliner at his home in Calabasas, California, near Los Angeles. Off camera, a defense lawyer asks him whether it's true his health is failing.

Dressed in a gray sweater and covered with a blanket, Kordestani replies in a stilted voice: "That's correct. I am, believe me, I am dying. I'm not in good shape. I am not going to survive."

For more than three hours, Kordestani responds to questions between labored breaths and hacking coughs, his eyes at times struggling to stay open. Lawyers argue as the Iranian immigrant is peppered with questions, many repetitive, about events that happened decades earlier.

It is not Kordestani's first time being deposed while suffering from mesothelioma, a rare and aggressive cancer linked to asbestos. A roomful of lawyers questioned him for more than 17 hours over 18 days in 2013. That year, Kordestani had sued 50 corporations for allegedly exposing him to the fiber while he worked at an Iranian oil refinery, starting in the 1960s. The refinery was built, in part, by American companies, which is why he's suing in the United States.

Depositions routinely last 20 or more hours in California asbestos cases, lawyers say, far outpacing federal limits and other states where the number of hours rarely exceeds single digits.

The arduous and antagonistic process puts a heavy strain on mesothelioma patients typically given months to live after diagnosis and simultaneously undergoing harsh therapies such as radiation. Situations like Kordestani's raise a thorny question: How much is too much?

TESTING PATIENCE

Plaintiffs lawyer Jeffrey Simon, who is licensed to practice in California, New York and Texas, says lengthy depositions have only been an issue in the Golden State. "I do not think that it is appropriate to depose a dying plaintiff for days on end," says the founding shareholder of Simon Greenstone Panatier Bartlett, based in Dallas. "That's every day in California."

In 2015, his firm handled three California cases in which plaintiffs were deposed for, respectively, 21 hours over six days, 36 hours over 10 days and 48 hours over 21 days. Simon and other plaintiffs lawyers call the drawn-out depositions a stalling technique meant to run out the clock or harass sick clients into dismissing claims. In California, clients must be alive during trial to claim damages for pain and suffering.

Defense lawyers counter that detailed depositions enable companies to adequately defend themselves when millions of dollars are at stake in plaintiff-friendly jurisdictions such as California. Mesothelioma settlements, the lawyers say, can range from $1 million to $5 million, with the success of cases often centered on whether plaintiffs can positively

identify exposures to specific asbestos-containing materials.

California's rules on damages, coupled with high standards for case dismissal, give plaintiffs a leg up, says Anosheh Hormozyari, who practices in Los Angeles with DeHay & Elliston and whose clients include ExxonMobil and 3M. "They're able to recoup a lot of money; it's a lot easier to get in California than in other states."

Hormozyari says plaintiffs are inclined to sue financially solvent companies, not the ones most likely to be responsible for their asbestos exposures. "You throw the pasta on the wall and see what sticks. That's kind of how it seems."

She denies that depositions are extended for any reason other than to gather pertinent facts. "I've never seen it purposely stall in the hope that something unfortunate happens to the plaintiff," Hormozyari says, noting that she and plaintiffs lawyers recently agreed to a 26-hour deposition. "The majority of these sick plaintiffs will not make it to testify for trial. You have to find a way to lock [in] the testimony for trial."

SETTING LIMITS

Like most states, New York doesn't limit the length of depositions, relying on cooperation between opposing lawyers or court discretion to curb testimony. Among those with limits are Texas, which restricts depositions to six hours, and Arizona, which holds them to four.

Only a third of the states have formal limits, according to Stephen Nichols, a defense lawyer with Polsinelli in LA who co-authored a 2015 article about asbestos depositions, "The Discovery Deposition Conundrum." Nichols urged shorter, more efficient depositions, advising lawyers against falling into "a 'groundhog day' mentality" with witness questioning.

Simon blames local courts in California for allowing defendants to drag out formulaic depositions far longer than what is considered ample time in other jurisdictions. "The cross-examinations in California are lengthier, but not better," he says.

Find additional coverage of deposition guidelines at ABAJournal.com/magazine.

California lawmakers emulated federal courts in 2013 by limiting most civil depositions to seven hours. An exception was made for complex cases, including asbestos claims, which were given a 14-hour cap.

But lawyers say jurisdictions see the limit as a suggestion, not a hard-and-fast rule. In 2014, the Los Angeles County Superior Court defaulted to an older, 20-hour guideline after it was sued by a defendant who hadn't had time to question a plaintiff in an asbestos case. The court also coordinates asbestos cases in San Diego and Orange counties, and has been known to grant additional time beyond 20 hours.

In October, Judge Emilie Elias of the LA County Superior Court declined a request to block Kordestani from being deposed further in a case filed by another former worker at Iran's Abadan refinery, Samad Sarooie. Abadan was among the world's largest refineries during the late 1940s, producing nearly half a million barrels daily, according to court documents.

The Sarooie case is separate from Kordestani's own 2013 suit. Though the two men played basketball occasionally, Kordestani testified that he knew Sarooie "not at all well" and was unable to provide any details on his work history.

"They just drill and drill; they ask the same question 20 times," Kordestani's daughter, Neda, says of the August 2015 deposition that was mandated by subpoena. "My dad doesn't even know enough about the facts they are looking for."

The deposition transcript shows repetitive questions about Sarooie's work history that Kordestani was unable to answer, as well as detailed questions such as whether Kordestani could recall the sizes of crates and boxes he saw in the refinery. The deposition was cut short when Kordestani's wife became concerned for her husband's health; he had spent the night before at the hospital.

Neda Kordestani says her father's health has only worsened since his 2013 mesothelioma diagnosis, with recent bouts of pneumonia and shingles. He has undergone more than two dozen rounds of radiation and chemotherapy and uses an oxygen machine to breathe.

Kordestani can be deposed again for the Sarooie case since his testimony is considered incomplete, but his lawyer and daughter say he has no intention of participating any further in a lawsuit in which he has no stake, regardless of any legal repercussions. "You have someone who is spending their entire existence trying to stay alive," says his lawyer, Benno Ashrafi, who oversees the asbestos practice at Weitz & Luxenberg in Los Angeles.

Erin Carpenter, who represents defendant Amec Foster Wheeler in the Sarooie case, did not respond to several requests for comment. Carpenter had previously deposed Kordestani at length about the Abadan refinery in the 2013 case. His firm, Hugo Parker, subpoenaed Kordestani for the Sarooie case.

"Many of these cases have people who are dying. They have to be subjected through depositions and all of that. It's a hard thing," Elias said in court in October. "I understand [Kordestani] is very ill, but if I take the position that very ill people don't have to have their depositions finished, we will have no depositions taken."

Elias played down the seriousness of a note from Kordestani's oncologist that read "any further deposition of Mr. Kordestani will cause immense amount of physical harm to Mr. Kordestani and could shorten his life."

Said the judge: "It's not going to cause his death."

A court representative declined to comment on Elias' behalf. ■

Jie Jenny Zou is a reporter with the environment and labor team of the Center for Public Integrity in Washington, D.C.

After Scalia

The Supreme Court goes back to work amid uncertainty

By Mark Walsh

Supreme Court Report

Antonin Scalia was a force on the Supreme Court for nearly 30 years, both for his conservative judicial outlook and his sheer strength of personality. His unexpected death on Feb. 13 at a ranch resort in Texas has plunged the court into a period of uncertainty—one that could last well into the next term.

Over the longer run, Scalia's successor will have the chance to reshape the court, either solidifying the rightward trend of the past three decades or steering the court back to the left on many issues.

"This isn't just another vacancy," says Shannen W. Coffin, a partner with Steptoe & Johnson in Washington, D.C., and a former counsel to Vice President Dick Cheney. "The future of the court hangs in the balance."

Carrie Severino, chief counsel and policy director with the Judicial Crisis Network in Washington and a former law clerk to Justice Clarence Thomas, put it more bluntly: "This is for all the marbles."

As of the deadline for this article, Senate Republicans were steadfast that they had no intention of giving a hearing or vote to whomever President Barack Obama were to nominate for the court. But the president indicated he planned to put forth a nominee.

While that battle plays out between the executive and legislative branches, the Supreme Court has jumped back into its busy term with eight justices.

Justice Samuel A. Alito Jr. told an audience at Georgetown University Law Center on Feb. 23 that Justice Scalia's death came as a shock to his colleagues. But as for the prospect of an eight-member court for the foreseeable future, he said, "We will deal with it."

Justice Stephen G. Breyer,

Supreme Court Justice Antonin Scalia's courtroom chair and bench are draped in black to mark his death as part of a tradition that dates to the 19th century.

AP IMAGES

speaking two days later to an audience at the Newseum in Washington, said, "We will do our work."

'THE USUAL SUSPECTS'

Breyer pointed to statistics about the court's caseload indicating that a relatively low proportion of cases are decided 5-4. He cited statistics from the 2013-14 court term, when out of 73 decided cases, just 10 (or 14 percent) were decided 5-4. And of those 10, Breyer said, only six had a lineup of what he called "the usual suspects."

By that, he clearly meant the court's conservative bloc of Chief Justice John G. Roberts Jr. and Justices Scalia, Thomas and Alito, being sometimes joined by Justice Anthony M. Kennedy to form the majority. That was the result in four of those six cases that term, with Kennedy joining the liberal bloc of Breyer and Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan in the other two.

But the 2013-14 term was one of unusual unanimity on the court, with two-thirds of cases being decided unanimously and a below average share of 5-4 cases, according to statistics compiled by SCOTUSblog.

The very next year, in the 2014-15 term, unanimous decisions were back down to 41 percent. A 5-4 split was again reflected in just about one-quarter of decided cases. But this time, the usual-suspects split accounted for 13 of the 19 cases decided by that narrowest of margins.

"Ah, but those are the most important ones," Breyer said, playfully suggesting that was an independent observation, not necessarily his.

This term, the "important cases" include pending ones from the fall or early this year for which Justice Scalia had participated in oral arguments—affirmative action in higher education, the meaning of "one person, one vote" in state and local elections, and mandatory fees for nonmembers of public-employee unions.

But with Scalia's death, his tentative vote in the justices' private conference can no longer be counted. Meanwhile, the court will have heard several more major cases by this spring—on abortion, religious objections to federally mandated insurance coverage of contraception, and Obama's "deferred-action" immigration policies.

POTENTIAL DEADLOCKS

The court could deadlock 4-4 in any of those cases, as well as in others from its docket. (The affirmative action case, *Fisher v. University of Texas at Austin*, is an exception among the bigger cases, since Justice Kagan has been recused in that case. That leaves seven justices participating in that one.)

Justice Samuel Alito said that Justice Scalia's death came as a shock to his colleagues. But as for the prospect of an eight-member court for the foreseeable future, he said, "We will deal with it."

The court has three possibilities when it deadlocks in conference, says Erwin Chemerinsky, the dean of the law school at the University of California at Irvine and contributor to ABAJournal.com.

For cases heard by Scalia and for which he would have been a crucial vote, the justices could reassess whether they could come up with an opinion on narrow grounds. That is the least likely scenario, Chemerinsky says.

The second outcome is to leave the tie in place. In such cases, the court announces that the lower-court ruling before it is "affirmed by an equally divided court." Such decisions carry no precedential effect for the nation or the high court.

In the days after Scalia's death, there was much speculation about such an outcome for a case like *Friedrichs v. California Teachers Association*, about public-employee union fees. Oral arguments in the case had left many legal observers with the impression that Scalia was likely to side with the conservative bloc and strike down a 1977 precedent authorizing such fees, which would be a huge blow to the unions.

Terence J. Pell, the president of the Center for Individual Rights, a Washington group that represents nonunion teachers in California who brought the *Friedrichs* case, says a 4-4 affirmance in the case would be unacceptable—and not just because that outcome would mean a federal appeals court decision in favor of the teachers' unions would stand.

"From our perspective, this is exactly the kind of case that should be held over," Pell says, "because the country needs a decision."

He called for the third option open to the court on a deadlocked case: ordering reargument in the future, when the bench returns to full strength.

Chemerinsky says the high court has the discretion to decide which deadlocked cases to order reargued and which to affirm without an opinion."But," he says, "the rules are murky on this."

SHORT-HANDED COURTS

Writing in the *Wall Street Journal* after Scalia's death, Josh Blackman, a professor at South Texas College of Law, and Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato Institute, pointed out that the Supreme Court has often found itself short-handed because of a vacancy. While some eight-member courts have existed for extended periods because of the death or incapacitation of a justice, others occur as a matter of course

Justice Antonin Scalia

FLICKR CREATIVE COMMONS, AP IMAGES

throughout any term because of, for example, a justice's recusal.

Since World War II, the scholars said, there have been 15 extended periods when the court had eight justices, and "each time the court managed its docket without a hitch."

When the justices split evenly on a case during those periods, it affirmed the lower court without an opinion in 25 cases and ordered reargument in 54. These include examples such as when Justice Robert H. Jackson took leave from the court in 1945 to serve as the chief prosecutor at the Nuremberg tribunals, the yearlong vacancy when Justice Abe Fortas resigned from the court in 1969, and the eight months from the retirement of Justice Lewis F. Powell Jr. in 1987 until the confirmation of Justice Kennedy to the seat after the divisive battle over the nomination of Judge Robert H. Bork.

In those instances, the court set a number of cases for reargument. The situation was a bit unusual when Justice Sandra Day O'Connor announced her retirement in 2005. After Chief Justice William H. Rehnquist died a few months later (and was succeeded by Roberts), O'Connor delayed her retirement until Alito joined the court in January 2006. In three cases heard by O'Connor in which her vote would presumably be the deciding one, the court heard reargurments when Alito joined the bench.

"Rather than making the judicial system grind to a halt, a Supreme Court vacancy merely delays rulings in a small number of cases," observed Blackman and Shapiro.

Irving L. Gornstein, the executive director of the Supreme Court Institute at Georgetown law school, agreed that historical practice at the high court "cuts more for reargument" in deadlocked cases on an eight-member court.

"The court has certainly survived some periods in which it has been operating with eight justices," says Gornstein, a former deputy U.S. solicitor general. Any delay in confirming a nominee "isn't going to irreversibly hurt the court," he adds, "but the longer it goes on, the more concerning it is."

Gornstein notes that Chief Justice Roberts, as recently as a couple of weeks before Scalia's death, has expressed concerns about public perceptions of the justices as Republican or Democratic, based on the party of the presidents who nominated them.

"I think the chief is certainly somebody who will find a way to make this court function as smoothly as possible," Gornstein says. "I'm sure he will try to bring them together, and it will be up to each justice to decide whether to go along." ■

Does This Hurt?

The Supreme Court's ruling in an antitrust case involving the regulation of dentists has raised questions about the regulatory structure for lawyers By David L. Hudson Jr.

Ethics

The organized bar is feeling pain from a U.S. Supreme Court ruling that a regulatory board for the dental profession in North Carolina doesn't have state-action immunity in a Federal Trade Commission antitrust action challenging the board's efforts to block nondentists from providing teeth-whitening services to consumers.

Writing for the majority in a 6-3 decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, Justice Anthony M. Kennedy stated that the dental board, which was made up primarily of practicing dentists, lacked immunity when it sent cease-and-desist letters to nondentists who performed teeth-whitening services.

In the decision issued Feb. 25, 2015, Kennedy said state-action antitrust immunity may not be invoked by a regulatory board unless the challenged restraint of trade is clearly articulated and expressed as state policy, and the policy is actively supervised by the state.

"Active market participants cannot be allowed to regulate their own markets free from antitrust accountability," wrote Kennedy, who stated that "prohibitions against anti-competitive self-regulation by active market participants are an axiom of federal antitrust policy. When a state empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest."

Legal experts generally agree that the case is likely to have important implications far beyond the dental profession.

"The *Dental Examiners* case is the most important decision in my lifetime in consumer protection law and antitrust law," says Robert C. Fellmeth, a law professor at the University of San Diego. "It renders the conduct of more than 1,000 agencies as illegal. Virtually all state regulatory agencies controlled by the same profession being regulated or its 'active participants' engages in per se antitrust offenses. For example, they limit supply and decide who and how many competitors they will have."

PRESERVING INDEPENDENCE

Many bar representatives are wondering what impact *Board of Dental Examiners* will have on self-regulation for the legal profession. The profession emphasizes self-regulation as a foundation of professional independence.

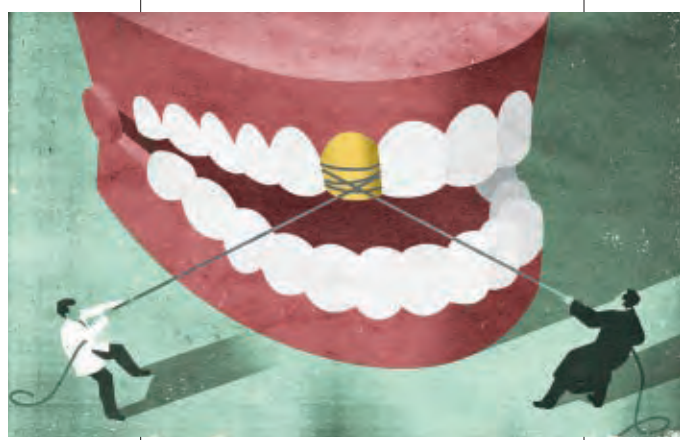
"The legal profession is largely self-governing," states the preamble to the ABA Model Rules of Professional Conduct, which serve as the basis for ethics rules governing lawyers in almost every state and the District of Columbia (California's rules follow a different format). "Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts."

The preamble asserts that self-regulation is vital to the professional independence of lawyers. "An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice." But the preamble also acknowledges that the legal profession "has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."

Nevertheless, the legal profession is not immune from antitrust principles. In 1975, the Supreme Court struck down minimum-fee schedules for lawyers in *Goldfarb v. Virginia State Bar*. In his majority opinion, then-Chief Justice Warren E. Burger explained that even

a learned professional is subject to antitrust laws. "Whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anti-competitive practices with impunity," Burger wrote. "We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act."

What impact *State Board of Dental Examiners* will have on state bar regulation "is not yet clear, and the answer will doubtless vary by state," says Deborah L. Rhode, a professor and director of the Center on the Legal Profession at Stanford Law School. "At issue is governance occurring in three major contexts: admission, discipline and unauthorized practice of law."



In response to the ruling, the Washington State Bar Association directed its ethics committee in December to stop issuing advisory opinions that could be interpreted as efforts to restrain trade in the legal services market. "We recognize the importance and value of the ethics advisory opinions for WSBA members," says Debra Carnes, the bar's chief communications officer. "That is why this is a temporary suspension, as we proceed very deliberately in the wake of the *Dental Examiners* decision. We are currently engaged with outside counsel on an extensive review of our work."

Meanwhile, the Pennsylvania Bar Association temporarily stopped issuing cease-and-desist letters for unauthorized practice of law and is referring UPL complaints to the state attorney general.

And a few months after the Supreme Court issued its decision in *Board of Dental Examiners*, LegalZoom, an online legal services provider, filed an antitrust lawsuit in U.S. district court alleging that the North Carolina State Bar was unreasonably keeping it from offering a prepaid legal services plan in the state. The suit was later settled under a consent decree that allows LegalZoom to offer legal services using lawyers in the state if it adopts certain consumer-protection measures.

UNCERTAIN OUTLOOK

Legal experts disagree over the effect that *Board of Dental Examiners* will have on the long-standing regulatory structure for the legal profession.

"Disciplinary authorities typically have little to fear, because most operate under the dictates and supervision of the state supreme court," says Keith A. Swisher, an attorney in Scottsdale, Arizona, who often represents lawyers in ethics matters. "Most ethics opinions are explicitly advisory only, although certain state supreme courts or other disciplinary authorities will more or less formally consider a lawyer's compliance with an ethics opinion as a mitigating factor in a disciplinary proceeding." Swisher also says that the decision addresses only state-action antitrust immunity, not the merits of any particular practice, although that could trigger costly litigation.

Fellmeth, however, sees the impact of *Board of Dental Examiners* as more far-reaching. "Either a state bar has to divest itself of practicing attorneys or implement active state supervision," he says. "There is an antitrust problem for those state boards that have practicing attorneys on these boards ruling on the ability to practice of other lawyers and there is no independent active state supervision for restraint-of-trade effects."

The question now is how bar associations should respond to *Board of Dental Examiners*.

"First, bar entities should ensure that they are acting in accordance with a clearly articulated state policy that serves the public interest," Rhode says. "These entities should follow formal rules adopted by a disinterested body after notice and comment. Bar practices should also be subject to active supervision, preferably by an individual or a body other than the state supreme court."

