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Meet our 2016 Legal Rebels: J.J. Prescott, Sarah Glassmeyer, David Colarusso, Deborah Read, Maura Grossman, Gurinder "Gary" Sangha, Jimoh Ovbiagele, William Hubbard, Manik Suri and Mary Shen O’Carroll
FEATURES

34 | Legal Rebels
In our eighth year honoring the people remaking the legal profession, we invite you to catch the wave!
By Terry Carter, Lorelei Laird, Victor Li and Stephanie Francis Ward

48 | Bar Fight
Exam passage rates have fallen, but battles over why and what it means are roiling legal education.
By Mark Hansen

56 | Policing the Police
A law professor and a journalist team up to open records and drive more accountability in law enforcement.
By Lydialyle Gibson

COVER PHOTOGRAPHY BY SHUTTERSTOCK; CONTENTS PHOTOS BY WAYNE SLEZAK, LEN IRISH, TONY AVELAR AND WORLDWIDE HIDEOUT
Letters

President’s Message
Linda Klein’s year will focus on ABA members, veterans, voting and childhood education.

Opening Statements
Enterprising college students are booking their dorm rooms on Airbnb.

What does copyright law have to say about pictures, videos and ideas that run rampant on the internet?

Autism awareness is being rolled out for judges and others in Pennsylvania’s juvenile courts.

Emeritus attorneys are filling the legal aid gap in Ohio and other states. / Cartoon of the month: See last month’s contest winner and craft a caption for the current cartoon.

Short takes and fast facts on the law.

Ten questions for the Virginia lawyer who helped revive Sweet Briar College.

Docket
NATIONAL PULSE  How big data can improve the jury system.

NATIONAL PULSE  An innovative program in New York provides public defenders for people facing deportation.

SUPREME COURT REPORT  The justices are divided over whether outstanding warrants discovered during illegal stops justify searches.

Practice
STORYTELLING  Clowning around is frowned upon in the courtroom, but comedy can be a useful litigation tool.

ETHICS  New Mexico Supreme Court urges judges to be discreet when using social media.

WORDS  How using checklists can improve your writing.

Your ABA
New ABA President Linda Klein is using what she learned in visits with lawyers around the country to chart her policy initiatives.

Issues papers seeking feedback on how legal services are regulated prompt lots of comments but little consensus.

The ABA responds to Department of Education panel’s threat to suspend its role accrediting law schools.

Dennis Archer receives ABA Medal to honor a career having impact far beyond his home state of Michigan.

The internment of Japanese-Americans during WWII offers a cautionary message for current political debates.

Precedents
The Warren commission delivers its report.

Business of Law
LEGAL EDUCATION  Program helps profs teach students how they can be the lawyers they want to be.

CONTINUING LEGAL EDUCATION  Law firms are putting entertainment into lawyer education programs.

TECHNOLOGY  Does learning to code make you a better lawyer?

LAW BY THE NUMBERS  New data reveals which practice areas are the most lucrative.

CORPORATE LAW  The Association of Corporate Counsel honors company and law firm efforts to increase value.
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Don’t Lower Our Standards

In terms of letting us know what is happening in the arena of legal education, “Testing a Test: One law school experiments with accepting the GRE for admissions,” (July, page 66) is informative. In terms of where the process is headed, the article is a little scary.

The information intimates that admissions testing may become less a matter of maintaining intellectual capability and more a matter of enabling (possibly) unqualified persons to fill the empty classroom chairs at law schools. That would be a mistake. The ability to absorb the law, apply it rationally and communicate clearly are essential legal skills not found, or readily developed, in all persons.

Our society has the benefit of persons with those skills and will need that benefit hereafter. Law school admission tests and policies must be designed to accommodate that need; they must stay focused on that need and nothing else. Other institutions will meet other societal needs.

Fred A. Kueppers
St. Paul, Minnesota

This gambit is nothing more than an attempt to gain access to more applicants to offset the decline of the traditional applicant pool.

To the law pros and apologists in support of this idea: Spare us all the hypocrisy of “access to justice,” “broadening opportunities,” etc., and call it what it is, which is “keep the gravy train running.”

Jack Grygiel
Orlando, Florida

KUDOS FOR YOUNG PROSECUTOR

The July 10 Questions, “A Quick Study,” page 12, is an outstanding story about an outstanding person and lawyer. Congratulations, Ms. Robyn Crawford! I have often told students to avoid a career in the law—to find something else to do. But you seem to be doing what you are for all of the right reasons.

And being an ex-prosecutor myself, I heartily agree with your statement that “it’s not ... about winning or losing, just making sure justice is done.” As you so insightfully remarked, it never feels good to lose. However, you’re absolutely correct when you say that all you can do is the best with the evidence (facts) you have. This is intelligence
—insight, even—that many seasoned prosecutors, and other attorneys, often lack.

David Griffith
Indianapolis

GOOD ENOUGH FOR GARNER
“The Sadistic Editor,” July, page 26, is a good, yet not great, essay—not great because Bryan Garner’s invocation of the renowned musical tyrant William Revelli seems slightly inapt (despite being highly interesting). Revelli, as a personality, seems to have little in common, at least in this essay, with the tyrannical senior lawyer Mr. Crombie. For Crombie, unlike Revelli, isn’t tactically bluffing in order to take credit for the sudden improvement of his subordinate lawyer, Edmund; Crombie is just a verbally abusive, know-nothing ass. At best, it seems as if but a tenuous link can be made between the two personalities: They are both aggressive and verbally abusive—Revelli intentionally, because of a cruel ploy, and Crombie because of ignorant hubris.

That said, I cannot wait to have all Garner’s riveting essays collected in one huge volume.

Michael Ellingsworth
Feasterville, Pennsylvania

DISAGREEMENT WITH GARNER
I read Bryan Garner’s articles each month in the ABA Journal and have learned much from them. However, I disagree with the June article, “Dear Sir/Madam,” page 24.

I think it is ridiculous to call a complete stranger “dear” and even more ridiculous when the letter is not addressed to an individual but, as in your article, to an officeholder or group (“Dear Clerk of Court!” “Dear Nominating Committee!”). However, I do use a salutation, including “dear,” when I write to an individual who is truly dear to me, such as my wife, my child, my parents, etc.

As to complimentary closes, I ordinarily but not always include one when I write to an individual who is dear to me. Examples are: “I love you,” “love and kisses,” “give my love to ... .” But I do not do so in other cases, especially when writing to a stranger. I don’t think that I have to say that I am sincere in what I wrote (“sincerely yours”) or that what I have written is true (“yours very truly”). The recipient of the letter can make that judgment.

Fred Carman
Northbrook, Illinois

Attica Locke’s
PLEASANTVILLE
WINNER OF THE
2016
Harper Lee Prize
for Legal Fiction

THE UNIVERSITY OF ALABAMA
School of Law
Finding the Better Way

Focus for the year will highlight ABA members, veterans, voting and childhood education

“There’s a way to do it better—find it.”
That motto, which hung on the wall of Thomas A. Edison’s laboratory to inspire his team, captures what we all want for the American Bar Association. We have many challenges facing the legal profession, our institutions and the rule of law. In the ABA we can work together to develop the best solutions to them.

Working together is how I have approached my legal career as well as my work in the ABA. The difference and impact that the ABA makes has become clear from when I joined the ABA in law school at Washington & Lee University, through my time as a summer clerk, a small-firm lawyer, medium-sized-firm lawyer and now a lawyer at Baker Donelson.

My goal in becoming a lawyer was to make a difference and help increase access to justice. As president of the State Bar of Georgia, we helped create the state’s first legislative appropriation for legal services to aid victims of domestic violence. But there was so much more to do. I knew we could do better.

As leader of the ABA, I believe that bar associations have a duty to listen to lawyers and deliver what they need to better serve their clients. Too many lawyers have told me that the burdens of running a law practice prevent them from practicing law. We can do better for them.

The ABA will produce tools and resources for lawyers so they can get away from administration and back to helping clients. Serving our members is Goal I of the ABA, and this year we will make helping our members a primary initiative.

Part of Edison’s genius involved assembling teams of scientists to work collaboratively. This is what the ABA does best: Bringing together the best legal minds to create solutions. My predecessor, Paulette Brown, did it and I will do it too.

Our newly formed Veterans Legal Services Initiative will be led by a distinguished 20-member commission that will develop a holistic, multi-pronged effort to ensure veterans have access to justice and receive the legal support they deserve. Veterans suffer from problems related to service that many people overlook, including evictions, child-custody disputes, wrongful denial of benefits and credit problems. Many issues can be solved with a lawyer’s assistance. We need your help.

To help veterans access legal assistance, join us in the veterans-specific pro bono activities in conjunction with our annual National Celebration of Pro Bono in October, which we’re extending this year to include Veterans Day. And also new this year, we’ll be mobilizing state and local bar associations and other providers to sponsor veterans’ pro bono events in May to provide a meaningful way to serve veterans around Memorial Day. Please participate and find an event near you. Learn more at www.celebrateprobono.org.

In the coming year, we’ll also mobilize the bar on other important civic initiatives. Voting is a cornerstone of our democracy and the rule of law, and as such, lawyers have a duty to encourage it. The significance of an informed and engaged citizenry is too important to disregard. We can do better.

But much like Edison, we need a team. We are asking not only that you vote, but to ensure your staff is given time to do so too. We also hope you will encourage your clients and community to be involved. We developed a card titled “Will Your Voice Be Heard on Election Day?” which you can customize and distribute. It can be found at www.ambar.org/votercard. The ABA’s elections website at www.ambar.org/vote offers valuable information on ID requirements and other voting laws, registration information and material on where to volunteer.

This year, with your help, the ABA will also promote the right to a high-quality education for every child. It’s a full plate and the year will go quickly, so I welcome everyone’s help and guidance. Together, we will do better!
Dorm BNB

Enterprising college students are trying to rent out their rooms online

FORGET A RAMEN NOODLE DIET OR DIGGING for coins in the couch cushions. Some thrifty college students are setting their sights higher—offering their dorm rooms on the lodging rental site Airbnb to make some quick cash.

Examples recently making headlines include students at King’s College in New York City and Emerson College in Boston. In each case, university housing administrators put a stop to the rentals as soon as they caught wind of them.

At King’s College, a guest-only policy quickly came under review and had restrictions added to it. Emerson requested the enterprising student, Jack Worth, take his listing down. A Change.org petition with more than 500 signatures defending Worth’s “honest, entrepreneurial endeavor” says the school is “levying several charges of misconduct against him, which could result in disciplinary action as extreme as his dismissal.”

The hashtag #FreeJackWorth had a social media moment earlier this year, when stories about the student ran in the Boston Globe, Washington Post and USA Today. When Airbnb learned about the story, it refunded the $150 automatic charge Worth incurred for canceling after guests had booked his room. The company’s chief technology officer voiced his support in a tweet to Worth that read: “Don’t forget, dorm-room businesses were forbidden at Harvard; then Facebook was born on campus. Great ideas eventually win.”

But while these ideas may seem resourceful and bold, they’re often illegal. Renting out a dorm room would typically be considered a violation of the housing contracts at most college institutions, where safety and security are taken very seriously, according to Emily Glenn, a representative of the Association of College &
University Housing Officers-International.

“The specifics can vary from institution to institution, but generally, students’ housing contracts forbid subleasing,” says Glenn. “As with other contracts, a housing contract is legally binding. Many institutions also request students register any guests who will be sleeping overnight in the residence, and that students accommodate their guests at all times.”

Airbnb encourages listers to “read your lease agreement and check with your landlord if applicable,” but it does not require them to provide proof that short-term rentals are permissible. And users of the site can select “dorm” from a list of property types (which also include bed and breakfast, castle, house and treehouse) when searching for options.

“The cases that have been in the news are high profile, but as far as I know, our members don’t consider subleasing on [Airbnb to be] a major issue,” Glenn says. “I think a student choosing to do this is still rare, and most cities’ rental or hotel markets are such that a student would find it hard to get any takers for part of a residence hall room. New York City, obviously, is an exception.”

So, it seems, are other major cities where tourism thrives and affordable lodging is at a premium. A search of Airbnb shows dorm rooms being offered in San Francisco and Philadelphia, among other large metropolitan areas.

—Judy Sutton Taylor

Opening Statements

That’s Awkward!

Do memes violate copyright law?

WHO OWNS A MEME—those pictures, videos and ideas that go viral on the internet?

