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NATIVE AMERICAN CHILDREN’S BEST INTERESTS

LAWYERS JOIN FORCES TO FIGHT QUESTIONABLE CLAIMS OF PAY-TV THEFT

WHO’S THE PIRATE?
BE SEEN
BE HEARD
BE VISIBLE

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A PANEL DISCUSSION ABOUT REVERSING THE TREND OF WOMEN LEAVING THE PRACTICE OF LAW.

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We are
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Excellence, then,
IS NOT AN ACT, BUT A habit.

ARISTOTLE

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Congratulations, Pauline!

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More on Movie Types

Regarding “The 6 Types of Lawyer Movies,” August, page 44, you seem to have forgotten that Jan Schlichtmann is not a movie character. To characterize him as “perhaps legal cinema’s most obtuse attorney” taints his performance as a lawyer in the W.R. Grace case with ridicule. It’s one thing to criticize a fictional movie character using such a shallow and flippant term; to classify a real person in such a manner is unfair and unwarranted.

Karen Minor
Washington, D.C.

No. 7: the immoral schlep, Ned Racine (William Hurt) in Body Heat.
David A. Gottardo
Grafton, Wisconsin

COPS KNOW WHAT LAWYERS DON’T

My only experience with Miranda warnings (“Think You Have the Right?” August, page 34) supports professor Stephen Schulhofer’s proposition “that Miranda has not handcuffed law enforcement.” Specifically, circa 2001, I was a victim of a hit-and-run driver.

Thanks to an eyewitness, the police tracked down the vehicle. When the police questioned the suspect (the nephew of the car’s owner), he refused to speak (his license had been previously revoked and he had taken the car without permission). The police then arrested the accused and only after he was Mirandized did the culprit “sing like a bird,” including admitting his guilt.

This counterintuitive revelation shocked me (especially since I was an attorney with 17 years’ experience at the time). My point is that the police know what we lawyers don’t: Not every accused acts logically. In my case, the suspect remained silent before he was read his Miranda rights; it was only afterward that the criminal thought he should explain why he left the scene of the accident.

To me, the fact that law enforcement knows Miranda can be used as a tool rather than the perceived procedural impediment (which is what William Rehnquist assumed when he said in 1969 that the warning would have the effect of preventing a defendant from making any statement at all) is yet another irony.

James R. Brewster
Tallahassee, Florida

CORRECTIONS

“A Good Listener,” September, page 63, should have reported that after an ABA Board of Governors meeting concluded in Washington, D.C., in June 2015, Linda Klein flew from D.C. to Minneapolis and then to Fargo, North Dakota. Due to an editing error, the story also misstated when she became the association’s president; it was August 2016.

Due to an editing error, the photo of the Warren court on page 37 of the August feature “Think You Have the Right?” misidentified Chief Justice Earl Warren. He is the center person in the bottom row.

The Journal regrets the errors.
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The Power of the Ballot

Lawyers need to be at the forefront in encouraging all citizens to vote

“Nobody will ever deprive the American people of the right to vote except the American people themselves—and the only way they could do this is by not voting.”

Franklin Delano Roosevelt said those words in an October 5, 1944, radio address. They could not ring more true 72 years later. In that 1944 presidential election, 56 percent of the eligible voting public cast a ballot. Since then, voter turnout has cracked the 60 percent mark in only seven of 17 presidential elections. In 2012, only 58 percent of the eligible population voted. Turnout for the 2014 midterm elections was even more woeful, with only 36 percent voting. These numbers should be much higher.

Voter turnout in the United States is far less than in almost every Western democracy and a far cry from the 1876 United States presidential election between Rutherford B. Hayes and Samuel Tilden that saw 83 percent of eligible voters participate.

As the country is about to elect a new president and many other officeholders next month, the American Bar Association will mobilize resources and urge lawyers to encourage voting and get involved as poll workers. Voting remains a cornerstone of our democracy. The more citizens who participate, the stronger our democracy becomes.

Voting is of particular interest to the legal community since it is the foundation of the rule of law, which lawyers have a duty to protect. In light of this, the ABA asks all lawyers to be advocates for voting, urging all attorneys to vote, but also to ensure that their staff has time to vote and that their clients and communities are encouraged to vote.

The ABA remains nonpartisan and believes that lawyers have a basic obligation to build and sustain our democracy by supporting voting. We have launched several projects to help achieve that goal.

To help inspire clients and their communities to vote, the ABA has developed a card titled “Will Your Voice Be Heard on Election Day?” which lawyers can personalize and distribute to their clients and communities. The ABA is also providing a new video to schools nationwide encouraging youth involvement in the electoral process.

Our voter website provides information on encouraging voting, serving as poll workers and other resources that promote the civic duty to vote while not advocating for any particular party or cause. The website provides an interactive map with state-by-state information on voter registration, voter ID requirements, time-off-to-vote rules and other resources. You can refer to this if a client calls with a question.

All this information, including a link to download the “Will Your Voice Be Heard on Election Day?” card can be found at voteyourvoicenow.org.

We want to collaborate with your state, local and other bar associations and hope you will use these resources to increase involvement nationally. Lawyers understand the need for due process and equal protection as a part of the electoral process and thus are well-suited to serve as Election Day officials.

When Ronald Reagan issued a statement in November 1981 after extending the Voting Rights Act, he stressed voting’s importance. “For this Nation to remain true to its principles, we cannot allow any American’s vote to be denied, diluted, or defiled,” he wrote. “The right to vote is the crown jewel of American liberties, and we will not see its luster diminished.”

Voting is Americans’ civic responsibility. It is our opportunity to make our voices heard and to shape the type of government we want. Patriots have fought and died so that we can have the right to vote. All eligible people should be involved. As lawyers, we can foster that sense of civic duty. While matching the turnout from the 1876 Hayes-Tilden race may be an optimistic goal, let’s strive to substantially increase voter participation in 2016.

Each vote is a building block in our democracy. The more people who participate, the stronger our system of government and our country become. Please download the card and print it to hand out or send electronically to your clients, friends and neighbors.

Follow President Klein on Twitter @LindaKleinLaw or email abapresident@americanbar.org.
What It’s Like Being a Female Lawyer in America

Attorney creates a documentary highlighting decades’ worth of challenges

THE OPENING SCENE OF THE NEW documentary Balancing the Scales shows Supreme Court Justice Ruth Bader Ginsburg talking about bathrooms.

Specifically, she talks about how when she was at Harvard Law School from 1956 to 1958, there were two teaching buildings, and only one of those buildings had a bathroom for women.

"Suppose you’re taking an exam, this very intense examination, so you have to make a mad dash from one building to the next," she says. "I can’t say that I encountered any discrimination in my classes, but there were impediments to women—and they were ... rather formidable."

A decade earlier, in the early 1940s, Phyllis A. Kravitch couldn’t even apply to Harvard Law School. In Balancing the Scales, Kravitch, now a senior U.S. circuit judge on the 11th U.S. Circuit Court of Appeals at Atlanta, recalls being rebuffed when she asked for the application forms.

"And I received a letter—which I wish I’d kept; I didn’t—which informed me, politely but firmly, that Harvard did not accept women students," she says.

After graduating from the University of Pennsylvania in 1943 and moving to Georgia to practice, Kravitch often found herself the only woman in a courtroom. It wasn’t until 1953 that the Georgia legislature passed a law even allowing women on juries.

More than half a century later women make up some 50 percent of law school graduates. But, as the film describes, they’re still rare in some settings: Women make up just 17 percent of this country’s law firm equity partners.

Balancing the Scales is attorney and documentarian Sharon Rowen.
Opening Statements

Sharon Rowen’s look at what it’s like being a female lawyer in America, and why that segment of the population is still without equity—literal and otherwise.

Rowen, a personal injury and probate lawyer in Atlanta, has been conducting interviews for the film for an astonishing 20 years. Justice Ginsburg and Judge Kravitch are just two of the many high-profile lawyers to contribute to a documentary rich with fascinating figures.

Those include twins Ruby and Ruth Crawford, who began practicing in 1943 and appeared on the TV show What’s My Line—where the panelists were asked to guess their profession and completely missed the mark.

Ruby Crawford talks on film about how degrading it was for female lawyers in the years when she worked for a major bank but could not sign her own name to documents.

“The letters and communications had to go out under a man’s signature, and that really galls you, you know, when you’ve done all the work,” she says.

Contemporary stories—from professors, judges, partners, ambitious associates and students—shed light on the challenges female lawyers still face. There are, for example, the contradictory expectations—to be neither timid nor forceful, not plain or showy—and the male colleagues who speak over any women in the room.

But most participants cited the complicated issue of children as the chief difficulty. The age when folks ordinarily graduate from law school and start their careers is also the age at which families often get started. It is not a new observation that women are under special pressure to achieve the impossible and to “have it all.”

Rowen presses her subjects on the topic of gender equality when it comes to child-rearing and professional progression and what the alternatives might be to level the field.

She comes away from her interviews believing that programmatic changes would help, such as allowing law firm attorneys to go part time while remaining on the partnership track. But the bigger issue is deeper and more systemic.

“It is ingrained in our culture that it’s the women who step back from their career to raise children,” Rowen says in the film.

And in the end, Rowen sees her film as both an exploration of women in the law and a call to action.

“I would like this film to jump-start a discussion in our society about how everyone—men and women—can have both career and family, with no preconceived notions about whose career is considered more important or more expendable,” Rowen says. “Only when our current assumptions are finally recognized as a problem can we then start seeking real solutions.”

One of the film’s subjects, renowned women’s rights attorney Gloria Allred, points out that it boils down to a catch-22: “I think one of the reasons why we don’t see more activism by women lawyers,” she says, “is because we don’t have enough women lawyers who have become partners yet.”

—Arin Greenwood

Warning Signs

Law profs create 4th Amendment lawn postings

ACCORDING TO THE U.S. Supreme Court, authorities lack an “implied license” to walk a drug-sniffing dog to a homeowner’s front door. Though, according to the opinion in Florida v. Jardines, an implied license is presumably given to peddlers and Girl Scouts.

Two law professors found that 2013 decision an odd application of the Fourth Amendment. “So, being law nerds, we thought we’d give people an opportunity to change any implicit license with explicit signs,” says Andrew Guthrie Ferguson who teaches at the University of the District of Columbia’s David A. Clarke School of Law. Together with Stephen Henderson of the University of Oklahoma’s College of Law, Ferguson created actual yard signs for that very purpose.

So if you want to forbid not only drug-sniffing dogs but also Thin Mints hawkers from approaching your front door, shop around at fourthamendmentsecurity.com for what Ferguson and Henderson are calling Lawn Signs.

The signs are “one-part joke, one-part serious,” Ferguson explains. While the professors don’t expect to get rich from sales, they do hope the signs serve as a tool to teach ordinary citizens about the Constitution.

“Right now, the Fourth Amendment is protecting your house, but it’s hard to conceptualize constitutional rights,” Ferguson says. “We’re seeking to make the Constitution real to people. It’s a document that unites us all. Civic education can actually be accomplished through absurdity.”

Ferguson believes there could be a real market for the signs among civil libertarians (personal freedom), tea party activists (down with big government) and fraternities and sororities (no searches, please).

In addition to the signs, bumper stickers are available. T-shirts and magnets are on the way. —Leslie A. Gordon
OVER THE COURSE OF SIX MONTHS, teams participating in the first-ever Women in Law Hackathon devised new ways to disrupt the diversity dialogue at elite law firms and close the gender gap.

The hackathon was a Shark Tank-style competition conceived by Diversity Lab in partnership with Stanford Law School and Bloomberg Law. Bloomberg contributed cash prizes for the three winning ideas, with the funds donated to nonprofit organizations helping to advance women in the legal profession and beyond.

The $10,000 top prize went to a platform called SMART (Solutions to Measure, Advance and Reward Talent), which is intended to revolutionize firm revenue models by balancing contributions and credit, realigning rewards with value systems and rewarding nonbillable work that adds value to the firm.

The gender-neutral reporting system includes an app and dashboard. It allows firms to determine compensation and advancement based on eight “pillars”: billable and pro bono hours, business development, advancement of diversity, quality of work, client satisfaction, lawyer development, leadership and initiative, and external visibility.

The team that won the $7,500 second-place prize also focused on ways to hack compensation, along with changing the model for origination credit.

“Our team solution for the hackathon focused on how we could upset the applecart in terms of how credit is passed along in law firms, so that we can close the pay equity gap between men and women partners,” explained recent Stanford Law graduate Erika Merit Douglas.

Power Development Program, Douglas’ team, pairs two generations of female lawyers—a partner and an associate—with an institutional client for a 12-month period. At the end of the year, the partner earns economic credit on the relationship team for that client, expanding her economic influence at the firm and her value as a key partner for the client.

The third-place prize, and $5,000, went to the Five Year Moment, which applies metrics and experiential solutions with the aim of eliminating systemic and individual barriers to business development success for female lawyers.

Hackathon participants included 54 law firm partners, 18 diversity experts, and nine Stanford Law students broken up into teams of nine, working virtually over the course of six months to create solutions.

“Through the hackathon, we brought together an unprecedented concentration of brainpower to tackle this issue,” says Diversity Lab founder and CEO Caren Ulrich Stacy. “We are grateful for the incredibly hard work put in by all of the hackathon teams. And, thanks to Bloomberg Law, we have the necessary funds to support and implement the hackathon ideas going forward.”

—Liane Jackson
Opening Statements

Pokémon Go at Work
How employers can reduce the risk of gameplay

THIRTY-YEAR-OLD RYAN CARTER HAS no problem admitting that he used to play Pokémon Go every chance he got—even at work.

“All you have to do is open the app; you don’t leave to physically play it. Never a conflict playing at work,” says Carter, who’s a warehouse employee in Jacksonville, Florida.

While tracking down the augmented-reality characters that became popular with gamers in the 1990s may not pose a problem for Carter, it’s concerning for employers as they try to manage the Pokémon craze, says Philippe Weiss, managing director of Seyfarth Shaw at Work, a legal consulting company.

According to Weiss, attorneys are struggling with how best to advise their clients of unique risks associated with the app, which are a case of first impression.

For example, he says one client almost had a visitor walk into a grain silo while chasing the elusive creatures. Then there’s the possibility that trespassers, or even a company’s employees, pursuing Pokémon could get hurt if they’re in areas that are normally off-limits. Or employees could inadvertently be exposed to confidential material after wandering into “sensitive” areas, he adds.

“We’ve gotten calls from the safety and performance standpoint from the very beginning of this phenomenon,” Weiss says.

And the digital game is indeed a phenomenon. While data trends show that Pokémon Go play may be in decline, its peak numbers made it the most popular mobile game of all time, according to Survey Monkey Intelligence. The app works in conjunction with the GPS on your phone, and the goal is for users to capture the virtual characters they see around them.

Weiss notes that while players may be immersed in augmented reality, managers need to be aware of what’s happening around them. He suggests rechecking all physical areas—not only building facilities but also the perimeter, which is where intruders are likely to show up. If you have gates, make sure they’re locked.

“This is an opportunity to be more vigilant in terms of performance deadlines in general and accuracy at work,” Weiss says. One way managers can do that, he says, is by being attentive to customer concerns. If an employee is distracted and not offering good customer service, there’s a good chance the client will notice it first.

Weiss says many companies already have policies that deal with many of the issues Pokémon Go presents, so it’s important to review what’s already in place. A business’s electronic communications policy might already prohibit accessing certain sites or phone games at work or on work-provided devices. According to Weiss, some companies have taken the extra step of including Pokémon Go on the list after experiencing actual safety repercussions as a result of play on the clock.

What is critical, Weiss notes, is that employees “prioritize performance over Pokémon,” or there will be consequences.

Meanwhile, Carter says his Pokémon-chasing days could be over. He’s not a fan of the latest update. Overall, he thinks the game still has its upside.

“I think it really gets you out. You can explore different parts of your neighborhood. It gets you a new adventure,” he says. Weiss cautions that the game can be distracting and addictive and ultimately cause a problem at work.

“You have to know when to say Pokémon stop,” he adds, “instead of Pokémon Go.”

—Cristin Wilson

Cartoon Caption Contest

CONGRATULATIONS
to Jonathan M. Stern
of Washington, D.C., for
garnering the most online
votes for his cartoon cap-
tion. Stern’s caption, left,
was among more than
100 entries submitted
in the Journal’s monthly
cartoon caption-writing
contest.

JOIN THE FUN Send us the best caption for the legal-themed cartoon above. All entries should be emailed to captions@abanjournal.com by 11:59 p.m. CT on Sunday, Oct. 9, with “October Caption Contest” in the subject line.

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

Survey Says

According to a recent survey, millennials are more likely to see themselves as “work martyrs” than older workers—and less likely to use all their vacation time. Additionally, more employed millennials (59%) reported feeling a sense of shame for taking or planning a vacation compared to those 35 or older (41%).


Say What?

U.S. District Judge Charles Breyer ruled the FBI violated the Fourth Amendment by recording more than 200 hours of conversation at the entrance to the San Mateo County Courthouse as part of an investigation into bid-rigging at public auctions of foreclosed homes: “With continuing advances in technology, private conversations may become anachronistic rituals reducing intimate encounters to silent exchanges of notes,” Breyer wrote. “But that day has not arrived. Until it does, our Fourth Amendment protections should be defined by traditional circumstances.”


$100,000

The median law firm starting salary for newly minted attorneys. Salaries grew by 5 percent for this group over 2014. However, members of the class of 2015 secured fewer private practice jobs than any class since 1996, and the overall class median starting salary was $64,800.


Acting Out

Justice Ruth Bader Ginsburg lent her theatrical chops to a mock trial of Shylock after a performance of The Merchant of Venice in the city’s Jewish ghetto. It was part of a series of events marking the ghetto’s 500th anniversary. Ginsburg has made a number of cameos presiding over mock Shakespeare appeals throughout the years.