Some bars are re-evaluating how they enforce rules on UPL. It's a logical response, says Swisher. "The arguably riskiest subject is UPL, as the North Carolina Dental Board case concerned enforcement of the 'unauthorized practice of dentistry' prohibition against tooth-whitening services," he says. "In addition to treading carefully on potentially anti-competitive subjects, committees should not threaten disciplinary or other enforcement against those who fail to honor their opinions. Of course, most committees already refrain from such activity, but, for example, some UPL committees have been involved in sending cease-and-desist letters."

Rhode says some regulatory functions, such as policing the unauthorized practice of law, "can be handled by local prosecutors or the state's attorney general, who have more public accountability than state bar committees. Many bar committees routinely proceed against lay competitors without evidence of consumer injury. This should cease, and it is more likely to when disinterested decision-makers control enforcement priorities. States should also rethink the composition of governance bodies to prevent active market participants from controlling decisions. No matter how well-intentioned, such participants are likely to lack impartiality in appearance if not in fact." ■

ILLUSTRATION BY SAM WARD

A Tribute to Nino

Justice Scalia's co-author offers an insider's view of his fixed-meaning canon—including Bugs Bunny and the Scots—and their last trip together By Bryan A. Garner

Bryan Garner on Words

"Originalism," so called, is perhaps the single issue for which Justice Antonin Scalia, my co-author on two books, was most controversial. I'll never forget his ire—it was full-blown anger—when I suggested, while we were working on *Reading Law*, that we change the term "originalism" to "historicism." A scholar in England had suggested that we might use that term in preference to originalism, which had long since become a lightning rod in legal language. It's another "ism" of the kind John Lennon lampooned in "Give Peace a Chance." (Citing Lennon was no help to me at all, naturally: Justice Scalia didn't like the Beatles.) The word *originalism* even sounds like the much-discredited "creationism," which is faux science.

Nino (the affectionate nickname he insisted on) was furious at me. "I've spent my whole judicial career calling it originalism, and if I were to change it now, I'd look foolish."

"But originalism is a snarl-word for some people, Nino, and it may hurt us."

"Well then maybe you've made a grave mistake throwing in with me." He hung up the phone on me—the first and only time that ever happened in our 10-year writing partnership.

Thirty minutes later I followed up with a contrite email message assuring him that I wasn't trying to undermine his legacy. We spoke again about 30 minutes later, and he apologized. We talked at some length about what to name the canon of construction that words in legal instruments don't change their meanings over time. Finally we settled on the "fixed-meaning canon," and it became No. 7 in our roster of 57 valid canons of construction in *Reading Law*. Our text also frequently refers to originalism, but the canon's name became "fixed meaning."

Many judges who've read the book have commented that, although they expected to reject the fixed-meaning canon, they found our justifications compelling. I unearthed a great many authorities that Scalia hadn't seen before, and in the end we made a strong historical case for the canon. The few critics we encountered didn't really lay a glove on us when it came to No. 7—nor on most other points, as an independent assessment published in 2014 in the *Journal of Law* found.

Because there's so much confusion about originalism, or fixed meaning, I thought I might—in tribute to my late co-author—coolly set out the term's meaning and its historical basis. I don't do it as a political clone of Scalia: For what it's worth, I'm pretty apolitical, but we disagreed on some hot-button issues. Yet the justice never questioned my bona fides. What we had in common was an abiding love of the English language. We also both believed (and I still believe) that a judge's personal beliefs about policy should remain largely irrelevant to outcomes.

"If I were king," he said in Hong Kong during our last tour together in February, "I'd lock up every flag burner for 20 years! But we have a First Amendment, and I'm not king." Hence he voted with the majority in the flag-burning case: A protest that involves flag burning is protected by the First Amendment. Yet he deplored the act.

But let's get back to the fixed-meaning canon. It's a simple idea: "Words must be given the meaning they had when the text was adopted." It makes a good deal of sense. And if it isn't true, then what is the competing theory? By the way, it's hardly perfect, and usually originalism doesn't even come into play; "textualism" (a commitment to the fair meaning of the governing words) always comes into play, but originalism in only a small fraction of cases.

ALL THE NIMRODS OF 1910

Words change their meanings in wholly unpredictable ways. My illustration of that point was one that Scalia loved. Let's say there's a 1910 statute that provides: "All nimrods in this state must carry a license."

In 2015, someone sues to invalidate the statute as being discriminatory against the intellectually disabled. What's the standard of being a nimrod? An IQ below 80? Why should low-intelligence people have to carry licenses? So the statute gets challenged on equal protection grounds.

The question is whether the 1910 meaning of *nimrod* governs, or the 2015 meaning. Ask almost anyone today, especially anyone under the age of 50, what a nimrod is, and you'll be given any of several possible synonyms: nincompoop, simpleton, doofus, idiot, moron, etc. Scalia was shocked by this revelation: To him, a nimrod was a hunter. He disputed me. We called in his law clerks, each of whom insisted that a nimrod is a stupid person.

He was even more astounded about the reason for the change in meaning: Bugs Bunny. In several episodes of the famous cartoon, the beloved rabbit emerged from a hole to insult Elmer Fudd, carrying his blunderbuss: "Nimrod!" And so several generations of Americans have learned, by osmosis from Bugs, that a nimrod is a dunderhead.

What should a judge do in applying the 1910 statute? Apply the new meaning or the old? Well, that's an easy example: the old, of course. It's a reductio ad absurdum, one of Scalia's favorite turns of mind. Take a principle to its logical extreme to show that it has no

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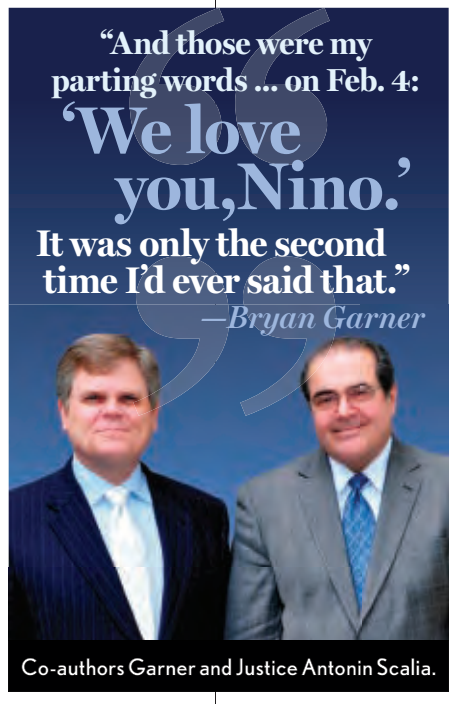
bounds or doesn't work.

What really surprised Scalia was my pointing out that (1) several law professors claim that originalism dates only from the 1980s, and (2) the first statute ever enacted within an English-speaking jurisdiction on the subject of statutory construction—dating from the 15th century—forbade any approach other than originalism.

It's true that the word *originalism* dates only from the 1980s. It's an example of a "retronym," a word invented to account for an age-old thing when some newfangled thing has emerged. Nobody referred to landlines until wireless technology came around; before that, all telephone lines were landlines. Nobody referred to whole milk until skim milk was developed; all milk had been whole milk. You get the idea. So it was with originalism: That was the only method that existed until the mid-20th century.

Some history is in order.

In 1427, the Scottish Parliament enacted the first-ever English-language legislation on statutory construction. Its title was "That nane interpreit the Kingis statutes wrangeouslie." You can read it despite the irregular spelling. The statute made it a punishable offense for any lawyer to argue anything other than original meaning: "Item, The King of deliverance of councel, the manner of statute forbiddis, that na man interpreit his statutes utherwaies, then the statute beares, and to the intent and effect, that they were maid for, and as the maker of them understoode: and [whosoever speaks] the contrarie, shall be punished at the Kingis will." In various presentations we made together, Scalia would quote this statute in a funny Scottish brogue, to the delight of every audience.



Co-authors Garner and Justice Antonin Scalia.

Time did nothing to alter the Scottish view except perhaps to remove the penalties against counsel. The influential Sir Edward Coke espoused fixed meaning in 1644, and so did an English judge five years later: "A statute cannot alter by reason of time." In 1765, the highly authoritative William Blackstone, with whom all American lawyers for a century were intimately familiar, insisted that a 14th century statute must be given its 14th century meaning, not its 18th century meaning. If you have a copy of Blackstone's *Commentaries on the Laws of England*, look at volume 1, page 60. It's the only passage in which Blackstone addressed the point.

The whole idea of a written constitution was to make its meaning stable and enduring. Several founders can be quoted on point. And all the statements about the issue come down foursquare in favor of originalism. As Daniel Webster, arguably the greatest 19th-century American lawyer, said in 1851: "We must take the meaning of the Constitution as it has been solemnly fixed." It's true not just of written constitutions but also of statutes, regulations, city ordinances and contracts—and with those latter documents, the doctrine is generally uncontroversial.

The basic idea is stable meaning. Then there's the question of application to the modern world. That's where things get more difficult. Under the Fourth Amendment, how do we assess a GPS tracker that law enforcement officers affix to a vehicle? A fellow originalist, Justice Samuel Alito (concurring), likened it to having a constable riding at all times in an 18th century carriage—the closest analogue he could invent. Naturally, that would violate the basic expectations of privacy. Writing for the Supreme Court, Scalia pronounced that GPS trackers are illegal tools for law enforcement. That opinion, *Jones v. United States*, changed the way police work is conducted in the United States. Without his influence, we might have a country in which tens of thousands of GPS trackers are attached to cars everywhere, and every movement of countless citizens would be monitored remotely by the central government.

IF WE COULD TURN BACK TIME

People get impatient with the fixed-meaning canon, of course. The U.S. Constitution is unbelievably hard to amend. In early February, Scalia told Asian audiences that he had once calculated that 2 percent of the American population could block a proposed constitutional amendment. Afterward, the two of us agreed that if we could time-travel for five minutes and speak briefly to the founders, we'd encourage them to make it easier to amend the Constitution by democratic means.

In the absence of that ease, however, our polity has taken to asking the Supreme Court to amend the Constitution from time to time. The reason is understandable. Democracy is messy and inefficient, and reformers get impatient.

Although I didn't succeed in persuading Scalia to change the term *originalism*, I did ultimately succeed in persuading him to change the term for its near-antonym: the living Constitution. That term, of course, is a euphemism for an ever-changing understanding of our founding document. In 1961, Justice William O. Douglas wrote a book called *A Living Bill of Rights*. New things could be discovered by the Supreme Court term by term in such a document.

It was a clever euphemism because if you're not in favor of a living Constitution, then apparently you want a dead

Continued on page 71 ▶▶

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Unsolicited Advice

After doing jury service, a playwright offers practical advice for trial lawyers

By Sean Grennan

Storytelling

Recently I had the privilege of serving on a jury in a malpractice case. And I think I saw something you can use.

But let me be clear: I write plays or act in them—some TV and film, too. I know next to nothing about the law: zip. I'll admit I was briefly interested in the legal profession in my early 20s and even took the LSAT, scoring a shade behind a chimp with a crayon; though in fairness, the chimp could juggle.

I've spent the last, wow, nearly 40 years of my life in the performing arts, the last 20 primarily as a playwright. In that time, I've worked on many new pieces. Workshops, readings, "showcase" productions, etc. And I've worked with great and horrific actors and writers (I've even been the latter). I've seen some very humble shows find their way and go on to great things. And I've seen some uber–talented folks crash and burn so badly that they can't find their careers with dental records.

So why does that make me qualified to talk to you? Because if your practice involves talking to a jury, then your profession is storytelling. Just like mine. Really, that's what it is. Boil away the cumbersome (but necessary) procedural stuff and you're telling a story. That said, here are three rules I think might help.

1, 2, 3

Rule No. 1: Less is more. (See also: Try not to bore us.) The trial I was on was a medical-malpractice case, so there were many technical medical terms that, of necessity, we had to wade through. No way around it. But if something is superfluous or tangential—even if you find it fascinating: Move along. Keep the narrative flowing.

We the audience are trying to absorb a lot of info that you might have had months or years to get used to. Talk slowly and assume we have the attention span of a puppy in a ball pit. And pare it to the bone. I've seen writers and composers fall truly, madly, deeply in love with some beautiful moment of a show. You can't pry them off of it with dynamite. And *that* moment, the one that is truly beautiful … destroys the rest of the show. Perhaps it's not about the story, or it makes us follow a minor character too much, or it exhausts our emotions too soon or …? In good storytelling, anything that's not your friend is your enemy, just like Thanksgiving with your family.

No article like this would be complete without a great quote by a wise person, so: "Murder your darlings!" Many writers have been given credit for it, but most likely it was British author Sir Arthur Quiller-Couch, aka Q. Basically it means: Take that wonderful, genius, world-changing, vivid detail you've come up with, and if it is a digression, delete it. Anything that slows or distracts or confuses is a problem. As a kind of Rule No. 1.2, I'd say: Don't give us too many versions of events. It's like trying to watch four movies at once. We might sort of get the plot, but we won't be immersed in any of them.

Rule No. 2: Be good on your feet. The audience doesn't lie. If, during your performance, jurors start to cough, shift in their seats, look around, mentally play Sudoku, they're telling you something. If I'm sitting at a preview of a new show of mine and tuberculosis breaks out, I will be up that night rewriting. Don't argue—fix it!

> **EMOTIONAL SUBSTITUTION:** Remember the day your dog died right before you get up to defend a toxic polluter.

But what if you've got a great plan, a killer "script"? You don't have to rewrite on the spot, do you? Yeah, you do. The best of you can add a little improvisation. See glazed eyes? Say something funny or sad; or drop something; do something that gives us a few moments of relief before you plow on. Self-deprecation is fantastic! Make fun of your skirt or tie or car or baseball team or weight. Be human, see us check back in, and then go on: Go on with your tight, nontangential, concise narrative that draws an easy, clear line between no knowledge at all and the only possible conclusion that decent people can reach. See how I try to drop a little humor into this piece whenever I feel like it's getting preachy? Like that.

In the realm of tight storytelling, there was one truly excellent thing that a lawyer did in our case. She presented a printed timeline for some events that happened over an hour of a mother's labor: the baby's heartbeat, contractions, etc., in 10-minute increments. As she did, a doctor/expert witness described what was taking place in each segment. Even though we were looking at printed sheets on a projector, it felt like we were

watching a Shakespearean tragedy in HD. She moved through the hour of events in less than 10 minutes and, by the end, we were pretty much wrung out and decided. It was clean storytelling in a crushproof box.

Rule No. 3: Be a good actor, or don't act. OK, this is a tough one and you might need some professional coaching or something to achieve it. A bad actor can be improved. A nonactor cannot. Here's the thing: The audience is exposed to great acting all the time. If you were so good, you'd have done that.

When one of the lawyers got up to show how passionate he was about his case, but then let some fakey-fake-fake emotion choke him up, we didn't buy it. We wanted to laugh. Now, if he had really felt that way, he should go with it and let that out; but he clearly didn't. There are exercises you can do to get there if it's not in you. Emotional substitution: Remember the day your dog died right before you get up to defend a toxic polluter. It can work! But really, if you're not a good actor, don't let your pride tell you that you are. Stay in your lane—you can still tell a good story.

Please know that I have nothing but respect and admiration for the legal profession and our system of laws in this country. While I started that case in the default reluctant mode you get when a summons arrives, by the end of it I was very proud to be an American. Proud to live in a country with courts, justice and lawyers. I hope this is useful. I wrote this because it kind of hurt me to see smart people bumbling. This is just my a priori advice. Take that, juggling chimp. ■

SEAN GRENNAN, *a Chicago native, is a New York City-based playwright and actor. As a writer, his plays and musicals have been performed around the world, including in Canada, China, the Middle East, Russia, Spain and the U.K. As an actor, he's appeared on regional stages around the U.S. and off Broadway, as well as on TV and in film.*

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PHOTOGRAPH BY ARNIE ADLER

Contact High

5 Coffee Challenge can help build a client base

By Jason Krause

Networking

FOR MORE THAN 35 YEARS, Hollywood producer Brian Grazer has tracked down people who interest him and asked them to sit down with him for "curiosity conversations." He claims that these confabs with scientists, activists and artists have helped plant the seeds for movies like *Apollo 13* and *A Beautiful Mind*.

Josh Beser, the general counsel at Canary, a security technology firm in Manhattan, has similar advice for young attorneys who want to learn to network. He calls it the Five Coffee Challenge, and he has created a 30-day program with guided instructions and email templates to teach lawyers how to meet and nurture potential clients by way of a coffee meeting.

It may seem silly to suggest that adult legal professionals need a lesson plan to help them meet with other

people, but Beser says basic networking skills are in short supply in many law firm environments. Since going in-house at a technology firm, Beser says, he has been approached by many of his colleagues in law firms asking for advice on how to network with potential clients in the tech world.

"In the tech industry, grabbing a coffee or having a casual conversation is a natural way to learn from each other, but it is foreign in law firms," he says. "I think more lawyers could benefit from slowing down and taking time to build relationships."

NO TIME TO NETWORK

The challenge is that many young lawyers do not have the time or the ability to build relationships early in their careers, so basic rainmaking skills are not developed.

"When young lawyers first come into a law firm, the partners want them to work and make their hours and receivables," says Damian Thomas, co-chair of the ABA Section of Litigation's Young Lawyer Leadership Program. "Then when you become more expensive, they suddenly expect you to start bringing in business, but they don't tell you how."

The goal of these meetings is not just to learn but also to discover through talking to someone how to give back to them and nurture a relationship—which could someday lead to new business.

"If you try a cookie-cutter approach to these [meetings] and ask everyone the same question, it's going to be uncomfortable and you could look stupid," Beser says. "But if you build the muscle, you can become comfortable and confident in your ability to meet people and foster relationships."

Patrick Noonan, a third-year associate with Dinsmore & Shohl in San Diego, took the program in February 2015 and says that while the number of coffee meetings he sets up each month has fallen off, he still uses the program and has built and nurtured several valuable relationships through the coffee challenge.

"For me, the big thing has been learning about other people's business," he says. "Even if they already have an attorney, you can find out what is valuable to people and learn what needs they might have. It's a great intelligence-gathering program."

Thomas points out that a colleague, Miami criminal defense lawyer Mark Eiglarsh, taught him years ago to set up several coffee meetings a week to network with other attorneys and potential clients. Thanks to this commitment, Eiglarsh has become a criminal law expert who

Space Time

Some firms are trimming their footprints creatively and efficiently

By Richard Acello

COURTESY OF BUCHANAN INGERSOLL & ROONEY

Offices

READY FOR A STAND-UP DESK?

How about a conference room on wheels? These and many other innovations are either on tap or already here as law firms, spurred by a desire to downsize their real estate footprints, slowly shed tradition and step tentatively into the 21st century.

Taken together, the new wave of cubicles, wireless headsets, coffee lounges and open spaces add up to a fundamental design shift. In the old paradigm, a lawyer retreats to a solitary office to get things done. Now you'll have a discussion in a collaboration room.

In November, the Tampa office of Buchanan Ingersoll & Rooney, with about 50 attorneys, consolidated two offices totaling around 60,000 square feet into one almost half its size at 32,000 square feet over two floors.

Rhea Law, chair of Buchanan Ingersoll's Florida offices, says the firm is leveraging desktop video and interactive document-sharing, as well as "follow-me" capabilities that allow attorneys to receive real-time email notifications from their computer, mobile device or throughout any of the firm's 20 offices via their smartphones.

The office design called for an increased use of glass to let in light while preserving the need for privacy.

"We have lots of collaborative space, and we are truly enjoying that," Law says. "We also put in a coffee bar so there's a lot more informal dialogue between clients and attorneys, and it's proving to be very helpful and aids the creative capabilities of our lawyers in problem-solving."

In addition to reconfiguring the space, Law says, the firm sought to build in a wellness component: Behold

appears regularly on national TV.

"Mark told me that you have to be dogmatic about it, because you are too busy and have too much to do," says Thomas. "He would call me like clockwork every two to three months for coffee and we'd get together. And I never saw him take notes, but somehow he would always mention something we had talked about last time."

Beser says the program teaches attorneys how to ask questions and find out how to make yourself useful. One obvious place to start is to share information or resources such as a job opening, or to help someone fill a position. And simple gestures like thank-you notes help burn your name into a contact's memory.

The system also includes checklists of things to do and ways to automate the system with email reminders. "People are busy. They don't want to do 94 things. They want simple, direct instructions on what to do," he says.