In the case of the Socially Awkward Penguin, the answer might be National Geographic, since a staff photographer took the original penguin picture. Around 2009, internet users got hold of that photo, changed the background, added text and made it an internet phenomenon.

But stock photo company Getty Images says it controls the penguin—and its meme progeny. Last year, Getty Images, which licenses National Geographic’s pictures, told the German company Get Digital that it owed license fees for using the penguin meme on one of its blogs. And Getty’s bill was twice the normal licensing fee, according to Get Digital.

The company paid, but it balked when Getty allegedly demanded confidentiality about the transaction. Instead, co-CEO Philipp Stern went public with blog posts in German and English. That was September. Three months later, Stern said he had received nothing further from Getty Images.

Jeremy Malcolm, senior global policy analyst for the Electronic Frontier Foundation, says this might not have happened in the United States, where the use of the penguin would likely pass the fair-use test. But no such rule exists in Germany, he says, despite some recent debate on adopting one in the European Union.

According to Brad Kim, editor of the website Know Your Meme, it’s not unusual for copyright owners, especially stock photo companies, to send Digital Millennium Copyright Act takedown notices over memes. His site, which catalogs and explains memes, has removed at least 20 entries and deleted others at the request of copyright owners.

Kim says copyright threats from big media companies can backfire by drawing attention to an otherwise obscure phenomenon. “It kind of aggravates the meme audience because from the get-go, meme culture was fostered with ... complete disregard for copyright,” he says. “Especially when bigger companies file these claims, it only brings it an unnecessary spike in interest.”

It can also anger netizens. In 2010, the company behind the German WWII movie Das Untergang asked YouTube to take down a series of parodies in which a scene was resubtitled to show Adolf Hitler ranting about video games or politics. After those videos began disappearing, “Untergangers” started uploading more—with Hitler ranting about fair use.

As for Socially Awkward Penguin, Google Trends reports that searches have fallen considerably since the winter of 2011-2012. But for those who want to use the meme without fear, Get Digital has created a new image macro (see above)—and made it available free of copyright restrictions.

—Lorelei Laird
Autism Awareness

Judges and others in Pennsylvania’s juvenile courts are being trained about signs and traits of the condition

FOR CHILDREN WITH AUTISM, social interaction, communication and behavioral development are common challenges. Those challenges are compounded when an autistic child gets wrapped up in the criminal justice system.

Sadly, there’s an overrepresentation of kids with autism in the juvenile justice system, and they often respond in unanticipated ways, including fleeing from authorities, inappropriately approaching an officer or becoming sidetracked by courtroom sounds or the sensation of handcuffs. As a result, autistic children require different treatment, yet judges and others may not understand the characteristics of autism.

“There have been no protocols for juvenile justice professionals to identify those kids,” says Tammy Hughes, chair of the Department of Counseling, Psychology and Special Education at Duquesne University’s School of Education. But in Pennsylvania, a change to the judicial code now requires magistrates to complete continuing education about the signs and traits of autism.

The Justice Training Project of Pennsylvania’s Autism Services, Education, Resources and Training Collaborative, together with the Autism Society of Pittsburgh, developed an education program for criminal justice professionals, including probation officers, public defenders, magistrates and judges. Through the program, which is supported by a grant from the Pennsylvania Department of Human Services and the Bureau of Autism Services, 1,000 Pennsylvania magistrates are now learning to recognize autism indicators in juveniles.

More than 21,000 children with autism reside in Pennsylvania, and contact with the criminal justice system more than doubled among residents with autism between 2005 and 2011. “Our training explains autism traits and, through video, magistrates can actually see how autistic kids are likely to behave,” Hughes says.

Blaise Larotonda, a magisterial district judge in Pittsburgh, says it’s “extremely important” that judges “have all the information available to us as it relates to the issues we hear in our courtrooms. Training is always the first and most important step towards the understanding and recognition of these issues.”

Educators in the 1½-hour training include psychiatrists, attorneys, parents of individuals with autism and teachers, who explain common characteristics of autistic individuals and effective ways to communicate with offenders who have autism. “A challenge with autistic individuals is getting information to them and out of them,” Hughes explains. “There are very specific techniques, such as asking short questions that are not open-ended.”

Competency is also an issue, Hughes adds. “If an autistic child participates in an interview or waives Miranda rights, did they understand what that meant? Individuals with autism have difficulty giving and receiving information. They’re often very good at mimicking and repeating, but if you say, ‘Tell me in your own words what I said,’ it becomes clear they may not have actually understood.”

The magistrate training program has received “an extremely positive response,” says Hughes, who adds that in juvenile justice, the priority is rehabilitation. “Nobody wants kids back in the courtroom.”

—Leslie A. Gordon
Pro Bono Pros
Ohio and other states look to emeritus attorneys to fill legal aid gap

Starting in September, retired and inactive attorneys in Ohio will be able to do some pro bono work under a new rule that’s meant to make it easier for folks without a lot of resources to get access to justice.

Inactive attorneys in good standing with the Ohio State Bar Association, who practiced for at least 15 years, will be able to register for emeritus pro bono attorney status. To do it, they’ll have to produce a letter from a pro bono organization—a law school clinic or legal aid organizations, for instance—confirming their affiliation and fork over 75 bucks.

All but a handful of states now have rules similar to Ohio’s, some with emeritus rules that have been in place for three decades.

A report by the ABA Commission on Law and Aging finds that emeritus attorneys perform valuable roles in the community by bolstering legal aid and other nonprofit programs beyond what would otherwise be possible given limited—some would say extremely strained—budgets.

“Emeritus attorneys become a critical component of efforts to address the unmet civil legal needs of individuals in the greatest social and economic need,” states the report.

That’s just what John Holschuh, president of the Ohio bar, is hoping will happen come September.

The bar has been focused on increasing access to justice in a number of ways for the last couple of years, in the face of decreased legal services budgets but no decrease in the number of people needing legal services. In 2014, Ohio Supreme Court Chief Justice Maureen O’Connor assembled a task force to tackle the issue.

The task force released its final report in March of last year. One of its recommendations was that the supreme court consider adopting an emeritus attorney rule.

Other efforts include substantially increasing the fees for out-of-state attorneys applying for pro hac vice status and asking Ohio lawyers to voluntarily pay an extra $50 every time they renew their bar status.

These two steps together are expected to raise somewhere in the range of half a million dollars per year—which, combined with the emeritus attorneys plying their trade, should help make sure that more Ohioans get more of the legal help they need.

“We are very hopeful,” Holschuh says.

—Arin Greenwood

**CONGRATULATIONS** to Paul Van Lysebettens of Chicago for garnering the most online votes for his cartoon caption. Lysebettens’s caption, right, was among more than 150 entries submitted in the Journal’s monthly cartoon caption-writing contest.

**JOIN THE FUN** Send us the best caption for the legal-themed cartoon below. Email entries to captions@abanjournal.com by 11:59 p.m. CT on Sunday, Sept. 11th, with “September Caption Contest” in the subject line.

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

“A simple ‘I don’t like your brief’ would have sufficed.”

—Paul Van Lysebettens of Chicago
Hearsay

Say What?

“We are concerned by some of the questionable musical evidence presented by the state as evidence of gang involvement. This evidence was cited by the court of appeals as ‘untainted’ evidence of gang membership. ... For example, the court of appeals noted that a song by Los Tigres Del Norte was stored on [the defendant’s] cellphone, and indicated that this was evidence of gang involvement. ... We find this conclusion troublesome. Los Tigres Del Norte has been one of the more prominent bands in Latin music for decades. Since forming in 1968, Los Tigres Del Norte have sold 32 million albums. They have won five Latin Grammy Awards, and they have performed in front of U.S. troops serving abroad. There is no support in the record for the contention that enjoying their music is evidence of gang involvement.”


Opening Statements

Worry Warts

About 38% of people worry every day. Women worry more about relationships and health. Men worry more about work.

Source: Liberty Mutual Insurance’s Worry Less Report (May 9).

435,000

The number of people in the United States ages 12 and up who use heroin.


1 in 5

The percentage of transgender people who experience housing discrimination.

Source: The National Center for Transgender Equality.

28

The number of states (plus the District of Columbia) that have gun laws holding adults responsible for letting children have unsupervised access to firearms.

Source: The Law Center to Prevent Gun Violence.

$55 million

The amount a Missouri jury awarded to a woman with ovarian cancer who claimed it was linked to use of Johnson & Johnson’s talcum powder-based products. A February verdict awarded $72 million in the same court to the family of a woman who died of ovarian cancer after using talcum powder.

Source: Reuters (May 3).
Making the Grade
Lawyer helps revive Southern institution

When Virginia lawyer Phillip C. Stone took the helm at Sweet Briar College, bringing it back from the brink of closure took skill, expertise and sheer determination.

The fall semester is in full swing at Sweet Briar, a 115-year-old women’s liberal arts and sciences college nestled in the verdant foothills of Virginia’s Blue Ridge mountains. On any given day, students are hurrying past rose bushes and gracious white-columned buildings on their way to class. They’re training for equestrian competitions, meeting friends, conducting experiments, researching theories. The scene is so busy and so bucolic, it’s easy to forget that just last year, Sweet Briar’s leadership had decided to close the college down, citing fatal financial problems. But a group of determined alumnae refused to let their beloved alma mater go. Protests and lawsuits ensued, all culminating in a summertime settlement that ensured classes could remain in session—at least in theory.

When Stone, Sweet Briar’s newly appointed president, arrived on July 2, 2015, the campus was quiet. Too quiet. There were no professors. Few staff. No students. Even the horses in the college’s fabled stables were gone. But Stone had experience in small college turn-arounds: Under his leadership, Bridgewater College, about 80 miles northeast, had increased its enrollment 78 percent and raised more than $40 million for its endowment. So, as Sweet Briar leaders had been doing for more than a century before him, Stone rolled up his sleeves and got to work.

Congratulations on a successful 2015-2016 year.

How does it feel?

Thank you. We’ve been through the ringer, but we are alive, we are celebrating, and we’ve had a flawless academic year.

Your “Day One” situation sounds pretty dire. What were the initial challenges you faced when you came to Sweet Briar, and what did you do first?

When I came to the campus over the July 4th weekend in 2015, my first act was to arrange for the technology people to post an announcement on the website to rehire all faculty and staff, sight unseen. I had hundreds of emails that first day. In those first few weeks, I put an interim team in place and worked with faculty leadership to identify who could be convinced to stay. In some cases, entire departments were gone. That gave us about five weeks to get a new food service, get our renowned horse-riding program back, get our junior-year-abroad program back and get our sports teams back on game schedules. There was also the little matter of recruiting students. We had none. I was working 16-to-18-hour days. People were feeling sorry for me. They brought me pie. Did you have a mantra or something that kept you motivated?

“Impossible is just another problem to solve.” We have this mantra printed on a big banner here on campus, and I put it on my email tag line.

What was it about this job that attracted you? I mean,
Opening Statements

You are in your early 70s, you've established a wonderful law practice with three of your children who are also lawyers, and you've had a successful and distinguished career. Do you have a connection to Sweet Briar?

I had no connection to Sweet Briar, and I had only been there once, several years before, for a meeting. But I love Virginia, and this was an important Virginia institution. I knew Sweet Briar’s great reputation, and I knew one of their former presidents. I thought: This can’t be permitted to happen, that a wonderful liberal arts women’s college with a great reputation and a great endowment and no public information about any stress or financial difficulties would go under, especially without a fight to do everything possible to save it.

Is this the kind of job where law experience has been helpful?

I think there are many lessons from an active law practice that are transferrable. We pride ourselves on being problem solvers, but we know we can’t spend forever working on them. I think that the ability to pick up a new file and say, “What’s this about?” serves you well when you enter the collegiate environment because there’s something new happening every moment.

How was the mood on campus after that first year?

People love this college. We’ve tried to really enhance the sense of community, build morale and add to the beauty of the campus—make it sparkle more. The alumnæ have been so invested. They not only saved this place; they’ve given generously. Faculty tell me they’ve enjoyed teaching this year more than any other year in their career and the reason is: We’re one team, one community. And the students are thrilled that they’re here at such a pivotal time. They know they’re making history.

What are your goals going forward?

The two obvious objectives are to get money and to get students.

And you’re on your way to achieving both—enrollment will be up this year by about 100 students over last year, the endowment remains untouched, and you’ve just raised $10 million. The equestrian team even won its conference championship again.