Mileage Controversy

A PROPOSED CLASS ACTION filed in federal court in Camden, New Jersey, claims General Motors overstated gas mileage estimates for up to 2 million vehicles sold between 2009 and 2016. The complaint claims that GM advertised its Buick Enclave, Chevrolet Traverse, GMC Acadia and Saturn Outlook crossovers with Environmental Protection Agency ratings of 17 mpg for city driving, 24 on the highway and a combined 19 mpg, but that the correct figures are 15 mpg for city, 22 highway and a combined rating of 17.


45 Million Pounds

The amount that the first U.K. firm to be publicly traded on the London Stock Exchange raised at its IPO. Gateley has also announced it made 11 million pounds in profit and posted a 10 percent increase in revenue.

Source: americanlawyer.com (Aug. 30) and Alliance News Limited (July 19).

Did You Know?

The Center for Computer-Assisted Legal Instruction has published a lighthearted but helpful workbook on basic legal research with what it calls “a colorful twist.” The primer on how to do legal research takes a nontraditional approach through short exercises and coloring.

Source: Open Law Lab (Aug. 16).
Nearly 20 years ago, a young Harvard Law School student named Raj De sat in his mentor’s office and explained why he’d decided to bypass BigLaw for the Department of Justice. The older lawyer understood completely. “You should always go where the action is,” he counseled. De took this advice—and then some. Leadership roles at the DOJ? Check. 9/11 Commission? He was a part of it, serving as counsel and contributing to its historic final report. U.S. Senate? Check that off, too: De was counsel to the committee charged with drafting and implementing intelligence reform legislation. Then came two dizzyingly busy years at the White House, where De worked directly with President Barack Obama as staff secretary. The follow-up? Three years as general counsel to the National Security Agency, where he helped steer the agency through perhaps its biggest crisis—the leak of countless classified documents by former contractor Edward Snowden. De left the NSA last March for the private sector, returning to the Washington, D.C., office of Mayer Brown—the law firm where he was a partner before working with the NSA—to direct the firm’s global cybersecurity and data privacy practice.

Cybersecurity is one of the hottest practice areas right now. How did you get into it?

After my experiences at the NSA and with the White House, I started to see what a prominent issue it was for our government. The NSA isn’t just an agency involving foreign intelligence gathering; its other mission is information assurance, a function of effective cyberdefense.

How do you talk to your clients about cybersecurity, outside of an NSA context?

It can vary. We work with very sophisticated financial entities and technology trailblazers, but we also work with companies in a range of industries where cybersecurity has not been top-of-mind. For some of those entities, we may have to explain why they may be a target for cybercrime. We explain that they may not see themselves as a primary target, but sometimes it’s not even an issue of what data you may have but what networks you are connected to. Any system may just be an entry point for a hacker.

Is there a typical day for you?

Yes, and it usually involves an airport!

It must be pretty different from the days when you flew on Air Force One with the president. What was that like?

It was exciting the first time and exciting the second time, but then it quickly becomes part of your work rhythm. I would say that I never stopped appreciating what an incredible opportunity it was, but it was tempered by just doing the job. For that role in particular, there is one customer—the president—and he’s a pretty focused customer.

So you’re traveling a lot now for work?

It’s been just over a year since I’ve returned to private practice, so I am relationship-building; checking in with GCs, existing clients and potential clients. I am also doing a fair amount of public speaking and
presenting to boards of directors.

You did some public speaking at the NSA, too, right?
Yes. Up to that point, it was relatively unheard of for a GC for the NSA to give a public speech and try to articulate some sense of the issues facing the agency—of the legal challenges—and to bring some transparency to the oversight regime.

Why did you want to do that? Did the NSA's reputation as some sort of secret spy agency bother you? I mean, there's that joke that NSA stands for “No Such Agency.”
The secret nature didn't really bother me, but I think that there is an obligation in a democracy for all parts of the government to be as transparent as they can be, articulating what they do on a general level. It was important for the NSA, but it’s also important for any business with a public profile. If there’s an incident or a reputational crisis, and the first time a layperson hears about what’s happening is in that moment, without any context, it takes a lot of effort to unwind that first impression. I wanted to put some context out there so people would have a frame of reference.

And there was a crisis: The Snowden affair was obviously huge news, yet you managed to stay out of the public eye. Was that by design?
The role of most good lawyers is not to be the center of attention unless it’s helpful. I did end up playing a fairly significant public-facing role dealing with media inquiries—it just wasn’t on camera. The NSA wasn’t equipped to deal with a media response. It used to be “no comment” was the most common historical response; but in any crisis, it’s important for the lawyers and the communications people to be integrated in managing public perception.

You advocate transparency, but could Snowden's actions be seen as the ultimate in transparency?
It’s possible to think that the discussion the public is having about digital privacy and surveillance is a positive thing, but that doesn't mean that what Snowden did was justifiable or a positive thing in and of itself. I do think that this dialogue is important, but I really think that what he did was a terrible, self-aggrandizing and reckless thing. It’s a complex global environment, and I am not sure the general public fully understands how complicated the threat scenario is and how sophisticated our intelligence apparatus needs to be. I think the trick for us as a society is: How do we manage the persistent threat landscape and stay true to the values we hold dear?

Is the Snowden affair over yet?
No. The implications of what he did will be felt for a long time. There were very real consequences for our national security that I don’t know if he realized, and the public can’t know because the government can’t speak about it. The need to mitigate the harm he caused is still ongoing, I am sure.

—Jenny B. Davis
Renard Sanders remembers the day in 2013 when his bosses at Dave & Buster’s in Duluth, Georgia, called an early-morning meeting. It was picture day, a Saturday when the entire staff would smile together outside of the building for a group photo.

But as they gathered inside afterward, management made several announcements. “They told us they were cutting our hours, so that they wouldn’t have to offer insurance, that they were taking everyone off of full time except a few people in management,” says Sanders, who had started out busing tables and later moved on to the cleaning crew during his two years with D&B. His shift was cut by 10-15 hours per week.

Sanders, 35, and his co-workers at the video-arcade and restaurant chain were not alone. At about the same time at the company’s Times Square location in New York City, Maria de...
Lourdes Parra Marin, a cancer survivor, heard the same news.

Employed full time since August 2006 as a line cook, preparing items from D&B’s “Fun American New Gourmet” menu, Marin learned that she and most of the 100 or so Times Square workers soon would be part time. Her hours slid to just seven for a week.

A native of Mexico, Marin, 53, didn’t know where to turn. At her age, “it is not easy to have a new job,” she says, especially in the kitchen of a restaurant typically dominated by young men.

That’s when—with the help of her 23-year-old nephew Edwin Olivo, an aspiring law student—Marin contacted the National Employment Lawyers Association. This ultimately led to the first class-action suit in the nation to claim that the actions an employer took to reduce health care costs and the number of full-time employees violates the Employee Retirement Income Security Act of 1974.

A NEW KIND OF CLAIM

What makes the case unique is the allegation that D&B made the changes to avoid complying with then-forthcoming mandates under the Affordable Care Act. The case is being watched by employers nationwide who are under the same requirement to provide health benefits or face a possible financial penalty.

At the time the suit was filed in May 2015, the attorneys estimated D&B’s actions had affected about 10,000 workers at 72 locations nationwide. Certification as a class action suit is another step in the process that has not been reached in the case, which is before U.S. District Judge Alvin K. Hellerstein in the Southern District of New York.

ERISA prohibits interfering with a worker’s ability to “exercise any right to which he is entitled under the provisions of an employee benefit plan.”

The complex ACA has both employer and employee insurance mandates. The ACA mandates, with some variations, that employers who have more than 50 workers provide health coverage for those who clock 30 hours on average per week or pay a penalty if the worker uses a federal subsidy to obtain insurance through an exchange. The penalties, which also can be imposed on individuals who remain uninsured, went into effect in January 2015 after a one-year delay.

In the past, typical ERISA cases have alleged workers were let go or otherwise induced to resign after making costly claims on an employer’s health plan or being terminated just prior to retirement with a loss of vested pension benefits, says William Frumkin, a partner with Frumkin & Hunter in White Plains, N.Y., who is among the attorneys representing Marin.

In Frumkin’s view, the ACA ushered in a new claim under ERISA, and by altering workers’ hours, employers were violating the prohibition in effect in the act. Instead of letting them go, so they no longer would be eligible, D&B reduced hours at locations across the country, he says.

“This is really the crux of our case,” he adds, alleging that D&B took this action so that “ACA-compliant benefits didn’t have to be provided.”

“They told us they were cutting our hours, so that they wouldn’t have to offer insurance, that they were taking everyone off of full time except a few people in management.”

Renard Sanders

Frumkin says he hopes the suit will deter others from acting to reduce worker hours in a way that causes them to lose health coverage.

There’s no doubt the suit is being watched because it is the first of this type, says Joseph Lazzarotti, a principal in the Morristown, New Jersey, office of Jackson Lewis, which exclusively represents management in employment law issues and cases.

GUIDANCE NEEDED

But Lazzarotti doesn’t think it’s a slam dunk for the plaintiffs. He says the ACA employer mandate has created a “perceived right” to health benefits, the validity of which Judge Hellerstein will have to decide, along with whether the affected workers were a “targeted” class.

In Frumkin’s view, the ACA “provides no right to participate in an ACA-compliant health plan, to either full- or part-time employees.”

But, to Judge Hellerstein, “the critical element is the intent of the employer—proving the employer specifically intended to interfere with benefits,” he wrote in his denial of D&B’s attorneys’ motion to dismiss the case.

He ruled that Marin’s legal team “sufficiently and plausibly alleged this element of intent” and had “sufficiently pled that the employer had acted with an ‘unlawful purpose’ when taking an adverse action against her.”

Among the D&B statements cited by the judge were those allegedly made during the meeting at which Marin attended, including that compliance...
with the ACA would cost Dave & Buster’s as much as $2 million, and that, to avoid that expense, the company planned to reduce the number of full-time employees to about 40 total from more than 100.

Judge Hellerstein also rejected D&B’s argument that Marin couldn’t make a claim “to benefits yet to be accrued,” namely the richer ACA-mandated benefit package, pointing out that Marin also lost the coverage in effect at the time. Hellerstein also said that Marin’s claim “for lost wages and salary incidental to the reinstatement of benefits” could move forward.

MEDICAL HARDSHIPS
All of this is welcome news to Marin—and to Sanders, who is eager to join the suit and did not know about it until he was contacted by the ABA Journal. The loss of insurance and pay led to a series of hardships for him, Sanders said, and he returned to Florida, where he currently is unemployed.

Marin has searched, unsuccessfully, for full-time employment that would give her insurance coverage. She has a second job and gets medical care at a local hospital-affiliated clinic that charges her income-based fees. Marin regularly takes medications to keep in check her high blood pressure, to keep her thyroid functioning and to prevent a recurrence of breast cancer. Yet, she has “stayed strong,” as her nephew Olivo put it, and is hopeful that her hours and benefits will be restored.

It is not right, Marin says, that she and the other workers committed years to D&B, and then, “one day, in one meeting, they say, ‘I’m sorry, everybody, but we don’t have money to pay your benefits.’”

By bringing the suit, she says, “I believe I am doing the right thing.”

Theresa Defino is an editor at Atlantic Information Services.

Checking Texting
New York considers ‘textalyzer’ bill that allows police to learn whether drivers in crashes were texting behind the wheel

By Jason Tashea

On a summer morning near Chappaqua, New York, in 2011, Evan Lieberman, 19, was carpooling with co-workers when the driver collided with another vehicle. Five occupants between the two cars were sent to the hospital. After 32 days of intensive care and multiple surgeries, the teenager died.

His father, Ben Lieberman, filed a civil suit against the driver of Evan’s vehicle, whom police did not charge. While the driver said he had dozed off, Lieberman thought there was more to the story. In the wrongful death suit, he subpoenaed the driver’s cellphone records to see whether the phone’s use was a contributing factor in the crash.

“What we learned is that police don’t really look at phones at all,” says Lieberman. While the police did not examine the driver’s phone, the records showed that the driver used his phone minutes before the crash. The case settled in 2013 for an undisclosed amount.

Through this emotional experience, Lieberman co-founded Distracted Operators Risk Casualties, a non-profit advocacy group that supports a bill in the New York Assembly that would allow police to analyze a driver’s phone without a warrant after a car crash to see if prohibited use had occurred. Deborah Becker is his co-founder; her son was the front-seat passenger in the head-on collision that caused Evan’s death.

Colloquially referred to as the “textalyzer” bill, it has been heralded as both a commonsense solution to the pervasive problem of distracted driving and derided as an infringement of constitutionally protected privacy rights and due process.

Like breath-test laws, the bill uses implied consent, which is given by anyone merely driving on the roads of New York or in possession of a state driver’s license, to justify the search of the phone. The technology, which has yet to be developed, would not collect the call’s content, text messages or social media posts but instead gather metadata, which shows that a call or message occurred.

Tools that can collect a phone’s content already exist. Drivers who refuse to hand over their phones risk their license or driving privileges, which “shall be immediately suspended and subsequently revoked,” says the draft legislation.

DAILY DISTRACTIONS
According to Distraction.gov, an official U.S. government website, distracted driving occurs when an activity diverts a person’s attention away from the primary task of driving. It includes activities such as tooth brushing and text messaging.

Concerning the impetus for the New York legislation, the 2011 National Occupant Protection Use Survey on Driver Electronics Use found that at any given daytime moment, 660,000 drivers, or 9 percent, operate a vehicle while using an electronic device. In 2014, 3,179 fatalities and 431,000 injuries happened nationwide that involved distracted driving, according to the site.

Police Chief Charles Ferry of the New Castle Police Department in Chappaqua is a proponent of the textalyzer bill. He says these numbers are underreported. “It’s very hard for officers to identify if a cellphone is a contributing factor in a crash,” says Ferry. Collecting better data is one reason he supports the legislation.
The bill also aims to create increased police access to people’s phones. Jay Shapiro, a partner at White and Williams in New York City, says the current process for a district attorney to subpoena a phone company can take anywhere from two to 30 days. He calls this “not practical,” because not enough time exists to legally track down each driver’s phone from every car crash. If textalyzing became law, then there would be no need for a warrant to collect metadata at the scene. However, police and prosecutors still would need a warrant if they sought the phone’s content, barring exigent circumstances.

Currently, Lieberman and others have spoken with technology companies such as Cellebrite about creation of this tool. According to Lieberman, the Israel-based company says it can build the tool. The company already sells a mobile device that allows law enforcement to collect information from a phone. However, Cellebrite, like any interested company, would have to bid for the contract should the bill become law. The company did not return a request for comment.

**AWARENESS VS. PRIVACY**

While the bill’s proponents see this as a way to bring awareness to distracted driving, privacy advocates take a different view.

“Our position is that the technology in question should always require a warrant,” says Erika Lorshbough, legislative counsel at the New York Civil Liberties Union. Requiring a warrant, she says, is to protect the “sacred” and immense data housed on cellphones.

In 2014, the U.S. Supreme Court affirmed heightened Fourth Amendment protections for cellphones in its unanimous decision in *Riley v. California*. The court held that police are required to obtain a warrant when searching a cellphone, unless exigent circumstances exist.

Lorshbough says two exigencies exist in a DUI case that are not reflected in a distracted-driving crash. The first is that the body will metabolize the alcohol. If a field sobriety test is not done, the evidence will disappear. Second, there is a public safety interest in not letting drivers back into their cars if they are intoxicated.

Referring to *Riley*‘s application to the textalyzer bill, Shapiro says that the bill “only has to do with use; *Riley* doesn’t talk about use,” as opposed to searching a phone’s content. He goes further to say “a lesser expectation of privacy in a vehicle” exists, and this lowered standard should apply to the textalyzer’s application.

The dichotomy Shapiro draws between content and use is part of a larger debate about whether metadata deserves the same protections as does the content of our communications.

“There’s no explicit content in metadata, but metadata can be used to infer features of someone’s life,” says Patrick Mutchler, a PhD candidate in computer science at Stanford University and co-author of a new study that shows how telephone metadata can make sensitive presumptions about an individual.

Armed with an outgoing phone number and call duration, coupled with a search of online databases such as Yelp, the study was able to correctly infer whether someone owned an AR semiautomatic weapon or had a chronic health condition. The study concludes: “Our results lend strong support to the view that telephone metadata is extraordinarily sensitive, especially when paired with a broad array of readily available information.”

“A lot of people don’t care about their metadata, and that’s so troubling,” says Todd Carpenter, executive director of the National Information Standards Organization in Baltimore. Metadata, he says, “is astoundingly robust.”

To this end, Lieberman says the bill tries to balance “public safety versus privacy.” The bill itself has no stated data retention or data use standards. If the bill became law, the New York Department of Transportation and other agencies would create rules and regulations as necessary.

The New York Assembly’s general session wrapped up in June without passage of the bill. However, this first-of-its-kind legislation has drawn worldwide attention. According to Lieberman and Democratic assembly member Felix Ortiz, the bill’s sponsor in the Assembly, (continued)
Future Dangerousness

Court considers death penalty case in which an expert testifies that being black is a predictor of violent behavior

By Mark Walsh

The U.S. Supreme Court opens its new term this month with its vacant seat unresolved, its future makeup subject to presidential politics, and a docket that—for now—is its thinnest in several years.

Nevertheless, in their first week of arguments, the justices will dive right back into the conspicuous issue of race in the criminal justice system, an issue they dealt with last term.

On Oct. 5, the court will consider the case of Texas death row inmate Duane E. Buck, who faces procedural hurdles in challenging his own trial lawyer’s decision, during the sentencing phase, to present an expert witness who predicted the future dangerousness of the defendant based in part on the fact that Buck is African-American.

The year of the trial “was 1997, not 1897; and the idea that Duane Buck’s own lawyer would present a so-called expert witness who actually said that because Mr. Buck is a black man, he is likely to be a future danger is extraordinary,” says Samuel Spital, one of Buck’s lawyers in the Supreme Court appeal.