The program, available through the Law Leaders Lab, is just finishing its beta trial run and is available to the public. The question now is whether lawyers will be willing to pay for a course that teaches them how to better interact with other humans. Pricing is based on the number of attorneys participating.

"Anyone can meet over coffee," Beser says. "The question is if you can build meetings into lifelong relationships." ■

"In the tech industry, grabbing a coffee or having a casual conversation is a natural way to learn from each other, but it is foreign in law firms. I think more lawyers could benefit from slowing down and taking time to build relationships."
—Josh Beser

the stand-up desk.

"Sitting at a desk all day long is considered the next smoking," Law says of its impact on health. "So we've said anyone can have a stand-up desk."

There is also a belt-tightening element to the changes. "We are noticing a tightening up of the market in the Tampa area—higher prices and less availability," Law says. "There have been several announcements of new office space, but we have not seen a significant expansion in 15 years."

Law says the Tampa office is being regarded as a prototype for other Buchanan Ingersoll offices as their leases expire.

FIRST STAGES

Real estate professionals who work with law firms say innovation is on the rise, but add that most firms are still in the talking stages.

"In our practice, we see firms planning the conversation on workplace strategy," says Luke Raimondo, corporate managing director of Savills Studley in Los Angeles, whose firm has worked with Kirkland & Ellis, Gordon Rees Scully Mansukhani and Wilson Elser Moskowitz Edelman & Dicker.

Among the trends Raimondo has noticed is "reversing the window line" so that administrators might be in windowed offices and lawyers in internal cubicles. "For attorneys who are at their desks infrequently," he says, "the argument is made that folks who are there every day need the access to natural light."

Raimondo also points out a generational twist to the new law office. "We hear that millennials are more open to things that are less hierarchical, and that is my experience," he says. "One workplace strategy is thinking about open space and working outside a traditional office environment, so instead of a library, there's a library that could be a lounge or a coffee bar or a cafe with soft seating and open collaborative areas."

Jeffrey Weil, executive vice president at real estate management firm Colliers International's Walnut Creek, California, office, says law office redesigns are also driven by less need for support staff. "It used to be one or two attorneys per assistant, but now it could be one assistant for seven attorneys as more lawyers do their own paperwork," Weil says.

The prestige of the corner office appears to be leaving with retiring boomers, Weil adds, as millennials are more interested in "work-life balance, so the corner office is less important to them."

Even the idea of what a successful law office should look like is changing. Where heavy doors and wood paneling once were meant to convey the impression of stability and authority, Weil says today's office should be designed with the client in mind.

"The office should be a fit with your clients," Weil says. "You want them to feel comfortable there and you don't want them to think you're overcharging them because of your office." ■

Law Scribbler by Victor Li

A Blog Clog?

Survey: Law firms plan more posting for more business

It already seems as if everyone and their dog has a blog. There's even a show on Disney about a dog with a blog—it's called, surprisingly, *Dog with a Blog*.

Well, get ready for lots of law firms with blogs. In an October LexisNexis survey concerning law firms and marketing, a majority of firms said they are planning to increase their investment in blogging and content marketing this year. According to LexisNexis, of the roughly 400 law firms that responded to the survey, 57 percent said they anticipated doing more blogging as a means of generating business.

Matt Thompson, the vice president of product marketing for the Foundation Software Group, which helped put the survey together when he was with LexisNexis, was surprised at the magnitude of the response.

The key, Thompson says, is that now blogs will be part of a centralized marketing and business development plan inside the firm. "In the past, maybe one lawyer would have a blog and it wouldn't necessarily be connected to the firm's marketing and developing plans. With increased investment from the firm, the hope is that there will be increased support from leadership and increased participation from attorneys."

A BEGINNER

One blog that has been around for years is Socially Aware, a social media law blog run by Morrison & Foerster. According to John Delaney, co-founder of the blog and an intellectual property partner in MoFo's New York City office, the idea for the blog came after he started getting questions about Facebook and corporate usage of social media. He and his fellow attorneys at the firm were fielding lots of calls from clients asking about things ranging from best practices to what the terms and conditions on Facebook meant.

"We realized that there's really no law on this stuff," Delaney says. "That's because law always lags far behind technology and it can be years before law catches up."

Delaney recalls that Socially Aware started as a newsletter to clients in July 2010. He and his Socially Aware co-founder, Gabriel Meister (currently vice president and senior media counsel for the National Basketball Association), wanted to start a blog, but the firm was reluctant to go that route.

"The firm was worried about legal risk, but we were advising people on how to minimize risk," says Delaney. "Our firm wanted to see what our competitors were doing, but very few—if any—of our competitors had blogs at the time. So they suggested doing the newsletter first."

Delaney says he and Meister published the newsletter every other month and usually put it together on weekends or after midnight during the week. "The newsletter did well and won an award, so the firm came to us in 2011 and suggested we turn it into a blog," Delaney says. "We said 'Great!' "

Delaney says Socially Aware has generated business for the firm. "Soon after we launched the blog, there was a Fortune 500 company that was looking to retain counsel to advise on social media issues. Because of the blog, we ended up on the shortlist. The firm hadn't done business with them before, but we had an advantage because of the blog."

In addition to landing that Fortune 500 company, Delaney estimates the blog has helped the firm pick up social media-related work from at least five or six companies. "We start our pitch with the blog and we say, rightfully so, that almost any legal development you can come to us with, we have it covered in our blog," he says.

Not all law firms should expect such a return. Frank Strong, communications director for LexisNexis Business and Litigation Software Solutions, cautions that firms should not adopt the mentality that if they invest in blogging, it will lead to a certain return the following quarter or else the whole thing is a failure.

"Law firms need to understand that it's a marathon, not a sprint," Strong says. "It takes time to build trust. Consistency matters, and you're not just conditioning writers to create content on a daily or weekly basis; you're also conditioning the audience to expect it."

To borrow a baseball metaphor, Strong says firms should resist the urge to go for the home run. Instead, he suggests a similar approach to that taken by Delaney and MoFo.

"If you focus on answering questions," he says, "that is a better path than investing countless hours and efforts on something you're hoping to go viral." ■

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

PHOTOGRAPH BY SAVERIO TRUGLIA

Beck and Call

Voice-responsive programs can assist—not replace—human help

By Dennis Kennedy

Tech

FOR MANY YEARS, ONE LAWYER and his or her secretary made a team. Over the years, one administrative assistant working for several or even many lawyers has become the norm, especially in larger firms. Are we now arriving at a time when lawyers will move back to a one-to-one relationship, at least for certain tasks, but with digital assistants named Siri, Cortana or Alexa?

By digital assistant, I mean a software program or service that responds to voice commands to answer questions and accomplish basic helpful tasks we traditionally relied on humans to do. Examples might be reminders, simple scheduling and directions.

I'm not talking about actually replacing everything a human can do. I'm suggesting there might be ways that digital assistants can help a lawyer who is vying for an assistant's time with other lawyers.

The key to understanding the potential of digital assistants can be found by looking at simple tasks and seeing what digital assistants now can do in ways similar to humans.

For instance: I wanted to set aside an hour of uninterrupted time to write this article. In the past, I might have said, "Pat, would you keep anyone from interrupting me for the next hour so I can work on an article?" Pat would then take phone messages and do other things to keep people from interrupting until coming in and saying, "Your hour is up."

Today, I turned to my Amazon Echo device and said, "Alexa, set a timer for 60 minutes." The burden is on me not to answer my phone and to avoid other distractions, but I know Alexa will sound a gentle alarm at the end of 60 minutes.

In either approach, I get the result I want—60 minutes of productive writing time.

I use Alexa as my example because "she" is now guarding my writing time, but the other digital assistants—Apple's Siri, Google Now and Microsoft's Cortana being the best known—will do many, if not all, of the same things.

ILLUSTRATION BY SAM WARD

UNHIRED HELP

Consider for a moment what you use and have used human assistants for and how that has changed over the years. My list includes reminders of all kinds, simple fact questions, directions to appointments, when to leave to get to an appointment, weather and traffic updates, sending simple messages—so many other simple tasks that I have started to wonder how much fun it really was to work for me. What I'd like to have done is keep giving my human assistants higher-level work so they can grow and make the best use of their skills.

The last point is where I see that lawyers can take advantage of digital assistants. Let computers do the work that computers are best at and will never complain about doing. I have a long list of things I use a digital assistant for: adding items to to-do lists, checking time zones around the world, conversions such as Fahrenheit to Celsius, weather forecasts in different locations, simple fact questions, dictating emails and text messages.

Digital assistants such as Siri and Google Now are available on smartphones and smartwatches, which means you can use them wherever you are. The Amazon Echo also doubles as a great Bluetooth speaker and music system, even though it's not portable. Putting a $179 Amazon Echo on a lawyer's desk—especially in firms and organizations looking to increase the lawyer-to-assistant ratio or reduce staff—may ease the pain and enable human assistants to do higher-level work.

Digital assistants have taken us a little bit by surprise. It's time to do some experimenting and see what all they can do and how they might help you. And thank you, Alexa, for letting me know that my time to work on this article is now up. ■

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

LAW BY THE NUMBERS

SUMMER HIRES GET JOBS

A LARGER 2015 CLASS GARNERS MORE JOB OFFERS

IS THE WORST OVER?

THE NATIONAL ASSOCIATION FOR LAW PLACEMENT REPORTS the percentage of 2015 summer associates receiving entry-level associate job offers reached a modern high for the second year running. This year's figure is higher than any as far back as 1993.

THE NALP REPORT, *PERSPECTIVES ON 2015 LAW STUDENT RECRUITING*, shows that the average summer class size in 2015 was larger as well, with an average of 13 summer associates per law firm instead of the previous year's 12, and as low as eight in 2010 and 2011.

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

SOURCE: *Perspectives on 2015 Law Student Recruiting*, National Association for Law Placement.

GRAPHICS BY STEPHEN RAVENSCRAFT

Review Boosts Results

Schools add bar exam class to curriculum and find success By David L. Hudson Jr.

Bar Exam

BAR EXAM PASSAGE RATES HAVE DECLINED NATIONWIDE RECENTLY, but there are success stories even in this climate of sinking scores.

One example is Belmont University College of Law. The Nashville, Tennessee, school posted a 94 percent passage rate by its first-time takers on the July 2015 exam. It outperformed all other law schools in the state. According to statistics from the Tennessee Board of Law Examiners, the overall pass rate was 64 percent and the pass rate for first-time exam takers was 74 percent.

Similarly, Florida International University College of Law posted an impressive 89 percent passage rate on the bar exam, far above the statewide average of 69 percent.

What was the secret to the success at these two law schools? It was due at least in part to a bar exam review course built into the law school curriculum.

"Bar exam success starts with good teachers, dedicated students and a well-developed curriculum," says Belmont law professor Jeff Kinsler, who teaches the school's course on preparing for the bar exam. "But I believe the bar review course played a vital role in our 94 percent first-time pass rate."

In the course, Kinsler lectured on all seven subjects tested on the Multistate Bar Exam—civil procedure, constitutional law, contracts, criminal law and procedure, evidence, real property and torts. The course also contains a comprehensive writing lab, where students were required to submit answers to essay and Multistate Performance Test questions.

Raul Ruiz, assistant professor of academic support and director of bar preparation at Florida International, attributes the students' success in part to the school's academic excellence program. This program culminates in Ruiz's U.S. law and procedure course, which covers the subjects on the bar exam.

"This is one of the most progressive bar prep courses in any American law school," Ruiz says, "and I have designed it from the ground up to provide our students with everything they need to study effectively with their commercial bar preparation course. It covers both the MBE and the Florida side of the exam, teaches students how to study for the bar exam, and gives extensive individualized feedback on both multiple-choice questions and essays."

A SURMOUNTABLE HURDLE

Ruiz also oversees something Florida International calls its Bar Exam Success Program. "This program partners each graduating student with an alumni or faculty mentor who supports students' bar study until the exam," he says. "BESP also provides students with several mock essay opportunities, extensive feedback and enrollment in an online program that provides them with licensed Multistate Bar Exam questions, coupled with an algorithm that helps them understand where to direct their efforts at improvement."

Wanda M. Temm, a clinical professor of law and director of bar services at the University of Missouri at Kansas City, started a bar prep course at UMKC in 2003. For years, she developed test strategies, bar exam questions and other preparatory materials. Eventually, she wrote her own textbook for the course, *Clearing the Last Hurdle: Mapping Success on the Bar Exam*.

"After developing all these materials, the book almost wrote itself," Temm says. "It is designed for 'for-credit' courses and supplemental programs. We continue to run both. I have also heard from individual students who have been using the book."

"I think most—if not all—law schools should implement a bar review course," says Kinsler, who served as Belmont's inaugural law school dean. "I think the best courses are taught by blending real-life MBE and essay questions into substantive lectures. The most important part of any bar review course, however, is academic rigor."

Despite the challenge, all three professors say students can pass the exam if they put in the work.

"You can do this," Temm tells her students. "You have been preparing to take this exam since the first day of law school orientation."

She notes that "the exam is not easy, but it is not an insurmountable hurdle for anyone. Have confidence in yourself—and work harder than you have ever worked—and you will do it." ■

TECH

BY VICTOR LI

TREKKERS

SOME LAW FIRMS TRAVEL OUTSIDE LAW PRACTICE TO AVOID THEIR 'KODAK MOMENT'

PHOTO ILLUSTRATION BY STEPHEN WEBSTER

During the course of reporting this story, the name Kodak kept coming up as a symbol of where the legal industry could be headed if it continues to resist technology. A survey released in January by Georgetown University's Center for the Study of the Legal Profession and Thomson Reuters' Peer Monitor serves up the Eastman Kodak Co. as its main allegory.

Kodak once enjoyed a virtual monopoly, controlling 90 percent of the film market and 85 percent of the camera market. However, as the lesson goes, the old-school company declared bankruptcy in 2012, and it sold most of its intellectual property to the likes of Apple, Google, Microsoft, Samsung and new-age others who had been more proactive in embracing digital photography. The *2016 Report on the State of the Legal Market* hypothesizes that, like Kodak, lawyers are reluctant to stray too far from the business model that has served them so well in the past.

Not that law firms are looking at extinction. "Firms at the highest end of the market will always be sought out for critical bet-the-company work," the study stresses. "But the range of activities that *only* [original emphasis] traditional law firms can undertake will continue to narrow as alternative service providers become more expansive in their capacities and as software development increases the automation of once heavily labor-intensive activities."

Or law firms can try to beat these alternative service providers at their own game.

In recent years, several of the largest firms in the country have gone outside the traditional model to explore ways of using technology to enhance the practice of law and deliver services to their clients.

In doing so, some firms have even invented tools and methods that allow clients to rely less on outside counsel.

Going outside the traditional construct has also resulted in a modification of the traditional attorney-client relationship. In some cases, clients are becoming more involved with firmwide decision-making, while firms are taking a more active role in clients' day-to-day operations. In some instances, firms are even changing client business processes entirely and coming up with a new model.

"Kodak didn't see how digital was going to reinvent its industry," says Dan Jansen, who is an entrepreneur, the mayor of Mountain Village, Colorado, and a professional services consultant who heads Dentons' NextLaw Labs, a wholly owned subsidiary focused on creating, developing and selling legal technology tools to help change the practice of law (see "Beyond Imagination," page 46).

"I've been involved in many organizations," he says, "and it's very difficult to reinvent from within. When you're inside, you get focused on the traditional value chain and the metrics that define your business. Sometimes you need an outside perspective."

From special teams to separate businesses, some firms are gaining that perspective, looking well beyond the bounds of legal practice.

CLIENT KEEPER

There's a cliché in the legal profession that clients hire lawyers, not law firms. In that vein, if the relationship is strong enough, then clients will often follow a lawyer from firm to firm.

Thanks to a piece of proprietary legal technology, however, that wasn't the case at Baker, Donelson, Bearman, Caldwell & Berkowitz when the firm lost one of its leading partners. The firm, which declined to identify the partner or client in question except to say that the client was an automobile company, used the automated document software ContractExpress from Business Integrity to keep its client in the fold.

"They told us that ContractExpress was one of the reasons they stayed with us," says Meredith Williams, chief knowledge management officer at Baker Donelson in Memphis, Tennessee. "But it wasn't just CE, but the way we used it to help them save money and time."

Seeking new ways to develop technology, the firm created a venture fund to help forge partnerships with legal service providers and to invest in promising new companies. The fund, which consists of about eight full-time members, draws on people from throughout Baker Donelson to brainstorm about changing the way the firm delivers legal services. According to Williams, during the just-completed fiscal year the fund had 80 timekeepers.

"The fund allows us to challenge lawyers to think differently," Williams says. "We're focused on how we can take our clients to the next level." She says that attorneys who come up with a tool or solution for a client get credit on their billable hours.

The group has been responsible for creating a custom portal and dashboard for its clients with ContractExpress. These innovations have allowed Baker Donelson's clients to see every single contract generated while streamlining their workflow by standardizing their forms.

Williams says the firm has done this for roughly 50 clients, ever since adopting CE more than five years ago. Back then, the firm used HotDocs, but Williams says Baker Donelson wanted something that was integrated with Microsoft Word as well as MS SharePoint.

"We were looking for something internal, but we wanted to be able to share it with our clients," she says. "Business Integrity was the only company to offer us that."

Now the firm uses CE across the board, including for contract drafting, e-discovery and even estate planning. "Our attorneys have seen their hours redirected," Williams says. "Instead of someone spending time drafting a document, we see them working more on client relationships or doing more customized work."

In fact, the firm has a team dedicated to advising Baker Donelson attorneys, as well as outside clients, on how to maximize the capabilities of ContractExpress, including how to streamline a client's workflow. "We're able to really seek out and identify a lot of pain points for a lot of groups because we are embedded with them," says Williams. "Last year, we developed 188 CE packages, both for clients and internally."

The firm's success with the software when it comes to streamlining workflow and business procedures has led to Baker Donelson's most recent endeavor. Launched in January, LegalShift is a Baker Donelson subsidiary that consults with general counsel to figure out ways to automate legal processes and be more efficient. LegalShift uses legal practice management, as well as Lean Six Sigma, to advise businesses to better manage their legal portfolios while bringing down expenditures and costs. The subsidiary also provides clients with the BakerManage app suite.

As for ContractExpress, Williams says one of her

PARADIGM SHIFT

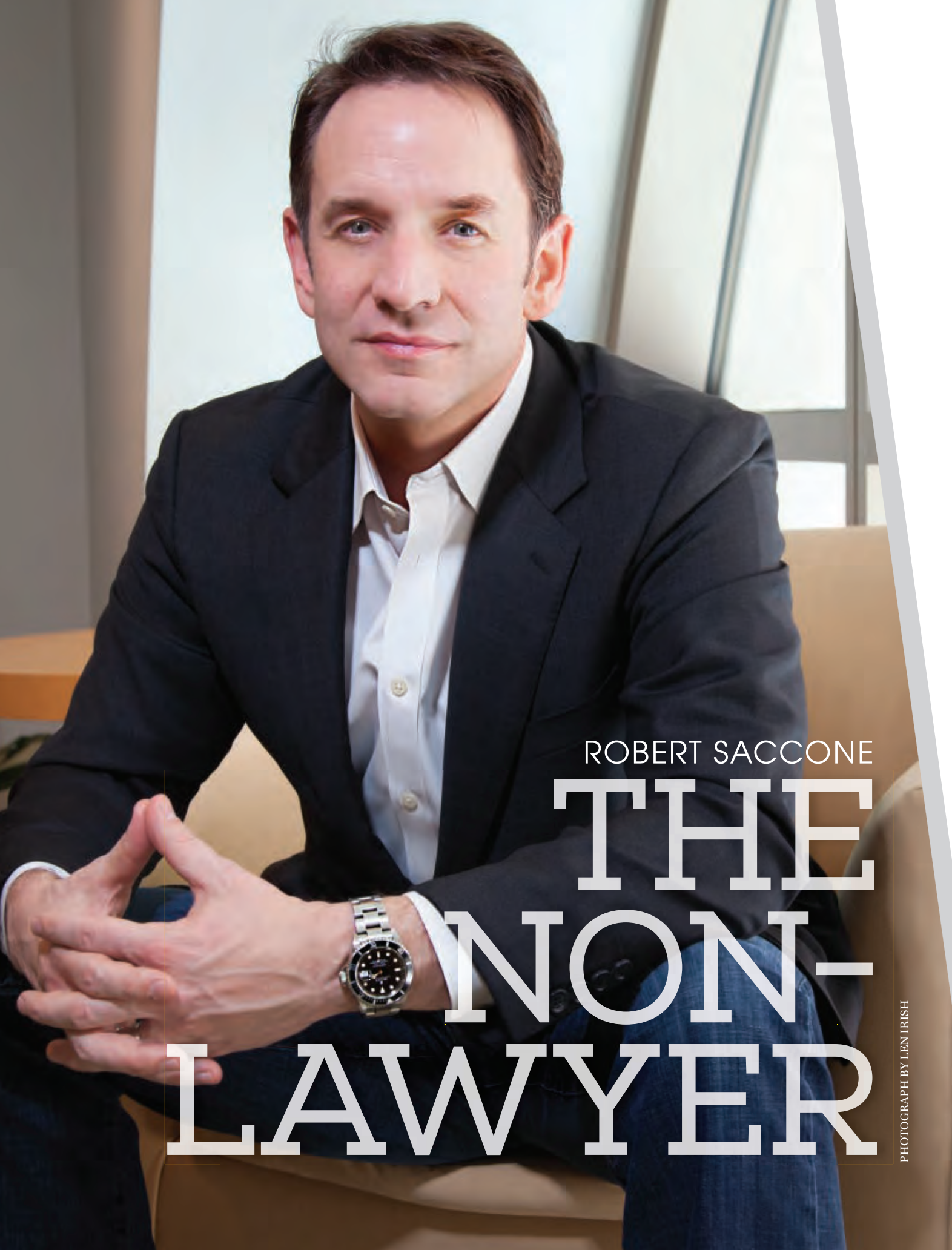
Starting in 2011, the *ABA Journal* initiated a series of reports on the shifting paradigm of law practice. This series looks at how the legal business is responding—and the legal profession often not responding—to pressures never before placed on lawyers and law firms: a maturing market, disruptive technology, economic recession and the rise of legal services competition.