Yes. At this point, no one is wringing their hands and wondering if we will make it another year.

Speaking of years, are you planning to lead Sweet Briar into the future?

I said when I got here that, especially with my age, my job isn’t to lead this college indefinitely. I will be here another year, but a search is being conducted now to name my successor.

What will you do next?

I might fully retire. I might go back to my law firm. My kids are still holding down the fort and even claiming that they’ll be glad for me to join them again. But without all this excitement, I hope I can adjust! —Jenny B. Davis

PHOTOGRAPH BY DAVID FONDA

Do you have more questions for Phillip Stone?

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Big-Data Juries
Professor says drawing from a variety of databases can improve the jury system
By Leslie A. Gordon

While advertisers, marketing companies and political campaigns routinely
glean personal information about consumers and voters from databases, such data
remain largely untapped when it comes to jury duty.
These billions of bits of unmined data offer a wealth of opportunity for courts
to increase juror diversity and for litigants to acquire information once available
only from expensive jury consultants, says Andrew Guthrie Ferguson, a law professor at the
University of the District of Columbia.
“Lawyers tend to pick jurors based on things they can see—race, gender, age, sexual
orientation—in part because they don’t know anything more,” says Ferguson, who envisions
a shift in the jury system as the use of database technology increases.
The nation’s court systems are using a practically antiquated system to summon potential
jurors by randomly culling names from driver’s license records and voter registration lists.
The process has been used since 1968, when a federal law was enacted to drive racism, sexism and classism from jury selection. Ferguson, who studies juries, describes these records as “dim data.” That’s because, by design, they reveal little about potential jurors.

Using dim data to summon and select jurors, however, hasn’t helped eliminate racism, classism or ageism, according to Ferguson, who authored a recent article in Notre Dame Law Review on this issue. He points out that public records used for summoning jury pools can be stale, resulting in a high no-show rate among potential jurors. And using dim data in voir dire encourages lawyers to rely on appearance, affect, hunches and stereotypes, which may actually result in discriminatory use of peremptory challenges.

**BRIGHT IDEA**

But by turning instead to what Ferguson calls “bright data,” deficiencies and inequities in both the jury summoning and selection processes could be eliminated. Bright data—more commonly referred to as big data—is about gaining insights using large-scale information and statistics in fresh ways. Big data centers around data brokers, who buy information that private companies collect about ordinary people, much of which is obtained after customers hit the “I agree” button online or use a store loyalty card that records usage. Other data vendors mine social media activity for information. And, yes, it’s all legal.

Before a trial, attorneys for both sides routinely obtain the names of potential jurors on the day of jury selection. It’s now possible using big-data sources to flag or score potential jurors on certain factors—fiscal and social ideology, for example, or on attitudes relevant to liability or damages—enabling lawyers to make exceedingly nuanced strikes.

Just as important, big data could be used by court administrators to make jury selection more efficient and accurate. And, in addition to helping determine who to strike, it could provide valuable information about how to approach jurors.

<table>
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<tr>
<th>Jury pool, which can improve the rate of response.</th>
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<td>But because they are notoriously traditional institutions, courts are only just beginning to consider experimenting with this kind of technological advancement. The Council for Court Excellence in Washington, D.C., for instance, recommended investigating big data in its December 2015 report, Jury Service Revisited: Upgrades for the 21st Century.</td>
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<tr>
<td>In 2014, the Superior Court of the District of Columbia mailed 150,454 summonses to potential jurors, according to the report.</td>
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<td>Of those, 70,715 were registered as “failure to respond” and 22,027 were returned as undeliverable, a situation that could be fixed with updated juror information obtained from big-data companies.</td>
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<td>Every year, the scale and accuracy of big data gets better and more robust, according to Tucker Willsie, co-founder of Jury Mapping, a company seeking to apply this technology to the court system.</td>
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<td>“There are thousands of data points that allow us to slice the population into segments,” he explains.</td>
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<td>Information purchased from data vendors can quickly reveal, for example, which jurors own a gun, who has a nurse in the family, who votes Republican or who subscribes to parenting magazines. “People are looking for an advantage in the time-constrained jury process. After months of trial prep, voir dire is typically very rushed,” Willsie says.</td>
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**PRIVACY CONCERNS**

But just because big data could be used in both summoning and jury selection doesn’t mean it should be, according to Ferguson. Indeed, several legal and ethical issues are raised by the specter of big-data juries. Most notable is the issue of privacy. Many citizens don’t want the government knowing the magazines they read, the places they shop or the TV programs they watch. Were the government to use that information or supply it to litigants, the result could be a backlash against jury service.

In addition, big data raises existential questions about the role of juries. Specifically, the jury system was established on the very notion that every citizen is equal. “If we’re seeking to create an algorithmically perfect venire, that undermines equality,” Ferguson says.

Related to equality concerns are 14th Amendment equal protection issues raised by the deliberate micro-targeting of jurors. For example, seemingly neutral information—subscriptions to, say, Essence or Southern Living magazines—may actually serve as a proxy for race or gender.

Yet some jury experts say the flip side may be true: Nuanced information gained from statistics may provide a reason for keeping a particular juror when a party might have otherwise struck that person on impermissible grounds. “I’m persuaded by the argument that if lawyers had more information than just race and gender, they’re less likely to focus on race and gender,” says Nina Chernoff, a professor at the City University of New York School of Law who studies the composition of juries.

There’s also the issue of cost. For litigants, this kind of data is only available to parties who can afford sophisticated jury consultants. “We hope to help correct the disparity of resources,” says Jury Mapping’s Willsie. “Our services cost a fraction of a jury consultant.” His website uses big data and predictive analytics to help litigants quickly and affordably zero in on desirable jurors.

“Normally, doing research on 300 people in advance would be prohibitively challenging and time-consuming, and it would lack the predictive scoring. With our tool, it’s all at their fingertips,” Willsie says. “The day of the trial, we’ll learn the names of the 50 individuals assigned to the courtroom, as well as the ordering. Armed with a ranking that we helped establish in advance, our client can look at the first six seated jurors and know who to direct questioning to—and who not to—to avoid exposing a favorable juror to the other side.”

While big data is cheaper than jury consultants, it may be too expensive for court administrators, at least at
first glance. However, in the long run, it might actually result in savings. Because summons yield rates are as low as 12 percent, courts must mail far more summonses than necessary, which requires postage and manpower.

BIG VS. BAD

“Yield rates are low in part because courts have bad records,” Ferguson explains. “Big-data services find out about [citizens’] moves right away,” in contrast to out-of-date Department of Motor Vehicle and voter records.

But Chernoff insists that whatever the cost, courts simply can’t yet handle large-scale information. “Jury offices are barely managing the basic data they’re required to. They’re struggling to keep pace with technology from 10 years ago,” she says.

In Hartford, Connecticut, for example, a computer error caused the federal jury selection system to interpret the “d” in Hartford to mean “deceased.” So no one from Hartford was called for jury service, eliminating more than 60 percent of eligible African-Americans. Similarly, the computer system in Kent County, Michigan, had an erroneous setting that only selected jurors from certain ZIP codes, particularly those without larger African-American populations.

“Courts do a horrendously poor job of dealing with ‘dim data.’ That’s the baseline: complete mismanagement,” Chernoff says. “It’s not malfeasance; they’re just under-resourced.” So adopting big-data technologies may be too much to ask of overburdened jury administrators.

As for the future of big-data juries, Ferguson maintains that the two potential uses for big data don’t need to be adopted together. For instance, court administrators could use big data for more efficient venire creation, but then not provide that personal data to litigants for actual jury selection. Either way, the possibilities and potential effects should be studied.

“Big-data companies could do this in a heartbeat,” Ferguson says. “All litigants want more information on potential jurors. Every civil lawyer, prosecutor and defense lawyer would encourage this.”

Immigrant Advocates

An innovative program in New York provides public defenders in deportation cases

By Lorelei Laird

When Judge Robert Katzmann joined the 2nd U.S. Circuit Court of Appeals at New York City in 1999, immigration was a “minuscule” part of the docket. Six years later, it had become 40 percent of the caseload.

Not only did the court have a hard time keeping up, but those facing deportation faced a severe disadvantage: There’s no right to appointed counsel for the poor in immigration cases because deportation is a civil, not criminal, penalty. In the cases that trickled up to the 2nd Circuit, Katzmann saw the results.

“I was able to see, in case after case, the carnage that results when families and individuals don’t have adequate counsel,” Katzmann said as part of a panel, “No Deportation Without Representation,” at the ABA’s 2014 annual meeting in Boston. “I always had a sense that if there had been a good lawyer, then the outcome might have been different, the family might not have been torn asunder.”

So Katzmann convened a group to study the issue and started a small revolution in immigration law by forming the New York Immigration Family Unity Project. It’s the nation’s first program offering universal representation to detained immigrants, accepting everyone who meets income criteria. Publicly funded by New York City, the project essentially imports public defenders into immigration courts.

The project has made a dramatic difference to detained immigrant New Yorkers. The Vera Institute of Justice says attorneys have reunited more than half of their clients with their families. It’s been so successful that the project has expanded to two upstate New York immigration courts, and is being used as a model for similar programs planned in Boston, Chicago, Los Angeles and San Francisco.

For immigrant legal services groups, which can generally take only a fraction of viable removal cases, the New York project represents a breakthrough, according to Andrea Saenz, who was a core advocate for the program as a teaching fellow at the Benjamin N. Cardozo School of Law.

“Previously, we have always had to use a patchwork of resources to get people facing deportation counsel,” says Saenz, who’s now a supervising attorney at Brooklyn Defender Services. “It’s the first time that we’ve been able to get any government entity to put up the funds ... so that they can have a fair fight.”

HIGH STAKES

Deportation is not a criminal matter, yet the immigration enforcement system shares many of the features of the criminal system: arrests by uniformed officers, jail or bail pending trial, and attorneys from the Department of Homeland Security who act as a kind of prosecutor. And because deported immigrants can lose their jobs, families and homes, the stakes in immigration court are even higher than they are in some criminal cases.

“We put people in a situation, especially when they’re detained, where they’re locked up and facing deportation and have to defend...
themselves in an ... unbelievably hard and complex" setting, Saenz says. “The government has a lawyer and they don't, and they may have no English skills or no education, and what that results in is people getting deported who shouldn’t.”

While there are some publicly funded lawyers available to represent immigrants, most who can’t afford one must find pro bono representation or go without. Indeed, federal statistics show that 42 percent of people in immigration court in fiscal year 2015 had no lawyer at any point in their cases. Success rates for self-represented immigrants are dismal. Katzmann’s New York study group found that just 13 percent of unrepresented New Yorkers who weren’t detained and 3 percent of those who were detained won their cases.

The group also found that whether immigrants were detained—jailed pending a removal trial—made a dramatic difference in their cases. Even with an attorney, only 18 percent of detained New Yorkers won their cases. When immigrants had both an attorney and were not in detention, 74 percent won their cases.

That’s why the New York Immigrant Family Unity Project focuses its efforts on detained New York immigrants. In its second phase, the study group determined that representing detained people—those who have the least ability to gather evidence and find their own attorneys—should be its priority. It launched a pilot project to do that in late 2013.

The project was successful enough that in the next two years New York granted it enough funding to represent every immigrant detained at the city’s Varick Street detention center, as well as New Yorkers with cases in New Jersey. Existing legal services providers—currently the Bronx Defenders, Brooklyn Defender Services and the Legal Aid Society—supply the attorneys.

The results have been striking: As of December, project attorneys had won 69 percent of their cases in New York, and Vera expects that the project will increase the proportion of detained immigrants permitted to stay in the United States by 1,000 percent. It’s also won a precedent at the 2nd Circuit, saying immigrants subject to mandatory detention must have a bond hearing within six months of detention.

In addition, project organizers have successfully pushed for state funding, permitting the effort to spread upstate and provide limited representation in immigration courts at Batavia and Ulster. Organizers are working toward funding to represent everybody in those two courts, plus the state’s other two upstate immigration courts serving detained immigrants in Bedford Hills and Fishkill.

**HOLISTIC DEFENSE**

The rest of the country has taken notice. Vera says organizations in several other jurisdictions have been in touch for advice on launching their own versions of the program.

These projects are in early planning stages, but at least two other projects doing similar work have already launched. One is in Alameda County, California—the eastern Bay Area County that includes Berkeley, where “crimmigration” attorney Raha Jorjani approached Public Defender Brendon Woods with the idea.