In 2000, Texas had conceded error in a similar case in which the same witness, psychologist Walter Y. Quijano, had provided his expert opinion that a defendant’s race or ethnicity was one of the “identifying markers” of future dangerousness, which is one of the special issues a Texas jury must find before a judge may impose death.

The state appeared to promise not to oppose habeas petitions in any of six other cases in which Quijano had made similar statements. But state officials would backtrack on their willingness to consider a new sentencing hearing for Buck, and now they defend their handling of the case.

“Here, the defense’s decision to elicit testimony from its own expert reflected a considered choice and a strategic legal decision,” the state of Texas argues in a brief. “While the state cannot, and should not, raise the issue of race, defense counsel can.”

A RACIAL VIEW

Buck, now 53, was convicted in the 1995 shooting deaths of his former girlfriend, Debra Gardner, and a friend, Kenneth Butler, as well as the shooting of his stepsister, Phyllis Taylor, who survived.

At the sentencing phase, the state presented evidence that Buck had been in an abusive relationship with another former girlfriend, as well as his record of convictions on drug and weapons charges. It also pointed to the fact that Buck shot and killed his ex in front of her children and laughed while he was detained in a police car.

Buck’s defense lawyers presented evidence from another psychologist that the defendant had been a model prisoner in the past and was not likely to be a future danger in prison.

The defense also presented the report and testimony of Quijano, a former psychologist for the Texas prison system who had testified as both a prosecution and defense witness at other sentencing hearings.

Quijano’s report indicated that several “statistical factors,” including a capital defendant’s past crimes, age and gender, were predictive of future dangerousness. The report identified race as another relevant factor for assessing future dangerousness, stating: "Black: increased probability."
There is an overrepresentation of blacks among the violent offenders.”

Buck’s lawyer asked Quijano about those factors, and the psychologist generally tracked the conclusions of his report. On race, Quijano said, “It’s a sad commentary that minorities—Hispanics and black people—are overrepresented in the criminal justice system.”

Nevertheless, the thrust of Quijano’s testimony was that Buck was unlikely to commit future acts of violence that would constitute a threat to society, and he had adjusted well in prison, where he was not violent.

The prosecutor, in the course of cross-examining Quijano, asked one question that alluded to the race factor. “You have determined that . . . the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?” the prosecutor said.

“Yes,” Quijano replied.

The jury requested Quijano’s report for use during deliberations. Jurors found that Buck was likely to be a future danger, and the trial judge sentenced him to death.

CONFESSIONING ERROR

In 2000, while Buck’s case was on appeal, the state of Texas confessed error in another case in which Quijano had made similar race-based conclusions about future dangerousness—this time as a prosecution witness.

In court papers filed under then-state Attorney General John Cornyn, now a Republican U.S. senator from Texas, the state said the use of race in the other defendant’s sentencing “seriously undermined the fairness, integrity or public reputation of the judicial process.”

Cornyn’s office identified the six cases, including Buck’s, in which Quijano had provided testimony about race in the same way. In a separate statement to the media, Cornyn’s spokesperson said the state of Texas “would not oppose federal habeas claims for relief based on Dr. Quijano’s unconstitutional, race-based testimony in any of” those six cases.

Things changed as Buck’s case proceeded through a long appellate process. Subsequent state officials determined that Buck’s case was different because it was the only one of the six in which the defense had elicited the testimony about race. (Although Quijano had been a defense witness in two other cases in the group, a prosecutor brought out the race conclusions in those cases, the state of Texas points out.)

When one of Buck’s appeals reached the Supreme Court in 2011, the justices denied certiorari, with Justice Samuel A. Alito Jr. issuing a “statement respecting that denial,” which was joined by Justices Antonin Scalia and Stephen G. Breyer.

While Alito called Quijano’s race-based testimony “bizarre and questionable,” he said that among the six questionable cases identified by Cornyn’s office, Buck’s is the only one in which it can be said that the responsibility for eliciting the offensive testimony “lay squarely with the defense.”

Justice Sonia Sotomayor wrote a dissent from the denial, joined by Justice Elena Kagan, indicating she was troubled by the “racial overtones” of Quijano’s testimony, among other aspects of the case.

Buck’s appellate travels continued after the high court issued a decision in a 2013 case, Trevino v. Thaler, which made it easier for habeas filers to challenge the ineffective assistance of counsel even if there had been procedural defaults in their cases.

Buck filed a new federal habeas case, which a federal district judge rejected, holding that Quijano’s testimony played a minimal role in the jury’s finding of future dangerousness, among other things. The 5th U.S. Circuit Court of Appeals at New Orleans held that Buck had not made out even a minimal showing that his case was “exceptional” under the appropriate standard.

PERNICIOUS STEREOTYPE

With the Supreme Court now taking up Buck’s appeal of that ruling, his lawyers, which include the NAACP Legal Defense and Educational Fund, argue that he should be able to make his case that his “trial counsel rendered ineffective assistance by knowingly presenting an expert opinion that Mr. Buck was more likely to commit future acts of violence because he is black.

“That testimony was so directly contrary to Mr. Buck’s interests, no competent defense attorney would have introduced it,” his brief states.

“Here we have the most pernicious racial stereotype being validated by a so-called expert,” says Spital, the New York City-based Holland & Knight partner who also is representing Buck.

Deborah N. Archer, a professor at New York Law School, filed an amicus brief on Buck’s side. It stresses the historical underpinnings of American whites’ fear of blacks as dangerous and quotes President Barack Obama’s thoughts on the subject.

“This narrative of dangerousness reaches back to slavery, when black people were believed to be not just inferior but also savage brutes prone to violence and criminality unless domesticated and made docile,” says the brief by Archer and others on behalf of the National Black Law Students Association.

The Texas attorney general’s office declined to comment on the case. But in his brief on the merits, Texas Solicitor General Scott Keller concedes that under the applicable standard, “jurists of reason would at least find it debatable whether trial counsel’s performance was deficient.”

But no substantial likelihood exists that the sentencing jury would have reached a different result without Quijano’s testimony on race, Keller argues.

Prosecutors did not make inflammatory racial references but only matter-of-factly walked Quijano through his report, which covered many other subjects as well, Keller notes.

“The aggravating evidence was overwhelming,” Keller says in the brief. “Quijano’s disputed testimony played a very limited role.”
Tear Down This Wall

Two lawsuits that seek to loosen bar admission rules in federal district courts are dismissed, but the issue isn’t going away

By David L. Hudson Jr.

The National Association for the Advancement of Multijurisdiction Practice pulls no punches when it describes its mission. The association’s website states that it was created “for the benefit of attorneys seeking to obtain bar admission in another state or U.S. district court without taking another bar exam.” The association’s goal “is to have obtained full admission on motion privileges for all attorneys in all U.S. district courts and state supreme courts that do not presently provide equal privileges and immunities, including the tit-for-tat admission rules that provide you get admission on motion in our jurisdiction if our attorneys get admission on motion in your jurisdiction.”

In pursuit of its goal, the Los Angeles-based association has filed a number of lawsuits in state and federal jurisdictions. The website states “the issue the NAAMJP is litigating is whether the equal rights, privileges and immunities inherent in bar admission on motion, which the United States Supreme Court has squarely held is a constitutionally protected privilege and immunity ... and has been adopted in 39 states, resulting in the admission on motion of over 60,000 attorneys, should be provided to all American attorneys,” referring to the 1988 decision in Supreme Court of Virginia v. Friedman.

But the association’s commitment to its cause has not always translated into victories in the courts. In two recent cases, for example, judges dismissed the association’s challenges to admission rules adopted by the federal district courts for the districts of Maryland and New Jersey. In both actions, the MJP association argued that the admission rules violated the First Amendment, the equal protection clause and the supremacy clause of the U.S. Constitution, along with the Rules Enabling Act of 1934, which delegated procedural rulemaking power to the Supreme Court.

“The challenged local rules assume that we live in the Garden of Eden,” says Joseph R. Giannini, a director of the MJP association. “The tree of knowledge does not stop growing or producing specialized knowledge based on a state boundary line. People today often live in four or five states over their lifetime.”

Experts in the legal ethics field say the association’s challenges are one indicator of the wider debate regarding bar admission.

“There is an ongoing debate about whether there should be any barriers for admission to federal district courts and even to bar admission in other states once a lawyer has been admitted in one state,” says law professor Peter A. Joy of Washington University in St. Louis. “Those such as NAAMJP argue against barriers to admission and contend that the admission barriers infringe on First Amendment rights, drive up the costs of litigation, interfere with a person’s right to counsel of one’s choice, and are anti-competitive.”

But “in spite of these and other arguments, there is still a strong belief, reflected in district court rules, that a lawyer should be admitted in the state in which the federal court is located,” Joy says. “This is based on the federal district courts wanting local control of the lawyers admitted to practice before them and to ensure that the lawyers are subject to professional discipline by state bar disciplinary authorities.”

Paul M. Sherman, a senior attorney at the Institute for Justice, a libertarian public-interest law firm in Arlington, Virginia, provides other reasons for changing the rules on bar admission.

A growing number of lawyers have specialized practices for which detailed knowledge of state law is largely inapplicable, Sherman says. “There are also many basic legal services that could be provided competently and less expensively by paralegals or other nonlawyers,” he says. “The internet has made it possible for people seeking legal advice to get it from a vastly larger group of people, both lawyers and nonlawyers. If the bar doesn’t adjust to these realities, it’s going to look increasingly like its primary focus is not on ensuring the competence of legal practitioners but on protecting its members from competition.”

The admission rule adopted by the U.S. district court in Maryland allows attorneys who are not licensed to practice in the state to be admitted to practice if their principal law office is in a state that allows Maryland attorneys to be admitted to practice under reciprocity rules. But the
district court there will not admit an attorney from another state who maintains a law office in Maryland without being licensed there.

Joy says the U.S. district court rule in Maryland is largely consistent with the admission rules in other federal district courts, “though it is actually somewhat more liberal by permitting reciprocity for non-Maryland attorneys if the federal district court where that lawyer’s office is located admits Maryland attorneys.”

**FIRST AMENDMENT FIGHT**

In the Maryland case, the U.S. attorney’s office for the District of Columbia, which is authorized to defend federal court rules, filed a motion to dismiss, which was granted by a U.S. district judge from North Carolina, who sat by designation to avoid any possible conflict of interest. On appeal, a three-judge panel of the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, affirmed in *NAAMJP v. Lynch*, decided June 17.

On its First Amendment claim, the MJP association contended that the admission rule infringed on the freedoms of speech, assembly and petition. The right to petition and assembly is a particular form of speech, says Giannini.

It is speech in which an individual or a corporation can speak directly to the government about their grievance, which requires the government to correspondingly listen to that grievance and rule upon it, he says.

“It is also conduct that is constitutionally protected—that is the right to file a petition with counsel of choice. If burning a flag is constitutionally protected speech, then it follows that filing a petition is constitutionally protected speech,” Giannini says.

The 4th Circuit rejected the First Amendment argument, finding that the district court’s rule was simply a regulation of a profession and a generally applicable licensing provision. The court acknowledged the professional speech doctrine but reasoned that it allows the government to license and regulate professionals without violating the First Amendment.

The professional speech doctrine has been superseded by the Supreme Court’s decision in *Reed v. Town of Gilbert*, says Giannini. That 2015 decision affirmed that content-based laws must be subject to a strict scrutiny test to pass First Amendment muster. “The local rule challenges pure content discrimination,” he says. “The subject of the content discrimination is federal substantive law and procedure. Government counsel is allowed to speak in petition regardless of where they are admitted and where they have their office, but out-of-state attorneys from 35 states are denied this constitutional right, solely because they come from states that do not provide reciprocal licensing to Maryland Court of Appeals lawyers.”

Sherman, who has written extensively about occupational speech and the First Amendment, questions the appeals court’s application of the professional speech doctrine. “The 4th Circuit likely reached the right result but for the wrong reason,” says Sherman. “The Supreme Court has never adopted a ‘professional speech doctrine’ and in recent cases, has even reviewed restrictions on lawyers’ speech with strict scrutiny. The 4th Circuit’s view that speech between ‘professionals’ and their clients receives no First Amendment protection at all is impossible to square with Supreme Court precedent and is the most extreme view taken by any of the circuits.”

The MJP association’s challenge to the admission rule adopted by the U.S. district court in New Jersey suffered essentially the same fate as did the association’s lawsuit in Maryland, when a judge from Pennsylvania sitting by designation granted a motion to dismiss.

The rule followed by the federal district court in New Jersey requires attorneys who are not licensed in New Jersey to apply for pro hac vice admission for each case they handle in federal court and pay a $150 fee for each admission.

The 3rd Circuit at Philadelphia affirmed the district court’s dismissal in *NAAMJP v. Simandle*, decided July 14. On the First Amendment claim, the 3rd Circuit wrote that the rule does not discriminate against the content or viewpoint of any speaker and said the rule places minimal limitations on expressive activities.

Despite its setbacks in court, the MJP association continues to advance the argument that barriers to admission are unconstitutional and inconsistent with current realities in the legal profession. The association has filed a petition for Supreme Court review of the 4th Circuit’s decision in the Maryland case.

But “until and unless there develops a circuit split on bar and court admission rules, I do not believe that this issue will be reviewed by the U.S. Supreme Court,” Joy says.
This year marks two important anniversaries concerning the great Justice Robert H. Jackson: Seventy-five years ago, in 1941, he took his seat on the U.S. Supreme Court; and 70 years ago he was on sabbatical from the court to serve as chief counsel for the United States in the prosecution of senior Nazi officials at Nuremberg. This month, the Center for American and International Law in Dallas is hosting a symposium—one of many around the country—to assess the significance of those postwar prosecutions. Much of the interest and energy will focus on Jackson himself.

Doubtless because Jackson was so unusually eloquent, a majority of the current justices name him as their favorite writer ever to serve on the court. Let’s see why. We’ll primarily consider two documents: his majority opinion in West Virginia State Board of Education v. Barnette and his opening and closing arguments at Nuremberg. There are countless other examples you might seek out as well.

Barnette was decided in June 1943. The United States was embroiled in World War II. It was a time when worries, fears and patriotism ran high. In this atmosphere, the West Virginia board of ed, emboldened by a 3-year-old opinion of the court (Minersville School District v. Gobitis), passed a resolution requiring all children to salute the flag and recite the Pledge of Allegiance. A group of Jehovah’s Witnesses objected that their civil liberties of the First Amendment were infringed, and they sued.

MEMORABLE PHRASING

The Jackson opinion for the majority is a thing of beauty. It’s rather like Shakespeare’s Hamlet: Almost every line is quotable. In the eight-page opinion, Jackson quotes very little. Much of the interest and energy will focus on Jackson himself.

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allusion deriving from Thomas Gray’s “Elegy Written in a Country Churchyard” (1751). But you needn’t even know the poem to get the point. The allusion appears in the second sentence here: “The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.”

In his tight essay, Jackson expresses truths that seem prescient today: “One’s right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.” Or this haunting image (remember it was 1943, and nobody in America knew anything about the horrifying extent of Hitler’s death camps): “Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”

ENDURING INSIGHTS

Jackson reminded his readers from time to time of his lawyerly credentials. He liked the word therein. But notice how he could be eloquent even with that smidgin of legalese: “If there is any fixed star in our constitutional constellation [note the alliteration], it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”

Small wonder that many constitutional scholars consider Barnette their favorite majority opinion of all time. Justice Felix Frankfurter, by contrast, wrote a long and quotation-filled dissent in which he begins defensively: “One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.” He alone wanted to enforce the expulsions from school. It was not his best moment—and, in fairness, we should note that his career was full of excellent moments.

But back to Jackson. When necessary to avert immediate dangers posed by those exhorting violence, he was ready to grant government the power of intervention. In a 1949 case, he dissented from a decision overturning the breach-of-peace conviction of a former priest whose incendiary pro-fascist and anti-Semitic rhetoric had provoked two mobs to clash. Citing the necessity of public order, Jackson warned in his dissent: “If the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” Again, his clarion, pithy insights are enduringly relevant.

In 1945–46, when he took leave from the court to prosecute war crimes in Germany, some of his colleagues were unimpressed. Chief Justice Harlan Fiske Stone thought the Nuremberg trials amounted to a fake show of victors’ justice. He said privately: ”Jackson is away conducting his high-grade lynching party in Nuremberg.”

But in his opening statement, Jackson delivered some of the most powerful words ever uttered in any courtroom: “The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.”

And in his July 1946 closing statement, he said: “If you were to say of these men that they are not guilty, it would be as true to say there has been no war, there are no slain, there has been no crime.”

Lincoln Lawyers

Litigator’s book documents the service of Kansas’ Frontier Guard
By Stephanie Francis Ward

IT WAS A LAWYER WHO CAPTURED THE FIRST FLAG from Confederate soil brought to the White House. He was one of 46 attorneys who in April 1861 traveled from the Great Plains to Washington, D.C., where they protected President Abraham Lincoln at a time when most of the troops were out West fighting Indians—and those left in the capital either didn’t shoot well or had Southern connections and couldn’t be trusted.

James Muehlberger, a Shook, Hardy & Bacon partner, found the group’s muster roll while on a three-month sabbatical from his work as co-chair of the firm’s practice in class actions and complex litigation. He wrote The 116: The True Story of Abraham Lincoln’s Lost Guard, a book about the men known as the Frontier Guard. They were led by Jim Lane, a lawyer and former U.S. senator who settled in Kansas territory. The book was published by the ABA’s Ankerwycke imprint.

Muehlberger is also the author of The Lost Cause, about Henry McDougal. A founder of Muehlberger’s firm, McDougal brought and won an 1870 Missouri civil lawsuit against outlaw brothers Jesse and Frank James regarding a stolen horse.

AN AUTHOR/LAWYER

Storytelling skills for litigation and literature are similar, says the Kansas City, Missouri, lawyer. “In some ways, writing books may have made my legal writing better,” Muehlberger says. “It’s taught me [how to] tell a story in a conversational and interesting way—one of those things we try to teach younger lawyers about their legal writing.”