This month's article looks at three law firms that have created their own entities to bring technology to bear on how they practice law and what services they provide their clients. They are among a host of major law firms that are taking on development or modification of software options and changing the traditional lawyer-client relationship.

PHOTOGRAPH BY DAVID MUDD

MEREDITH WILLIAMS

THE STREAMLINER



ROBERT SACCONE

THE NON-LAWYER

PHOTOGRAPH BY LEN IRISH

main jobs moving forward is to figure out new ways for the firm to use it. In August the firm launched a mobile app with CE integrated into it that allows franchises to generate documents while out in the field with potential franchisees.

Internally the firm started using the software to help with its lateral hiring process. "We looked at our entire process of 'onboarding' and used CE to streamline it for lateral partner and associate hiring," says Williams. "There are a ton of forms any lateral candidate has to fill out: HR forms, client matters and background checks, for instance. We can use CE to pull data from all sorts of places and have all the forms done quickly."

Kent Zimmermann, a legal consultant with the Zeughauser Group in Chicago, says he hasn't heard of a firm using its automated document system to streamline the lateral recruitment process like Baker Donelson has. And Ryan Turley, a partner at the Madison West legal recruiting firm in Chicago, says the same, but he points out that law firms have been relying more on technology in recent years, especially when it comes to accepting resumés and transcripts.

LEANING OUT

Of course, Baker Donelson isn't the first firm to launch a business consulting subsidiary focused on applying principles of Lean Six Sigma to corporate clients. Seyfarth Shaw was an early convert to the philosophy, adopting it firmwide more than a decade ago. Robert Saccone emphasizes that Lean Six Sigma is more than just cost-cutting; it's about the importance of processes and how they drive an organization to achieve efficiency.

"All organizations have inefficiencies," says Saccone, who until this year headed SeyfarthLean Consulting. "We use our methodology to identify these inefficiencies and to map out the optimal way of getting work done. And we explore realistic use of technology, such as document automation and workflow systems, to make work consistent and easier."

The subsidiary was formed in April 2014 so the firm could export its philosophy to law departments and companies without the constraints that come with running a law firm. Saccone, a nonlawyer, came aboard as CEO in January 2015 after spending 18 years in the legal-tech landscape, including a 4½-year stint as director of knowledge management technology at Goodwin Procter and a CEO role at XMLaw, a legal tech startup that became part of Thomson Reuters in 2009. (He left Seyfarth at the end of February.)

"SeyfarthLean Consulting grew out of internal efforts to improve our value proposition to our clients," he says. "As clients increasingly asked if we could help with their own internal operations, the firm decided to stand up SeyfarthLean Consulting as a business consulting practice focused on solving bigger client problems."

The main thrust of SeyfarthLean Consulting, according to Saccone, is process mapping and workflow optimization so that lawyers can devote more time to performing high-end legal work instead of doing repetitive, commoditized work that could easily be done by a computer.

For instance, in 2013 SeyfarthLean Consulting put into place processes to help Nike with its high-volume but largely routine transactional work, such as procurements. SeyfarthLean consultants worked with Nike to design the Transaction Solutions Center, a work-allocation process model that contains a risk matrix to determine which agreements can be automated and which need to be handled by a Nike lawyer. According to SeyfarthLean Consulting, the center has allowed Nike to reduce its contract turnaround time from an average of 15 days to fewer than three. Additionally, in the center's first year, a third of its projects were completed in less than 24 hours.

"Most legal departments handle a range of matters; some are big and complex like M&A transactions, but most are volume—small requests and tasks like handling routine agreements," Saccone says. "Without an efficient way of handling these routine tasks, they take time and focus away from the more complex and more valuable projects that in-house resources want to be focusing on."

Saccone emphasizes that the subsidiary does not practice law, but the majority of its work is in conjunction with the legal work of the firm. Additionally, the subsidiary is taking on an increasing number of projects from companies and businesses that are not clients of Seyfarth Shaw.

The primary tool the consulting group uses is SeyfarthLink, a Microsoft SharePoint-based platform created by the law firm in 2013. SeyfarthLean Consulting customizes it based on a client's needs—all with an eye toward boosting efficiency. For instance, a client with a heavy litigation caseload would require customized tools so that it can keep track of all of its matters. But tracking cases is just the start of it, Saccone notes.

"Clients generally don't have good methods or systems to help them capture the nuances and details of the cases they are handling, which is crucial to understanding and improving the value that both in-house resources and outside counsel are providing," he says. "We help them define and capture this information using online databases and other tools that simplify processes, and then help them use the information to further tune processes." Clients get data analytics tools, dashboards and fiscal transparency features so they can get real-time updates on costs and expenditures.

SeyfarthLean Consulting also develops tools for clients as needed, although Saccone stresses that it's not a software development shop, per se.

"We develop and use technology in tiers," says Saccone. "We have software developers that can solve complex problems that don't have off-the-shelf solutions, and we also have a team of legal solutions architects that can bridge the gap between a client's problem and the best technology solution available, whether our developers created it or we've partnered with others to provide it."

LETTING CLIENTS IN

The attorney-client relationship forms the bedrock of the U.S. legal system and creates a strong bond between everyone involved. Despite

that, law firms haven't historically been known for letting clients take an active part in their internal decision-making process.

Dentons and Akerman are two firms that have thrown open the doors and tried to forge stronger partnerships with their clients—especially when it comes to technology.

When Dentons announced the formation of NextLaw Labs in May, the firm noted its advisory board would consist of thought leaders within the legal industry as well as the firm's clients. According to Jansen, the lab has invitations out to several general counsel, and his hope is that the board—which at press time consisted of former Kia counsel Casey Flaherty; law professor William Henderson of Indiana University (who helped create the *Journal*'s Paradigm Shift series); and IIT-Chicago Kent College of Law professor and ReInvent Law co-founder Daniel Katz—will eventually consist of about 10 members.

MARTIN TULLY
THE NON-TRADITIONALIST

In the meantime, NextLaw Labs is soliciting input from clients to determine what tools it should invent and what companies it should invest in. "We've received over 100 ideas since we started," Jansen says. "Of the top 10 opportunities that we're working hardest on, they all came from either a client or a firm lawyer, and almost all of them involve the ability to do expert legal research faster, cheaper and better."

Another firm that has taken a collaborative approach to creating technology is Akerman. When it first announced its R&D Council in April 2014, it was notable because it promised to be an active collaboration between firm lawyers and clients to create new tools and implement innovative ideas. The question was whether Akerman would actually give clients a real voice on the council, or if it would give out a few token seats to some clients before treating them like silent partners.

Martin Tully, chair of Akerman's data law practice and a member of the R&D Council, says the firm was serious when it gave clients an opportunity to help steer the council and decide what projects it would undertake. The council consists of about a dozen members, and it's nearly evenly divided between clients and firm lawyers.

Tully joined Akerman in August 2014, six months after the firm opened its Chicago office. He says one of the first things he did was ask to join the R&D Council. "The firm is very innovative, and the idea of taking a nontraditional approach to the delivery of legal services was very attractive to me," says Tully. "I knew they had formed this R&D Council and I wanted to get involved."

In November the council unveiled the Akerman Data Law Center. The center is actually a Web-based tool that tracks the data privacy and security laws of all 50 states and the federal government. It is one of the first things created by the R&D Council. (In July, the council announced creation of an interactive tool that helps appellate advocates prepare for oral arguments.)

According to Tully, the data law center evolved from client concerns, not just about cybersecurity and privacy, but also about data retention laws and how to keep track of them and be compliant with them at home and abroad.

"Companies are either unable to keep up with what the rules are or they are spending lots of money to come up with static summaries of the rules that then need to be constantly refreshed and updated," Tully says. "We tried to figure out how to leverage our nonlegal service provider relationships to drive down that cost and be able to interact more with clients by bringing our expertise into the fold, adding new value to our client relationships."

According to Tully, the subscription-based tool, developed in conjunction with Thomson Reuters and Neota Logic, resembles the popular Turbo Tax product. It asks users questions to clarify what they need help with, then uses decision trees and logic gates to come up with an accurate answer.

"The tool utilizes Thomson Reuters' research, Akerman's expertise and Neota Logic's online portal," Tully says. "Eighty to 90 percent of the time, users should be

PHOTOGRAPH BY WAYNE SLEZAK

able to get an answer without having to speak with a lawyer."

In case a user has a problem so complex and unique that legal assistance is required, Tully says, there will be an option to call a lawyer at Akerman, and the cost would be tailored to the needs of the client. He claims that Akerman Data Law Center clients can reduce legal fees by more than 80 percent compared to the traditional billable hours.

Tully hopes the tool will be ready to launch this spring. In the meantime, he anticipates that the council will look at solving the original problem posed by its clients—foreign and domestic data retention laws. On that front, he says, he isn't sure whether the firm would create a new tool or expand the data law center's capabilities.

"We've had several clients ask for something that would help them with data retention laws," Tully says. "We plan to expand how we use our new technology to address these other issues. The Akerman Data Law Center model is adaptable to many areas with varied regulatory requirements."

In the meantime, Tully will continue looking at innovative ways of delivering legal services, all the while balancing his other job as mayor of Downers Grove, Illinois—a Chicago suburb. Like Jansen, Tully says his firm encouraged him to keep his mayoral job.

"Twelve years of municipal service in a leadership role has taught me a lot," says Tully. "Local governments are being forced to do more and more with less and less. That has forced us to think differently and be innovative. We're doing the same thing with the R&D Council."

A SKEPTIC WON OVER

These are approaches that even a legal technology skeptic like Keith Lee finds have merit.

The Hamer Law Group attorney and editor-in-chief of the Associate's Mind blog says it's important for lawyers to approach technology the way they would any case or matter—with extreme skepticism and an understanding that there are always things that lie beneath the surface.

Lee of Birmingham, Alabama, says he often distrusts legal tech companies that say they can solve all of a lawyer's or client's problems. To Lee, that's impossible: Because law firms vary so much in size and quality, and practice areas each have their own unique sets of problems, it's folly to suggest that there might be a one-size-fits-all solution.

But it's a different story if the lawyers themselves are the ones developing tools for clients to use to make them more productive, efficient and less reliant on outside counsel.

"It's not much of a stretch that big firms, especially ones with foresight and support from management, would begin to develop certain tools designed to provide services to clients," Lee says. "After all, who knows a client's processes or workflow better than the actual lawyers who are already providing legal services for them?"

He notes that it's perfectly fine to use software to automate some parts of the process so that outside lawyers can provide more control and information to clients and allow them to make their own decisions.

"It certainly makes sense for the firms to be creating the tools," Lee says, "as opposed to some people from Silicon Valley who don't know about what law firms do and what problems clients have." ■

PHOTOGRAPH BY DAVID MUDD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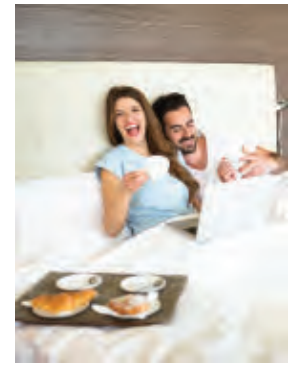

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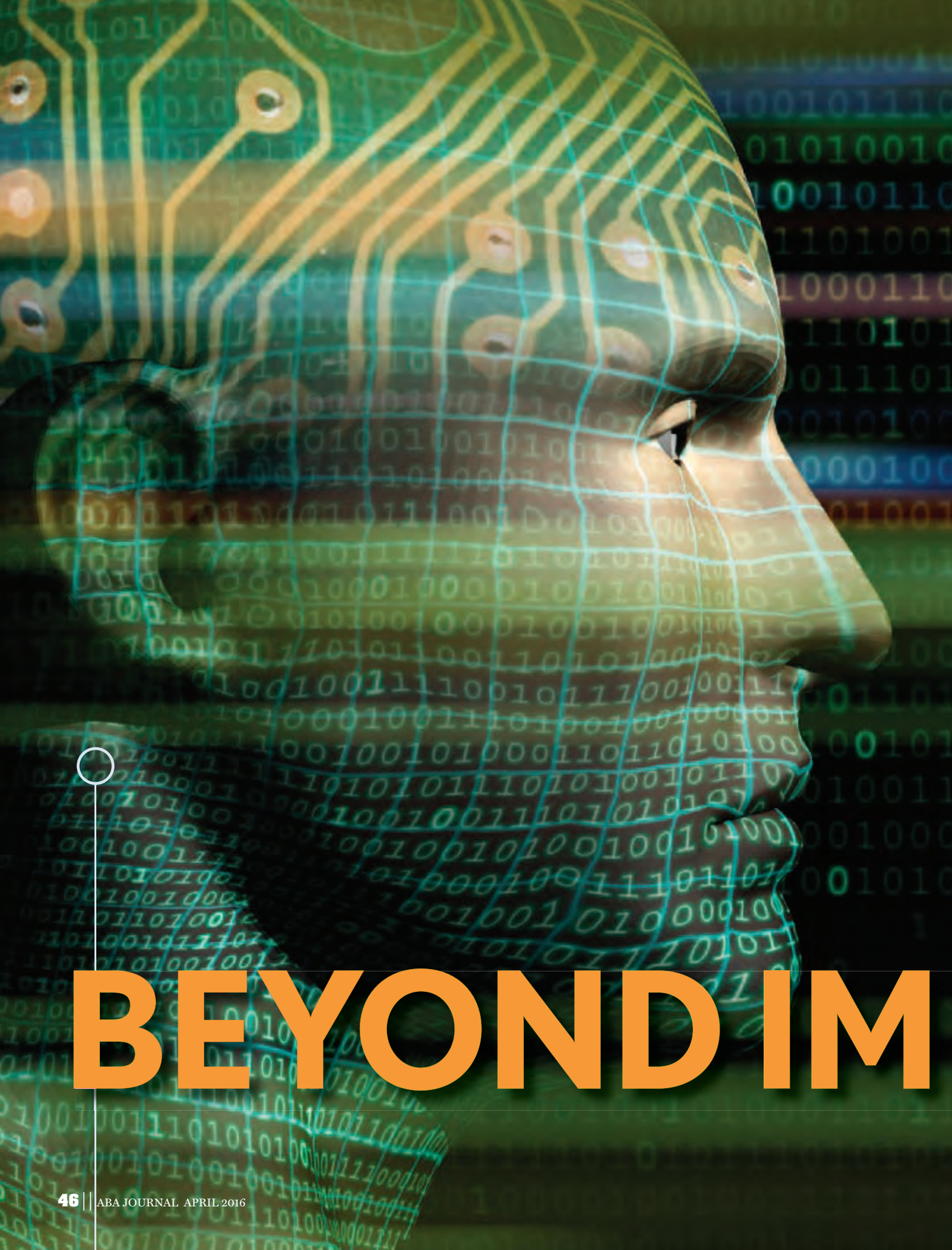


BEYOND IM

How artificial intelligence is transforming the legal profession

AGINATION

BY JULIE SOBOWALE

The future of the legal profession began 20 years ago.

The technology boom was just beginning with the emergence of email and personal computers. Jay Leib was working for Record Technologies Inc. as director of software sales and training in 1999, and the company was scanning documents into databases for clients. At one point the company printed and scanned legal documents related to a lawsuit with Microsoft. Leib thought that was inefficient, a waste of time and paper.

So he and his business partner, Dan Roth, decided to create a program that would help lawyers manage electronic documents for litigation. Their idea led them to purchase an e-discovery application. By 2000, Leib and his partner launched their own creation, Discovery Cracker.

"We saw a gap in the marketplace," Leib says. "Why print all that paper? Lawyers need tools to keep up with it."

Instead of wading through piles of paper, lawyers now deal with terabytes of data and hundreds of thousands of documents. E-discovery, legal research and document review are more sophisticated due to the abundance of data. So while working as chief strategy officer at kCura in Chicago, Leib saw a need again in the market.

"What is the future of the industry? We thought about it," he says. "There were whistleblowers

in their companies who knew what was going on, and the unstructured data contained the stories. Companies could detect potential problems early on, provide alternatives to counsel and C-suite, and understand their exposure. It would prevent unnecessary legal spend and mitigate risk, thus protecting the company's brand and shareholder value."

In 2013, he and Roth, a professor and head of the cognitive computing group at the University of Illinois at Urbana-Champaign, created NexLP, a company using artificial intelligence to analyze data and identify trends.

A REVOLUTION BEGINS

Artificial intelligence is changing the way lawyers think, the way they do business and the way they interact with clients. Artificial intelligence is more than legal technology. It is the next great hope that will revolutionize the legal profession.

Change can be brought on through pushing existing ideas. What makes artificial intelligence stand out is the potential for a paradigm shift in how legal work is done.

AI, sometimes referred to as cognitive computing, refers to computers learning how to complete tasks traditionally done by humans. The focus is on computers looking for patterns in data, carrying out tests to evaluate the data and finding results. Chicago-based NexLP, which stands for next generation language processing, is creating new ways for lawyers to look at data.

"Gerry Spence once said, 'Telling a story is one of the most persuasive means of communication,' " Leib says. "Text analytics and machine learning can be incredibly helpful in helping the data tell its story, thus allowing legal teams and the C-suite to focus their time on nuanced analysis and application of that story to the issue at hand."

Leib is not interested in the usual data analytics but, rather, in preventive measures, including predicting litigation and measuring workflows in real time. His company uses predictive coding, whereby users sample data and identify what is relevant. Through sampling, the program is able to learn what documents are relevant. This process greatly reduces the time needed for e-discovery and document review because the program is searching for concepts as opposed to simple keywords. The company is interested in identifying key information to predict future outcomes.

"Analytics can help in many areas of a business, not just legal," says Leib. "We can guide compliance departments to streamline internal investigations to get to key information within hours.

"IT professionals have also been pressed into investigations of data breaches," he notes. "In the Sony data breach, unstructured data was exposed that was financially damaging and embarrassing, underscoring the need to be in front of it to understand what insiders are discussing within the four walls of the corporation."

Storytelling is one of the features of NexLP's work.

"For years, lawyers have been stuck with antiquated tools that focus primarily ... on Boolean search. Better tools are needed to truly understand data."
Jay Leib

Deep within the data lies a story, whether it's a story to tell a judge at trial or to pitch to potential clients.

And there is an enormous amount of data that is being generated. According to IBM, 2.5 quintillion (2,500,000,000,000,000,000) bytes of data are created every day, and 90 percent of all data was created within the last two years. In order to tell a good story, lawyers need a way to sift through the data.

"Nearly 80 percent of a company's data is unstructured," Leib says. "While unstructured data represents the lion's share of a company's data, for years lawyers have been stuck with antiquated tools that focus primarily or solely on Boolean search. Better tools are needed to truly understand data, infer meaning, classify the various types of ideas present, and help you get to the result fast—even if that result didn't involve the keywords you used."