“I pointed out that New York City had been conducting a similar model with great success and there’s no reason why California, with its significant immigrant population, shouldn’t be making the same efforts,” says Jorjani, formerly a supervising attorney at the University of California at Davis’ Immigration Law Clinic.

Woods agreed—and hired Jorjani as California’s first full-time county public defender for immigration matters. Jorjani takes a limited number of immigration cases—generally deportation cases or those of undocumented juveniles who are eligible for legal status because they’ve been abused or abandoned by a parent.

Within its first three years, the program won 12 of its 15 completed cases and a published ruling from a California appeals court. It’s also started a trend in other Bay Area public defender offices. San Francisco has hired its own specialist, Francisco Ugarte, to do a job similar to Jorjani’s. And the counties of Contra Costa, Santa Clara and Sonoma have hired specialists of their own to do immigration consulting in criminal cases and limited nonremoval work.

Meanwhile, in New Jersey, the New York project has also inspired an entirely private effort. The American Friends Service Committee, a non-profit that puts the Quaker faith into action, launched the Friends Representation Initiative of New Jersey in March of 2015. It uses its own in-house lawyers and grant funding to represent detained clients before the court at the Elizabeth, New Jersey, detention center. Amy Gottlieb, who oversees the program in her role as associate regional director at the AFSC, participated in the later stages of Katzmann’s study group.

The project doesn’t have the capacity to represent everybody detained at Elizabeth. Nonetheless, the AFSC estimates that on the days it’s in court, it represents 95 to 100 percent of immigrants whose cases are heard that day—a vast improvement over the estimated 35 percent representation rate before her group arrived.

Gottlieb, an attorney herself, says other programs and private counsel represent almost everyone else who’s detained at Elizabeth, creating a vital safety net.

It’s “desperately important for people to realize that immigration lawyers make a difference,” Gottlieb says. “Any program that increases access to counsel in any way ... makes a difference in what often can be a question of life or death.”
The arrest of Edward J. Strieff Jr. outside a Utah convenience store led to two diametrically opposed responses on the U.S. Supreme Court this past spring.

To the majority, the arrest was essentially no big deal based on a rare police misstep. To the dissenters, the decision could lead to a widespread increase of police stopping individuals on the street, permitting them to arrest anyone with an outstanding warrant and subjecting them to a search.

In late 2006, police in the community of South Salt Lake City, Utah, received an anonymous tip reporting “narcotics activity” at a house. Police Detective Douglas Fackrell conducted intermittent surveillance of the home over the course of a week, and he observed a steady stream of visitors who arrived and left in short order, which raised his suspicions that drugs were being dealt from the house.

At some point, according to court papers, the officer decided to stop and question the next person to leave the house. When Strieff left the home, Fackrell followed along before detaining Strieff in the parking lot of a 7-Eleven, identifying himself, and asking the man what he was doing at the house.

Fackrell could not remember Strieff’s response when he testified later, but the officer also asked for the man’s identification, which he relayed to a police dispatcher for a warrant check.

When the dispatcher reported that Strieff had an outstanding traffic warrant, Fackrell arrested Strieff on the warrant and conducted a search incident to arrest. He discovered a baggie of methamphetamine and drug paraphernalia.

When Strieff was charged with drug offenses based on that discovery, he moved to suppress the evidence as the fruit of an unconstitutional search. Utah prosecutors conceded that Fackrell had lacked reasonable suspicion for his initial stop of Strieff.

But the state argued that the evidence should be admitted because it was discovered during a search incident to the subsequent lawful arrest—based on the existing arrest warrant—and thus it was sufficiently attenuated from the unlawful stop.

Two Utah courts agreed, though the Utah Supreme Court disagreed, concluding that the discovery of an arrest warrant during a routine warrant check is not an “intervening circumstance” under existing precedents.

On June 20, the U.S. Supreme Court reversed the state high court on a 5-3 vote in *Utah v. Strieff*.

**NO FLAGRANT MISCONDUCT**

In a short, workmanlike opinion for the majority, Justice Clarence Thomas said the evidence discovered on Strieff was admissible because the unlawful stop was sufficiently attenuated by the arrest warrant.

“Although the illegal stop was close in time to Strieff’s arrest, that consideration is outweighed by two factors supporting the state,” Thomas wrote. “The outstanding arrest warrant for Strieff’s arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff.”

“And,” Thomas added, “it is especially significant that there is no evidence that Officer Fackrell’s illegal stop reflected flagrantly unlawful police misconduct.”

The opinion was joined by Chief Justice John G. Roberts Jr., Anthony M. Kennedy, Stephen G. Breyer and Samuel A. Alito Jr.

Thomas applied a 1975 Supreme Court decision, *Brown v. Illinois*, which outlined the “attenuation doctrine” governing when evidence indirectly resulting from Fourth Amendment violations might not be suppressed if it is sufficiently remotely connected to the violation.

The three factors of the test are...
time, or how soon after the unconstitutional search the evidence was found; second, the presence of intervening circumstances; and third, how flagrant the Fourth Amendment violation was.

The first factor in Strieff’s case favored suppression, Thomas wrote, because of the short time between the illegal stop and the discovery of drug evidence. The other two factors, however, strongly favored the state. The warrant for Strieff was entirely unconnected to the illegal stop, Thomas reasoned, and was an intervening circumstance. The police officer made good-faith mistakes, Thomas wrote.

“There is no indication that this unlawful stop was part of any systemic or recurrent police misconduct,” Thomas wrote. “To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house.”

To Utah Solicitor General Tyler R. Green, who had argued the state’s case before the justices, Thomas’ opinion was a straightforward endorsement of a view that had been adopted by most lower courts that had considered the issue.

“It’s really not a blockbuster,” Green says of the decision. “It’s a short opinion, and the analysis is five pages. The Supreme Court can’t break a lot of new ground in five pages.”

WARRANTS, WARRANTS EVERYWHERE

The dissenters had a quite different take on the decision, and many legal commentators have agreed that the ruling in fact does break new ground.

“Do not be soothed by the opinion’s technical language,” Justice Sonia Sotomayor wrote in a section of her dissent that was joined by Justice Ruth Bader Ginsburg. “This case allows the police to stop you on the street, demand your identification and check it for outstanding traffic warrants—even if you are doing nothing wrong. ... The white defendant in this case shows that anyone’s dignity can be violated.”

Justice Sonia Sotomayor, in a portion of her dissent not joined by Ginsburg, said that she was “writing only for myself, and drawing on my professional experiences,” to point out that such stops can be “degrading ... when the officer is looking for more.”

“The white defendant in this case shows that anyone’s dignity can be violated in this manner,” Sotomayor wrote. “But it is no secret that people of color are disproportionate victims of this type of scrutiny: ... For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”

Sotomayor provided what one observer has called a “summer reading” list on minority sensitivity for her colleagues in the majority. She cited these works: W.E.B. Du Bois’ The Souls of Black Folks (1903); James Baldwin’s The Fire Next Time (1963); and Ta-Nehisi Coates’ Between the World and Me (2015).

‘TREASURE HUNT’

Sherry F. Colb, a professor at Cornell Law School, calls the majority decision “dangerous.”

“Once you tell the police that something that happens in the course of a stop can retroactively support the stop, that invites the police to stop people for no reason,” she says. “It becomes a treasure hunt. Just stop people and call in to dispatch, and who knows, you may find something.”

Green, the Utah solicitor general, says that if there were evidence of the “parade of horribles” suggested by the dissenters and others, it would have turned up in the jurisdictions where the holding in Strieff has been the law for some time.

“Police officers, by and large, try to do what’s right,” he says. “This notion that this decision will be carte blanche for the police to ignore the requirements of the Fourth Amendment, I think we would fundamentally disagree with that premise.”

Both Sotomayor and Justice Elena Kagan, in a separate dissent, emphasized an issue that was raised in briefs and at oral arguments by the lawyers for Strieff: the widespread existence of arrest warrants for large swaths of the population.

Kagan noted that the South Salt Lake City police department’s “standard detention procedures—stop, ask for identification, run a check—are partly designed to find outstanding warrants. And find them they will, given the staggering number of such warrants on the books.”

Both she and Sotomayor took note of a U.S. Department of Justice report looking into the 2014 police shooting death of Michael Brown in Ferguson, Missouri, which prompted days of unrest. The federal report found that with a population of 21,000, some 15,000 residents of Ferguson had outstanding warrants.

Outstanding warrants “are the run-of-the-mill results of police stops—what officers look for when they run a routine check of a person’s identification and what they know will turn up with fair regularity,” Kagan said. “In short, they are nothing like what intervening circumstances are supposed to be.”
Practice

Comedy in the Courtroom
Clowning around is frowned upon, but don’t underestimate the genre’s value

By Philip N. Meyer

Not long ago in these pages, a column asserted that humor is misplaced in the courtroom and proscribed for attorneys: “Don’t Be Funny: Litigation is no laughing matter to your clients” (ABA Journal, November 2015, page 26). There is some truth in the observations: Misguided humor can be dangerous in the courtroom, especially inappropriate “jokes.”

Worst of all are jokes that—purposefully or inadvertently—target either the vulnerable or the victimized, or that somehow denigrate the gravity and importance of the proceeding itself (especially to the litigants). The column provides several illustrations of bad courtroom humor—jokes that clearly miss their marks. These misguided attempts at humor are toxic and can have horrible and unintended consequences in litigation, saying far more about the speaker than about the subject of the humor. But the genre of comedy is much broader than bad jokes, and the edge of a sense of humor can be a useful litigation tool.

Purposeful comedy can defuse tension, evoke a shared humanity, engage a jury or judge and, most important, provide an alternative narrative perspective. While courtrooms are not comedy clubs, shrewd and strategic use of humor can be powerful and effective.

Here is a better rule: Any humor that comes at the expense of the weak, the victimized, the vulnerable or the disempowered should be scrupulously avoided. Inappropriate lawyer humor, especially comments that are an abuse of power and privilege, is always a misstep—and misguided jokes can be costly and destructive.

On the other hand, no genre of storytelling is off-limits in the courtroom: melodrama, tragedy and comedy all have their proper places in legal storytelling. And the column’s proscription to never employ comedy is simply wrong. There is much that lawyers can learn about comedy, and how to use it, from artful comedic stories in popular culture.

THE CAREFUL HUMORIST

Of course, some lawyers, by inclination and instinct, are simply better at employing humor than others. And the column makes a correct cautionary observation: Attorneys as humorists must always be careful, for we do not all share the same sense of humor.

Let me briefly identify one type of humor or comedy that is at the opposite end of the spectrum from inappropriate jokes cracked at the expense of litigants, victims or the disempowered. This is socially observant humor that often tips the world upside down and depicts the perspective of the outsider, revealing social truths that may diminish in power or become cliché when expressed more abstractly. That is, this type of comedy invites an audience to reimagine the world from a different perspective.

I think, for example, of Richard Pryor’s masterful standup routines including autobiographical recountings of youthful experiences when arrested by the police and experiences within the criminal justice system. I also recall Pryor’s famous punchline: “I went down to the courthouse looking for justice, and that’s what I found—just us.” Equally powerful are Pryor’s self-deprecating explorations of his drug experiences, including setting himself on fire while freebasing. He speaks with remarkable candor and insight about the seductions of drugs—that is, it is the drugs’ voice that speaks seductively to him. We get inside Pryor’s skin, even as he sets himself ablaze. Clearly, these are not intrinsically funny subjects for comedy. Why, then, do we laugh so hard? Perhaps, in part, because we momentarily share Pryor’s ironic edge, his self-effacing honesty, his candor and perspective.

There is a specific word that captures an academic understanding of how this type of humor works. Merriam-Webster’s Collegiate Dictionary defines alterity as “the quality or state of being radically alien to the conscious self or a particular cultural orientation.” As law professor emeritus Jack L. Sammons explains: “The gist of it is that comedy, most of it, enacts a sudden alternative community among listeners, an alterity in academic parlance, and is—very oddly—like religion in this [in evoking shared belief]. This is of value to lawyers because it offers a way of reminding jurors and judges of other ways of thinking ‘we’ all share in situations, like trials, in which our thinking is often divided.” Sammons further suggests: “Next time you listen to a comedian, try noticing the community he or she calls into existence by the comedy.

“I WENT DOWN TO THE COURTHOUSE LOOKING FOR JUSTICE, AND THAT’S WHAT I FOUND THERE—JUST US.”