While on his first sabbatical in 2007, Muehlberger found the James brothers’ court record at the Daviess County clerk’s office in Missouri. As a Shook Hardy partner, he can take a three-month sabbatical every six years. He doesn’t know of other law firms with similar offerings. “I think it helps us retain lawyers; people really enjoy it. We've always been a very hardworking trial firm,” he says. “This is high-pressure stuff, and a sabbatical helps our
Much of his first sabbatical centered on researching post-Civil War history around the Missouri-Kansas border, where many Confederate sympathizers supported the James brothers. That work led to Muehlberger’s discovery of Lane, who besides being a lawyer had successfully fought off pro-slavery soldiers in the area. Lane met Lincoln when the president traveled there.

Kansas had achieved statehood in January 1861, only four months before the Civil War began. “Lincoln asked Lane what he should do,” Muehlberger says, “and Lane said, ‘Get loyal men in the White House.’ ”

116 STRONG

The Frontier Guard was composed of 116 men, whom Muehlberger read about in a long-forgotten muster roll he found at the U.S. Library of Congress. A vellum-bound book that’s about 7 by 8.5 inches, it includes the men’s names and ages written in quill pen, along with descriptions of daily activities. A historical researcher from Kansas helped Muehlberger piece together their biographies and a timeline of the activities.

Out of the group of lawyers, many had experience fighting pro-slavery soldiers, and Muehlberger suspects a few may have practiced law with Lincoln in Illinois.

Some of the lawyers were East Coast abolitionists who went to the Kansas-Missouri border as anti-slavery activists. Others didn’t go to law school, but passed a bar exam and went to the Kansas territory because there was money to be made from legal work on land sales and title disputes.

It was a pairing Ivy League-educated lawyers who did civil rights impact litigation with attorneys who put themselves through a part-time program and built state court practices representing individuals and small-business owners. Court appearances for the self-taught lawyers were often reached by horseback after traveling long distances through the wilderness. Knowing how to shoot and ride was necessary for survival.

“Lane was able to bring these two groups together,” says Muehlberger. “Some had money to buy guns, and the others actually knew how to use guns. Many of these guys knew how to handle a pistol as readily as a pen.”

A SHOW OF FORCE

When the Frontier Guard got to Washington on April 18, they set up in the White House’s East Room. The Secret Service, the FBI and the CIA didn’t exist, and the men feared that the Confederates would storm the capital and kill Lincoln.

Lane positioned sharpshooters on the White House roof with buffalo rifles, large-caliber weapons that could shoot huge holes through almost anything.

In a town known for rumors, Lane started one about having hundreds of men fighting for him. None of the group wore uniforms, and people couldn’t spot them to count them. On their first night in town, the men marched noisily back and forth across the Potomac River’s Long Bridge so their numbers looked to be in the thousands.

After hearing word that the opposition was gathering in Falls Church, Virginia, 9 miles outside Washington, D.C., and preparing to ambush the White House, Lane and his men marched there on April 23 and attacked.

The Confederate troops scattered and left behind their flag, which Lane took to the White House. A Confederate officer had told Gen. Robert E. Lee that Lane had 12,000 troops.

“Their legal training had to come into play,” Muehlberger says. “What lawyers do is figure out problems and create narratives,” he says. “Lane had to figure out how he could create a force, and he was a problem solver.”
Firm Backing

New lawyers get an assist on their student loan debt  By G.M. Filisko

Not many first-year associates would have the courage to march up to their firm’s chief operating officer and boldly ask for help with their student loans.

Sharon Casola did. The result is that her firm, Latham & Watkins, soon partnered with a lender to help associates refinance their debt.

More than 150 Latham associates have taken advantage of the program, reports LeeAnn Black, the COO Casola so boldly approached. Their savings will amount to $4.75 million in interest (an average of $31,000 per associate) over the life of the loan they refinanced.

“The thing I’m most proud of is that I’ve spoken to 15 or more people at other firms,” Black says. “They’re starting to implement programs. It isn’t about us. It’s about getting that debt load off associates’ plate.”

Rough rates

Now a second-year associate at Latham, Casola says her annual law school tuition was $50,000. By the time she graduated in 2014, the interest that had already accrued—even though she hadn’t been required to begin paying her loans back—brought her total debt load to $170,000.

The worst part? Casola’s interest rates ranged from 5 to 7-plus percent at a time when mortgage interest rates were dipping as low as 2.5 percent. But there was virtually no market for student loan refinancing in the years after the Great Recession until the student loan refinance companies Social Finance Inc. and CommonBond emerged online in late 2011—and their offerings were limited.

If you’re keeping score, the terms of Casola’s loans translated to a $1,900 monthly payment.

What started as a joke with a partner—the firm represents major banks; can’t it leverage those relationships to help associates refinance student loans?—turned serious.

“The partner encouraged me to speak with LeeAnn,” recalls Casola. “She gives a state-of-the-firm address to all attorneys, and after her address, I went up, quickly introduced myself, told her my student loan interest rates were exceedingly high, and asked if there was any way we could partner with one of our clients to refinance them.”

Black heard Casola’s plea. Just a few months later, in April 2015, the firm announced a loan refinancing program with First Republic Bank. The institution—which wasn’t a client of the firm but a recommendation from a partner who banked there—declined to comment for this article.

Associates can refinance $60,000–$300,000 in student loans at variable interest rates (in June, they ranged from just under 2 percent to just under 3 percent) through First Republic, according to Black. Loans can be bundled, including with those of spouses and family members.

The bank requires associates to undergo an in-person interview and meet underwriting requirements. The drawback is that by refinancing federal loans into private loans, associates lose their ability to pause payments during a hardship.

First Republic also requires associates to open an account and deposit 10 percent of the loan amount with the bank. Black recognized the liquidity requirement might be an insurmountable hurdle, so the firm agreed to guarantee those amounts for the first year of each associate’s loan.

Kirkland & Ellis also announced a program in April with First Republic, according to Steve Ritchie, a partner in the firm’s Chicago office. Associates in areas in which First Republic has a physical location—those in New York and California—can participate.

Debevoise & Plimpton has teamed up with not just First Republic but also Citizens Bank to offer refinancing options to its U.S. staff members who meet the lenders’ loan standards. Skadden, Arps, Slate, Meagher & Flom says it rolled out a program with Darien Rowayton Bank in addition to First Republic and Citizens Bank.

Not done yet

The irony of this tale? Casola refinanced electronically with SoFi in late 2014, but hasn’t refinanced under Latham’s program, even though she could reduce her payments even further. The in-person interview has been hard to arrange, and she hasn’t had time to move her banking to the institution.

“Probably the first thing on my to-do list is to look into refinancing again,” she says.

Casola is now paying $3,500 a month—several times more than her refinanced minimum payment. If she maintains that pace, she’ll have saved $30,000 over the life of her loans and paid them off in just four more years.
C-Other-E

Law firm helps social workers stay up to date

By Stephanie Francis Ward

UNTANGLING BAD LEGAL ADVICE, ESPECIALLY WHEN IT'S GIVEN BY SOMEONE who isn't a lawyer, is a difficult task, particularly if the faulty information comes from a person the client trusts, such as a social worker.

"I've always thought that social workers should have at least some acquaintance with the legal landscape about government benefits because they're on the front line with patients and their families," says David A. Cutner, a name partner with New York City's Lamson & Cutner. His law firm, which handles elder law issues, is one of two registered with the New York State Education Department to provide law-focused continuing education credits for social workers.

"Like it or not, they're giving people advice or direction," Cutner says. "And when they have the wrong understanding of legal issues or legal requirements, I've seen some very concrete examples of how problematic that can be."

Since January 2015, New York state requires that licensed social workers complete 36 hours of continuing education every three years. The classes, which cost $40 to attend, last for two hours and give two credit hours toward the licensing requirements. A networking reception, with wine and cheese, follows the presentation.

OTHER PROFESSIONS

"When I realized that social workers needed continuing education credits, it was the perfect fit," says Cynthia P. Kuster, Lamson & Cutner's director of institutional relations. She previously organized similar seminars for nursing home and hospital staffs and filed an application with the New York State Education Department for continuing education certification. That included submitting a description and course outline to the agency, as well as speaker credentials.

Lamson & Cutner advertises the courses on its website and in its newsletter, and the firm also sent invitations to social workers at New York hospitals and nursing homes. Kuster estimates that 150 social workers attended the courses, adding that some have sent the firm business.

"What I like about our courses is that a lot of social worker courses are soft, therapy-focused classes," Kuster says. "Our classes offer really concrete advice they can use in their practices."

Part of the course focuses on power of attorney filings. Cutner mentions a client who, on the advice of a social worker, downloaded a power of attorney form from the internet for a parent.

"It was invalid under New York law," Cutner says. "Even if it had complied with New York regulations, the scope of authority was so limited, it would have been useless anyway."

The man's children didn't find that out until after he developed dementia and no longer had the mental capacity to sign off on a new power of attorney.

"The lack of a good power of attorney greatly complicated any planning we might have done to protect the parent," he says. "Social workers should know that powers of attorney are complicated documents, and people should talk to attorneys about them."

The course also focuses on advance directives, including paying for long-term care and Medicaid planning. According to Cutner, social workers and other health care professionals sometimes give families incorrect advice about a loved one qualifying for New York Medicaid, a government insurance program for people with high medical bills who are not covered by Medicare and who meet certain financial requirements. At that class, Lamson & Cutner attorneys address strategies covering topics such as eligibility and financial planning, including transferring assets and setting up a Medicaid trust.

"Many people think you have to spend down all your money because you're going to a nursing home or need home care. Actually that's not the case, and you want to do something to protect your money," he says. "What we want social workers to take away from the course is that their patients have very good options. They shouldn't be telling them that they'll never qualify or they have too much income to qualify. That's really bad advice."
FRIENDLY PERSUASION
To gain more clients, use social media

54 PERCENT
OF RESPONDENTS SAY THEY WOULD BE LIKELY TO HIRE AN ATTORNEY WHO IS ACTIVE ON SOCIAL MEDIA

So Facebook is frivolous? LinkedIn a laugh? Twitter a twit?

A FINDLAW SURVEY WARNS lawyers not to dismiss social media out of hand.

THE SURVEY, CONDUCTED BY polling a demographically balanced sample of 1,000 American adults, found that 54 percent of respondents said they’d be likely to hire a lawyer who is active on social media. The number jumps to 69 percent for those consumers ages 18 to 44.

IN FACT, THE SURVEY FOUND that 34 percent of consumers already have used social media to help select a local service provider, such as a lawyer, plumber or doctor. And 48 percent of those 18 to 34 have done so.

SURVEY RESULTS ARE PART of a downloadable white paper in which FindLaw discusses the popular social media sites (the three mentioned above, as well as Instagram, Pinterest and Snapchat) and what lawyers can do to be active on such sites.

FIND LINKS TO MORE DATA AND OTHER PRACTICE STATS AT ABAJOURNAL.COM/LAWBYTHENUMBERS.
Here are some tips on getting your message across to the media By Julie Sobowale

**SPEAK IN plain language. BE FAMILIAR WITH the topic at hand. Keep your comments short and sweet.** While these tips may sound simple, dealing with the media can involve certain nuances. And putting these guidelines into practice gives lawyers an advantage in courting coverage.

As a former war correspondent for the Washington Post and a former legal correspondent for Reuters, Rebecca Hamilton was no stranger to the media. But her view on media changed when she went on her book tour for *Fighting for Darfur: Public Action and the Struggle to Stop Genocide*.

“I learned the value of talking points,” says Hamilton, an assistant professor at American University’s Washington College of Law. “It sounds basic, but you need to have them rehearsed in advance if you want them to come out in the story. The challenge of a book tour is that in your head you have all the details, but you need to put them into context for people.”

After graduating from Harvard Law School in 2007, Hamilton was a prosecutor at the International Court of Justice for two years. Her writing career began covering the conflict in South Sudan for the Post. She learned that finding the best sources for stories can be challenging—something that lawyers need to be aware of.

“The first thing is that it’s completely appropriate to say to a journalist, ‘I’m the wrong person to talk to,’” Hamilton says. “Your biggest contribution could be to point them to the right person.”

When working with journalists, find out the focus of the story and what information is needed from you. And watch out for using too many technical or legal terms.

“Some lawyers are so immersed in their field that they can’t talk like a normal person,” Hamilton says. “Talk to the media like you would talk to your mom. Know the value of short quotes. If you speak in long sentences, then there’s a danger of having your quotes shortened and then feeling like the quote doesn’t represent what you said.”

**KEEP IT SHORT**

Stacey Burke, a legal marketing consultant and former personal injury attorney, recommends being succinct when communicating with today’s more compact and smartphone-accessible media.

“Have your main bullet points and one or two sub-points,” Burke says. “Think about what you really want to drive home. For press releases, the more concise and interesting, the better.” When standing in as spokesperson during a crisis, it’s important to have strong relationships with media outlets to get your message out as quickly as possible.

“You want a short statement that can be published in full as is,” Burke says. “While the first instinct of litigators is to talk, sometimes that’s not the best approach to handling the media during a crisis... Don’t give a substantive opinion or make promises.”

Become the go-to person, not only in your area of expertise but as someone who can identify other great sources for stories.

“Look for the long-term relationship,” Hamilton says. “If you give a good referral, they will remember you.”

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Similarly in running my law practice, I need quick access to information about the performance of my business. Needles gives me the gauges and controls that allow me to communicate to my team and ensure my business is operating smoothly. Without Needles, you’re flying blind!”

Danny Daniel
Partner and Attorney
Daniel Stark Injury Lawyers
Bryan / College Station
Waco / Austin, TX

The sky is the limit.
WHO’S THE LAWYER?

The 8 Ball tavern in the small town of Cotati, California, sometimes gets phone calls from people who claim to be with the gas or electric company or the IRS or some such, saying, “Pay us money you owe, or we’ll shut down your business.”

“We tell them we’re not interested and hang up, because we’re used to scammers,” says 8 Ball co-owner Rick Gorell. So, when he received a letter from a Pasadena lawyer demanding money to settle a claim for...
showing his patrons an unauthorized televised pay-per-view fight, Gorell threw it away.

“I knew it was just another scam,” he says, taking a moment from preparations for the lunch crowd, a blend of students at Sonoma State University, workers from nearby vineyards and others of various white- and blue-collar persuasions.

When a second demand letter came a month later from the same lawyer, Gorell took it seriously. An 8 Ball regular who is a lawyer looked it over and sent a reply, asking for proof that the bar showed the fight. It was a one-off pushback like a lot of lawyers do for friends, hoping the matter ends there.

The response was a lawsuit for $170,000-plus against the 8 Ball’s owners, Gorell and John Graham, filed on behalf of J&J Sports Productions, which licenses the rights to show prize fights. Gorell and Graham soon found they were in the company of many others hit with lawsuits that allege TV signal piracy; and, like them, they were scratching their heads in disbelief, unsure of what to do.

The lawyer, Thomas P. Riley, operates in a narrow-but-deep practice niche, making demands of similar small businesses, often owned by foreign-born proprietors who vary both in their facility with English and their ability to afford a legal defense. Opposing lawyers describe Riley’s litigation style as unrelenting, aggressive and abrasive.

In scenarios similar to the 8 Ball’s, thousands of small businesses and do-good organizations like Elks and Moose lodges—even American Legion posts—have been caught up with private lawyers who pay armies of freelance investigators to go into establishments and document pay-per-view theft.

For a small business, such a lawsuit could be a death knell. According to Marc Libarle, a San Francisco lawyer who is defending the 8 Ball and one other business, yielding to Riley’s demand would cost at least $6,000 once the boxing distributor and opposing lawyers were paid. But demands can run as high as $40,000, and going to court would risk strict liability damages, as well as costs and attorney fees.

But defense lawyers like Lisa Clay of Chicago and Susan Wright of Dallas are raising serious ethical questions about the vetting and supervision of the investigators, who are paid only when they produce affidavits that swear they witnessed TV signal piracy.

The 8 Ball’s owners learned of the suit—even before they were served with papers—when they got a solicitation letter from a lawyer, Matthew Paré of Chula Vista, California. He culls federal court dockets for potential clients, then negotiates with Riley on their behalf.

But the 8 Ball’s owners were certain they had not shown a televised fight, so they wanted a fight with Riley.

“We didn’t want to pay thousands of dollars to settle a case when we didn’t do anything wrong,” Graham says.

A REAL PROBLEM

To be clear, plenty of businesses illegally show cable or satellite TV broadcasts, including premium channels such as HBO and Showtime, as well as pay-per-view events. One distributor said in a court filing that he is losing millions of dollars to piracy, although the figure is impossible to quantify. Therefore, vigilant anti-piracy efforts are an effort to stanch the flow of lost revenues.

But lawyers who try to help some of these businesses,
often mom-and-pop shops, say they think the anti-piracy business model might be less a deterrent than a revenue source—through demand-letter settlements and default judgments in federal courts. They say that the cases often are built on questionable evidence, and that too many are simply unfounded.

“We believe they’re reaping a windfall from this litigation, or just from the threat of it,” says Trevor McCann, a Concord, California, lawyer who downloaded 14,000 pages from Westlaw to help build a spreadsheet to fashion attacks on flawed anti-piracy claims.

Aside from prelitigation settlements, a huge and ever-growing number of default judgments exist in the federal court system, which McCann and other lawyers involved think has become an unwitting collection arm. Awards from those judgments range from a couple of thousand dollars to tens of thousands.

A PACER search shows that Riley alone is involved in thousands of cases in federal courts in several states. He represents mostly televised sports-event licensing distributors, such as J&J Sports Productions. Those court cases might be just the tip of the iceberg: Opposing lawyers say it is likely that a greater number of businesses settle on the initial demand letter—payments that don’t show up in any public record.