Roth helped develop technology that can turn information into stories. Story Engine is a program that can read through unstructured data and summarize conversations, including the ideas discussed, the frequency of the communication and the mood of the speakers. The company uses the data to build models to analyze behavior and find signs of fraud or litigation.

"For example, when investigating securities fraud, price movement can be a very useful indicator," Leib says. "However, stock prices rise and fall throughout the trading day. Our analytic engine can overlay communications between traders discussing that stock-on-top-of-price-movement data to compare the times they both occurred. Perhaps the traders in question also emailed client information to themselves. By comparing these various data points, a clear pattern can quickly emerge—one that might have previously gone unseen or would have been considered circumstantial. These patterns allow financial firms to better understand and identify this behavior to prevent it, and also tell easy-to-follow stories to regulators or judges."

SEEING THE FUTURE

Another potential use for data is predicting legal outcomes. In 2014, Chicago-Kent College of Law professor Daniel Martin Katz, then at Michigan State University law school, and his colleagues created an algorithm to predict the outcomes of U.S. Supreme Court cases. It attained 70 percent accuracy for 7,700 rulings from 1953 to 2013. Leib's company wants to take this idea one step further, working with analyzed information to predict future litigation.

"As companies develop better metrics around things like litigation and compliance spend, the barriers to entry that analytics tools used to face are quickly falling by the wayside," says Leib. "Once companies get their arms around case flow and spend, the ROI and economics around using analytics to streamline legal workflows and reduce or eliminate risk becomes much more attractive."

NexLP offers services where clients use the software to identify patterns in the data. Once any possible issues are flagged, the system can collect the necessary documents for any possible litigation.

"The biggest differentiator for us is our strength in pattern recognition," Leib says. "We will be able to detect problems 'in vitro,' ... closer to where they're happening. We surface and expose anomalies people should be paying attention to. We can take key issues and fact patterns common to certain types of matters and build models that identify and prioritize documents that should be looked at first. For example, for trade secret theft, we can identify behaviors that can quickly pinpoint the time frame the theft occurred, how it was accomplished and who was involved."

Leib wants lawyers to think differently about legal technology. His company is working on measuring emotional responses and using existing technology such as programs designed to detect insider trading.

"More and more every day, we are building the bridge to increased analytics usage," says Leib. "Our clients have grown comfortable using keywords. I believe that keywords are only one part of the equation, and keyword usage alone leads to inefficiency, increased cost and unnecessary risk.

"AI classifies and organizes data faster, better and cheaper, and augments human intelligence," he says. "It empowers people to make use of huge amounts of data to make better decisions and tell better stories."

NURTURING INNOVATION

Legal experts such as Richard Susskind and Jordan Furlong have long been writing about the legal profession's woes and its stubborn adherence to traditional culture. The Canadian Bar Association laid out the need for legal reform in a 2014 report, *Futures: Transforming the Delivery of Legal Services in Canada*. The report stated that the key to a viable, competitive and relevant legal profession is innovation.

So what the profession could use is an industry leader willing to take a calculated risk. This is where Dentons steps in.

In 2015, the world's largest law firm created NextLaw Labs, an independent subsidiary designed to disrupt the legal industry through innovation. So far their plans are working: The *Financial Times* recognized Dentons as the most forward-thinking North American law firm last year.

Dan Jansen, an entrepreneur with a background in advertising and media, came on board as the first CEO of NextLaw Labs. After years of making lawyer jokes to his wife, who worked as a corporate attorney, Jansen now has the job of transforming the legal profession.

"What drew me is the opportunity of reinvention," says Jansen. "Law firms have historically had a pyramid structure that technology is evolving into a diamond. If the work at the bottom of the pyramid is being automated, we want to own that technology and not be a victim of it. If this was the advertising industry, we would be 10-20 years too late, but we think we're right on trend in legal tech."

NextLaw Labs stands out among the world's large innovative firms. Even the structure of the company is unique: As an autonomous subsidiary of Dentons, it has the freedom to operate outside of the partnership model, which can be an obstacle for innovation.

PHOTOGRAPH BY WAYNE SLEZAK

"It would be hard to do this internally in any business," Jansen says. "The last business I had was an alternative advertising model, and it was a similar autonomous entity. We're sponsored by the firm, and they understand that there are long sales cycles in law and we need to speed that up. We have separate management and separate governance so we can move quickly and drive change quickly in this $600 billion [global] industry."

According to the *2016 Report on the State of the Legal Market*, published by Georgetown University's Center for the Study of the Legal Profession and Thomson Reuters' Peer Monitor, demand for legal services was "essentially flat for 2015 ... [and] continues a pattern seen over the last six years." Also "there has been an overall downward trend in the productivity of all categories of timekeepers except associate." The report attributes at least some of this stagnation to business clients' reduced spending—a jaw-dropping 25.8 percent between 2004 and 2014 in inflation-adjusted dollars, the 2015 report noted. With increasing competition in the legal market, law firms are under pressure to invest in innovation.

U.S. businesses generally spend, according to Jansen, about 3.5 percent of revenue on research and development. "The legal industry spends less than 1 percent on R&D, compared to telecommunications for example, which spends 13 percent, or biotech, which spends even more," says Jansen. "We can have a real impact in the industry with modest spending given where the legal tech sector is at. It's an opportunity that is fairly unique."

What makes NextLaw Labs special is its drive for change. Jansen and his staff began by consulting with lawyers and staff at Dentons for ideas.

"So far, 80 percent of the ideas we spend our time on are from our partners or clients," Jansen says. "Actually, we have partners who say: Here's a problem, here's a possible solution and here's the prototype that I've been thinking about. There are joint ventures involved, business launches, product launches, and we can help accelerate that while contributing to new and different ways that lawyers can work with their clients."

The NextLaw Labs advisory group weeds through the top ideas to pick out those that are most promising, and it then conducts market research to see whether others are working on the same ideas. If they find a large company is involved, Jansen says, they seek to

"Law firms have historically had a pyramid structure. ... If the work at the bottom of the pyramid is being automated, we want to own that technology and not be a victim of it."
Dan Jansen

PHOTOGRAPH BY RAY BURNSIDE

What Is AI?

Artificial intelligence is the legal tech buzzword of 2016, but it can be misunderstood. AI, also called cognitive computing in the legal tech world, is about machines thinking like humans and performing human tasks.

"Cognitive computing enables robots to learn," says Garry Mathiason, co-chair of the robotics, AI and automation industry group at Littler Mendelson in San Francisco. "In traditional software, the possibilities are mapped out and predetermined. This has limited the development and application of software-driven machines and robotics.

"However, this is dramatically changing with the introduction of cognitive computing. Modeled after human learning, smart machines process massive data, identifying patterns. These patterns are used to 'create' entirely new patterns, allowing machines to test hypotheses and find solutions unknown to the original programmers."

There are two types of artificial intelligence—hard and soft. Hard AI is focused on having machines think like humans, while soft AI is focused on machines being able to do work that traditionally could only be completed by humans. The main difference is that soft AI doesn't necessarily involve machines thinking like humans.

"Our perspective on artificial intelligence has changed significantly over the past several decades," says Jack Conrad, lead research scientist in corporate R&D at Thomson Reuters and president of the International Association for Artificial Intelligence and Law. "AI failed to live up to the early expectations that focused largely on hard AI capabilities, such as the ability to perform humanlike reasoning. When those lofty goals were not attained, researchers came to understand how difficult such achievements really were. After all, trying to teach computers to perform cognitive activities was an extremely challenging task.

"Over time, as expectations were lowered and research efforts became more narrowly directed, a shift towards 'soft' AI applications took place, focusing on providing intelligent tools and problem-solving resources to humans."

PHOTOGRAPH BY TONY AVELAR

partner with it, and if it's a small firm, they'll provide investment capital and advice.

"We also have access to a cognitive computing platform with IBM Watson that provides a menu of tools that represent very sophisticated technologies, which is also attractive," Jansen adds.

The abilities of the Watson question-answering supercomputer have also drawn the interest of legal industry giant Thomson Reuters. Eric Laughlin, a managing director at Thomson Reuters Legal, announced in late January that the Watson Initiative he heads hopes to have a beta version of a corporate compliance product available for testing later this year. And Robert Schukai, head of applied innovation, technology and operations for Thomson Reuters, says the firm is building a center for cognitive computing.

Meanwwhile, one NextLaw Labs startup that immediately stands out is Ross Intelligence. A Canadian partner in Dentons (along with IBM) informed Jansen about the Toronto-based firm. Ross Intelligence uses the Watson cognitive computing system to enhance legal research. Users ask legal questions in plain English and Ross searches legislation, case law and secondary sources. NextLaw Labs signed Ross last August as its first portfolio company, providing capital and office space in Palo Alto, California.

"We resolved to find and work with innovative law firms who saw the future and see something big," says Andrew Arruda, a co-founder of Ross Intelligence. "With NextLaw Labs, their financing was just one of many factors that showed their commitment to innovation to the law. It's great to be part of the initiative."

Ross began as an idea from co-founder Jimoh Ovbiagele, who was deeply affected watching his parents struggle to pay hefty legal fees due to expensive legal research. Like NextLaw Labs, the goal is more than creating good technology; the firm is working to make legal research easier and more affordable and thus bring down legal fees for consumers. In its short time with NextLaw Labs, Ross has gained 20 clients in the United States and has plans to expand to international markets.

"We're working on having lawyers teach the computer to think like a lawyer. That would be a huge step." Andrew Arruda

"Ross Intelligence is not to replace lawyers but to [allow them to] do more than they were able to do before," Arruda says. "We're working on having lawyers teach the computer to think like a lawyer. That would be a huge step for humanity.

"With legal tech, there will be new jobs, and we can embrace a very happy future in the law," he says. "This is a new frontier."

Most legal startups have difficulty raising capital because of the unknown market and the long turnaround time required for product development and launch. NextLaw Labs partners with venture capital firms to help young companies grow.

"What we found working with venture capitalists is that they appreciate our expertise and Dentons as a potential first major customer who can help to shape their nascent companies' offerings," Jansen says. "Our lawyers appreciate that we're funding these companies that can give them access to cutting-edge solutions that they can introduce to their clients."

THE ARTIFICIAL INTELLIGENCE GENERATION

Adam Nguyen suffered from a career problem that many lawyers have faced. The Harvard Law grad began his career as an associate at Shearman & Sterling in 2002, working late nights doing due diligence and copying and pasting information into various legal documents. He

switched into many different roles, working as a clerk at the U.S. District Court for the District of New Jersey and later as an in-house lawyer at AQR Capital Management.

"I thought about what I should do with my life," Nguyen says. "As a group, lawyers tend to be miserable because a significant portion of our work is tedious and doesn't require much analytical skills. Many of us hadn't entered the profession expecting to spend much time on tasks like copying and pasting, document summarizing or assembling document binders.

"Moreover, clients increasingly are pushing back on paying for less sophisticated, manual tasks," he notes. "Technology that automates tedious tasks, while not a panacea, can free up lawyers' time to perform higher-level, more intellectually satisfying work which clients would be willing to pay for. It would help to make lawyers happier and more productive. There are many smart, eager young lawyers whom we'd want to keep in our profession."

Nguyen wanted something better. So he and co-founder Ned Gannon approached Columbia University to work on technology for due diligence and contract review. The technology already existed, but it hadn't been used much in the legal field. They worked on the technology for nine months, and eBrevia's Diligence Accelerator program was launched in 2012.

Companies like eBrevia aren't seeking to eliminate lawyers, but to make their lives better. Law firms are feeling the pressure from clients, particularly in-house counsel, to lower costs. And artificial intelligence is born out of necessity.

"Companies and their lawyers often have to perform a cost-benefit analysis in areas like legal due diligence," Nguyen says. "Perform a partial review of a database of documents and keep costs low, or perform a thorough review and blow through the budget? It's clear we need a solution that increases lawyers' productivity while helping to deliver legal services at the level expected by clients."

The focus for eBrevia's products is on extracting information from data. Clients upload documents to the server, where they search for information and download it sorted according to their preferences. What makes eBrevia different is the program's ability to learn how to do searches more efficiently.

"The machine-learning technology learns from examples," says Nguyen. "It's been taught to recognize and abstract legal concepts like assignment, change of control or renewal. The user would upload documents to the system, and it would return sentences relating to legal concepts that it has learned.

"Many users ask: Isn't this just a word search? The answer is no. Among other things, AI learns from the relationships between words and what provisions and concepts look like from samples of documents. After learning, the software doesn't have to be retrained for a new transaction as with litigation e-discovery tools. The software recognizes legal concepts regardless of the vocabulary used to express them. And it's adaptable, because adjusting to a new legal domain simply requires training on that domain's examples."

The company hopes to expand to new markets. It partnered with RR Donnelley and introduced Venue contract analytics in October. The program allows RR Donnelley's Venue virtual-data-room users to have automated contract review and due diligence using eBrevia's artificial intelligence software. The company also plans to

PHOTOGRAPH BY ARNIE ADLER

Laws and Robotics

Many legal and ethical issues surround the use of AI. For example, the issue of liability hasn't been resolved yet for Google's driverless cars, though researchers such as UCLA professor John Villasenor and others argue that product liability could cover any driverless car accidents. And in employment law, when a machine used to interview potential job candidates measures the person's blood pressure, privacy becomes an issue.

"When AI is coupled with big data, the solutions formed can unintentionally conflict with workplace laws, some of which were written 50 to 100 years ago," says Garry Mathiason of Littler Mendelson. "For example, big data shows that the closer one lives to where one works correlates with job longevity. When this finding is discovered by a brilliant machine evaluating applicants, it is likely that those hired will disproportionally live close to where the company is located. What happens if the company is located in a rich, nondiverse neighborhood? This seemingly benign process may be having a disparate impact on the diversity of those hired, leading to a claim of racial discrimination."

The current regulatory scheme doesn't account for machines, but researchers, lawmakers and academics are working on the different issues. Mathiason believes bar associations can help.

"There's no way for workplace laws, regulations and court decisions to keep up with the technological changes," Mathiason says. "Members of the bar are called upon to provide soft-law advice and solutions that will bridge the gap between today's workplace decisions and tomorrow's review of those decisions by courts, regulators and legislators."

continue expanding its reach by developing products for real estate and M&A deals.

"I was on a law panel in March 2015 and the title was something like 'Will robots take our jobs?' " Nguyen says. "No, it's not about replacing but transforming. About 20 to 30 years ago, lawyers had to manually red-line documents, but we don't do that anymore. We don't perform legal research by going to the books. Do we still have to red-line documents and perform legal research? Yes, and actually we are doing a lot more. I would argue that technology transformed our jobs and enabled us to ... add more value."

TRANSATLANTIC VISTAS

While Nguyen has his sights set on Europe, U.K. firms have their eyes set on North America. The AI movement is more advanced in the U.K., with firms partnering with universities and using financial incentives to innovate. Alternative business structures have been around since 2007 there, opening the door to new competition for law firms.

Again, pressure is on large firms to cut legal costs and become more efficient with less time and money to work with. The result is traditional law firms, accounting firms, legal startups and myriad other businesses are competing for clients.

Ravn Systems is in the next line of U.K. companies looking stateside. Founded in 2010, it focuses on using cognitive computing to extract information from data with its Applied Cognitive Engine program.

"We derive structure from chaos," says Ravn CEO and co-founder Peter Wallqvist. "For example, we can tell what are the tables, price lists, clauses and charts. We look at that with the robot and transfer it into structured data. What we do very well is having the ability to understand every little bit of the contract."

While Ravn's work is similar to other companies in the AI field, its vision reaches far beyond the law. The company's next target is the global financial markets.

"The OTC trading market is at least 10 times bigger than exchange-traded security markets," Wallqvist says. "Selling contracts to others is unbelievably painful for banks. Had people used this kind of technology in 2006 or 2007, maybe they could have known how unsustainable the market was. That was the OTC trading market and the banks didn't know how much exposure they had. There's a huge opportunity to extract the data from the structure and provide more information."

Artificial intelligence has the potential to bring in new business for lawyers, too. Because Ravn's technology can quickly go through large amounts of data, it opens the door for different legal work that previously wasn't possible.

"For example, there's a firm with a corporate client," says Wallqvist. "There is a new law in the EU that says an employer is liable for overtime pay even during the employee's paid vacation days. When you're a company with 50,000 employees, that's a big deal. The client asks the firm's employment lawyers: How much will we be liable? The firm says: We would have to read through all the documents and it would take one year for two lawyers to do that. Now they can instead use our technology and do work like this," he says, predicting his firm could do the job in a few days.

This legal revolution is moving quickly. Ravn announced in December that its new Ravn ACE Contract Robot would be able to extract data from title deeds along with other documents.

Riverview Law, a U.K.-based firm known for its progressive ideas, recently launched its virtual assistant Kim, which stands for knowledge, intelligence and meaning. The program will use artificial intelligence technology from the University of Liverpool and Clixlex, a U.S.-based data collection and management program that was acquired by Riverview last summer and renamed Kim Technologies.

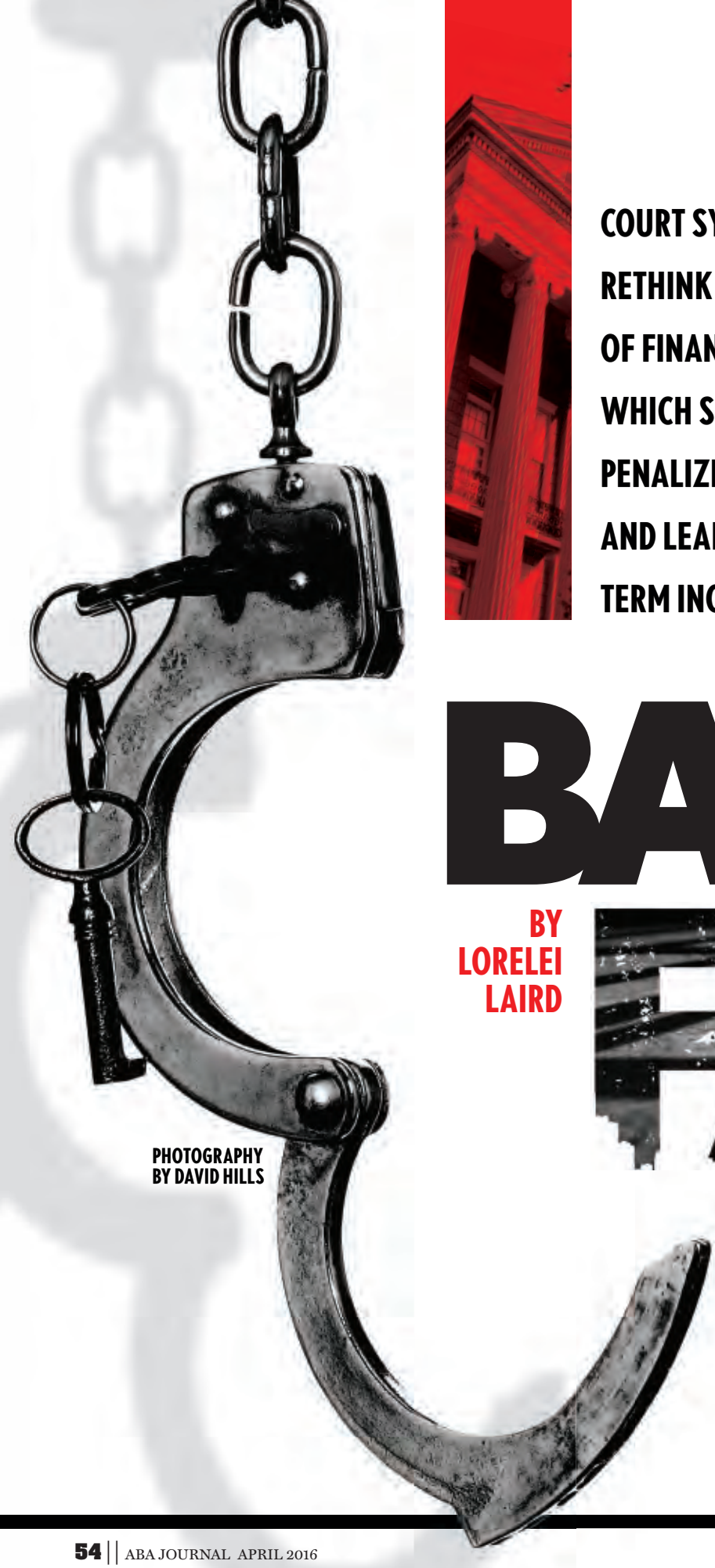
AWAITING ADOPTION

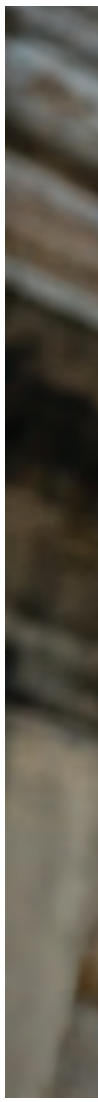
While AI is growing, it hasn't reached the majority of law firms yet. What will really make artificial intelligence a revolution is to change the thinking of lawyers. Perhaps real change will come with a simple recognition of the need to better serve clients.