—RICHARD PRYOR

Clowning around is frowned upon, but don’t underestimate the genre’s value

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Let me briefly identify one type of humor or comedy that is at the opposite end of the spectrum from inappropriate jokes cracked at the expense of litigants, victims or the disempowered. This is socially observant humor that often tips the world upside down and depicts the perspective of the outsider, revealing social truths that may diminish in power or become cliché when expressed more abstractly. That is, this type of comedy invites an audience to reimagine the world from a different perspective.

I think, for example, of Richard Pryor’s masterful standup routines including autobiographical recountings of youthful experiences when arrested by the police and experiences within the criminal justice system. I also recall Pryor’s famous punchline: “I went down to the courthouse looking for justice, and that’s what I found—just us.” Equally powerful are Pryor’s self-deprecating explorations of his drug experiences, including setting himself on fire while freebasing. He speaks with remarkable candor and insight about the seductions of drugs—that is, it is the drugs’ voice that speaks seductively to him. We get inside Pryor’s skin, even as he sets himself ablaze. Clearly, these are not intrinsically funny subjects for comedy. Why, then, do we laugh so hard? Perhaps, in part, because we momentarily share Pryor’s ironic edge, his self-effacing honesty, his candor and perspective.

There is a specific word that captures an academic understanding of how this type of humor works. Merriam-Webster’s Collegiate Dictionary defines alterity as “the quality or state of being radically alien to the conscious self or a particular cultural orientation.” As law professor emeritus Jack L. Sammons explains: “The gist of it is that comedy, most of it, enacts a sudden alternative community among listeners, an alterity in academic parlance, and is—very oddly—like religion in this [in evoking shared belief]. This is of value to lawyers because it offers a way of reminding jurors and judges of other ways of thinking ‘we’ all share in situations, like trials, in which our thinking is often divided.” Sammons further suggests: “Next time you listen to a comedian, try noticing the community he or she calls into existence by the comedy.
It is always—at least among standups—a claim that ‘we’ see this differently and, of course, ‘we are correct.’ And, of course, Sammons is correct too. Comedy can evoke hidden or embedded subtext. When the audience truly gets it, the recognition may be signaled by laughter.

Of course, trial attorneys are not standup comedians, and it is not our job to manufacture laughter. Besides, few lawyers possess Pryor’s narrative artistry. Nevertheless, trial attorneys sometimes draw purposefully upon this type of dark and ironic outsider humor.

For example, in my criminal law class we talk about the O.J. Simpson case. Many of my students are too young to recall the specifics of the case unless they’ve been watching the recent docudrama featuring it. Most students are initially profoundly skeptical about the defense’s proposed theory: Racism within the Los Angeles police force compromised the murder investigations of Nicole Simpson and Ronald Goldman. For them, there is no possibility that racist Los Angeles police investigators could have conspired to plant evidence framing Simpson, because he was a successful black celebrity. The defendant’s conspiracy theory seems far-fetched, a storyline evoking narrative possibilities beyond their experiences.

I have then played portions of Johnnie Cochran’s masterful closing argument on behalf of Simpson. One of the ways that Cochran draws the jury into the argument is by strategic use of a darkly ironic sense of humor. At a crucial moment in the argument, the students laugh as Cochran dons Simpson’s black knit cap, implicitly mocking the prosecution’s claim that the cap was part of the killer’s disguise. Cochran’s irony, I believe, is a vital component of a complex persuasive narrative strategy; his visual humor re-emphasizes that the prosecution’s earlier “demonstration” had gone awry—when Christopher Darden compelled Simpson to try on black leather gloves also recovered from the crime scene that seemed too small for his hands. Cochran observes:
Practice

“[Prosecutor Marcia Clark] talks about O.J. Simpson getting dressed up to go commit these murders. I was thinking last night about their theory and how it didn’t make any sense. Let me put this knit cap on. You’ve been seeing me for a year. If I put this knit cap on, who am I? I’m still Johnnie Cochran with a knit cap. And if you looked at O.J. over there—and he has a rather large head—O.J. Simpson in a knit cap from two blocks away is still O.J. Simpson. It’s no disguise. It’s no disguise. It makes no sense. It doesn’t fit. If it doesn’t fit, you must acquit.”

FIT TO BE TRIED

In a lesser-known case, United States v. Nelson (1997), federal prosecutor Alan Vinegrad drew upon the context of the O.J. trial and successfully spun irony and dark humor in a different yet equally purposeful direction, mocking Cochran’s argument in that other trial, just as Cochran had done with Clark’s closing argument. Defendant Lemrick Nelson, charged with the stabbing death of Yankel Rosenbaum, claimed that baggy pants smeared with Rosenbaum’s blood introduced at trial did not belong to him, as evidenced by the fact that they did not fit him, though he had appeared in a Newsday photograph wearing the pants. Vinegrad employed an ironic edge and argued:

“What [does the defense resort to?] The baggy-pants defense. Until today the fiascos of the case on the West Coast—I won’t mention the name—hadn’t invaded this trial. But the defense in his desperation brought it into the courtroom and paraded it before you. It turned the courtroom into a theater of the absurd. Pants don’t fit, you must acquit.”

“All that Lemrick Nelson’s demonstration here proves is: He wears baggy pants. Over the last 5½ years, either these well-traveled pants have gotten stretched out a bit or he’s gotten more slender or firmer or both. Who knows? Maybe that is why the police were able to catch him, because he couldn’t run fast enough, because of holding on to these baggy pants. I guess what I’m really saying, since that California case is in the courtroom now: ‘If the pants don’t fit, I don’t give a ___.’ You fill in the rest.”

Does comedy work in the courtroom? Sometimes, but you have to be careful when and how you use it. And always know what the purpose is and who is the subject and object of the humor.

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.

Don’t Get Too Friendly

New Mexico Supreme Court urges judges to be discreet when using social media By David L. Hudson Jr.

For most of its 37-page opinion in State v. Thomas, issued June 20, the New Mexico Supreme Court explained its finding that the convictions of Truett Thomas for murder and kidnapping violated the confrontation clause. The supreme court reversed the convictions and remanded the case for a new trial only on the murder charge because there was insufficient evidence to support the kidnapping conviction.

It wasn’t until page 31 of the opinion that the justices turned to an issue that might have been a more important factor in the case, if not for the confrontation clause violation.

During the trial, Judge Samuel L. Winder of the District Court of Bernalillo County, which encompasses Albuquerque, posted the following statement on a Facebook page created for his unsuccessful re-election campaign:

“I am on the third day of presiding over my ‘first’ first-degree murder trial as a judge.” While this was a seemingly innocuous post, Winder later posted the following message after trial but before sentencing: “In the trial I presided over, the jury returned guilty verdicts for first-degree murder and kidnapping just after lunch. Justice was served. Thank you for your prayers.”

On appeal, “defendant argues that social media postings by the district court judge demonstrate judicial bias,” wrote Chief Justice Charles W. Daniels in his opinion for a unanimous court (with one abstention). “During the pendency of the trial, the district court judge posted to his election campaign Facebook page discussions of his role in the case and his opinion of its outcome. Although we need not decide this issue because we reverse on confrontation grounds, we take this opportunity to discuss our concerns over the use of social media by members of our judiciary.”

Judges “should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens,” stated Daniels, citing Rule 21-102 of the New Mexico Code of Judicial Conduct. “Judges must avoid not only actual impropriety but also its appearance, and judges must act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary. These limitations apply with equal force to virtual actions and online comments and must be kept in mind if and when a judge decides to participate in electronic social media.”

A NOTE OF CAUTION

Daniels emphasized that the court was sounding a note of caution to judges. “While we make no bright-line ban prohibiting judicial use of social media,” the opinion states, “we caution that ‘friend-ing,’ online postings and other activity can easily be misconstrued and create an appearance of impropriety. Online comments are public comments, and a connection via an online social network is a visible relationship, regardless of the strength of the personal connection.”

The New Mexico Supreme Court’s opinion echoes the view expressed by the ABA Standing Committee on Ethics and Professional Responsibility in Formal Ethics Opinion 462, issued Feb. 21, 2013. “A judge may participate in electronic social networking,” states the committee in Opinion 462, “but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity or impartiality, or create an appearance of impropriety.”

The court also offered a few thoughts on how social media created to support judicial election campaigns should be used. “We recognize the utility of an online presence in judicial election campaigns, but we agree with the American Bar Association in recommending that these campaign sites be established and maintained by campaign committees, not by the judicial candidate personally,” states the court’s opinion. Moreover, the opinion states, judges should consider...
“any statement posted online to be a public statement and take care to limit such actions accordingly.”

Ethics expert Peter A. Joy says it is significant that the New Mexico Supreme Court said as much as it did about the trial judge’s use of social media since the case already was decided on other grounds. “The portion of the decision dealing with the judge’s social media activities goes far beyond what the judge did, and that is unusual,” says Joy, a professor at Washington University School of Law in St. Louis. “Usually, a court does not go beyond the facts in the case it is deciding. In this case, it goes far beyond the allegations about this judge’s use of social media, and the court basically uses its discussion, which is just dicta in the case, to give a mini-ethics lesson about judges using social media.”

Only part of Winder’s Facebook posting was problematic, says John G. Browning, a shareholder at Passman & Jones in Dallas, whose article “Why Can’t We Be Friends? Judges’ Use of Social Media” was published in the University of Miami Law Review in 2014. “As far as what the judge posted is concerned, he was fine when he limited himself to making just a factual comment, as with his post on the third day of trial or the first sentence of his follow-up post,” Browning says. “It’s the second part of his post, the comment about ‘justice being served,’ that is troubling. That could indicate to a reasonable person some partiality or bias on the part of the court. This is particularly concerning when that same judge may have to preside over post-trial motions.”

Keith Swisher, an ethics counsel in Phoenix, takes issue with the New Mexico Supreme Court’s conclusion that judicial campaign sites be established and maintained by campaign committees, rather than the candidate. “To be sure, that is good advice and will help the judge avoid disqualification and other ethical risks, but it is hard to read the current ethical codes as requiring that approach which might, in any event, collide with the First Amendment,” says Swisher. “Although judicial candidates are generally not permitted to solicit campaign contributions person-to-person or even to link to a site soliciting campaign contributions—it is a bit of a stretch to suggest that candidates cannot otherwise maintain their own pages to promote their candidacy.”

TECHNICAL DIFFICULTIES
How judges use social media is cause for concern, agree many ethics authorities. “In recent months, judges have been disciplined for misusing social media,” Browning says. For example, an ex-judge in Mississippi was improperly endorsing political candidates on Facebook; a Minnesota judge frequently went on Facebook to comment on the cases, counsel and litigants appearing before him; and a Kentucky judge vented on Facebook about whether he perceived to be racial injustice occurring in his court, Browning says.

What is surprising, Joy says, “is that not all judges have gotten the message yet: Using social media is just like talking to the press. It seems that some judges, just like some regular citizens, hang up whatever good sense they have when they use social media. The problem is partly one of a lack of technological know-how, says Browning. "Unfortunately, many judges are not as knowledgeable or comfortable with technology as we’d like them to be, which can lead to mistakes," he says. "And more judges need to be aware that their conduct on social media is just as subject to canons of judicial ethics and the Code of Judicial Conduct as their more traditional activities and forms of communication."

Another factor is the pressure of judicial election campaigns, Swisher says. "The judges feel a need to campaign to the public and occasionally post about their cases or seek to connect with parties or lawyers. Judges have been disciplined or disqualified for their Facebook friends, their Facebook posts, or their ex parte communications with parties or lawyers over social media."

Swisher says that the states, with a few exceptions, are fairly consistent in their approach to social media. "The approach has moved to acceptance, with warnings and limitations," he says. "Unlike other social media users, judges are properly subject to unique restrictions and disqualification issues relating to the content of their postings and their online connections. These restrictions are justified, in part, to assure parties of judges’ impartiality—both in actuality and in appearance."

As for Winder, he now practices law in Albuquerque after losing his bid for re-election. After the supreme court issued its opinion, Winder told the Santa Fe Reporter that judges perhaps should consider staying away from social media. "No one questioned my impartiality during the trial or after. We’ve all learned from this new medium, and judges should never make any comments on Facebook."
Matter of Routine
How using checklists can improve your writing

By Bryan A. Garner

Have you ever noticed that you tend to make mistakes when you depart from a routine? You have a normal way of doing things, but then something unforeseen happens and you change your routine slightly. Let’s say you always carry your phone charger in the middle pocket of your briefcase. But in hastily packing up after a meeting on the way to the airport, while two of your colleagues are congratulating you on a successful presentation and saying their goodbyes, you just drop it in the already-open left pocket. The next morning, you need your charger, you can’t find it in the middle pocket, you fret about having lost it, and you end up buying another. A week later you see it in that left pocket.