THE 8 BALL’S OWNERS, Rick Gorell (above, left) and John Graham, are the targets of a lawsuit alleging they showed patrons a boxing event they didn’t have the commercial rights to show. Trevor McCann (left) is a lawyer who downloaded 14,000 pages from Westlaw to help build an attack on flawed anti-piracy claims.
Then there is the problem of incentives. Investigators in these cases are paid only after they produce a potential case, receiving as much as $650 per hit. According to a contract sent by Riley’s office to a prospective investigator, “compensation is performance-oriented” and lists à la carte payment amounts for various specific proof. The basic requirement is an affidavit attesting to having viewed the programming and two color photos of the establishment’s exterior. But investigators can receive extra payments for further proof, such as copies of liquor licenses or videos that show the program on the TV of a business.

Many of the investigators in these cases are not licensed professionals, though their affidavits typically imply that they are. And they have to spend only a few minutes in a bar or restaurant to document piracy; thus several hits can earn a lot of money for an evening’s work. But no hit means no pay, leaving an incentive to manufacture a case.

Questionable anti-piracy cases can occur for several reasons. Sometimes businesses are given residential accounts mistakenly, leaving them open to liability for showing programs, such as pay-per-view and specials, for which commercial customers must pay significantly more. Although pricing has evened out in recent years, lawyers who defend these cases say it was not uncommon several years ago for businesses to be given residential accounts instead of the more expensive commercial ones for cable or satellite. The customers often didn’t know they had the wrong kind of account, but the providers did—possibly motivated to beat a competitor’s pricing.

Marc Bragg left his law practice in 2012 to open a bar called Sally and Henry’s Doghouse in San Diego, but he had to hit the law books again two years later when he was sued in the U.S. District Court for the Southern District of California by J&J Sports Productions and Joe Hand Promotions for showing two fights he bought through DirecTV, a satellite television provider.

Bragg says he didn’t know he’d been given a residential account. The installer offered a better price than Bragg had gotten from Cox Communications. Bragg thinks the lower price was derived from an installation made under the wrong kind of account. He countersued Joe Hand, the boxing distributors, as well as Riley. But he also sued DirecTV for having put him in that position. Though the bar has closed and Joe Hand has settled, the case still is pending.

In 2010, DirecTV entered a nationwide agreement to better police its third-party contractors, but Bragg thinks the misidentified installations still are routine. The third-party contractor who installed Bragg’s system had DirecTV logos on his uniform and van. “You can’t look at this ... area of town and not know that it’s commercial,” he says.

ACCOUNT ERROR

Bragg is not alone in thinking the confused installations were deliberate and routine.

“I estimate that about 50 percent of [these types of] cases involve a residential account in a commercial establishment, and the customer didn’t know that’s what they were getting,” says Chicago litigator Clay, who alleges that small-business owners were then targeted, particularly those with names that suggest they are foreign born. She believes foreigners were targeted because they would more likely be fearful of the judicial system in general—and less likely to have the will and resources to push back.

In March, Clay filed a proposed class action in the Northern District of Illinois as a counterclaim in the case G&G Closed-Circuit Events v. Castillo. The lawsuit, which she has been litigating for more than two years, now incudes a third-party action against DirecTV and, more recently, Riley’s law firm. And in May, after she deposed Riley and two of his staffers—one of them a lawyer, Julie Dadayan, who has since left the firm—Clay added racketeering charges against both the
boxing distributor and Riley’s firm.

Attempts to reach Riley and Dadayan for comment were unsuccessful. In Riley’s case, he did not respond to a telephone message left at his office nor to an email follow-up. Weeks after those attempts, a managing director of FTI Consulting, a Chicago-based international crisis and issue management firm, called seeking to arrange an interview with Riley. But the interview never happened.

Clay’s class action suit details a “nationwide scheme and RICO enterprise whereby they use questionable means to entrap unsuspecting business owners and individual consumers” and “then extort money” from them.

The scheme, she alleges, takes advantage of the fact that DirecTV often provides residential programming to businesses. With the wrong kind of account, businesses that show any DirecTV program would be in violation, even if it were part of the package they bought. For example, if proprietors show an HBO or Showtime event—commonly, a non-pay-per-view boxing match—it sets them up to be sued by the licensing distributors as a violation of the residential package. Even if they properly order a pay-per-view event, the license is not valid because commercial account pricing is based on an establishment’s maximum capacity.

But some cases against the small businesses—maybe 10 percent, Clay estimates—are based on flawed, sometimes fraudulent affidavits by investigators.

BEFORE THE 8 BALL

Kim Lyell, the investigator who hit the 8 Ball, provided everything on Riley’s menu. But the investigative agency she listed as her employer apparently doesn’t exist, says Pat Hanley, an 8 Ball patron who has worked as a licensed private investigator in California.

“It’s phony on its face,” says Hanley, who dug into the details of Lyell’s affidavit and provided them to lawyers who represent the tavern’s owners. “She just made it up.”

Her documentation was similarly suspect. An alleged covert video snippet of the televised fight was an unrecognizable blur and shadow—until Hanley broke it down frame by frame and found a second or two of a basketball game. No boxing.

Hanley provided several more glaring omissions and errors. For example, Lyell swore she was at the 8 Ball in April 2012 for the main bout, Manny Pacquiao versus Timothy Bradley, but described only the undercard match. And the purportedly timely photos of the outside of the bar were taken in a different season than she reported. Moreover, co-owner Graham says, the 8 Ball has no subscription to HBO, and the bar was not billed for and did not pay for a pay-per-view event.

Lyell’s affidavit included one observation the 8 Ball owners agree with. She noted that the sound was turned down on the bar’s nine television sets and that none of the estimated 16 patrons, except her, was watching.

On her affidavit, Lyell listed a New Jersey phone number along with “Taylor & Associates” as the agency with which she worked. She is not registered as a licensed private investigator in New Jersey or California. And there’s no record of a PI business by that name in either state.

That New Jersey phone number has shown up on other courtroom affidavits, including in other states, going back at least until 2010. A call to that number was answered by a man who said he didn’t know who Lyell was but after a moment said, “Oh, you’re calling about an affidavit. We don’t know where she is. We tried to contact her, but she didn’t respond to our client.”

The number is registered in the name of Daniel Szlezak, and a Facebook page under that name lists jobs that include “private investigator at PI Taylor & Associates.” New Jersey state police say no private detective agency registered in the state goes by that name; and Szlezak is neither a licensed private investigator there, nor has he been registered as an employee of one.

The man at the end of the line declined to identify himself, his business or the client, saying, “I’d rather not discuss any of this.”

In a deposition, Lyell said that when she received the 8 Ball assignment, she was working as an “independent contractor” selling jewelry on cruise ships and working occasionally as a mystery shopper. (Mystery shoppers visit retail businesses and report on the quality of service.) After responding to an online forum for mystery shoppers, Lyell says, she received an email from someone named Robert Taylor in New Jersey and got two assignments from him. One was the 8 Ball.

Under questioning by Riley, she said Taylor told her the assignment would be similar to mystery shopping but involved TV piracy. She said when she checked Taylor out she found “he was a licensed investigator ... in New Jersey.”

When Libarle began his questions, Lyell said she had to leave town four days later to join a cruise ship in Barbados. Fred Olsen Cruise Lines records show the cruise she said she was joining was in Estonia, not
Barbados. Moreover, Robert F. Taylor was identified as a prominent private investigator and a former president of the New Jersey Licensed Private Investigators Association. But that is not the Robert Taylor with whom Lyell dealt.

There is a Robert Taylor in New Jersey who has a company called “Taylor & Associates,” which is a member company of the Mystery Shopper Providers Association-North America. The group, which lists Taylor and gives his phone number, has an online forum on which he and others post possible assignments for mystery shoppers.

The only “Taylor & Associates” incorporated and registered with New Jersey’s Department of the Treasury is owned by a mortgage broker who has no relationship to Taylor, Szlezak or mystery shopping. And the licensed PI Robert F. Taylor says he never has heard of Robert Taylor PI, Taylor & Associates or Szlezak.

Riley advertises in many venues, mostly online, seeking licensed professionals as investigators or professionals who oversee unlicensed associates and vouch for their work. A 2008 ad was addressed to “private investigators/detectives” with a requirement to be a “principal of a licensed agency, capable of providing surveillance services.” But it added that “your signature on a sworn affidavit is good enough for us and always has been.”

Riley enters agreements with subcontractors who then can hire and supervise unlicensed auditors or investigators. Using unlicensed professionals might be problematic in some states if their findings are likely to be used for litigation or prosecution. But it hasn’t been a big problem, says Jimmie Mesis, a PI who is the editor and publisher of PI Magazine.

“They technically might be crossing the line of conducting an investigation” that a state might consider the province of a licensed PI, “It can be a gray area,” Mesis says.

The New Jersey telephone number Lyell put on her affidavit for the “investigative agency” for which she works also was used by Szlezak in a 2010 affidavit. His exhibits and affidavit were the only evidence presented in a case brought in the federal court for the Eastern District of Pennsylvania in 2012. Riley got a default judgment for his client, Joe Hand Promotions. Although there was no challenge to Szlezak’s affidavit, the judge wrote a lengthy, scorching opinion critical of Riley and his approach. (See a sidebar about the decision at ABAJournal.com.)

CASE LAW CONSIDERATIONS

In a Chicago case that concerned the Lucky Inn bar, the proprietor paid a fee to show a boxing match, but she says she didn’t know her account wasn’t commercial. The original complaint said she stole the TV signal without paying for it, which likely would have held up for a default judgment, but she was represented by a lawyer patron.

Clay argues the laws on TV piracy suggest judges are not obligated to levy even minimum statutory damages, much less award enhanced damages. “I think the statute has been bastardized,” she says. “Judges shouldn’t just look to the statutory provisions cited by the plaintiffs.”

“There’s a huge body of case law on these defaults building on itself around the country,” she adds. “They’re targeting people who can’t defend themselves, and courts need to re-evaluate how they look at these cases because of that.”

That development of case law has been inconsistent and sometimes flat-out wrong, says California lawyer McCann: “Signal piracy law is like the Middle Ages, and defaults had a lot to do with it.”

Indeed, lawyers who defend these cases, often for little or no money, tend to feel like they’re on a crusade. “We’re up against a business model,” says Clay. “The plaintiffs are capitalizing on the fees and costs of litigation. These people don’t give a rat’s ass about their licensing rights. They’re out to make money on this. And my clients can’t afford the fight. So I made a personal decision and don’t charge them. I don’t want to benefit from a system I feel is wrong.”

Clay and McCann began conferring earlier this year, and they were joined by Libarle, the lawyer in the 8 Ball case. And Clay recently developed a successful approach that has borne fruit for McCann: Serve the plaintiffs lawyer with a third-party subpoena that demands, among other things, detailed information about the lawyer’s staffing, office procedures and how the case was worked up in the office. When McCann filed such notice in March in federal court in San Francisco, Riley’s client settled.

Clay and McCann have developed another approach, which they intend to formalize with document templates: As soon as possible, file a Rule 11 motion that questions the most basic premises of the suits, which rarely provide many case-specific facts or documentation. Among the questions to be asked are:

• Why isn’t the distributor’s contract to sell the shows attached to the complaint? (When pressed, one distributor said in a declaration it was oral.)

• Where is the investigator’s affidavit? (The affidavit
usually isn’t seen until a motion for summary judgment.)

- Where are the details or proof behind specific, high-dollar claims for enhanced damages?
- Was the alleged infringement from cable or satellite? (Separate statutes cover the type of distribution and provide different potential fines.)

**FEE FEARS**

More lawyers say they would like to fight these cases, but they can’t pull so many unbillable hours out of their practices, and they fear putting clients in jeopardy of strict liability and mandatory costs and fees.

“I’d love to represent someone economically situated well enough to take the risk of that statutory hammer and shove one of these cases down their throat,” says Chicago lawyer Timothy M. Murphy. He defended the 75-year-old Polish woman who runs the Lucky Inn bar, where he and his wife sometimes dine.

Despite paying Comcast Cable $59.99 to show a pay-per-view fight, the woman was sued by J&J Sports Productions. The demand letters came from Riley, but the suit was filed and litigated by a lawyer in a Chicago firm, Andre Ordeanu of Zane D. Smith & Associates, one of several law firms used in jurisdictions where Riley is not admitted to practice.

Because of the hammer, Murphy says, he settled the case just before trial last year, although for a fraction of the original demand.

He had planned to show the meager profits of the Lucky Inn; let his elderly client, Luba Orenkiewicz, speak for herself in limited English; and he figured he needed little more to win over the affidavit by investigator Peter M. Scurto, president of M.B. Scurto & Associates.

Like Taylor & Associates, Scurto’s company specializes in providing mystery shoppers. Scurto is not a licensed private investigator, although Riley’s advertisements typically say a PI license is required.

Scurto’s affidavit contained significant errors: providing the wrong name for one of the boxers and identifying the Lucky Inn bartender as a man, when the proprietor says she never has had a male employee. Murphy knows the place well enough to say the headcount given in the affidavit is inflated by multiples. On the night in question, the Lucky Inn’s gross revenues were $337.

Shortly before the scheduled trial in March 2015, Murphy says, Ordeanu emailed him an additional exhibit, well after discovery ended, saying somehow it wasn’t in the original package in discovery. But Murphy noticed immediately that it was a revised version of one he’d received earlier, and now it had the boxer named correctly. It was notarized and had the same date as the original affidavit: May 7, 2012.

“This last-minute, shameless attempt to alter evidence makes clear the exact value of Mr. Scurto and his affidavit as evidence: precisely zero,” Murphy wrote in his trial brief.

Neither Scurto nor Ordeanu responded to interview requests.

**BREACHED AGREEMENT?**

In 2010, because of widespread abuses by third-party contractors, among other problems, DirectV entered a settlement agreement with all 50 states and the District of Columbia. The company paid a $13.5 million penalty and promised remedies, including better oversight of the contractors.

And lawyers for businesses swept up in anti-piracy efforts have filed counterclaims alleging breaches of that agreement. “DirectV knew installers were putting residential setups in these small businesses and told them to go ahead and do it,” says Wright, the Dallas litigator, who has about 20 such clients in state courts in cases brought by Julie Lonstein, Riley’s significant competitor in New York. Lonstein declined to be interviewed for this article.

Wright has alleged in pleadings, based on discovery, that DirectV knew residential accounts were being set up in businesses and approved of it or did nothing to correct the problems. She deposed an installer who said it was simpler to do residential installations. And those residential accounts are maintained for years until Riley, Lonstein or other lawyers send in their investigators.

“We’re declining comment, but thanks for reaching out,” wrote Robert G. Mercer, at the time the senior director of public relations at DirectV, in an email response to a request for an interview.

But questions are coming more frequently as defense lawyers are collaborating. And lawyers in California and Illinois have alerted their attorneys general of possible violations of the 2010 agreement.

The 8 Ball tavern likely will end up filing a countersuit for malicious prosecution, Libarle says. And his client Graham does not fear the hammer of costs, fees and strict liability.

“I’m not in this for money,” Graham says. “I want to expose the problem and make it easier for others to expose this BS.”
Alexandria P.’s short life has been full of harsh goodbyes. At 17 months, she was taken from her parents after accusations of neglect. Los Angeles County authorities placed her in a foster home—but within months, she suffered a black eye and a scrape and was removed again.
Lawsuits claim the Indian Child Welfare Act is not always in the best interests of those it’s meant to protect.
A second foster family gave her up after just a few months, partly because of her extreme neediness. By the time she was placed with her third set of foster parents, Rusty and Summer Page, 2-year-old Alexandria called every adult—even those who were not her foster parents—“Mommy” or “Daddy.” The Pages say she was weepy and clingy, but also volatile.

“If you picked her up, she would freak out,” says Rusty Page, a director at a medical technology company. “If you just sat here like this, she would come and sit on your lap. But the minute you stood up with her, she would freak out, like digging her nails in your arm.”

After most of a year with the Pages at their home in Santa Clarita, California, those behaviors almost vanished. Lexi, as she’s now called, came to regard the Pages and their biological children as family—and vice versa. When her birth father gave up on regaining custody in 2012 (a court had already ruled out custody for her birth mother), the Pages decided to pursue adoption.

They knew it would be an uphill battle. Lexi’s birth father is a member of the Choctaw Nation of Oklahoma, which makes her case subject to the federal Indian Child Welfare Act. ICWA lays out special rules for custody and adoption cases involving children from federally recognized Indian tribes.

Like California law, the act prioritizes placement of tribe members with family. In Lexi’s case, there was extended family in Utah interested in adoption—and officials from the county and the
Choctaw Nation expressed a preference for placement there. Those preferences led to another harsh goodbye. In March, after a three-year legal fight, the Pages were forced to give up 6-year-old Lexi.

On the day slated for the transfer, the Pages’ calm suburban block at the foot of the Tehachapi Mountains was crowded with family, friends and neighbors holding signs with messages such as “Save Lexi” and “Do the Right Thing.” Because of the crowd, county child welfare authorities rescheduled the handover for the next day, March 21.

But the supporters were back. A stone-faced Rusty carried Lexi through the crowd as Summer screamed “Lexi!” and restrained her oldest daughter, Maddie, from running after them. Maddie and her little brother, Caleb, watched from the driveway, crying. Summer clutched her youngest, Zoey. County child welfare officials escorted Rusty and Lexi through the crowd, blocking the cellphones many were holding up to record the scene.

As they drove away, foster uncle Graham Kelly ran alongside the car yelling, “We love you, Lexi!” He then fell into the street crying. The Pages and their supporters gathered in a circle to pray. Rusty broke down while telling TV reporters that Lexi had been named student of the month at her school.

Two weeks later, a banner and sign remained outside the Page residence—but the slogans had changed to “#BringLexiHome,” and their attention is now turned toward the courts. The Pages’ appeal is pending, and they say they’ll pursue it to the U.S. Supreme Court, if necessary.

WHOSE BEST INTERESTS?
To make their case known, the Pages have given more than 100 media interviews in which they reiterate their message: The Indian Child Welfare Act, originally intended to protect Native American children from overreaching by child welfare authorities, is now acting against many of those children’s best interests.