"You start with a number of documents and ask questions like what are the termination clauses," Wallqvist says. "For example, there's a major telecommunications company that would tell us about documents they had to review. They told us how they had to go through 1,000 documents, which would take three people six months to complete. We can do that in a matter of days."

That is the future. Maybe it's not so scary after all. ■

Julie Sobowale, a lawyer, is a freelance writer based in Halifax, Nova Scotia.





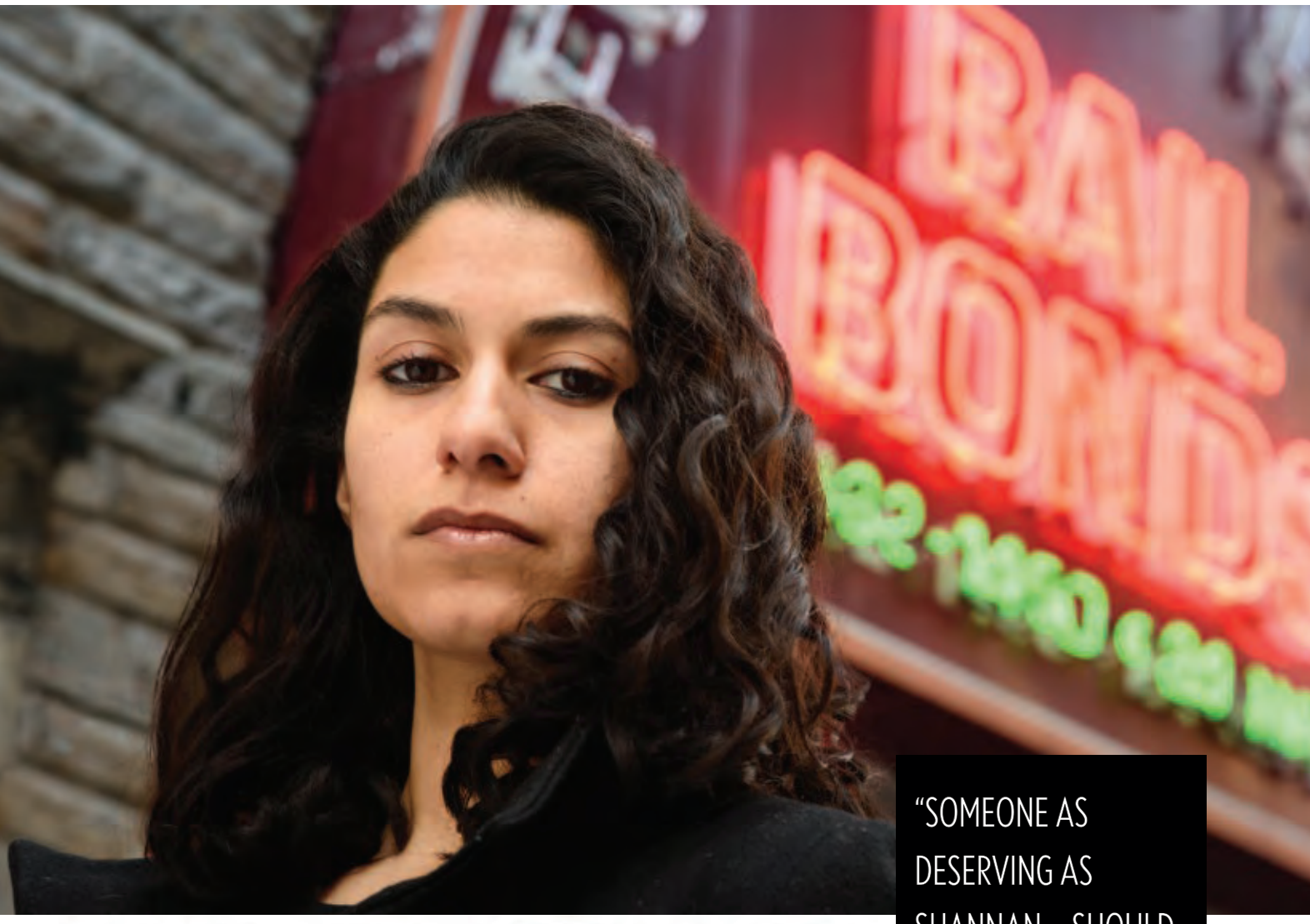
COURT SYSTEMS RETHINK THE USE OF FINANCIAL BAIL, WHICH SOME SAY PENALIZES THE POOR AND LEADS TO LONG-TERM INCARCERATION

BAIL'S FAIL

BY LORELEI LAIRD

PHOTOGRAPHY BY DAVID HILLS

Shannan Wise of Baltimore had never been arrested before. A single mother of two, she was busy juggling her family, her job as a driver for a private van service, seasonal work at Target and going to school to become a medical biller.



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But on Oct. 24 of last year, Wise, 26, had a fight with her younger sister, who has mental disabilities. The next day, Wise dropped off her kids, ages 2 and 5, at day care and school. When she got home, she found the police waiting with a warrant for her arrest. Her sister had filed a false police report against her for assault.

A judge set bail at $35,000, which was increased to $100,000 at a bail review hearing because—based on the allegations against her—the judge believed Wise was dangerous.

Wise didn't have that kind of money. Her family scraped together a down payment to a bail bond company, but it took five days. During that time, her kids had to be shuttled between their father and another of her sisters.

Worse yet, Wise missed work and fell behind on bills. The Maryland Public Service Commission, which regulates her driving job, sent her two scary letters requesting

"SOMEONE AS DESERVING AS SHANNAN ... SHOULD HAVE GOTTEN OUT A LOT SOONER AND SHOULDN'T HAVE HAD TO PAY THAT EXPENSE TO A BAIL BONDSMAN, SOMETHING SHE WILL NEVER BE ABLE TO GET BACK."

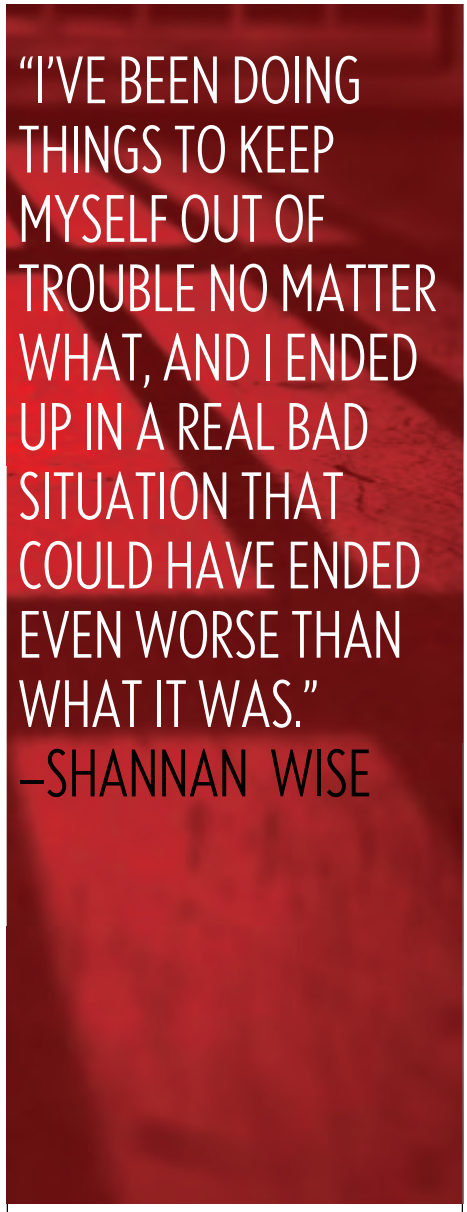
–ZINA MAKAR

information on the outcome of her charges. Her grades suffered, and she had to postpone an externship in medical billing—a step toward her planned career—because it conflicted with a court date.

Zina Makar, Wise's public defender, was ultimately able to get the charges dismissed. But that didn't happen until Jan. 8—the first day a court gave Wise's case meaningful review since a Nov. 19 postponement. If Wise hadn't been bailed out, she could have been in jail for more than two months. As it was, five days were enough to set her back.

"While five days may sound very short, ... you can see just being held for five days has grave consequences on Ms. Wise's life and her ability to care for her kids, her education—a lot of things that she was looking forward to," Makar says. "Someone as deserving as Shannan ... should have gotten out a lot sooner and shouldn't have had to pay that expense to a bail bondsman, something she will never be able to get back."

Wise says it was stressful. "It just put a lot of strain on me, a lot of strain on bills, when it was already a trying time," she says. "I've been doing things to keep myself out of trouble no matter what, and I ended up in a real bad situation that could have ended even worse than what it was."



REFORM MOVEMENT

Stories like Wise's illustrate why court systems are rethinking the use of financial bail. Concerned about the chain of negative effects bail can have on people of modest means, as well as its contribution to jail overcrowding and costs, jurisdictions around the nation are reforming bail. In 2013, Kentucky was among the earliest to adopt a pretrial system replacing cash bond with risk assessments and pretrial supervision. In 2014, New Jersey voters agreed to a similar system.

Last summer, New York City announced it was replacing money bond for low-risk defendants with text reminders to appear in court and counseling as appropriate. The state's chief judge, Jonathan Lippman, announced in October that New York would encourage judges to use alternatives to financial bond. In Texas, Chief Justice Nathan Hecht formed a committee in June to study whether financial bond can be replaced with an evidence-based screening process.

Even the U.S. Department of Justice has come out strongly against the use of financial bail. Last year, the department intervened in a little-noticed lawsuit challenging bail practices in Clanton, Alabama. "It is the position of the United States that [financial bond, set] without any regard for indigence, not only violates the 14th Amendment's equal protection clause but also constitutes bad public policy," the department wrote, intervening in a lawsuit filed by the nonprofit Equal Justice Under Law.

Advocates for the poor have long argued that financial bond is neither fair nor safe. By conditioning freedom on the ability to pay, they say, bail systems needlessly imprison poor defendants who pose no threat. Meanwhile, wealthy people go free regardless of what danger they might pose. Fifty years ago, those arguments led Congress to pass the Bail Reform Act of 1966, which eliminated financial bond for most federal defendants. But over the next few decades, the issue fell out of the public eye.

Now, the issue is once again being discussed, fueled by increasing bipartisan agreement and interest from the DOJ. This time, local jurisdictions are exploring—voluntarily or otherwise—alternatives to financial bail.

"These things are happening all around the country for various reasons," says Arthur Pepin, director of New Mexico's Administrative Office of the Courts and the author of a 2012 paper on evidence-based pretrial release. "Some as a result of litigation," he says, "some as a result of folks just thinking we should do a better job on this."

PRICE OF FREEDOM

Financial bond—technically, "bail" refers to all conditions of release—is widespread and routine in state and local jurisdictions. Most use either a judge's discretion or a bail schedule—a long list of charges corresponding to set prices, based on the severity of the crime. So usually, pretrial freedom comes at a literal price.

"Most of the country is doing it in an old-fashioned, nonscientific way," says Cherise Fanno Burdeen, executive director of the Pretrial Justice Institute in Gaithersburg, Maryland, and co-chair of the ABA Criminal Justice Section's Pretrial Justice Committee.

Critics see two major problems with financial bond. One is about the potential public safety threat

created by letting wealthier people go free even if they could be dangerous. That's why law enforcement officers don't like financial bond, according to Alec Karakatsanis, a co-founder of Equal Justice Under Law and one of Burdeen's co-chairs on the CJS Pretrial Justice Committee.

Then there's the opposite problem—locking up people who can't pay, even if they're not a threat. There's evidence that may be a civil rights violation. In a 1978 bail case, *Pugh v. Rainwater*, the 5th U.S. Circuit Court of Appeals at New Orleans found that without "meaningful consideration of other possible alternatives," jailing people because they cannot afford bail violates their due process and equal protection rights. The U.S. Supreme Court decided in 1983's *Bearden v. Georgia*, a case about payment of fines, that the 14th Amendment forbids "punishing a person for his poverty."

Imprisonment has far-reaching effects on the defendant's life, as Wise discovered. Worried about their families, jobs, finances and more, some defendants choose to plead guilty even when they aren't—despite the well-known stigmas of a conviction.

Chesa Boudin, a deputy public defender in San Francisco, encounters this routinely. "What we see literally every day is judges and prosecutors offer our clients 'credit for time served' plea deals," Boudin says. "If you plead guilty, you get out of jail today. If you assert your innocence, you're staying in jail. To see that sort of coercive pressure exerted on people to waive their constitutional rights because they're too poor to pay for their freedom is unbelievably frustrating."

Research has also found that pretrial detention—a practice intended to protect public safety—can actually lead to more crime. One 2013 study by the Laura and John Arnold Foundation, a nonprofit that funds research into social problems, found a strong correlation between length of pretrial detention and likelihood of committing more crimes. The researchers suggested that as detention increases, "the defendant's place in the community becomes more destabilized," which increases the risk of recidivism.

Another 2013 study by the foundation determined that those held in pretrial detention were more likely to receive prison sentences. The reason: Juries tend to believe that defendants in prison uniforms are guilty, and prosecutors have greater leverage in making plea deals with defendants who are jailed, according to other research.

Detaining those who can't afford bail also strains jail systems. The Department of Justice estimates that local jail populations grew by 19.8 percent between 2000 and 2014; pretrial detainees accounted for 95 percent of that growth. In mid-2014, the department says, 60 percent of those held in local jails were pretrial detainees.

And that's expensive. In Philadelphia, the cost of incarceration in the city's jail system is $110 to $120 per inmate per day. A 2015 Vera Institute of Justice report noted that Bernalillo County, New Mexico, where Albuquerque is located, spends $85.63 per inmate per day. Johnson County, Kansas, where fewer people are incarcerated, reported spending $191.95 per inmate per day.

All of this will be part of the pitch if Burdeen and Karakatsanis, as co-chairs of the Pretrial Justice Committee, introduce a resolution in the ABA's House of Delegates calling for the abolition of all money-based pretrial detention. The resolution, planned for the 2016 annual meeting this August, would also call for the elimination of private, fee-based pretrial services—a related practice that's also been the focus of recent litigation.

JAIL ALTERNATIVES

In making that case, they can point to a well-established alternative: pretrial risk assessment, followed by pretrial services that ensure defendants show up to court. That's the system in use by the federal courts since the 1960s.

Risk assessment includes a series of questions based on research into why people fail to appear. The questions typically examine the defendant's criminal history, current charge and personal circumstances. The federal questionnaire, for instance, asks about the seriousness of the defendant's charges, whether he or she has failed to appear in the past, homeownership and employment status, and any strong ties to a foreign country.

Judges consider the answers when making pretrial release decisions. If the

Shannan Wise relied on relatives to care for her children while she was jailed for five days.

offender is deemed dangerous or likely to flee, the system typically requires a preventive detention hearing. Those released get pretrial supervision—regular check-ins with an agent, backed up when necessary by measures such as telephone reminders for court dates, drug treatment and ankle monitors.

Typically, this is much cheaper than detention. In the federal system, the cost of pretrial services was $8.98 per person per day in fiscal 2014, while the cost of pretrial detention was $76.25.

The ABA Criminal Justice Standard 10-1.10 calls on every jurisdiction to use risk assessment and pretrial supervision, making money bond a last resort. Most states have adopted that standard, Burdeen says. But bail is still widespread because it's easy for judges, she says. "The practice has become that they skip over all these other considerations and options and they just go straight to setting money," she says. "Because it is a legal option and it's a shortcut."

Anne Milgram, former vice president of criminal justice at the Arnold Foundation, adds that cost has also been a deterrent to reforms. Plenty of jurisdictions have looked into Washington, D.C.'s decades-old risk-assessment system, she says—but most decided they couldn't afford it. The problem is that older risk assessments use interviews with the defendant, which requires a court employee's time. It also invites the possibility that the defendant will lie or refuse to cooperate.

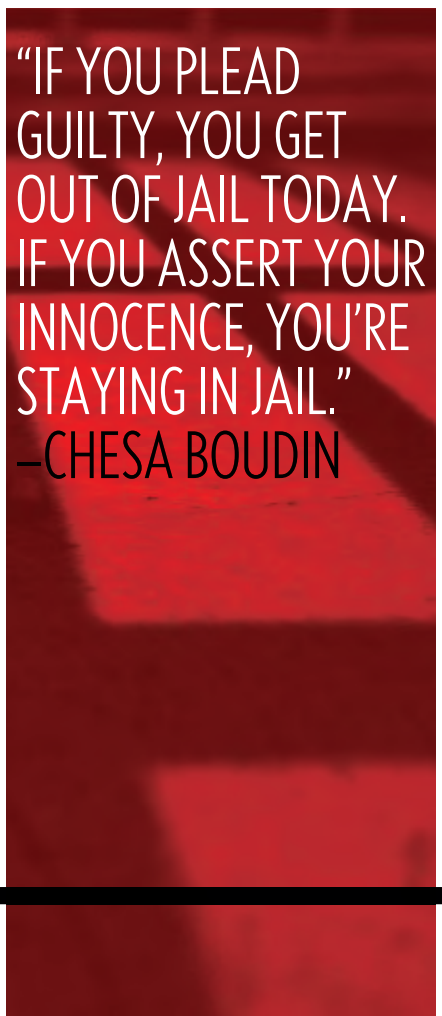
The expense of interviews is one concern that the American Bail Coalition, an industry group, raises about switching to risk-based systems. "It's extremely expensive," says Jeffrey Clayton, policy director for the coalition. "If folks want to go that direction, they just need to understand the implications of it all."

Interviews take time, which can be a problem if the goal is to get release-eligible defendants freed quickly, he says. Clayton believes financial bail should remain. For one thing, he says, financial bail gives family members, who often stand to lose money or property, an incentive to prevent the defendant from fleeing.

It's also effective, Clayton says. He cites a 2004 study from the *Journal of Law and Economics* that concluded defendants who used a bail bond company were 28 percent less likely to fail to appear than those released on their own recognizance. The probability of becoming a fugitive was also 64 percent lower for those using a bail bond company than those paying the court directly. The study attributed this to the work of bond dealers and bounty hunters, who have a financial stake in the outcome and the right to forcibly arrest defendants.

GAINING TRACTION

The financial bail debate is drawing more attention than it has in years—in not only the media but also local governments and the Department of Justice. Burdeen traces the current interest in bail reform to 2011, when the DOJ called a National Symposium on Pretrial Justice. This deliberately echoed a similar meeting convened in 1964 by Robert Kennedy, who pushed hard for the 1966 Bail Reform Act.



The DOJ did not respond to repeated requests for comment. But it remains critical of financial bail, as evinced by remarks Attorney General Loretta Lynch made in December.

"In so many instances, an individual's access to justice has become predicated on their ability to literally pay for it," she said during a speech in December at the White House Convening on Incarceration and Poverty. "When bail is set unreasonably high, people are behind bars only because they are poor."

Perhaps more important, the issue is getting attention at the local level. In 2012, the Conference of State Court Administrators published a policy paper calling on state courts to propose risk-based, rather than money-based, decisions on release of criminal defendants, along with nonfinancial release options. The author of that paper is Pepin, the New Mexico courts leader, who is also COSCA's president-elect. He says the conference chose that topic out of concern that most states' bail practices "weren't productive and perhaps not evidence-based."

"People accused of minor crimes, even traffic offenses, are staying in jail because they can't meet a bail or bond, and that doesn't serve public safety," he says. "If you normalize the data for all other factors, the [defendants] who can't afford to make bail are at much higher risk of conviction and recidivism."

Pepin has spent nearly three years working toward bail reform in New Mexico. He's chair of the Bernalillo County Criminal Justice Review Commission, formed in 2013 to solve long-standing overcrowding at Albuquerque's largest jail. Crowding there is part of a civil rights lawsuit, *McClendon v. City of Albuquerque*, which entered its 21st year in January.