It’s a trivial example—not unlike dozens of simple examples that Sigmund Freud wrote about in his fascinating little book The Psychopathology of Everyday Life. In any event, your collection of phone chargers is becoming quite impressive because of such minor distractions.

Humans go through some routines that are much more complicated than keeping a phone charger in its place. Think of the golf swing. Every really good golfer has what is called a “pre-shot routine”: a series of movements behind and around the ball, a way of taking the stance to execute the shot, the wagging of the clubhead above the ball a certain number of times before resting the clubface just behind the ball and then executing the shot. With professionals, it’s done the same way every single time. When it’s interrupted in some way, or the player departs from it, mistakes are likely to occur.

But people often go through much more complicated series of actions. That’s where checklists are invaluable: They’re informational job aids that reduce mistakes by compensating for the limits of human attention and memory. Pilots are required to use them to counteract compensating for the limits of human attention and memory. Pilots are required to use them to counteract mistakes behind and around the ball, a way of taking the stance to execute the shot, the wagging of the clubhead above the ball a certain number of times before resting the clubface just behind the ball and then executing the shot.

With professionals, it’s done the same way every single time. When it’s interrupted in some way, or the player departs from it, mistakes are likely to occur.

But people often go through much more complicated series of actions. That’s where checklists are invaluable: They’re informational job aids that reduce mistakes by compensating for the limits of human attention and memory. Pilots are required to use them to counteract the possibility of human error. Surgeons use them to ensure that every step is properly executed in the correct order.

Lawyers use them in litigation and in various aspects of their work, but not so much in writing. Let’s take the example of preparing a brief. You have a deadline for filing. Some will say, “Let’s get it done!” and start writing about the arguments they know (or think they know). That ends up wasting a lot of time. There will be much rewriting needed. But when filing time comes, it’s more or less ready to go—after plentiful but rather haphazard massaging.

I suggest a more systematic way of going about it: creating a checklist in reverse chronological order. You must work back from the filing date. It might look like what follows. This is a pull-out-the-stops brief from a large or moderate-size law firm. The schedule takes no account of weekends or holidays. Of course, it’s adjustable to your needs—and according to the resources at your disposal. But this is the kind of process I follow in my most important briefing projects.

**SEPT. 25**
- Electronic deadline at 7 p.m. (a self-imposed deadline—it’s really midnight).
- Proofread for error correction only.
- Verify correctness of formatting (no headings at bottom of page, etc.).
- Spot-check hyperlinks.

**SEPT. 24**
- Hyperlink citations to the record.
- Hyperlink citations to the cases.
- Fact-check all case citations.
- Fact-check all quotations word for word, character for character.
- Prepare table of authorities.

**SEPT. 23**
- Serial editing by three crackajack editors who have never seen the brief (one reader at a time in the morning, noon and late afternoon). Their goals are to (1) correct any errors, (2) tighten wordings, (3) sharpen vague assertions and (4) brighten the wordings to make the prose less dull.
- Paralegal must verify that all edits have been properly entered.
- Lead brief-writer must approve which edits go into the master version.

**SEPT. 22**
- Two read-throughs by each team member with whatever edits, additions or subtractions seem desirable: one set of edits to be handed over at 3 p.m.
- Verify that all necessary arguments have been properly addressed.
- Verify that all factual matters have been pinned to the record as closely as possible. The person who verifies the statement of facts must be someone other than the second-chair lawyer who wrote it. Every sentence in the statement of facts must be tied to the record with a citation. Any argument must be stripped out of this section.
- Ensure that the issue statements match up nicely with the point headings—and that their order corresponds. Double-check the word count to make sure that no single multisentence issue exceeds 75 words.

**SEPT. 21**
- A senior team member who attended yesterday’s focus group continues rewriting the brief in light of what happened there.

**SEPT. 20**
- Focus group: Five smart lawyers from outside the firm spend two hours adjudicating the case in a controlled environment. Ultimately, they vote as if they were judges, giving short, written reasons for the outcome. They mustn’t know which side of the case you’re on. They’ve done a conflicts check and understand that the entire exercise is confidential.
In light of what happens here, a senior team member rewrites the brief this evening and Sept. 21 to overcome whatever problems your five-member panel had with your side.

SEPT. 19

☑ Ensure that the brief is in apple-pie form: all record citations filled in, all case citations verified, everything proofed to make the brief read well. This is the point at which many people would be ready to file the brief. But it can still be greatly improved.

SEPT. 18

☑ The lead lawyer assembles the brief by beginning with the point headings and choosing the text that supports and develops them. He or she designates which parts are to go under what point headings and in what order. For each point heading, the lead lawyer has two versions to select from and will probably use elements of both versions to create a much better version than either of the two that have been submitted.

☑ Delete and replace the following stereotypical words and phrases to make the brief sound less generic. For However, use a case-sensitive search:
  - absent (in its legalistic adverbial use)
  - accordingly
  - consequently
  - in the event that
  - However
  - moreover
  - prior to
  - pursuant to
  - subsequent
  - thus

☑ The second-chair lawyer writes the statement of facts with the instruction to avoid all argument, conclusory assertions, and characterizations.

SEPT. 17-16

☑ Have team members write the brief as quickly as possible while free from all distractions. All handheld devices and computer prompts are turned off.

☑ It’s possible to have the argument under each point heading written by two team members who aren’t allowed to collaborate or compare notes. They must work independently. On Sept. 17, their work is presented to the lead lawyer.

☑ The lead lawyer coolly writes the introduction and the conclusion—and each one distinctive, and each one absolutely free of disparagement and sarcasm but showing a little literary flair.

☑ Prepare a table of contents for the argument section, showing the point headings (complete sentences of 15 to 35 words).

☑ Ensure that each stage of the argument progresses from major premise (law) to minor premise (facts), followed by refutation of counterarguments. The dialectic engagement with opposing views is important at each stage.

☑ Prepare multisentence (“deep”) issue statements of up to 75 words apiece. Arrange the sentences syllogistically. They must be self-explanatory and fully comprehensible on a single reading to someone not involved in the case.

☑ These two steps can be done in a conference room at a whiteboard. All participants work in silence at first (for up to 15 minutes at a stretch) and then together.

SEPT. 15–14

☑ Write case briefs for the five most important precedents that bear on your argument. Meanwhile, keep researching.

SEPT. 13–9

☑ Read and reread the record. Reflect. Brainstorm. Take notes on the record, categorizing record citations according to the points you want to make.

☑ Research the law with tenacity and ingenuity. Try to “get” the arguments.

EARLY SEPTEMBER

☑ You’re retained to work on an appellate brief, which will be due Sept. 25.

☑ Discuss the matter in great detail with the trial lawyers. Come to an understanding of why they think they should win on appeal.

So that’s one version of my checklist for a big case. You can easily scale it down. Why think about the chronology in reverse? That’s the only way you’ll allow sufficient time for each stage.

One thing you might be curious about is why the statement of facts gets written only after the argument. Some lawyers would write it first. The danger there is that you will include material that doesn’t in some way illuminate the issues to be decided. You must rigorously exclude tangents and anything else that doesn’t contribute to the argument. One way to improve on that score is to write the statement of facts last. This method will also help you avoid arguing there. Even though all appellate rules say don’t argue in your statement of facts, lawyers routinely do it—to their clients’ disadvantage.

As you know, brief-writing involves many moving parts. Having a checklist will ensure that you and your team are at your best.

BRYAN A. GARNER, president of the Dallas-based company LawPro Inc., is the author of many books, including The Winning Brief and The Winning Oral Argument. His two most recent books are Garner’s Modern English Usage and The Chicago Guide to Grammar, Usage, and Punctuation.
What’s Your ID?
Program helps profs teach students how they can be the lawyers they want to be
By Stephanie Francis Ward

Legal education is more than teaching students how to think like lawyers, Neil Hamilton says: They should graduate with a sense of how to act like one, too, in a way that works for them individually.

As an ethics professor at the University of St. Thomas School of Law in Minneapolis, Hamilton has developed a professional identity curriculum to...
help students think about what they might want from careers, focusing in part on what they can do during law school to have rewarding work after graduation. And each summer the school’s Holloran Center sponsors workshops for other law school professors about teaching professional identity formation.

“When we talk about professional identity, it’s not just about being rational and analytical. It’s also about holistic engagement, and how you build relationships with clients and others in the legal system based on trust,” says Hamilton, who co-directs the Holloran Center, which focuses on legal ethics.

For the most part, law schools use the curriculum during the first year. At St. Thomas, which refers to the classes as the “roadmap process,” the learning includes personality assessments. Students meet with career coaches to discuss what sorts of careers interest them and how they can start pursuing that work in law school. Successful lawyers come in to talk about personal learning experiences, and many mention law school. Successful lawyers come in to talk about personal learning experiences, and many mention problems they encountered.

“Our students hear stories about people making mistakes, owning them and overcoming them,” says Hamilton. That’s unlike more traditional law school courses, he adds, where students are taught they should never make mistakes—and if they do, it could be the worst thing that ever happens to them.


GAINING GROUND

Not everyone is on board with professional identity courses, Hamilton admits, but many law professors are warming to the idea as it’s increasingly seen as a way to teach social intelligence, which seems to bring more job opportunities for young lawyers. So far, 124 faculty and administration members from 28 law schools have taken the classes.

Out of St. Thomas’ law school class of 2012, only 59.6 percent had full-time, law-related jobs nine months after graduation. Out of the class of 2015, 79 percent had full-time, law-related jobs after 10 months. Both groups took roadmap-related courses.

Jerry Organ, a St. Thomas professor and co-director of the Holloran Center who teaches some of the courses, knows why. “The difference is that the class of 2015 worked through the roadmap for employment within their professional responsibility course,” he says, “and we helped coordinate better the messaging among the various courses directed toward professional formation and the search for meaningful employment.

“We had made an assumption that all the things we were doing would translate into what it means to be a lawyer and how to get a job,” he says. “We realized we needed to do more to help them connect the dots a bit.”

TEACHING BALANCE

Santana Royer, a student at the University of North Dakota School of Law, took a professional foundations course taught by Michael McGinniss. Before the class she thought she needed to memorize every case in all of her books. All the studying was making her dizzy, she realized during the course, and her personal relationships felt the strain.

“I learned that I needed balance, and there’s a way to get good grades in law school and have time for yourself,” says Royer, who expects to graduate in 2018. “The class taught us how to be self-reflective and make sure that we check in with ourselves, which will be super helpful when we’re actually lawyers.”

Students in McGinniss’ course work in small groups discussing things like client relationships and writing reflective essays. Lawyers, he says, all have setbacks, and he hopes his students have less anxiety about that after they take his course. He helped coordinate the curriculum in 2014, and the next year went to the Holloran Center to share his experiences with other professors.

“I want [students] to develop a habit of engaging in self-reflection before they act,” says McGinniss, who previously served as the Supreme Court of Delaware’s disciplinary counsel. “This includes recognizing when a particular decision is, in fact, a significant one, and warrants taking a step back to self-reflect for some time before forming a judgment about how to act.”

During his course, it’s not uncommon for students to change their career plans. That includes Royer, who came to law school thinking that she’d do family law. A former domestic violence advocate, she now wants to do nonprofit work. Inspiration came from a legal aid lawyer who spoke to her class.

“You really need to do what you are passionate about,” Royer says. “Yes, you want to have money and be comfortable, but you want to go to work every day not thinking of it as just another job. You want to go to work knowing that what you are passionate about is sincerely helping people.”
Can It Be? Fun CLE?
Putting entertainment into lawyer education programs

By Richard Acello

ANYONE WHO’S EVER been in a law school lecture hall knows the feeling: Your foot has fallen asleep and your mind is wandering to a sunny beach when you realize your coffee cup is empty and drinking more isn’t necessarily going to spark your interest in the lecture at hand.

It doesn’t stop after law school. To retain their licenses, most lawyers must take continuing legal education classes, which are often anticipated with the same enthusiasm as going to the dentist. But firms need their lawyers to stay current, so here are a few strategies being used to lure lawyers to yet another class.