“This little girl who’s one sixty-fourth Choctaw is being controlled by her one sixty-fourth,” says Rusty. “If she were a percentage of African-American and the African-American community came and ... dictated where she could go, there would be an uproar.”

That’s the theme of several challenges to ICWA in the last year and a half. Chief among those is Carter v. Washburn, a civil rights lawsuit filed in July 2015 against Kevin Washburn (then the assistant secretary of Indian Affairs) by the Goldwater Institute, a conservative nonprofit whose mission includes limiting government. Drawing on comparisons to Brown v. Board of Education, the complaint argues that the act creates race-based disadvantages for American Indian children, including a proposed class of all off-reservation Native children in Arizona, represented by family law attorney Carol Coghlan Carter as next friend. Those disadvantages could include physically dangerous placements, the complaint says.

“Because of ICWA, what’s happened is that these Indian children are given unequal and substandard treatment, and their interests are not considered primarily in considering the best interests of the child,” says Adi Dynar, a research attorney for the institute.

Those are hotly disputed claims among ICWA practitioners. The legislation was enacted in 1978 because, as congressional research found at the time, “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children.” And because many of those children were being raised by non-Indians, tribal cultures were in danger of being wiped out. Tribes still feel those traumas today.

“There is absolutely still an understanding that without ICWA, things...
PAINFUL HISTORY

For many great-grandparents of today’s Indian children, arbitrary removals by nontribal governments were the norm, a practice dating back to the first Indian boarding schools in the late 1800s. The schools were designed by the federal government to assimilate the children into mainstream American society. At the time, memories of U.S.-Indian wars were still fresh, and many Americans considered boarding schools a more progressive option than warfare.

But the policy took a profound toll on families and communities. Students were given new “white” names and punished for speaking their native languages or practicing their religions. Boys had to cut their hair. When they returned home years later, they didn’t know how to be Indians anymore.

Punishment, in keeping with the era, meant beatings, loss of privileges or restricted food. Communicable diseases were common, and underfunding by the government meant some kids went hungry. Without parents nearby, children were vulnerable to physical or sexual abuse. If parents refused to turn their children over, the federal government sent police or withheld the family’s food rations.

Around 1900, tens of thousands of children attended 460 Indian schools across the country, according to a 2006 PBS documentary series, Indian Country Diaries. Boarding schools eventually fell out of favor, in part because of reports of the terrible conditions; a 1975 law permitted tribes to set up their own schools with federal funding. But by the mid-20th century, child welfare workers began removing kids from reservations by claiming neglect—a charge justified by the poverty in which they lived.

By the time the act was under congressional consideration—sponsored by Democratic Sen. James Abourzeck of South Dakota, whose state is heavily Native—Indian children were being removed from their homes by child welfare agencies for neglect or abuse in vastly disproportionate numbers to the rest of the population. In 1969 and 1974, the Association on American Indian Affairs found that, in states with high Native populations, 25 to 35 percent of Native children were being removed.

ICWA addresses this on several fronts. To empower tribes, it gives them concurrent jurisdiction over state child welfare cases (and exclusive jurisdiction over ones arising on their own land). Parents may request a transfer to tribal court. In voluntary foster and adoption cases involving Indian children, parental consent must be given in writing. In involuntary cases, the act requires the state to meet a higher legal standard for removal than states typically mandate. And ICWA requires states to show they’ve made “active efforts” to stop the breakup of Indian families; no such requirement exists in state law.

If children are going to foster care or adoption, ICWA requires that courts try to place them first with a relative, then another member of their tribe, then another Indian home and finally, in the case of foster care, a tribally approved institution. Children may be placed outside those preferences only if a court finds good cause to deviate.

“That’s the exception the Pages hoped to qualify for—and they thought they had a good case. After almost a year, Lexi had bonded with the family and no longer needed therapy to address her emotional trauma. Staying in Los Angeles County also would keep her near several half-siblings.

Not only that: Summer Page is partly descended from the Southern Band of Tuscarora Indians, which a social worker said could strengthen their case. The Pages had explored that heritage before Lexi was placed with them, and they made an effort to teach Lexi Choctaw language and stories. The Utah family has no Native ancestry, says Rusty Page, and is related to Lexi only through marriage.

But Summer’s tribe is not federally recognized, and thus doesn’t meet ICWA’s definition of an “Indian tribe.” And regardless, both California law and ICWA give non-Indian family a higher priority in placement than unrelated Indians.

In addition, the Utah family was far from strange to Lexi. One of her half-sisters lived with the family for a time and now lives down the street; another, who was born...
after Lexi, now lives with the family full time. Even before Lexi’s stay with the Pages, the Utah family expressed interest in adopting her, but was told to wait while her father worked toward reunification. After that effort failed, the Utah family began chatting with Lexi twice weekly on Skype. About a year before she was removed from the Pages, Lexi began making overnight visits to the Utah family, including one weeklong visit in the summer.

The parties disagree about Lexi’s reaction to those visits. Rusty says that she was clingy and anxious whenever she left or returned, and that the mother in Utah once called during a visit to have them calm Lexi down. But according to a California Court of Appeal opinion handed down this July, a social worker sent on the weeklong trip says Lexi told her she had a great time and would like to visit again. That appellate opinion says Lexi seemed particularly interested in a relationship with her younger sister who lived with the Utah family.

In late 2013, the Los Angeles County Superior Court ruled that there was no good cause to depart from the placement preferences. The Pages believe they would have gotten custody if not for ICWA. But attorney Leslie Heimov disagrees. She is the executive director of the Children’s Law Center of California, which employs the attorney appointed by the court to represent Lexi. She’s speaking only for the center about this case and says “the law is very clear” in California that placement with family is preferred. “The ICWA piece created a vehicle for all of the appeals,” she says. “But placement with family is always our priority.”

Trial courts have three times ruled for the Utah family;
the appeals court has twice ruled that trial courts used the wrong standard and twice remanded it. After the third appeal, in March, it declined to stay Lexi’s removal. That’s how Lexi came to be removed March 21. Her roller skates and helmet were still by the door when she left.

**TUG OF WAR**

While Lexi’s original case was pending, in September 2013, another family was saying its own harsh goodbye to a little girl.

“Baby Veronica”—who’d just turned 4—had spent the first half of her life with an adoptive couple and the second half with her birth father, Dusten Brown.

On the day she was born, Veronica’s birth mother relinquished her parental rights and placed the infant with the couple—but Brown contested the adoption. Courts in South Carolina, where the adoptive parents lived, awarded custody to her birth father because ICWA’s adoption procedure had not been followed.

The adoptive couple appealed, and *Adoptive Couple v. Baby Girl* became the second ICWA case to reach the Supreme Court. The justices reversed 5–4. Justice Samuel A. Alito Jr., writing for the majority, said ICWA’s parental rights requirements don’t apply to a parent who never had custody of the child before the case.

Sept. 23, 2013, was a “frantic day,” recalls Nimmo, who had worked closely on the case as an attorney for the Cherokee Nation. Brown would be arrested if he didn’t give Veronica up. Media and protesters were outside his home on tribal land. Inside, the birth family, attorneys and tribal leaders had gathered. After Brown agreed to turn Veronica over, an ambulance came for Veronica over, an ambulance came for Veronica’s grandfather, who had a panic attack the family mistook for a heart attack. Everyone agreed it was best for the two families not to meet face to face, so Nimmo escorted Veronica. She helped the girl pack two suitcases—one with clothes and one with toys—and carried her to a waiting car service, which would take her to the Cherokee Nation Marshal Service, which would take her to the adoptive family at the station.

Nimmo doesn’t think it was traumatic for Veronica. But more than two years later, recalling it still saddens her. “There were tears in her eyes. She wasn’t hysterical,” Nimmo says. “I carried her out and set her in her car seat and helped buckle her in. And I kissed her on the cheek and told her her father loved her.”

“And,” Nimmo says, her voice breaking, “they left.”

The current crop of challenges to ICWA are in some ways attempts to expand *Baby Girl*. In *Carter*, the plaintiffs expressly take up the earlier case’s unfinished arguments. Though *Baby Girl* didn’t reach constitutional issues, the majority said that if ICWA can disrupt an otherwise settled adoption “solely because an ancestor—even a remote one—was an Indian,” that “would raise equal protection concerns.”

*Carter* puts those concerns front and center. Its complaint argues that ICWA disrupts otherwise fit placements for Indian children and sometimes puts them in danger. Applying it on the basis of Indian status is racial discrimination that violates the children’s equal protection and due process rights under the Fifth and 14th Amendments, the plaintiffs say.

**A QUESTION OF RACE**

Underlying that argument is the idea that Indian status is about race. A person’s percentage of Native American ancestry is not relevant under ICWA, but it can matter indirectly. Under federal law, Indians must enroll in their tribes to be officially counted as members. ICWA only applies to children who are enrolled in a federally recognized tribe or are qualified to enroll and have an enrolled parent.

But for tribes to get federal recognition, the law says they must require members to “descend from a historical Indian tribe.” Most tribes require at least a certain percentage of ancestry in the tribe, proof of descent from a member of the tribe or both. Thus, at least a little Indian ancestry is indirectly required to qualify for ICWA.

That dependence on ancestry, the *Carter* plaintiffs say, makes tribal membership racial. Dynar of the Goldwater Institute notes that child welfare workers are sometimes required to enroll children in tribes. “That sort of involuntary association based on nothing but [lineage] is indeed a racial classification,” he says.

To succeed with that argument, the Goldwater plaintiffs will have to
overcome more than 40 years of precedent. In 1974, the high court ruled in Morton v. Mancari that hiring preferences for American Indians at the Bureau of Indian Affairs did not amount to racial discrimination. The unanimous court found that the preference was not racial in nature but depended on political membership in “quasi-sovereign tribal entities.”

Fort says this ruling has been challenged regularly without success. Non-Indians have argued that they should have the “active efforts” rights conferred by ICWA, and Indians have argued that federal laws pertaining to them specifically are racial discrimination. Neither group has succeeded.

“They are trying to overturn all of Indian law” in Carter, Fort says. “It’s terrifying, but also a big weakness.”

The federal government might agree. In a March court filing in Carter, Department of Justice attorneys say ICWA doesn’t rely on race because not all Indian children are eligible for membership in a federally recognized tribe. There are people who don’t qualify by “blood quantum” for enrollment despite being 100 percent descended from tribes, Nimmo says, and anyone is free to leave a tribe. There are also tribes that aren’t federally recognized, like Summer Page’s.

Dynar isn’t convinced. He notes that government, in its motion to dismiss Carter, has said “blood descent is typically shorthand for the social, cultural and communal ties a person has with” a tribe. “Anything that’s shorthand—that just is one step removed from mentioning race by name—is a racial classification.”

That would violate not only the Constitution, but two federal laws enacted specifically to forbid racial discrimination by federally funded adoption or foster agencies: the Multiethnic Placement Act and the Intertribal Placement Act. Those laws say agencies may not refuse or delay placement based on the race of the child or the prospective parents.

Dynar has Supreme Court case law of his own. In 2000’s Rice v. Cayetano, the justices held that “ancestry can be a proxy for race,” and thus the state of Hawaii may not hold elections in which only Native Hawaiians are allowed to vote. The court declined to apply Mancari, in part because that case didn’t implicate state law.

The other national case challenging ICWA also makes the race-based equal protection argument—but it lost its first challenge. In National Council for Adoption v. Jewell, the northern Virginia district court dismissed the case largely on other grounds. But the opinion included a sentence rejecting the discrimination argument, citing Mancari as authority that “the definition [of ‘Indian child’] is political in nature.” An appeal in that case was pending before the 4th Circuit at Richmond.

And race is an issue in a slightly different way in two cases challenging states’ versions of ICWA. In Doe v. Piper in Minnesota and Doe v. Pruitt in Oklahoma, the plaintiffs are Indian parents voluntarily offering babies for adoption. They’re challenging state versions of ICWA requiring notice to the tribe for a voluntary adoption involving an Indian child. They say the laws invade their privacy and discriminate racially in violation of the 14th Amendment. “No other parent in the world has any duty to tell the state about their adoption plan,” says Mark Fiddler, the attorney who represents the Minnesota Does.

Among ICWA attorneys, Fiddler could be considered a turncoat. His credentials are right: He’s a longtime child welfare, adoption and ICWA attorney; the founder of the Indian Child Welfare Act Law Center in Minneapolis; and a member of the Turtle Mountain Band of Chipewa Indians. But he’s also fought against the act—most famously as the former attorney for the white adoptive couple in Baby Girl.

Some in the Native community see that as betrayal. After Baby Girl came down, Fiddler had to learn how to block people on Twitter. It still happens when he’s in the media on ICWA issues. He told Time magazine last March that ICWA reduces stability for Indian kids, a comment that generated more nastiness, he says—some advancing an argument and some just ridiculing him.

“I remember I was in the Minnesota Supreme Court ... trying to stop a case from going to tribal court, and the tribal attorney said, ‘Why don’t you come over from the dark side, Mark?’ ” says Fiddler, a solo attorney in Edina. “It was a joke, but he was clearly telling me I was viewed like I was on the dark side.”

He believes his critics are attempting to shame and scorn him for zealously advocating for his clients. Fiddler has learned to ignore it. “Our first agenda is stopping the harm to the child,” he says.

Fiddler also represents the plaintiff-appellants in National Council. One of the major complaints in that case—echoed in Carter—is about the Interior Department’s 2015 guidelines for interpreting ICWA. If a court is deciding whether to depart from the act’s placement preferences, the guidelines tell it not to consider the best interests of the child. Because the best interests of the child are the primary consideration in all proceedings involving non-Indian children, National Council says, the ICWA guidelines discriminate against Indian children.

The federal government says ICWA’s placement preferences already reflect the best interests of the child; thus, it’s not necessary for judges to consider best interests independently. Nimmo points to amicus
FOR LEXI’S SAKE

The Pages might agree. They’re not worried about Lexi’s physical safety with the Utah family, but they believe changing her placement could resurrect her attachment problems.

Though she’d gotten better, Rusty says separations were still hard on Lexi. She would cry hysterically when she left to visit her family in Utah, he says, and she was clingy for weeks after she returned.

He says the battle to get Lexi is not a selfish one. “It’s not about expanding our family,” he says, noting that they’d had their third biological child while Lexi was living with them. “It’s about doing what’s in her best interest.”

The Pages became foster parents not to adopt but because, as Summer puts it, they have “hearts for kiddos.” Before Lexi, they’d had one long-term foster son and several kids in temporary “respite care.” Lexi herself started out as a respite care case, just until she could be placed in a Native American foster home.

But Los Angeles County had no such home at the time, so Lexi stayed. The Pages knew from the beginning that the Utah family was interested in adoption, but the county wanted Lexi to stay local at first so her birth father could work on regaining custody. By the time he gave up, the Pages say, they loved Lexi like their own.

Summer says it’s “dumbing down the situation” to say they were just foster parents. “We didn’t see Lexi like that,” she says. “She was our daughter; why the hell would we not fight for her?”

Heimov, the supervisor of Lexi’s court-appointed attorney, doesn’t believe contesting Lexi’s case has served her best interests. “The delays have been in large part because the Pages keep filing appeals,” she says.

And they intend to keep going. After the Second District Court of Appeal ruled in July that there was no good cause to depart from the placement preferences of the Indian Child Welfare Act, the Pages announced that they intend to appeal to the California Supreme Court.

Nimmo says that adoption decisions should consider the child’s future as well as a relatively short period of her past.

During Baby Girl, she heard from adult adoptees—Indian and non-Indian—who were outraged that Veronica’s father, a fit biological parent, was being denied custody. They grew up without the chance to know their own families, and they felt that loss. “To me, it is going to be in [a child’s] best interest long term to have those types of connections,” Nimmo says.

For Nimmo, news of Lexi’s case dredged up memories of Veronica’s, even though they’re quite different legally. “It’s still so raw when we think back to what happened in the Veronica case,” she says. “My first thought when I saw that was ‘Oh no, here we go again.’”

Media coverage of Veronica’s case suggested the Indian Child Welfare Act and her birth father were arbitrarily tearing a family apart. Nimmo worries that the same could happen in Lexi’s case.

But Veronica’s story has a happier postscript: Despite the contentious legal battle, Veronica’s adoptive family has allowed her to stay in touch with her birth family, Nimmo says.

There’s been no indication whether Lexi’s families would be willing to work together. Two weeks after Lexi left, the Pages had heard nothing from her. They were sure she wanted to call, but the Utah family was not allowing contact.

Heimov of the Children’s Law Center of California says the plan was always to maintain contact with the Pages as extended family.

But she says contact was cut off, at least temporarily, because of concerns about creating another media circus like the one that surrounded Lexi’s removal.

“It doesn’t have to be this way,” says Heimov. “There could be a large, loving extended family for this child. Ideally, she would just have a whole lot of people in her life who love her.”
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An ex-con turns his frustration with corporate media into a ‘litigation juggernaut’

By David L. Hudson Jr.
Photography by Tom Salyer
aul Wright has been fighting to get *Prison Legal News* into America’s prisons and jails for more than 25 years.

Part journalist, part prisoner-rights advocate, part First Amendment crusader, Wright says his monthly publication doesn’t get a warm welcome from corrections officials whose institutions and practices are often criticized in its pages.

The newsletter, Wright says, “is frequently censored by prison or jail officials around the country who are hostile to an independent media that focus on prison and jail issues.”

Wright’s latest legal battle is in Florida, where the Department of Corrections has been impounding issues for more than a decade based on some of the newsletter’s advertisements, including those for three-way calling services and prison pen pals.

Wright sued the department, arguing that the ban violated freedom of speech and the press as protected by the First and 14th amendments.

“No other prison system or jail in the entire country considers it necessary to censor *Prison Legal News* on the basis of its advertisements,” according to a *PLN* brief. “Other prisons face concerns with stamp-based payments or three-way calls and respond to those concerns with sensible regulation of primary conduct, not censorship of critically valuable publications.”