The commission's reforms include risk assessments for use at arraignments and increased use of community supervision rather than jail. Pepin says this can be as simple as a reminder that court is

coming up or as drastic as an ankle monitor. As a result of those and other measures, a September report to the state legislature said that Bernalillo County's jail population went down by 38 percent in two years, saving more than $5 million.

And, thanks to a 2014 decision from the New Mexico Supreme Court, similar reforms may be forthcoming across the state. *New Mexico v. Brown* found that the state shouldn't have held Walter Brown on $250,000 bail when less-restrictive measures would have sufficed. Brown, who has developmental and intellectual disabilities, was charged with murder. The court wrote a lengthy opinion expressing concern that judges were basing decisions solely on the nature of the criminal charges.

To recommend statewide changes, the court appointed the Ad Hoc Pretrial Release Committee. The committee recommended an amendment to the state constitution to authorize pretrial detention for those found too dangerous for release and to prevent defendants from being held in jail solely due to inability to post bail. The amendment passed in both houses, according to its sponsor, state Sen. Peter Wirth, D-Santa Fe, and will likely go to New Mexico voters in November.

The risk assessment used in Bernalillo County, Pepin says, was taken from one developed by Kentucky. But early this year, the county was also hoping to use a new risk-assessment tool designed by the Arnold Foundation, called the Public Safety Assessment. Developed from analysis of 1.5 million court cases drawn from more than 300 U.S. jurisdictions, the PSA aims to make risk assessment inexpensive, impartial and usable in any U.S. jurisdiction.

The foundation's model removes the need for interviews and uses only nine questions, all of which can be typically answered in criminal records. Milgram says that some jurisdictions are working to generate the answers automatically from databases.

About 29 jurisdictions were using the PSA or working on implementing it as of late 2015, according to Milgram. That includes the states of Kentucky and New Jersey, as well as numerous Arizona counties. More than 100 other jurisdictions were interested, she says—so many that the Arnold Foundation couldn't handle the demand.

It's too early for any definitive data on outcomes with the PSA, Milgram says, because testers hadn't had it long enough for most of their cases to close. But the foundation was working on rigorous testing. However, she says, early data is promising. For example, early adopter Mecklenburg County, North Carolina, which includes Charlotte, saw its jail population drop 20 percent and its rate of failure appear to drop without an

"MOST OF THE COUNTRY IS DOING [FINANCIAL BOND] IN AN OLD-FASHIONED, NONSCIENTIFIC WAY."

–CHERISE FANNO BURDEEN

"I WAS ... WATCHING PEOPLE STUCK IN JAIL BECAUSE THEY COULDN'T PAY $200 BAIL. ... IF ANYTHING, THE PRINCIPLE IS EVEN STRONGER IN THE PRETRIAL CONTEXT. YOU HAVEN'T BEEN CONVICTED OF ANYTHING YET." –ALEC KARAKATSANIS

increase in reported crime.

A more recent adopter is Allegheny County, Pennsylvania. The county, which includes Pittsburgh, had already adopted a risk-assessment tool designed by the Pretrial Justice Institute back in 2007.

But that tool is interview-based. And Janice Radovick Dean, director of pretrial services for the Fifth Judicial District, says county courts outside the city of Pittsburgh didn't have the staff to implement it. That's why Allegheny County planned to adopt the PSA for its outlying courts in 2016, using automatically generated answers. After six months or so, the county will consider whether to switch the whole system to the PSA.

The county saw promising results. Dean says jail admissions decreased by about 30 percent in the first six months. In 2015, she says, failure to appear, recidivism and jail population had all dropped. She cautions that other factors may be at work—but she's confident that fewer low- and moderate-risk people are jailed pretrial today.

LAWSUITS PROMPT CHANGES

Meanwhile, some jurisdictions are changing the hard way: through litigation. Leading the charge is Equal Justice Under Law, the D.C. nonprofit led by Karakatsanis. He and co-founder Phil Telfeyan started suing over financial bond after pursuing a series of cases about the related issue of debtors' prisons—public or privatized systems that jail people who can't afford court costs.

"As I sat in courts all around several states, watching people be jailed because they couldn't pay their court costs, I was also watching people stuck in jail because they couldn't pay $200 bail," Karakatsanis says. "And you know, if anything, the principle is even stronger in the pretrial context. You haven't been convicted of anything yet."

Almost all the lawsuits were filed against small cities. That includes the case in which the Justice Department intervened, which was filed against the 8,745-person city of Clanton, Alabama. "It both brought us a lot of media attention but also I think served to highlight that the nation's leading law enforcement group, the DOJ, has examined this issue," Karakatsanis says, "and has itself been administering a system without money bail for the last several decades."

It may also have persuaded defendants to settle. In late 2015, Equal Justice Under Law had settled with six of the nine jurisdictions it sued. Typically, Karakatsanis says, cities drop the bail requirement altogether rather than replacing it with risk assessments, since most don't prosecute serious felonies.

But that's likely to change with the case against San Francisco, which does prosecute felonies. The case named the state of California as

a defendant, because its law requires the use of bail schedules. As a result, the case could reform bail across the nation's most populous state.

That lawsuit is also different because it's facing more serious opposition. In January, Judge Yvonne Gonzalez Rogers told Equal Justice Under Law that its complaint was "impermissibly vague" and misunderstood how the California court system works. She gave the plaintiffs 30 days to amend their complaint with a clearer legal theory. She also dismissed the state of California as a defendant, citing sovereign immunity. Shortly afterward, on Jan. 29, Equal Justice Under Law filed a similar lawsuit against Sacramento County. It named California Attorney General Kamala Harris, in her official capacity, as a defendant, suggesting one strategy for amending the San Francisco case.

Despite this, the case has local support. The San Francisco public defender's office is officially supporting the case, as is the former sheriff, Ross Mirkarimi.

Shannan Wise and her public defender, Zina Makar, reunite at the Wise household after her charges were dropped. They still await the case's expungement from her record.

SWIFTER REVIEW URGED

The American Bail Coalition was considering intervening on behalf of California and San Francisco at press time. Clayton argues that bail schedules are not unconstitutional because the indigent are not a suspect class for equal protection purposes, and there's no disparate treatment when all defendants are given the same bail.

He thinks the real solution is a swifter review of the case, so release-eligible defendants don't languish for days. "As I've looked at many of the settlements, particularly the ones in Alabama, that's been the outcome," Clayton says. "And we're for that."

Length of pretrial detention is an issue in the other cases currently addressing bail reform, filed by the national American Civil Liberties Union. Brandon Buskey, a staff attorney on the organization's criminal law reform project, says his bail reform work has been part of a larger push toward pretrial justice reform—a set of issues also including the right to counsel and the right to prompt review.

In 2014, Buskey and others sued Scott County, Mississippi, alleging it routinely imprisons people for months without an indictment—but won't appoint public defenders until an indictment. A Mississippi federal judge dismissed some of the claims in September, but left financial damages claims alive.

However, it's possible that nobody will have to sue for reforms. Karakatsanis says he's heard from many municipalities that have changed their policies after seeing their neighbors get sued.

Burdeen believes more will follow. "I'm already in conversations with other states and saying, 'I don't know if you noticed, but other jurisdictions are settling; do you want to go through the expense of being sued?' " she says. "There's been a lot of progress over the last four years, and I think the next two years will see even [more] accelerated progress."

As for Shannan Wise, she says her sister never faced any legal consequences for filing the false police report, which led to Wise being held in jail.

Wise has been getting her own life back on track. She filled out expungement paperwork the same day the charges were dropped, which she hoped would put to rest worries about her state-licensed job. She finished her medical billing course in December and is hoping to land a new externship. ■

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yourAba

PHOTOS BY EARNIE GRAFTON

BOLSTERING THE BIAS RULE

Ethics proposal needs more teeth, speakers say

BY JAMES PODGERS

Efforts to strengthen the ethics rule sanctioning discrimination and harassment as related to the practice of law received criticism in one area during a public hearing at the 2016 ABA Midyear Meeting in San Diego—that the measure was not broad enough.

The ABA Standing Committee on Ethics and Professional Responsibility wants to add provisions that would make it misconduct for lawyers to knowingly discriminate or engage in harassment in conduct related to the practice of law.

The panel's work received generally positive reviews from about a dozen speakers who testified. But nearly every speaker, including ABA President Paulette Brown, urged the committee to make further changes in its proposal to give it even broader effect.

The committee, which has primary responsibility for revising and interpreting the ABA Model Rules of Professional Conduct, issued its draft proposal to amend Model Rule 8.4 on Dec. 22. The committee accepted written comments through March 11, and it plans to submit a final proposal for consideration at the ABA Annual Meeting in San Francisco this August.

Model Rule 8.4 addresses bias or prejudice in a comment to the black-letter rule that states: "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status," is in violation "when such actions are prejudicial to the administration of justice."

But the language raised concerns for several ABA entities because comments may not be enforced in the same way as black-letter rules, and because the language is not broad enough to adequately address discriminatory behavior by lawyers in the context of law practice.

"By addressing this issue in a comment, however, the compromise did not make

manifestations of bias or prejudice such as discrimination or harassment a separate and direct violation of the Model Rules," states the committee's memorandum accompanying its proposed amendments. The committee's proposal "moves beyond the comment to craft a distinct rule within the black letter of the Model Rules of Professional Conduct prohibiting lawyers from engaging in harassment and knowing discrimination in conduct related to the practice of law" against people on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. A revised comment states that the prohibition would apply "to conduct related to a lawyer's practice of law, including the operation and management of a law firm or practice."

Association members salute the national colors during the opening ceremonies of the House of Delegates.

ABA President Paulette Brown receives a standing ovation.

UPON REQUEST

The ethics committee's review of Model Rule 8.4 was prompted by a letter it received in May 2014 from the ABA's Goal III commissions: the Commission on Women in the Profession; the Center for Racial and Ethnic Diversity; the Commission on Disability Rights; and the Commission on Sexual Orientation and Gender Identity. (Goal III states the ABA's commitment to eliminating bias and enhancing diversity.) In the letter those commissions urged the committee to consider amending the Model Rules to address issues of harassment and discrimination more effectively.

It was primarily representatives of those commissions whom the ethics committee heard from at the public hearing, and the consensus message was that the committee should give amended Rule 8.4 even more and sharper teeth.

Brown was the first person to address the committee. "A prohibition against discrimination and harassment must be in the body of the Model Rules and not just in a comment," she said. "A prohibition against discrimination must be the rule."

But one problem with the proposed amendments, she said, is that applying the prohibition to lawyers who "knowingly" discriminate may undercut its application in many cases. "Some have objected to the inclusion of 'knowingly,' " she said, "and I'm troubled by its inclusion in the rule."

Brown also urged the committee to add gender expression to the list of attributes that would be protected under the rule.

ADD SOCIAL EVENTS

Other speakers who echoed Brown's concerns also said the proposed amendments fail to define the practice of law in a way that would encompass incidents in the context of nonprofessional activities at law firms, such as receptions, dinners and informal social events.

These are the types of events where much of the harassment of or discrimination against female lawyers occurs, several speakers said.

"The impediments to women of bringing discrimination claims against their firms to court are great," said Wendi S. Lazar, a partner at Outten & Golden in New York City who testified on behalf of the women's commission. For that reason, she said, expanding the application of Model Rule 8.4 to social settings "is absolutely critical and crucial to retaining women in the profession."

In closing comments, ethics committee chair and Arizona State University law professor Myles V. Lynk said, "The comments will inform us as we give further consideration to the proposed language. This was something that wasn't on our radar. But it clearly needs to be on our radar—and on the radar of the entire association."

Later, the ABA's House of Delegates easily adopted a resolution encouraging programs on diversity and inclusion in the legal profession as part of mandatory or minimum continuing legal education requirements. Resolution 107 asks licensing and regulatory authorities that require MCLE to make diversity and inclusion programs a separate credit, but without increasing the total number of hours required. ■

Lorelei Laird contributed to this report.

GUIDANCE ON LEGAL SERVICES

House OKs objectives to regulate nontraditional providers

BY LORELEI LAIRD

After extended and heated debate at the ABA Midyear Meeting in San Diego, the House of Delegates adopted a resolution to guide states in their regulation of nontraditional legal services.

Resolution 105 provides model objectives for state regulators considering how to supervise nontraditional legal service providers. These providers include online startup businesses and corporations, but also practitioners like the limited-license legal technicians recently authorized in Washington state. And the heart of the debate was over whether, by adopting the resolution, the House was endorsing the practice of law by nonlawyers.

The resolution was proposed by the Commission on the Future of Legal Services, a major project of the ABA's immediate-past president, William Hubbard. Commission chair Judy Perry Martinez of New Orleans introduced it with a short speech noting that nontraditional legal services are now a significant economic force and are already providing services for people of modest means.

A long list of delegates filled out "salmon slips" seeking to speak on the resolution, but House chair Patricia Lee Refo limited debate to two speakers for and two against. Hubbard spoke in favor of the motion, giving a long list of ABA entities and outside legal organizations that support it. He cited statistics on the "justice gap" and told the audience that nonlawyer providers would continue regardless of what the House did.

Votes on a measure to table Resolution 105 are counted.

Delegates listen to the debate on Resolution 105 during the House of Delegates session.

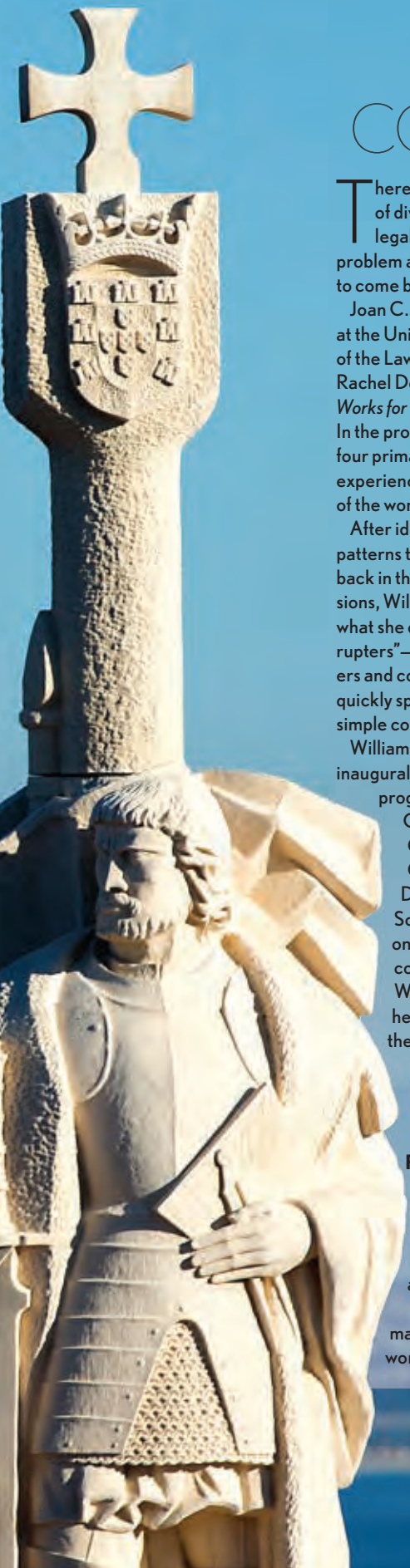
"We're not going to put the Internet back in a bottle," Hubbard said. "Let's stand up and lead."

But opposition also came from many ABA and outside legal entities. Marjorie O'Connell, the ABA delegate from the National Conference of Women's Bar Associations, said her members were "mad as anything" at the prospect of handing legitimacy to poorly trained practitioners, particularly since so many female lawyers have struggled to be taken seriously.

"We have no patience with the idea of a big corporation coming in and saying,

Continued on page 70

Cabrillo National Monument



INTERPRETING AND CORRECTING IMPLICIT BIAS

There's no shortage of discussion about lack of diversity in the workplace, especially the legal profession. But solutions to the diversity problem and ways to combat implicit bias are harder to come by.

Joan C. Williams, a feminist legal scholar based at the University of California's Hastings College of the Law in San Francisco, wrote with her daughter, Rachel Dempsey, *What Works for Women at Work*. In the process they identified four primary bias patterns experienced by 96 percent of the women they studied.

After identifying the bias patterns that hold women back in their chosen professions, Williams came up with what she calls "bias interrupters"—ways that managers and colleagues can more quickly spot bias and take simple corrective steps.

Williams spoke during an inaugural "GOOD Guys" program, "Why GOOD Guys—Guys Overcoming Obstacles to Diversity—Are So Important," sponsored by the Commission on Women in the Profession. The women's commission and the National Conference of Women's Bar Associations honored men who help mentor and support the advancement of their female colleagues.

The groups also released the Good Guys Toolkit for individuals and organizations to use to deal with bias in the legal workplace.

Joan Williams

PATTERN RECOGNITION

Williams outlined four bias patterns women may recognize:

- Prove-It-Again: Women (and minorities) having to prove time and again that they are competent.
- Tightrope: Balancing the push to be masculine against the expectation that women should be feminine.
- Maternal Wall: Using family commitments as a reason to hold women back.
- Tug of War: Facing a loyalty test, or pressure to identify with their gender or a certain group in order to succeed.

To combat bias in each of these patterns, Williams developed common scenarios that managers or colleagues may face with example responses that could correct the issue.

For Prove-It-Again, Williams used the example of origination credit. A woman may come up with an idea in a meeting, but the idea is ignored. When repeated by a man, it is perceived as brilliant. Astute managers or colleagues could correct the bias by saying, "I've been pondering that ever since Pam first said it," giving credit where credit is due.

When becoming aware of a Tightrope situation, a manager or colleague may see that women in a department are held responsible for items such as the housework of planning parties, meeting-planning logistics, staffing and billing, or note-taking. To correct the issues, the manager would not ask for volunteers for party planning because women are under pressure to accept and men to decline. Other tactics include:

- Assigning support personnel to handle meeting planning.
- Establishing a rotation for tasks such as note-taking.
- Having each person do his or her own billing.

Maternal Wall issues may come up when a manager hears someone express uncertainty that a woman can do a task because of her child care issues. One possible response would be to call out the bias directly: "I wonder if we'd say the same thing about a man."

In the last example, Tug of War, Williams suggested looking out for tokenism and making sure that there isn't a pattern of having one woman on a committee or team.

—Molly McDonough

YOUNG LAWYERS MOST AT RISK, SUBSTANCE ABUSE STUDY SAYS

A study released just before the 2016 ABA Midyear Meeting rejects the prevailing wisdom about substance abuse and mental health problems in the U.S. legal profession on two key points.

First, the levels of problem drinking and mental health issues in the profession appear to be higher than indicated by previous studies. And second, younger lawyers are the most at risk of substance abuse and mental health problems. Previous studies indicated older lawyers were more at risk for developing problems in both areas.

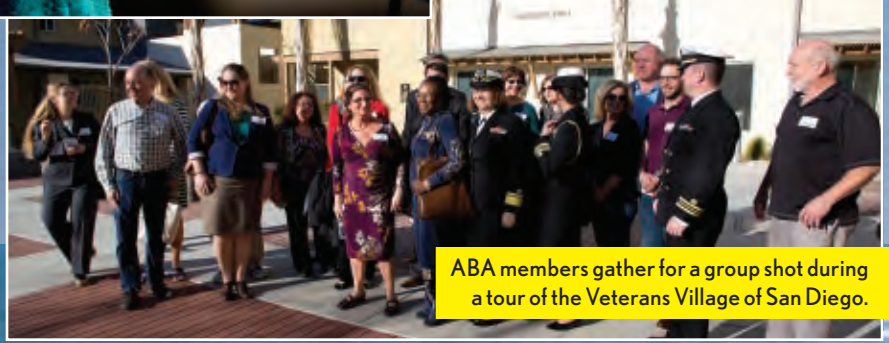
The study was conducted jointly by the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation, based in Center City, Minnesota. Nearly 13,000 licensed and employed lawyers and judges throughout the United States responded to the 10-question Alcohol Use Disorders Identification Test, a screening tool developed by the World Health Organization that asks for objective and subjective information.

According to the findings, 20.6 percent of the lawyers and judges surveyed reported problematic alcohol use, said Patrick R. Krill, director of the legal professionals program at Hazelden Betty Ford and a co-author of the study. But the study also found, using a variation of the questionnaire that focuses solely on the frequency of alcohol consumption, that 36.4 percent of the respondents qualified as problem drinkers.

The study results also indicate that 28 percent of the lawyers responding experience depression, 19 percent experience anxiety and 23 percent experience stress —all higher rates than were reported in earlier studies.