TURN IT INTO A GAME
At Chicago-based Much Shelist, the business development and professional development teams collaborate on cross-office education among different practice groups. Their lawyers might wind up in a game of Construction Karaoke, Bankruptcy Jeopardy or a Halloweenish series on death and taxes—because what could be scarier than estate planning?

Meanwhile, “The Buzz About Our Medical Marijuana Practice,” a summer happy hour session, introduced the firm’s new medical marijuana practice, with “plenty of munchies.” Much Shelist has about 30 attorneys, with 10 or more new attorneys coming aboard annually, so CLE is an important part of the firm’s attorney development efforts, says Jennifer Gallinson, director of attorney recruitment and professional development.

“We want to give our lawyers an opportunity to learn from one another, and learn more about our different practice areas,” she says.

This might take the form of a “lunch and learn” or a 4 p.m. mixer, but the goal is the same—to “get people from behind their desks and to get to know each other in our various practice areas,” Gallinson says.

“We’re business attorneys, so if our client describes a problem, we don’t want people saying, ‘I’m just a litigator,’” she says. “We want them to be able to spot the issues and be better able to identify the client’s problems.”

Much Shelist is drawing about 30 attorneys for each program, which Gallinson says is “very good considering CLE attendance can be hard to come by. Attorneys are competitive by nature, and so harnessing the competitive spirit can make learning fun.”

NO SHOW? NO PROBLEM
Steve Gluckman is a legal learning specialist and CEO of Law Firm Elearning in Bethesda, Maryland, and Toronto. Gluckman says he works with “dozens of law firms” to create on-demand programs lawyers can digest at their own pace without having to be any place in particular.

“It’s getting harder and harder to get people to come to live programming,” Gluckman says. “I remember putting on lunch programs with a pastry chef to get people to come.”

Gluckman says his programs feature bite-size learning. “We try to chunk out the learning, try to divide it up and think outside the box, or outside the hour program.” Participation can be tracked by including an intermittent pop-up window that requires the user to click within a certain amount of time.

“We can then calculate how many of the pop-ups were clicked by the user,” he says. “If it’s a high-enough percentage, we’ll go ahead and record that they completed the module.”

“Finally, we can include a ‘knowledge check exercise’ to make sure they understood the material.”

TURN IT INTO AN EVENT
Stephanie Ball, the Los Angeles-based director of attorney development and recruiting for Best Best & Krieger, is having success with an author series highlighting books that have a hook into a CLE subject.

Her recent lunch program featuring Los Angeles County Superior Court Judge John Kralik, author of 365 Thank Yous: The Year a Simple Act of Daily Gratitude Changed My Life, drew record attendance.

“We have 210 attorneys, and for this program we had 96 turn out. So to get almost 50 percent of the firm attending a CLE—that’s fantastic.” She says Kralik’s book is not only about his personal journey, but about the importance of ethics and civility in the courtroom.

Here are a few of Ball’s rules of CLE success:

• “It has to be something more than just pounding rules and regulations. It’s got to be imaginative and creative. The invitation should be innovative because if you don’t have a hook, they won’t come and find out how great your program is. I included a YouTube video.”

• “You have to make sure how you’re doing the presentation is something different.” In the case of Judge Kralik, his personal story made the class about him and how his story relates to any attorney’s sense of ethics and personal growth.

• “Give them a prize.” In this case, it was a book signed by the author. And here’s a hint: Some educational book publishers will provide a hefty discount for bulk purchases. Authors are likely to be receptive, too, since they’re getting publicity for their book.
Hacking the Law
Does learning to code make you a better lawyer? By Jason Krause

When V. David Zvenyach was general counsel for the Council of the District of Columbia, a local activist named Tom MacWright asked for help making the Code of the District of Columbia accessible to the public online. Zvenyach thought it was a simple request—until he took a look at the actual law, which was nearly impossible to work with due to copyright and formatting complications.

It turns out that making the law accessible online demands more than just publishing the words as written. Computers must be able to index the text, make connections, and understand hierarchies and interrelationships between the sections. MacWright asked me for the data underlying the laws, and I spent months trying to understand what he meant,” Zvenyach says. “I had to learn about the difference between the underlying structure and presentation of the law.”

The result was the website at dccode.org, which is maintained by a team of volunteers, including MacWright and Zvenyach. The site allows citizens to search and link to D.C. laws, and it can be updated and amended to reflect changes to the laws. (It also got Zvenyach named an ABA Journal Legal Rebel in 2015.)

To make this possible, Zvenyach taught himself basic computer programming, and he has been hacking the law ever since. He has created more apps, including @SCOTUS_Servo, a Twitter account that sends alerts when the U.S. Supreme Court makes changes to its official opinions after they are handed down, something Zvenyach says was difficult to spot otherwise.

“Before I learned to code, I would have been a grump about the state of affairs and moved on,” he says. “But in the new world, I wrote 70 lines of code in one evening that does the job.”

AUTOMATING TASKS
Learning to code can be portrayed as an essential job skill for all Americans, advocates say. But do lawyers need to learn it?

“Learning to code could be a nice thing to have in your tool belt, but I don’t know that knowing how to code is necessary,” says Bill Speros, a Cleveland-based attorney and expert in the use of machine learning and technology in litigation. “As an e-discovery attorney, I can see how it can be useful. But for the most part, knowing how to code is several steps removed from anything I need to do in litigation.”

Paul Ohm recently began teaching a course called “Computer Programming for Lawyers” at Georgetown University. The goal is to help practitioners and techies communicate, collaborate and automate legal tasks.

“Unfortunately, lawyers and computer programmers are like foreign cultures,” Ohm says. “Unless you speak the language, you need a native to guide you through.”

Ohm bristles at the suggestion that learning to code will be useful to attorneys as an intellectual exercise, but not for day-to-day use in their practice. He believes lawyers who code can use basic programming to automate legal tasks.

“What we’re teaching is meant to be a practical lesson, not a philosophy,” he says. “We’re teaching basic computer coding skills that they can use in a profession that is increasingly data driven.”

For example, basic programming skills make it possible to automate the process of researching, collecting and assembling case law. Coding lets lawyers search large collections of text-based data, Ohm says, and helps lawyers analyze and marshal data as evidence. At the completion of his class, students should be able to write simple-to-moderately-complex computer programs to automate tasks that would be difficult or impossible to perform without programming skills. Proponents say learning to program might make a better lawyer or an engineer who understands the law. Or perhaps not.

As Zvenyach, now a legal hacker with the General Services Administration’s 18F agency, points out: “I am an attorney and a software engineer, but I am now doing a little of neither.”
PRACTICE MAKES PROFIT

WHERE YOU HANG A SHINGLE CAN AFFECT THE JINGLE

THIS SUMMER THE ABA, along with Glassdoor, Salary.com, LawyerEdu.org and the National Association for Law Placement, published statistics about attorney salaries by practice area. And the makers of Practice Panther law practice management software combined the data to create this list. They suggest it might be useful to law students debating which practice area to choose. (It can also bring joy or jealousy to those already in a certain area.)

OTHER CATEGORIES

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FIND LINKS TO MORE DATA AND OTHER PRACTICE STATS AT ABAJOURNAL.COM/LAWBYPTHENUMBERS.
Champion Collaborations

The ACC honors company and law firm efforts to increase value

By Richard Acello

"WE CAN'T GO ON LIKE THIS" is an oft-heard expression of trouble on the horizon, but it took the financial crisis of 2008 to force meaningful changes in how corporate counsel work with outside firms. That year the Association of Corporate Counsel seized the initiative with its ACC Value Challenge, which honors law departments and outside law firms for promoting adoption of management practices that control spending.

In 2012, the association introduced the ACC Value Champions. In the recently completed fifth annual competition, 12 winners were selected from a pool of 57 nominees. Winners were cited for increasing client satisfaction, enhancing the value of legal services spending, reducing turnaround times and costs, and improving results. It also created global legal staff rotation programs and used technology to allow access to legal information in real time.

The ACC says winners prove corporate counsel can learn from one another in implementing the challenge's directives. And outside firms have embraced the idea of collaboration with corporate counsel to help their clients reduce litigation under alternative fee arrangements, including fixed fees and success fees.

"We're pleased to say that over the last five years,... we've been able to integrate the lessons that the Value Champions provide into our annual programs, so we have corporate counsel telling their peers, and the message spreads," says Amar Sarwal, ACC vice president and chief legal strategist.

Sarwal also credits the emergence of legal operations executives, who are responsible for internal staffing, budgeting and management of outside counsel.

LESS LITIGATION

Among this year's winners was Indianapolis-based Hhgregg Inc., a national chain selling electronics and appliances, and its Atlanta-based law firm Ogletree Deakins, hired in 2013. The firm sought to prevent lawsuits by analyzing past litigation and demonstrating the need for further training or policy changes.

Ogletree Deakins slashed response times from eight or nine days under old firms to minutes. Litigation dropped by 74 percent, claims by 60 percent, and Hhgregg saved 44 percent on outside legal spending.

Chuck Baldwin, managing director at Ogletree Deakins. “The idea is to bring worker issues to the company’s attention sooner so disagreements don’t become lawsuits.”

And Hhgregg was ready for a new approach.

“I was here 5½ years,” explains Charles Young, the company’s chief human resources officer. “We had been with the same [law] firm for 30 years, so we thought it was important to look at our cost drivers and other service options.”

The corporation put out a request for proposals and selected Ogletree Deakins. “They are helping us to reduce litigation. That’s why they got the business, and they’ve done a stellar job,” Young says.

The company has had no individual litigation case in nearly two years, Baldwin says. It also instituted a mandatory arbitration clause for new employees. Baldwin says existing employees were given the right to opt out of the arbitration process and remain employees.

Other firms honored for their work with outside counsel were Philadelphia-based Axalta Coating Systems with Hunton & Williams of Richmond, Virginia, and Greenwood Village, Colorado-based Red Robin with Bryan Cave, which has its headquarters in St. Louis.

A complete winners list is on the ACC website.
HIGHLIGHTING INNOVATION AND ENTREPRENEURSHIP DURING A CRITICAL TIME OF CHANGE IN THE INDUSTRY OF LAW

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PHOTOGRAPHS BY EARNIE GRAFTON; SHUTTERSTOCK

HIGHLIGHTING INNOVATION AND ENTREPRENEURSHIP DURING A CRITICAL TIME OF CHANGE IN THE INDUSTRY OF LAW
We have a leader of in-house legal operations; a law librarian whose census shows how public data is kept from the public; an entrepreneur who developed both GovLab, which seeks to change government through transparency and collaboration, and MeWe CoInspect, which helps food trucks comply with government regulation.

Add in the lawyer who helped turn technology-assisted review into a buzzword—twice—and a professor inspired by vagueness in law to develop software that finds contract ambiguities. This year, we even have one of the ABA’s own, a past president able to achieve some hard-won successes in model regulatory objectives for nontraditional legal service providers.

By Terry Carter, Lorelei Laird, Victor Li and Stephanie Francis Ward
OPENING A WINDOW ON CLOSED DATA

Sarah Glassmeyer has spent the past year as a research fellow at the Harvard Library Innovation Lab studying how government publishes law. And how little is available to the taxpayers who finance it.

Her work includes a census of 50 state regulation websites and 105 court websites. And her study found at least 14 barriers to accessing legal information, including how the information is stored and cataloged and the availability of bulk downloads.

“These barriers exist for both the individual user of a resource for personal research as well as an institutional user that would seek to republish or transform the information,” she notes in her report. “At the time of the census, no state provided barrier-free access to their legal information.”

“I really hope that in 20 years, everything will be digitally published for free,” says Glassmeyer, 40, a law librarian by trade. On her website, she also describes herself as a lawyer, educator, “free-law enthusiast, advocate of justice, social media aficionado, emerging tech geek, raconteur and bon vivant—and coffee addict.”

Her research, available online for free, found that some states restrict downloads of codes and opinions, and include a copyright notice with posted information. “I assume state legislatures see this as a moneymaking opportunity,” Glassmeyer says. “They think that if they copyright it, they can sell it to Westlaw.”

For the most part, Glassmeyer says, she hated law school: She disliked both the competitiveness and the teaching style; however, she couldn’t see herself practicing law but wanted to do something that helped people. So she got a master’s degree from the Indiana University School of Library and Information Science in 2005.