A federal district court ruled in August 2015 that the Florida department’s rule and its application did not violate the First Amendment; however, the court found that there was a due-process problem with how officials confiscated the newsletter. Both sides have appealed to the 11th U.S. Circuit Court of Appeals at Atlanta.

While the battle in Florida continues, Wright and his colleagues have been successful in many other legal battles to get *PLN* inside prison walls. His organization has even attracted the services of a former U.S. solicitor general.

“One indicator of *Prison Legal News*’ success is the extent of attempts to ban it by prisons and jails throughout the country,” says Seattle attorney Mickey Gendler, who has represented *PLN*.

**INSIDER INFORMATION**

That success was hard-won by a man who’s highly motivated to publicize what he sees as the inequities and indignities of prison life. He should know. He was once on the inside.

Wright was convicted in 1987 for murder in the state of Washington. He was a private in the Army at the time and tried to rob a drug dealer. The dealer attempted to shoot Wright, but Wright shot first and killed the dealer. Wright claimed self-defense but was convicted and sentenced to 25 years in prison. He was released after 17 years in 2003.

While in prison in Monroe, Washington, Wright saw that inmates lacked a constructive outlet to voice their concerns. They had no resources to learn about legal rights, nor ways to advocate for change within the system. He felt that traditional media were either unable or unwilling to report on prisoner rights issues and was compelled to do something himself. “It actually was
my frustration with the corporate media ignoring prisoners and our plight on a systemic basis that pushed me to start PLN,” he says. “Paul was right,” says Peter Y. Sussman, a Berkeley, California-based journalist and author who has written extensively on press access to prisoners. “The press often reflects the public’s lack of interest in knowing anything at all about prison affairs because the public just wants to wash their hands of what happens in prison.”

Sussman says the only way to spark reform is through exposing the system from the inside. “Paul and I share the strong belief that nothing can be done to improve the criminal justice system and the prison system unless the public learns more about what goes on inside these public institutions,” he says.

So in 1990, Wright and fellow inmate and prison activist Ed Mead co-founded the newsletter. “Ed Mead had a history of prisoner-rights activism and publishing when I met him,” Wright says.

The first issue cost $50 to print and distribute—the epitome of a shoestring budget. Wright’s father served as the group’s de facto office manager on the outside.

The first issue featured a variety of articles that included topics such as prisoner-rights court victories, a one-day boycott at the prison in Monroe and a poem by a convicted rapist that was titled The Terror.

Mead has since left the publication, but Wright expanded the newsletter and its reach. Today, Prison Legal News spans more than 70 pages and has a subscription base of more than 10,000. Wright now heads up the Human Rights Defense Center, which began primarily as an organization that published a newsletter on prisoners’ issues out of Lake Worth, Florida.

“The Inmates’ Friend
The name Prison Legal News, or its acronym, is instantly recognized among those in the prisoner-rights movement. “PLN is an indispensable part of the prisoner-rights movement,” says David C. Fathi, director of the American Civil Liberties Union’s National Prison Project. “PLN has done more for the First Amendment rights of prisoners and their correspondents than anyone else.”

Prison Legal News publishes articles that inform inmates of their constitutional rights, reports on prison abuses, develops articles based on public records requests and chronicles the continuing expansion of mass incarceration.

“We’re proud of most of our content published over the past 26 years, including our extensive reporting on issues like solitary confinement, the Prison Rape Elimination Act and sexual abuse of prisoners,” says managing editor Alex Friedmann, who started writing for the newsletter in 1996 while incarcerated in Tennessee.

Friedmann says the publication has had significant impact with stories that exposed the price gouging of families through the prison phone industry. The stories helped convince the Federal Communications Commission to order rate caps and launch other reforms in 2013 and 2015. Prison Legal News not only publishes prison-related news but also has a role in litigating prison censorship and public records cases across the country. “Their success rate is close to 100 percent” Fathi says. “They have been described as a litigation juggernaut. If anything, that is an understatement.”

To do all that legal work, PLN has developed a litigation network headed by Human Rights Defense Center General Counsel Lance Weber, who practiced criminal defense in Kansas City, Missouri, for the first decade of his career. “We have established a moderate-sized network of lawyers across the country with whom we have teamed up over the years,” he says.

Some are high-profile, including former U.S. Solicitor General Paul D. Clement and Michael McGinley of Bancroft in Washington, D.C., who head the PLN appellate team in the Florida case.

Even their adversaries acknowledge the depth and breadth of PLN’s work. “They know what they are doing,” says Athens, Georgia-based attorney Andrew H. Marshall, who went up against PLN in the state federal court. “It is part of their business to bring suits. They do it quite a bit. They are a well-oiled machine.”

Wright and his team have fought prison and jail officials in more than 30 states that tried to ban Prison Legal News. Many times, a correctional institution will simply confiscate the newsletter and not deliver it.
When that happens, the HRDC springs into action. The organization has obtained consent decrees in 10 states that prevent prison officials from failing to deliver the newsletter to inmate subscribers.

In 2010, for example, the HRDC challenged a South Carolina jail's policy of disallowing inmates any newsletters, magazines or other reading materials. The only reading materials that inmates could receive were paperback Bibles. The U.S. Department of Justice intervened in 2011 on behalf of Prison Legal News. The case was settled in 2012 for $100,000 in damages and nearly $500,000 in attorney fees.

"PLN is the only national organization that I am aware of that has taken on this issue," explains San Francisco-based attorney Ernest J. Galvan, who has represented the group. "If you look at the major decisions in this area since the mid-1990s, almost all of the important
Litigating can be costly, but PLN has benefited through some of its victories. Prevailing parties in civil rights cases can recover attorney fees, and PLN and its attorneys have won some large attorney-fee awards. One filed in federal court in Oregon led to an attorney-fee award of more than $800,000.

Wright’s colleagues give him much of the credit for their legal victories, especially because of his unconventional thinking. “Paul is one of the most creative thinkers in our movement,” says Fathi, who’s known Wright for more than 20 years. “He is a master at thinking of new approaches to problems.”

Fathi even has a favorite Paul Wright story. “When Paul was still in prison, prison officials erected an electric fence to prevent prisoner escapes,” Fathi says. “Instead of filing a lawsuit, Paul wrote a letter to the U.S. Fish and Wildlife Service and got the prison in trouble for violating the Migratory Bird Treaty Act of 1918.”

While PLN has an impressive litigation record, it’s had some disappointing defeats. In 2012, the 5th Circuit at New Orleans sided with the Texas Department of Criminal Justice after PLN challenged the censorship of several books, including The Perpetual Prison Machine: How America Profits from Crime, in the Texas penal system. The court reasoned in Prison Legal News v. Livingstone that deference and discretion should be given to prison administrators in these subjective assessments of what materials are dangerous.

“Prison and jail officials have found that contraband is smuggled inside correctional institutions through reading materials,” says Virginia Beach, Virginia-based attorney Jeff Wayne Rosen, who is defending a case brought against the Virginia Beach sheriff by PLN. “Courts have upheld many of these policies that restrict the types of materials that inmates can have in prison or jail.”

SENDING POSTCARDS

PLN also has challenged postcard-only policies in jails across the country. Under these policies, inmates can only receive metered postcards—not even care packages from family members or longer private letters from friends. Officials claim the policies are necessary for security and cost reasons.

“A postcard-only policy helps jails tremendously by decreasing the risk of contraband, crime planning and similar activities,” says Spokane, Washington-based attorney Milton G. Rowland, who has litigated two postcard-only cases against PLN. “If promulgated and enforced correctly,
with great care for legitimate interests, a postcard-only policy can be a tremendous benefit to a corrections facility with minimal, if any, impact on the inmate population.

But Weber argues that postcard policy can deprive detainees of access to important communications. “The majority of the prisoners in county jails are usually pretrial detainees who have not yet been convicted of any crime,” says Weber, who monitors all of PLN’s litigation efforts. “With that in mind, perhaps the most dangerous aspect of postcard-only mail policies is that they tend to completely cut off communication between pretrial detainees and their loved ones outside of the jail.”

PLN successfully has challenged such policies in many counties, including Columbia County in Oregon and Ventura in California. A federal judge explained in Prison Legal News v. Columbia County (2012) that jail officials “have failed to offer evidence or even an intuitive, commonsense reason why the postcard-only mail policy more effectively prevents the introduction of contraband than opening and inspecting letters.”

On the other hand, a federal district court in Georgia ruled in 2014 that there is a “commonsense connection between a jail goal of reducing contraband and limiting the number of pages of correspondence.”

“Challenging these policies is akin to the game Whac-a-Mole,” says Friedmann. “You strike one down and others keep popping up around the country.” The group has pending challenges to postcard-only policies at jails in Michigan, Oklahoma and Tennessee.

PUBLIC RECORDS
In its ongoing crusade for prisoners’ rights, the HRDC also advocates for open records within the correctional system. Staff and contributors frequently encounter resistance from prison officials or other government officials when seeking information crucial to their reporting.

“Prisons and jails are the least transparent of all American institutions, including the CIA, the FBI and the NSA,” Wright says. “In the United States, you can learn more about what is going on in a prison in Guatemala than you can learn about what is going in a local jail in the United States.”

The group has sought information detailing how much public money is spent defending prisoner-based litigation each year, and asked for telephone contracts between departments of correction and private companies. “PLN’s public records requests frequently get refused or delayed far beyond what would be reasonable, and typically there are no consequences for government officials who refuse to follow the law by honoring the public record requests properly,” Weber says.

In fact, the HRDC, with legal assistance from the American Civil Liberties Union of Vermont, battled for three years with the Corrections Corporation of America over whether records of the private company contracted to run prisons were subject to Vermont’s public records act.

A state judge ruled in 2014 that the CCA was a governmental entity, reasoning that the corporation carries out “uniquely governmental acts” by keeping inmates in captivity, disciplining them, regulating their liberty and carrying out the punishment imposed by judges and juries. The case was settled last November.

“Our position at PLN has long been that when private companies provide essential, fundamental government services, including operating prisons and jails, then their records must be available to the public to the same extent as government agencies,” explains Friedmann.

TRUSTED AND RECOGNIZED
The work that Wright and his colleagues have done through Prison Legal News and the Human Rights Defense Center is highly valued among prisoner-rights advocates.

“PLN is a trusted source of information not only for pro se prisoner litigants but also for experienced prisoner-rights attorneys,” says David A. Singleton, executive director of the Ohio Justice & Policy Center, which frequently litigates prisoner-rights cases. “On more than one occasion I have learned of prisoner litigation in another part of the country that has inspired me to bring a similar claim in Ohio.”

The HRDC also has received accolades for its zeal in challenging censorship and pushing for more transparency. In 2013, the HRDC received the First Amendment Award from the Society of Professional Journalists. Wright won the James Madison Award for his efforts to further open government from the Washington Coalition for Open Government in 2007.

Wright is not motivated by awards. “Everything has gotten worse,” he says. “When we began PLN in 1990, there were a million people locked up. Now there are more than 2.5 million locked up. The United States has the highest incarceration rate in the world.”

That makes the work even more important, especially when mainstream media seem little interested in covering prison censorship issues. “We are committed to freedom of speech,” Wright says. “We are the only publisher that routinely challenges censorship in the prisons. We are driving this whole area of law.”

“What Paul and Prison Legal News are doing is not only for the benefit of prisoners; it also is for the benefit of society,” journalist Sussman says. “The legacy and great achievement of Paul Wright is that he has linked together the legal aspects, the human aspects, the civil rights aspects, and the information aspects, which affect not just prisoners but the public in general.”

David L. Hudson Jr., a regular contributor to the ABA Journal, serves as the ombudsman for the Newseum Institute’s First Amendment Center.
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The ABA House of Delegates took several actions during its sessions at the 2016 annual meeting in San Francisco to assert the association’s commitment to increasing diversity and inclusion in the legal profession and American society.

In one of its most significant actions, the House voted overwhelmingly to make it an outright violation of the ABA Model Rules of Professional Conduct for a lawyer to engage in conduct “that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”

In the run-up to the House debate, there were some rumblings of opposition to the amendments to ABA Model Rule 8.4 that were developed primarily by the Standing Committee on Ethics and Professional Responsibility. A few opponents even wrote to House Chair Patricia Lee Refo of Phoenix to voice their concerns that the amendments would undermine free speech and religious freedom.

But the resolution, which was co-sponsored by a number of other ABA entities, fostered no debate in the House and few overt signs of opposition beyond a smattering of “nays” when the measure was put to a vote. There were so many “salmon slips”—so named for their distinctive orange color—from proponents prepared to speak in support of the measure, that Refo said she was struggling to come up with a way to describe the volume. Only a few of the approximately 70 proponents who filled out salmon slips addressed the House.

The resolution proposing the amendments to Rule 8.4 was introduced by Myles V. Lynk, a professor at the Sandra Day O’Connor College of Law at Arizona State University in Tempe who chairs the ethics committee. He urged the House to act now to adopt the amendments and noted that 25 states already have revised their ethics rules to incorporate the changes being proposed for Model Rule 8.4.

“The states have not waited for the ABA to act,” he said. Lynk also cited the widespread support for the amendment among bar associations and ABA sections and committees.

“Are they all wrong?” he said.

One of the first speakers in favor, Mark Johnson Roberts of Portland, Oregon, who chairs the Commission on Sexual Orientation and Gender Identity, mentioned that he was passed over by a law firm hiring committee as a new lawyer 28 years ago because he is gay. Roberts focused his remarks, however, on a story about a young female colleague who was groped and accosted by an older male opposing counsel at a holiday party. The woman went to her bar association to file a complaint, only to discover that the man’s behavior violated no ethics rule—unless he had been convicted of a crime.

Don Bivens of Phoenix, a delegate representing the Section of Litigation, said the section had a detailed discussion with the ethics committee about its concerns, which centered on potential penalties for vigorous representation of clients. Those discussions, he said, resulted in revisions that added the “knows or reasonably should know” language. The resolution explicitly does not preclude legal advice,
Your ABA  Annual Meeting Report

Myles Lynk

particularly in regard to otherwise legal behavior in jury selection.

Previously, the idea that lawyers should not engage in discrimination or harassment was contained in the comments to Model Rule 8.4. But "comments are only guidance or examples," Lynk said. "They are not themselves binding."

By adding the prohibition against discrimination or harassment to the black letter of the rule, he said, "this was a way for the ABA to provide guidance to the states. Every jurisdiction is a little different, so the ABA rule may help foster more uniformity." (The Model Rules are the basis for binding rules of professional conduct for lawyers in every state and the District of Columbia.)

Now that the House has adopted the amendments to Model Rule 8.4, the Policy Implementation Committee in the Center for Professional Responsibility will begin working with states to get the new version of the rule adopted. As to how that process will unfold, Lynk said, "I'm going to wait and see. I know there are questions out there, and I look forward to a dialogue. These are not easy issues, and we all appreciate that."

Lynk credited the ethics committee for its efforts on this issue over the past two years. "I think the committee undertook a tremendous piece of work over a two-year period," he said. "We worked incredibly hard on this as a team, and I'm proud of its willingness to take on such a difficult task and take it to completion."

A related resolution that concerns diversity in the legal profession had an easier time. Resolution 102, sponsored by the National Conference of Federal Trial Judges, called for more diversity on every part of the federal bench, including magistrate and bankruptcy judges.

The ABA continued to address diversity and inclusion, which was a theme for outgoing ABA President Paulette Brown. The ABA passed resolutions on the "school-to-prison pipeline" and added marital status, gender identity and gender expression to its list of reasons potential jurors should not be denied eligibility for jury service. It also urged legal services providers—large law firms, in-house legal departments and others—to expand opportunities for attorneys of all backgrounds.

INCLUSION BY REFERENCE

A resolution that calls on Congress to make privately drafted parts of the law freely available attracted accusations in the House of Delegates that the ABA was trying to give away other people's intellectual property.

When federal agencies incorporate privately drafted standards into their rules by reference, Resolution 112 asks Congress to make the relevant portion of those privately drafted standards available online to the public. The measure, sponsored by the Section of Administrative Law and Regulatory Practice, was intended to advance the idea that the public should have access to laws that regulate things such as food additives, windshield safety standards and toy safety.

Proponents of the measure say these rules are not accessible for free in any place but the reading room of the Office of the Federal Register, where researchers must make a written request for an appointment. Paying for access to the rules could cost anywhere from $40 to thousands of dollars, professor Ronald Levin of Washington University in St. Louis told the House.

The resolution was criticized as going too far and not going far enough. Beverly Quail, a partner at Ballard Spahr in Denver and a Colorado delegate to the ABA, said taxpayers should not foot the bill for publishing standards of interest to very few people. "They whine about having to pay $9,000 if you want to get a copy of the nuclear power plant [standards]," she said. "Who should pay for those plans? Us, the general taxpayers, or the people who are going to build the nuclear power plant?"

Carl Malamud of Public.Resource.org, a website that seeks to make government information more accessible, said the measure didn't go far enough.

"The promulgation of the edicts of government is at the heart of the rule of law," said Malamud, an associate member of the ABA who received special privileges on the floor. "Writing down the law is meaningless if we cannot read it, but we must be permitted to do more than simply read the law. We must be permitted to speak the law, to share [it] with fellow citizens."

A motion to postpone the resolution indefinitely failed in a vote of 141-206. Although the opposition remained, the House voted in favor of Resolution 112. Among other issues, the House:

• Strongly condemned the use of for-profit, privatized probation companies funded by the offenders themselves.
• Called for confidentiality in communications between lawyer referral services and their clients.
• Approved allowing law students to be paid for externships.
OUTGOING ABA PRESIDENT PAULETTE BROWN (RIGHT) PASSES THE GAVEL TO CURRENT PRESIDENT LINDA KLEIN.
Your ABA ANNUAL MEETING REPORT

As expected, the ABA Commission on the Future of Legal Services delivered plenty of recommendations for how the bar can close the gap in access to justice in America, while steering clear of the most contentious issue: alternative business structures.