The results indicate that alcohol use disorders and mental health problems are occurring in the legal profession at higher rates than in other professions and the general population, Krill said. But he added that there is not one clear answer to why legal professionals appear to be more susceptible to these problems.

President-elect Linda Klein speaks at the 2016 Spirit of Excellence Awards luncheon.



ABA members gather for a group shot during a tour of the Veterans Village of San Diego.

WORK-LIFE IMBALANCE

"This long-overdue study clearly validates the widely held but empirically undersupported view that our profession faces truly significant challenges related to attorney well-being," Krill said at a press briefing. "Any way you look at it, this data is very alarming and paints the picture of an unsustainable professional culture that's harming too many people. ... The stakes are too high for inaction."

An online version of the study is on the site of the *Journal of Addiction Medicine* from the American Society of Addiction Medicine. Co-authors of the study include Ryan Johnson, a research assistant at Hazelden Betty Ford, and Linda Albert, the manager of the lawyers assistance program at the State Bar of Wisconsin in Madison.

The study "creates an opportunity for the legal profession to turn the corner on some of these issues," Krill said. Possible policy changes could include:

- Mandatory law school classes on the importance of maintaining well-being.
- Comprehensive mentoring programs.
- CLE-required courses on substance use disorders and mental health problems.
- Adequate funding for bar-sponsored lawyer assistance programs and collaboration with health groups to develop effective treatment.
- Programs to help bar regulators and licensing agencies identify and deal with lawyers who have problems with alcohol or mental health issues.

"People involved in COLAPS probably won't be surprised by these findings," said Terry L. Harrell, executive director of the Indiana Judges and Lawyers Assistance Program, who chairs the ABA's Commission on Lawyer Assistance Programs. "But the thing is, we finally have good data so we can engage the entire profession to do something about this." —*J.P.*

DIVERSE SLATE TO LEAD THE ABA

As a result of actions taken by the Nominating Committee at the organization's midyear meeting, the top leadership ranks of the ABA have never been more diverse than they are now.

The nominees for all four of the ABA's top leadership positions—president-elect, chair of the House of Delegates, secretary and treasurer—are women, including two African-Americans and one Native American.

The committee's action sends an important message to the rest of the ABA and the legal profession as a whole, said Hilarie Bass, a shareholder and co-president at Greenberg Traurig in Miami, who was nominated to become president-elect in August (and president a year later) pending her formal election by the House of Delegates when it convenes in San Francisco during the annual meeting.

"One of the challenges of diversity is that we've made huge progress in making American law schools more diverse while there is less diversity in law firms," Bass said. "And that explains why young lawyers, especially women and people of color, are leaving law firms. It's not just about diversity; it's about a sense of belonging. Diversity in the ABA's leadership shows younger lawyers that there is a place for them in the profession."

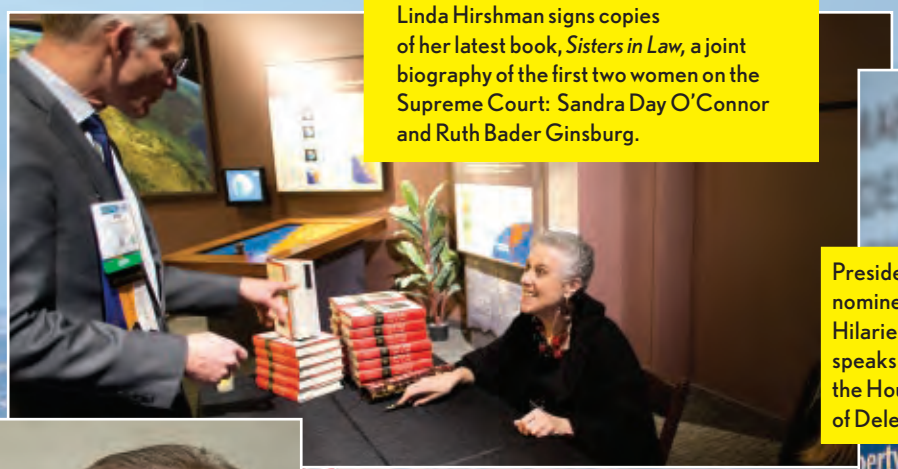
The other candidates selected by the Nominating Committee are:

• Deborah Enix-Ross, an African-American woman who will become chair of the House for a two-year term starting in August. Enix-Ross is senior adviser to the international dispute resolution group at Debevoise & Plimpton in New York City.

• Mary L. Smith, who will become ABA secretary for a three-year term starting in August 2017. An attorney with the Office of the Special Deputy Receiver in Chicago, Smith is a member of the Cherokee Nation and immediate-past president of the National Native American Bar Association.

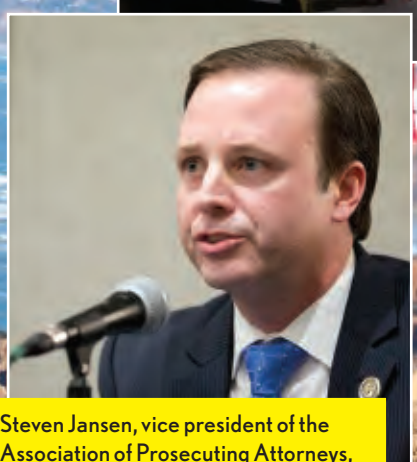
• Michelle A. Behnke, who will become ABA treasurer starting in August 2017. Behnke, an African-American, is principal of Michelle Behnke & Associates in Madison, Wisconsin. Since she serves on the Nominating Committee as state delegate from Wisconsin, Behnke recused herself from the committee's vote.

The formal election of all the candidates by the House of Delegates in August is virtually assured. *—J.P.*



Linda Hirshman signs copies of her latest book, *Sisters in Law,* a joint biography of the first two women on the Supreme Court: Sandra Day O'Connor and Ruth Bader Ginsburg.

President-elect nominee Hilarie Bass speaks to the House of Delegates.



Steven Jansen, vice president of the Association of Prosecuting Attorneys, discusses "stand-your-ground" laws.

ABA members listen to a panel discussion on the "school-to-prison pipeline."

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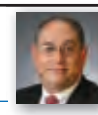

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ABA Notices

DELEGATE-AT-LARGE ELECTIONS

Pursuant to § 6.5 of the Association's Constitution, six Delegates-at-Large to the House of Delegates will be elected for the 2016-2019 term. The deadline for filing nominating petitions is Tuesday, May 17, 2016. For procedures on filing petitions, visit ABAJournal.com/magazine and scroll to Your ABA-click ABA Announcements.

NOTICE BY THE BOARD OF ELECTIONS

Pursuant to § 6.3(e) of the ABA Constitution, the state of Utah will elect a State Delegate to fill a vacancy (for the remainder of the 2015-2018 term). The deadline for filing nominating petitions is Monday, April 11, 2016. For procedures on filing petitions, visit ABAJournal.com/magazine and scroll to Your ABA-click ABA Announcements.

NOMINATING COMMITTEE ACTION AT THE 2016 MIDYEAR MEETING

In accordance with § 9.1 of the ABA Constitution, the House of Delegates Nominating Committee, at its meeting on Sunday, February 7, 2016, nominated officers of the Association and members of the Board of Governors. For the list of all nominees, visit ABAJournal.com/magazine and scroll to Your ABA-click ABA Announcements.

LEGAL SERVICES

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'We can for $5 get you a lawyer and get you an answer,' " she said. "It's not informed by an education, by adherence to professional standards."

A voice vote on a motion to postpone the resolution indefinitely left Refo in doubt, so she asked delegates to stand and be counted. In the end, 276 delegates opposed postponing and 191 favored it.

The House then considered proposed amendments to the measure. The first was adopted easily, adding language saying that nothing in the resolution abrogates ABA policy on nonlawyer ownership of law firms or other core values.

The second was the subject of more debate. Sharon Stern Gerstman, a counsel at Magavern Magavern Grimm of Buffalo, New York, moved to urge regulators to require lawyer supervision of nonlawyers providing legal services; require that such practitioners be subject to rules of professional conduct; and require that such practitioners accurately state the scope of services provided. She phrased it as a matter of consumer protection.

Amendment supporter Marshall Wolf of Wolf and Akers in Cleveland said the Section of Family Law would support the resolution only with this amendment, and he noted that family attorneys were not represented on the commission despite family law taking up 50 percent of civil dockets.

But speakers against the amendment cautioned that it would have unintended consequences. Andrew Perlman, dean of Suffolk University Law School and vice-chair of the Commission on the Future of Legal Services, said it could regulate paralegals who are currently not regulated, as well as Washington's limited-license legal technicians and various states' courthouse navigator programs. Lucian Pera, a past ABA treasurer and partner at Adams and Reese in Memphis, said it would be "the work of months and years" to come up with appropriate model regulations.

The second amendment failed on a voice vote, though there was strong support. The resolution itself then proceeded to a voice vote. The ayes had it.

After Resolution 105 was adopted, ABA President Paulette Brown released a statement: "The adoption of Resolution 105 is intended to create a framework to guide the courts in the face of the burgeoning access-to-justice crisis and fast-paced change affecting the delivery of legal services. The ABA Model Regulatory Objectives for the Provision of Legal Services [adopted provide] for the protection of the public, the advancement of the rule of law, the independence of professional judgment, and diversity and inclusion among legal services providers, as well as freedom from discrimination for those receiving legal services. Moving forward, it allows the assessment of regulations that may develop concerning nontraditional legal service providers. The ABA recognizes the importance of evaluating the changes in delivery of legal services and the need for the ABA to carefully analyze these changes so that the public and the legal profession are protected and lawyers maintain the ability to serve their clients."

ACTION ON THE UNIFORM BAR EXAM

In other action, law students seeking a more mobile practice got some encouragement when the House adopted two resolutions concerning the Uniform Bar Examination.

Over some opposition, the House adopted Resolution 109, which urges bar admission authorities to "adopt expeditiously" the UBE.

The UBE is a combination of the Multistate Bar Exam, the Multistate Essay Examination and the Multistate Performance Test, and it is coordinated by the National Conference of Bar Examiners. The resolution was sponsored by the ABA Law Student Division.

The House also approved the related Resolution 117, urging bar admission authorities to consider the UBE's impact on minorities. It also asks bar admission groups to consider including subjects that are important in their jurisdictions—particularly Native American law, which is important in some regions but not covered by the UBE. ■

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A TRIBUTE TO NINO

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one. Scalia sometimes joked about that, but it was a self-defeating joke. If you ask the American people whether they want a living or a dead Constitution, of course they'll answer "living"—with little further inquiry. But if you ask them whether they want a stable or a morphing Constitution, they'll answer "stable." Naming rights are powerful. If you use your opponent's terminology, you're probably engaging in futility.

Scalia finally came around to that idea in 2013—after he'd spent 30 years arguing against the living Constitution. After that, he abandoned the euphemism of his intellectual nemeses and called it the "changing Constitution." Was it too late? In at least one precedent-setting case, yes. He lost the argument in *Obergefell v. Hodges*, which established a new right that many people favored: same-sex marriage.

One important thing to remember about Scalia is that, despite what his detractors say, he was committed to being principled: He believed in democracy and in the separation of powers. He didn't think judges should innovate rights. In the popular mind, this view gets equated with homophobia. In the popular mind, judges are philosopher-kings who get to enact the policies they favor. When that becomes the prevailing notion among judges and the populace as a whole, then the appointment process becomes ever more political. It's not so much about judging as it is about policymaking.

Fascinated by the word *soothsayer*, Scalia took a photo of the fortune-teller's sign. But he refused Garner's urging to have his fortune read.

THE SOOTHSAYER'S STALL

We spent 14 of his last 23 days together, Scalia and my wife, Karolyne, and I. There was no extra security except at airports. We traveled to Singapore and Hong Kong, speaking at universities about our two books. We were together morning, noon and night—about 14 hours a day, all told. He was in high spirits, and he loved exploring other cultures. He discovered one Asian delicacy that he craved: jellyfish.

On our last day in Hong Kong, Feb. 3, we went to a Taoist temple. People were engaged in all sorts of prayers and divinations of the future by means of sortilege (shaking sticks out of a box to foretell their fortunes, as our tour guide explained it). Scalia was fascinated by a sign for the "Soothsayer's Stall," and he paused to take some photos of it because he liked the word *soothsayer*. I took photos of him taking those photos.

Karolyne and I decided to have our palms read by that soothsayer, and we were both told that we'd "easily" live into our late 80s or early 90s. The soothsayer also said some startling things: For example, he somehow knew that I had two daughters and no other children. Scalia looked on with great interest.

"Nino, you ought to get your palm read," I said. I wondered whether the soothsayer could accurately say he had nine children and 36 grandchildren.

"No. I don't want to know when I'll die."

"Come on!" I insisted.

"No."

He couldn't have thought that the end would come so soon. I certainly wouldn't have believed he would live only 10 more days. I'm still stunned every time I hear the words "the late Antonin Scalia." It's hard to register the reality of it.

Already his intellectual enemies have predicted that originalism will have less influence now that he's gone. Yet others predict that his influence will be much greater in death than it was in life. Time will tell.

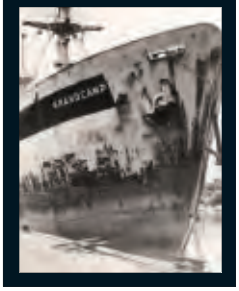
One thing I do know is that my own life won't be the same without him. I will miss him as long as I live. Despite our political differences, I loved the man. And those were my parting words at DFW Airport as he headed on to Washington, D.C., on Feb. 4: "We love you, Nino." It was only the second time I'd ever said that. He seemed to get choked up for a second. "Thank you both," he said. "I'll see you again soon." He turned, flanked by three U.S. marshals, and strode toward his next flight. As always upon parting after a long visit, Karolyne and I watched until he disappeared from our sight. ■

BRYAN A. GARNER *is the distinguished research professor of law at Southern Methodist University.*

PHOTOGRAPH COURTESY OF BRYAN GARNER

Explosion Leads to First Class Action

April 16, 1947



Even before the end of World War II, the U.S. began to repurpose its wartime manufacturing for peacetime, and one of the first industries targeted was munitions production. As early as 1943, some factories previously devoted to the development of explosives began conversion to the manufacture of fertilizer for large-scale agriculture.

Postwar food shortages in Europe created a sense of urgency, so government officials continued their wartime supervision of private manufacturers to create fertilizer-grade ammonium nitrate, a coated and bagged version of the highly volatile chemical for shipment overseas.

On the morning of April 16, 1947, two French-controlled ships were being loaded with FGAN at the port terminal on Galveston Bay in Texas City, Texas, when smoke was spotted in the hold of one of them, the SS *Grandcamp*. At first, longshoremen were more concerned with a small cache of munitions from Belgium than the 1,850 tons of fertilizer already loaded aboard. But the steam they forced into the hold only seemed to make matters worse, as broad billows of smoke attracted the city's entire fire department dockside, as well as scores of spectators.

The first explosion came at 9:12 a.m., launching debris and shrapnel 2,000 feet into the air and fireballs across Galveston Bay. The blast collapsed houses, leveled warehouses, sparked fires at nearby refineries and destroyed an entire chemical plant. It also set fire to the second ship bound for France, the SS *High Flyer*, which held more than 1,000 tons of ammonium nitrate; about 15 hours after the first blast, a second ripped across the city. In all, 568 were killed, 3,500 were injured and a large part of Texas City was destroyed.

Elizabeth Dalehite, the widow of a ship's captain killed in the blast, was one of some 8,500 claimants who filed 300 lawsuits against the federal government. The suits alleged negligence under the recent and controversial Federal Tort Claims Act (1946), which allowed private citizens—with certain exceptions—a right to sue government officials for damages.

In order to save countless repetitions of evidence, a federal judge in Texas combined the 300 cases into what the Supreme Court later described as "a test case" plea for the entire class. In a nonjury trial, the judge declared the government liable, citing "blunders, mistakes and acts of negligence" by federal officials. His ruling was reversed at the 5th U.S. Circuit Court of Appeals at New Orleans, clearing the way for the nation's first class action to be heard by the Supreme Court.

In 1953 in *Dalehite v. U.S.,* the government argued that the Federal Tort Claims Act had been intended to compensate citizens for small-scale accidents, not $200 million catastrophes. Moreover, the decision to make, bag and ship the fertilizer, however dangerous, was one of government discretion—one of the specific exemptions to the FTCA. In a 4-3 decision, the high court agreed.

In dissent, Justice Robert Jackson cringed at the logic that dismissed government culpability for the Texas City tragedy, as if for a hurricane.

"This was a man-made disaster; it was in no sense an 'act of God.' "

"Surely a statute so long debated was meant to embrace more than traffic accidents," he continued. "If not, the ancient and discredited doctrine that 'the King can do no wrong' has not been uprooted; it has merely been amended to read: 'The King can do only little wrongs.' "

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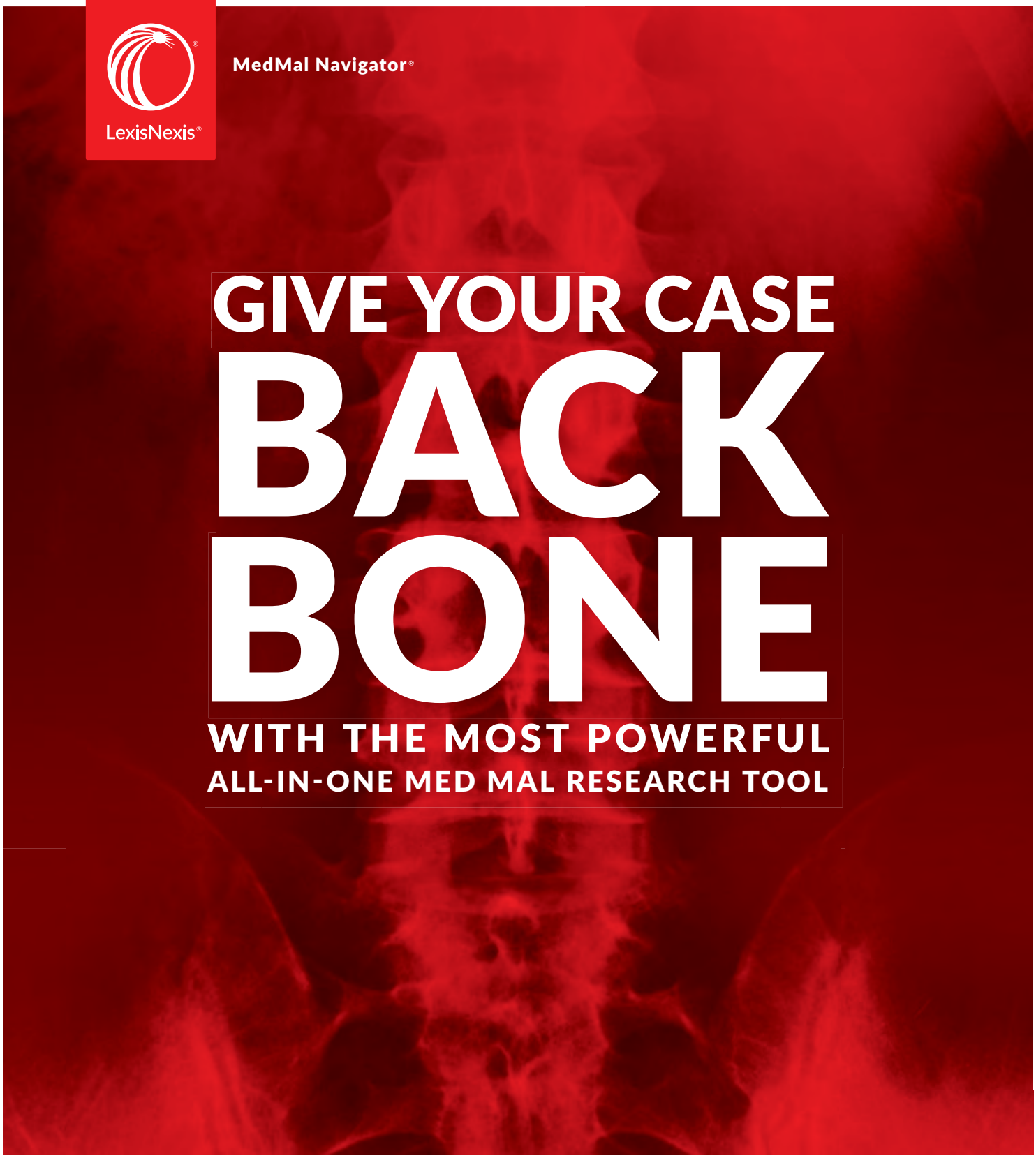

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