After two years of work, the commission released its final report at the 2016 ABA Annual Meeting in San Francisco. The underlying message of the report, said outgoing ABA President Paulette Brown of Morristown, New Jersey, is that “the future is not going to wait for us. We have got to go with it. We have to not let the future get away from us.”

Citing statistics that show that in some jurisdictions more than 80 percent of the civil legal needs of lower-to-middle-income individuals went unmet, the commission called on the legal profession to support the idea that all people should have some form of legal assistance for their civil legal needs. To that end, the commission found that the profession “should support the aspirational goal of 100 percent access to effective assistance for essential civil legal needs.”

The commission stated that courts should be open to innovations in the delivery of legal services and called on them to adopt the ABA Model Regulatory Objectives for the Provision of Legal Services. States should “explore how legal services are delivered by entities that employ new technologies and internet-based platforms, and then assess the benefits and risks to the public.” Courts, meanwhile,
should provide automated services for pro se individuals, including online dispute resolution and remote-access self-service kiosks.

The report also recommended the ABA open a Center for Innovation that would amount to a research and development division for the legal industry. “Industries as diverse as consulting, medicine and personal finance have invested in research and development laboratories to create new service offerings and substantially improve client relationships,” the report stated. “Lawyers must do the same, and the Innovation Center can play an active role in these efforts.”

The Center for Innovation has been approved by the ABA Board of Governors. Its primary tasks will include assisting law firms interested in introducing new approaches to their practices, studying innovations in legal services delivery in other countries, and developing training programs for law students interested in innovative law practice. The commission also will play a key role in carrying some of the commission’s recommendations forward.

It is crucial that the ABA and other elements of the legal profession help lawyers to understand how the legal environment is changing, said commission chair Judy Perry Martinez. “We can help lawyers understand what the public need is,” she said. “If we can help lawyers to be of service to the public, we can be of great service to our members.”

The commission also recommended that “all members of the legal profession should keep abreast of relevant technologies” and cited the Florida Bar Board of Governors, which recently approved mandatory technology CLE requirements for state lawyers. Additionally, the report stated that the legal profession should partner with other industries to design, develop and create new delivery models and technological tools.

“Some may view the commission’s recommendations as too controversial, and others may view the recommendations as insufficiently bold,” the report says. “What is clear, however, is that the solutions will require the efforts of all stakeholders in order to implement the recommendations contained in this report.”

—Victor Li and James Podgers
A survey by the Bureau of Justice Statistics asked college students whether they had been sexually assaulted during the 2014-2015 academic year. The respondents reported 2,380 rapes during the survey, 770 of which took place on campus. But only 170 of them were reported to the schools. That’s a reporting rate of just 7 percent, says Carrie Bettinger-Lopez, White House adviser on violence against women.

That disturbing number kicked off an afternoon of serious discussion at the annual meeting session, “Sexual Assault on College Campuses: Balancing the Rights and Interests of the Accused and the Victim.” The discussion was a showcase CLE presentation sponsored by the ABA’s Criminal Justice Section.

Bettinger-Lopez works on these issues full time; she also represents Vice President Joe Biden on the White House Task Force to Protect Students Against Sexual Assault. She took the audience through the numerous federal resources available to colleges and universities, attorneys, victim advocates and others interested in the hot-button topic. Perhaps the most famous of those resources is a 2011 “Dear colleague” letter from the U.S. Department of Education that states that sexual assault and sexual harassment impede equality under Title IX, which prohibits discrimination from federally funded schools.

Noreen Farrell of Equal Rights Advocates in San Francisco said a turning point on this issue came in 2010, when a video of Yale fraternity pledges went viral, showing them chanting “No means yes! Yes means anal!” After that, she said, calls to ERA’s discrimination and harassment hotline skyrocketed.

Farrell thinks the criminal justice system is not adequately handling cases—and the sexual assault case against Stanford University swimmer Brock Turner, whose victim’s statement went viral online, reflects why: Too much emphasis is placed on how penalties could affect the bright futures of the accused.

“I can tell you these cases have a chilling effect on students who think about going to law enforcement for recourse,” she said.

THE IMPORTANCE OF THE SYSTEM

But Robert Cary of Williams & Connolly in Washington, D.C., thinks taking these cases to the criminal justice system is vital. That’s the best way to guarantee that people who are accused get the due process they are entitled to by law.

University disciplinary proceedings don’t necessarily give the accused the right to confront their accusers, gather evidence, have an attorney and more. And while the accused might not face criminal penalties in a university disciplinary context, being kicked out of a university can have a profound effect on a person’s future, according to Cary.

The criminal justice system also is better at stopping serial rapists, he said. Turner, for example, will be a registered sex offender for life, whereas someone kicked out of a university faces no civil disability.

Farrell added that serial rapists are not uncommon on campuses, but their victims often don’t realize it until a legal case is filed or news of an accusation spreads.

—L.L.
NAACP’S IFILL: LAWYERS MUST STEP UP IN COP-SHOOTINGS CRISIS

The seemingly constant stream of new videos and other reports of African-Americans being shot by police under questionable circumstances is creating a crisis of confidence in the rule of law, said Sherrilyn Ifill at a luncheon gathering for the Pro Bono Publico Awards. “When large segments of the population no longer believe in the integrity and legitimacy of the rule of law, it is a threat to our democracy,” said Ifill, president and director-counsel of the NAACP Legal Defense and Educational Fund, in her keynote address. Ifill said she leads an organization that worked to end segregation and to secure full rights for all. But “this is a moment where people like me will start to have no credibility with people who I have devoted my life to represent.”

In this moment of crisis, lawyers should be leaders and work for solutions, Ifill said. “We’re compelled not only to use our time and skills to step up our pro bono commitment, but it’s time we start shaming our friends who aren’t stepping up.”

MOVING FORWARD

Ifill provided a story about her first exposure in developing an understanding of law enforcement and the relationship with the black community. When she was 10 years old growing up in New York City, two police officers got out of their car and started chasing a man and his 10-year-old son who were out walking on a Saturday morning. An officer shot and killed the boy and said he thought the father and son were robbery suspects. Although it was more than 40 years ago, Ifill remembers details such as the image of the New York Daily News on a table at home with a story about the shooting; and she remembered the officer’s last name. The officer was indicted and then acquitted by a jury that had only one black member. “The point of the story is these issues have been going on for a very long time,” Ifill said. Black people were not believed when they described such incidents. But now there are videos, “and you can’t avoid the truth.”

Two law firms and three individuals received Pro Bono Publico Awards:

- Cleary Gottlieb Steen & Hamilton, whose U.S.-based lawyers dedicated more than 63,000 hours to pro bono matters in 2015.
- Katten Muchin Rosenman, which established the Katten Legal Clinic at José de Diego Community Academy, the first legal clinic located in a Chicago public school.
- John O. Goss, a lawyer at Goss & Fentress in Norfolk, Virginia, who worked to represent claimants in eastern Kentucky and southern West Virginia who were abruptly terminated from the Social Security disability program.
- Renee M. Schoenberg, a senior counsel at DLA Piper in Chicago who secured tax-exempt status for the “low bono” DC Affordable Law Firm.
- Hillary Gaston Walsh, a lawyer based in South Korea who has taken on several asylum cases and appeals.

—Terry Carter
All of the panelists at the session “Knock Knock. Who’s There? The Internet of Things” had a favorite internet-connected device that made their lives a bit easier. Those favorites included wearable step counters, home-security devices and “smart cars” that permit them to lock their automobile remotely or check their spouse’s commute.

But the panelists for the CLE discussion, sponsored by the Section of Litigation, also had a lot of warnings about the security and liability issues created by the growth in internet-connected devices.

Professor Gary Marchant of the Sandra Day O’Connor College of Law at Arizona State University moderated the panel. He started it off with a definition of “the internet of things”: consumer products that connect, store or transmit information to one another and to people.

The Brookings Institution predicts exponential growth in the number of those devices in the near future, Marchant said. But the most exciting thing to technologists, according to Marchant, is the connections between those devices. With a “smart” refrigerator, he said, you easily could track how soon that you might run out of a staple—and maybe even order more to be delivered to your home. But that kind of setup also raises the possibility of “someone hacking your fridge and delivering 10,000 gallons of ice cream.”

Laura Berger, an attorney for the Privacy and Identity Protection Division of the Federal Trade Commission, said consumer education is part of the answer. At the FTC, one thing regulators examine is whether information is being used in a way that consumers expect—and if not, whether the company has disclosed that in a clear, conspicuous way.

Devika Kornbacher, a partner at Vinson & Elkins in Houston, added that the technology industry should come up with a standard. Her clients want to know what they can do to avoid litigation. Adherence to a standard is one way, but the industry still is young enough that it’s not clear what that standard should be.

Despite the destructive potential of the internet of things, Robert E. Anderson Jr. of Navigant Consulting thinks there’s no turning back.

“Technology is moving so quickly that there’s a cost to liberty,” he said. “The reality is that we’re so interconnected that it’ll never go back to the way it used to be.”

—L.L.
Early on during a rambling dialogue about the impact that television and other forms of entertainment are having on public perceptions of justice in the United States, David E. Kelley downplayed his role as one of the leading purveyors of TV shows about the law.

“I don’t delude myself that we’re doing great and important work,” said Kelley. “We make television shows.” Among Kelley’s achievements that landed him in the Television Academy Hall of Fame in 2014 are his productions Boston Legal, The Practice and Ally McBeal.

But much of the discussion in the program that helped open the ABA Expo at the association’s annual meeting in San Francisco undercut Kelley’s professed modesty. And if anything, the lines between fact and fiction in how people view the legal system might be blurring more than ever.

“None of the law reviews or law libraries in the country have done what he accomplished with just one of those series,” said Jonathan Shapiro, who has written and produced several television shows about the law, including The Practice and Boston Legal.

Kelley and Shapiro are co-executive producers of the upcoming eight-part series Goliath, which depicts the efforts of a down-and-out lawyer who’s out to seek redemption.

Prompted by questions from moderator Renee Montagne, a co-host of National Public Radio’s Morning Edition, Shapiro acknowledged that the public’s perception of the law has been influenced by what is known as the “CSI effect,” stemming from a number of popular police procedurals on television.

“Jurors now expect a level of evidentiary proof that doesn’t often exist,” Shapiro said. “Sometimes even attorneys believe the fictions [TV shows] present are true.”

“You’re absolutely right—we take some license,” Kelley said in response to a question from the audience about how legal programs depict the jury selection process. “We’ve heard the same thing about closing arguments. Litigation is a grinding, methodical process, and we put it through the time-warp machine to tell our stories.”

Kelley also conceded that his TV shows about the law have had some effect on the ethical integrity of the legal profession.

“We definitely took some liberties with the rules of professional conduct,” he said. “But I don’t think we blazed the trail.”

Shapiro, who worked as a federal prosecutor, received his JD from the University of California at Berkeley. Kelley also is a lawyer who received his JD from Boston University School of Law.

The draw of stories about lawyers and the law is as old as the republic, Shapiro said. “Americans, from the beginning of our culture, have loved the law because it relates to all aspects of life, and there’s a wish fulfillment that law can help make society better.”

But lawyers have to do a better job of explaining their contributions to society, Shapiro said. “Lawyers have done a terrible job of telling their story,” he said. “Standing in front of a jury was still the most exciting thing I’ve ever done as a professional, and you wouldn’t be here if you didn’t love what you do.”

—J.P.
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At the beginning of the annual meeting event “Peace Officer: How Militarization of Law Enforcement Has Affected Peace Officers and the Communities They Serve,” San Francisco Public Defender Jeff Adachi asked how many people in the audience are afraid of police officers.

“No at all,” he observed. “You may be afraid after this.” Indeed, the event, presented by the Section of Civil Rights and Social Justice, gave the audience a sobering look at how police use of military tactics and equipment can lead to unnecessary loss of life.

Speakers Rashidah Grinage of the Coalition for Police Accountability in Oakland, California, and William “Dub” Lawrence, former sheriff of Davis County, Utah, both told stories about how they lost family members in police confrontations that didn’t have to become violent.

Moderator Cathleen Yonahara, vice chair of the section’s Civil Rights and Equal Opportunity Committee, explained that the program was inspired by a 2015 documentary, Peace Officer, which looks at the militarization of American police forces through Lawrence’s own experience. As sheriff of a county outside of Salt Lake City in the late 1970s, Lawrence founded a SWAT team that later killed his son-in-law.

Lawrence explained that his intent was to deploy the team only to neutralize violent situations. Lawrence thought he could talk his son-in-law out of the police confrontation—but by then, he was out of office, and officers told him to move away from the scene. In the end, he said, his son-in-law was “mutilated” by all of the shooting.

Lawrence now is an advocate for ending qualified immunity for police officers. He noted that part of the teachings of his Mormon faith is that all people, when given some authority, “will immediately begin to exercise unrighteous dominion.”

A 2014 report from the American Civil Liberties Union, War Comes Home, found that of more than 800 SWAT deployments between 2011 and 2012, 62 percent were solely to search for drugs. That report also found that SWAT teams were deployed against people of color disproportionately; 42 percent of targets were African-American, and 12 percent were Latino.

This might not be conscious, Adachi said, but could be a result of implicit bias—the subconscious belief that people of color are more dangerous.

Grinage said militarization can be brought back to the issue of who makes decisions and who controls law enforcement. Regardless of public opinion, she said, officers won’t be held accountable if powerful police unions have the ear of public officials who make the decisions.

“The reality is that if all that happens to you is you get a two-week or six-week paid vacation while you are under investigation, all the while confident that your action will be deemed justified, there’s no incentive to change the behavior,” she said.

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Joan B. Claybrook,
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Eighteen states will elect State Delegates for three-year terms beginning at the adjournment of the 2017 Annual Meeting. The states conducting elections and the election rules and procedures are indicated on the filing petitions, visit ABAJournal.com/magazine and click Your ABA-ABA Announcements.

2016 DELEGATE-AT-LARGE ELECTION RESULTS

At the 2016 San Francisco Annual Meeting, the following persons were elected to three-year terms as Delegates-at-Large to the House of Delegates: Michael G. Bergmann (Illinois); Jose C. Feliciano (Ohio); Latanisha D. Watters (Alabama); Pauline A. Weaver (California); Randi B. Whitehead (Florida) and Carole L. Worthington (Tennessee).

2016 DELEGATE-AT-LARGE VACANCY ELECTION RESULTS

At the 2016 San Francisco Annual Meeting, the following person(s) were elected to fill two-year vacancy terms as Delegates-at-Large to the House of Delegates: Richard N. Bien of Missouri and Kelly-Ann F. Clarke of Texas.
The Great Crash Shakes the Nation

Given the sprawl of the disaster, the optimism expressed on Wall Street seemed delusional.

On Tuesday, Oct. 29, 1929, as much as $9 billion was lost on a volume of more than 16 million shares on the New York Stock Exchange alone. So much was traded so quickly that hundreds of extra runners had to be recruited from nearby telegraph offices. Stock tickers ran more than two hours behind the trades they were reporting. Similar turmoil was reported by the dozens of exchanges operating in cities, including Boston, Chicago, Montreal and San Francisco. So abject were the losses, so disarrayed were the overloaded markets that a final tally of the day’s disaster was ultimately deemed irrelevant.

Regulation of the markets was nonexistent as a matter of bipartisan policy, so there was no role for a government response. The Federal Reserve Bank of New York met for six hours and elected to do nothing. So at noon, as the markets spiraled downward, a group of bankers met at the offices of J.P. Morgan. In the midst of the massive liquidation, they hoped to stimulate stock purchases by lowering margins required for brokerage loans. “There is plenty of money and it will be loaned freely,” they announced in a statement. A glimmer of hope came in the form of a brief rally in the last 15 minutes of trading on news that U.S. Steel and American Can were raising dividends by $1.

The crash was more of a surprise than it should have been. On March 25 and throughout the summer, the market endured brief panics; they were corrected by more vigorous trading. Instead of being forewarned by the volatility, speculators seemed to decide that stock prices would rise perpetually as long as they continued to buy. The few who voiced fear of a crash were derided as fools.

Thin hope for a market correction seemed justified when the market rebounded lightly on Wednesday and again on Thursday. On Friday and Saturday, the NYSE closed to balance accounts and allow exhausted employees to rest. But on Monday the market declined, and by Tuesday resignation had set in. Massive margin calls made the rich suddenly destitute. Banks closed. Credit tightened. Businesses shuttered. Unemployment swelled. Day after day, month after month, the markets continued a steady downward roll. Between September 1929 and July 1932, the value of stocks on the NYSE alone had dropped more than 80 percent—a loss in excess of $74 billion.

Prompted by the 1932 elections, Congress began enacting a regulatory framework to protect investors and depositors. The Glass-Steagall Act (the Banking Act of 1933) created the Federal Deposit Insurance Corp. as a safety net for bank depositors. But it also prohibited banks from trading on their own account. The importance of Glass-Steagall was underscored in June 1934 by the Pecora commission. Congress appointed Ferdinand Pecora, a former prosecutor with a reputation for integrity, to investigate the events of Black Tuesday. In a series of public hearings, the titans of business and banking were confronted—in sometimes lurid detail—with the recklessness of their decision-making. The abuses filled 421 pages of Pecora’s report.

Ultimately, Pecora revealed, the culprit was not just stock speculation but also the daisy chain of unrestrained borrowing behind it. Speculators invested on margin with brokers. Brokers, in turn, borrowed from banks to buy stocks for their clients. The bank loans to brokers were backed by the bank’s own deposits, or loans from the Federal Reserve. With cash received from stock issues, corporations began playing the market along with busboys and housewives. And as long as prices were rising, wealth seemed an entitlement. It was a popular delusion of epic proportions.

“If there must be madness,” mused economist John Kenneth Galbraith, “something may be said for having it on a heroic scale.”
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