“Library science is the happiest accident of my life,” she says. “I love working with self-represented litigants, and a lot of what I do is what I would have done as a legal aid attorney, without the commitment and being weighed down too much by the actual practice of law.”

—Stephanie Francis Ward

“I REALLY HOPE THAT IN 20 YEARS, EVERYTHING WILL BE DIGITALLY PUBLISHED FOR FREE.”

—SARAH GLASSMEYER
Digital assistants that can handle legal inquiries like a super-Siri, answering your spoken question with a response with case law links, would never make money. That’s what many people told computer scientist Jimoh Ovbiagele—mainly because attorney incomes depend on being paid for legal research.

Then the Toronto Globe and Mail wrote a 2014 article about Ovbiagele’s project, which he and other University of Toronto students made using IBM’s Watson cognitive computing system. And after that story ran, NextLaw Labs, an independent subsidiary of the legal giant Dentons, became an investor in what is now known as Ross Intelligence.

When Ross got funding, Ovbiagele left college and moved to California, and the company is now headquartered in San Francisco. In May, Baker & Hostetler announced it would be licensing Ross Intelligence to use in its bankruptcy practice. Other law firm subscribers include Latham & Watkins and Wisconsin’s von Briesen & Roper.

Friends says Ovbiagele, 23, is a genuine and curious listener. That may be why he saw room for Ross in the law firm market when others did not. To him the problem seemed apparent—clients need legal research, but they increasingly can’t or won’t pay for it.

And he’s seen firsthand the problems individuals have paying for legal services. When Ovbiagele was 10 years old, his mother, a nurse from the Philippines, wanted to divorce his father, a Nigerian immigrant. But she couldn’t afford the legal fees, and the two are still married, although they lead separate lives.

Ovbiagele doesn’t see people using Ross as a way to get legal help without hiring a lawyer, but he does think the service will allow legal services to be delivered at a more affordable price.

“Justice isn’t accessible for everyday people,” he says. “Although there are fewer positions for lawyers today, 80 percent of the people who need legal representation can’t afford it. Technology will be an opportunity for small bands of lawyers to address this.” —S.F.W.
When a drafting error made it all the way to the U.S. Supreme Court, Gurinder “Gary” Sangha started thinking.

In *King v. Burwell*, the fight was over the language Congress used when it passed the Affordable Care Act. The law referred to “an exchange established by a state,” so the plaintiffs argued that no tax credits were available via federal exchanges. But without those tax credits, the whole system could collapse.

“I just thought, ‘Wow, I can’t believe that millions of Americans could lose their health care because of a simple error by a staff attorney,’” says Sangha, 37.

Sangha is a lecturer at the University of Pennsylvania Law School and a fellow at CodeX—the Stanford Center for Legal Informatics. That gave him access to both universities’ computer science and linguistics departments. So he talked to some researchers in computational linguistics, which uses computers to solve problems related to human languages. They said they could help.

That was the genesis of Lit IQ, the company Sangha founded in 2015. Lit IQ’s software permits attorneys to automatically find ambiguities that could cause problems. The company’s internal research found about a quarter of commercial disputes include a dispute over contract language.

“There’s a big difference between litigating over a document that’s airtight and litigating over a document that’s full of loopholes and inconsistencies,” Sangha says.

Lit IQ is still a young company; it launched its software early this year and has been raising money through venture and angel capital. But it’s not Sangha’s first legal technology startup. His previous venture, Intelligize, allows users to search SEC filings, corporate documents, transactions and other documents useful to corporate attorneys. It’s been successful enough—that Sangha was able to step down at the end of 2013.

Shipra Dingare, lead engineer at Lit IQ, says the experience is paying off.

“It’s nice when the person in the driver’s seat is someone who really knows what they’re doing,” says Dingare, who trained as a barrister in the United Kingdom. “He knows about getting investment. He knows what investors are looking for. He knows what’s going to be compelling” to law firms.

—Lorelei Laird
GOOGLING UP IN-HOUSE EFFICIENCY

These days, it seems as if Google tracks absolutely everything about everyone. In fact, if you Google “Google tracks everything,” you get about 37 million results. So it might be shocking to learn that, within the last decade, Google’s ability to track data stopped at its own doorstep—or at least at the front door of its legal department.

Mary Shen O’Carroll remembers that when she took over Google’s legal department in 2008, she was surprised her new department was, essentially, in the dark when it came to data and analytics.

“Running an in-house legal department was worldly different than running a law firm,” says O’Carroll, 40, who joined Google after five years at Orrick, Herrington & Sutcliffe, where she served as profitability analysis manager. “Law firms track everything and know what everything costs. They have very good data and analytics. On the other hand, we had very little to no data on the legal department side. We had no visibility on what we were spending.”

Some of her changes involved putting in basic processes like having standard engagement letters and billing guidelines, items she calls “low-hanging fruit.” She instituted Google’s Outside Counsel Dashboard, which allows Google lawyers to see real-time information relating to their outside counsel spending, and includes an e-billing system. Her LinkedIn profile describes developing “processes and policies resulting in millions of dollars in annual savings.”

“It took a long time to become this fairly mature legal department compared to others,” says O’Carroll. “But I think we’ve succeeded—and even paved the way for others after us.”

O’Carroll is passionate about collaboration, both within Google and amongst the legal department field. She sits on the leadership team of the Corporate Legal Operations Consortium, an organization that brings together legal operations professionals to exchange ideas on everything from best practices to innovation.

As Susan Hackett, CEO at Legal Executive Leadership, points out, collaboration like the consortium advocates isn’t something lawyers are known for. “Mary believes in the power of teams to exponentially multiply results delivered,” Hackett says, “so she’s spent a significant amount of time helping them to leverage that power by driving communication, collaboration and engagement strategies throughout the department.”

—Victor Li

“RUNNING AN IN-HOUSE LEGAL DEPARTMENT WAS WORLDLY DIFFERENT THAN RUNNING A LAW FIRM.”

—MARY SHEN O’CARROLL
A few years ago, J.J. Prescott went to court to deal with a traffic ticket. The University of Michigan Law School professor waited four hours to have a very short informal hearing. “Imagine if I lived in a rural area where the courthouse was two hours away,” he says. “And as a result, I had to miss an entire day of work to go to court, which, if I were paid by the hour, would equate to $100 or more in lost wages. All of that aggravation, all to come over to have that conversation. "I can’t believe that in 50 years, that’s how our courts will operate.” They might not, and Prescott’s work could be a reason why. The U-M Online Court Project, which began with his collaboration with former student Ben Gubernick, created an online platform allowing citizens to resolve smaller legal matters—civil infractions, plus minor warrants and misdemeanors—online. Users submit their side of the story and other information, answer questions and eventually hear from a decision-maker.

Prescott, 42, says at least half of court cases are minor matters that could be resolved this way: “It can happen the way you request an increase in the credit limit on your credit card—at 11 p.m. from your couch.”

The project was in the beginning stages when Prescott got the ticket. With a grant from the University of Michigan, he had a prototype made and convinced the Michigan state court administrative office to give the project access to court data. Prescott’s startup Court Innovations is collecting data on public response, but early feedback is good. Court Innovations heard from one user who appreciated the platform because she works 12-hour days every day the court is open.

Court Innovations CEO M.J. Cartwright was brought on early to lend some business expertise. She appreciates Prescott’s willingness to let her take the lead in those areas. “He really appreciates that you bring something to the table and he brings something to the table,” she says. —L.L.
To borrow a cliché, insanity is doing the same thing repeatedly and expecting a different result. And in that vein, Maura Grossman, a clinical psychologist-turned-attorney, believed it was folly for attorneys to continue using traditional means of conducting document review.

Grossman, 58, joined Wachtell, Lipton, Rosen & Katz in 1999 and decided to zero in on e-discovery after the new Federal Rules of Civil Procedure were enacted in 2006, the year she became of counsel at the firm.

“How do you handle large volumes of [electronically stored information] where there are only one or two associates on a matter and you’re not big on outsourcing to contract attorneys?”

For her, the answer lay with technology.

In 2009, Grossman crossed paths with Gordon Cormack, a professor of computer science at the University of Waterloo. Grossman thought that his methods for separating spam messages from regular email could be adapted for e-discovery.

“I saw what he had done with his spam filters and algorithms on a simulated legal task and was struck by how accurate they were,” Grossman says. “I approached him and asked what was in the secret sauce.”


In 2014, the two published another paper, “Evaluation of Machine-Learning Protocols for Technology-Assisted Review in Electronic Discovery,” dubbed TAR 2.0. They found that attorneys get more accurate results from TAR if they employ “continuous active learning,” whereby lawyers continue to tweak and adjust the algorithm during the review process.

The duo, now engaged to be married, are both at the University of Waterloo; Grossman has left Wachtell for her own e-discovery consulting firm.

John Tredennick, founder and CEO of Catalyst, credits Grossman for following a rigorous scientific approach to produce results that showed, quantitatively, how inefficient and inaccurate the traditional method of e-discovery could be.

“To me the essence of rebel is that you challenge a major segment of the legal industry,” Tredennick says. “She wasn’t alone, but she was one of the few that actually got up and said ‘the emperor has no clothes’ to the masses and proceeded to show them how to fix the situation. How often do people do that?”

—V.L.
David Colarusso taught high school physics for six years and co-founded a software business before going to law school, so it isn’t a stretch that he’s turned out to be a data scientist at law.

His first job out of law school in late 2011 was as a public defender in Massachusetts, immediately handling arraignments and bail hearings and soon trying cases. He’s still at the Committee for Public Counsel Services, which handles representation for indigent criminal defendants statewide. But he doesn’t take on cases anymore, though he sometimes analyzes and maybe tweaks huge batches of cases to improve the agency’s work—and justice itself.

Colarusso, 37, is a hacker. He’s happiest when doing a deep dive into an information system, finding problems and creating fixes. He did just that in the wake of the state drug lab scandal in which a chemist had falsified tests of drug samples, tagging them positive, in tens of thousands of cases. The discrepancies were discovered in 2012, yet the number of tainted convictions still is unknown.

In 2014 the CPCS put Colarusso on temporary duty to sort through the mess and determine how many defendants were affected. Temporary assignment morphed into full time in 2015, and he works as part of the agency’s IT team—and its only lawyer.

His official title was data analyst, but he recently succeeded in getting it changed to data scientist because he applies data, mathematical formalism and experimentation to the field of law. Colarusso’s combination of skill sets and interests is unique. He graduated from Cornell University in 2001 with a self-designed major in physics and science education via presentation in popular media. Then came a master’s degree in education from Harvard University, after which he began teaching high school physics and astronomy.

“I saw the skills he had, especially around data science, and thought the agency needed someone on IT who is a lawyer and can better understand the agency’s processes,” says Daniel Saroff, the agency’s CIO since 2014. “I have good technical people, but that doesn’t mean they understand what it takes to defend clients.”

—Terry Carter
As is her way, Deborah Z. “Debbie” Read used the five months from the time she was elected managing partner until beginning the job in May 2012 for deep-dive research and analytics. She read everything she could find in the Thompson Hine library on problems facing law firms, particularly on the heels of the 2008 recession.

“As I was preparing for this role,” Read says, “it became clear that the way law firms deliver services was not in line with what clients want in an economic downturn.”

A tax lawyer specializing in nonprofits (with clients such as the Rock & Roll Hall of Fame), Read, 59, is—by professional nature and instinct—cautious. But she was confident enough to take what some saw as a big risk as soon as hand touched helm.

At the next all-partners meeting of the nearly 400-lawyer, seven-office, 105-year-old Cleveland-based firm, Read sketched out the beginnings of fundamental changes in how they would operate. That redirection in some ways reflects her nature, in that it is analytical in practice and geared to efficiency.

With its own special touches and tools, Thompson Hine began retooling and changing approaches to practice, and in 2014 launched SmartPaTH (the “TH” is the firm’s initials), an institutional and structural framework for the firm and its work based on four prongs:

- Legal project management (the most important).
- Value-based pricing.
- Flexible staffing.
- Process efficiency.

Read had pored over several years’ worth of the consulting company Altman Weil’s annual Chief Legal Officer Survey, and she saw the same results year after year: a median score of 3 on a scale of 10 in answers to a question about the willingness of law firms to change delivery models rather than simply lower their rates.

“Our industry wouldn’t move off of 3,” says Read. “To me that is an opportunity. We can do better than 3 for sure.”

In March the firm was among the top seven in the country cited for innovation as “client service strategists,” in a survey of corporate counsel by the BTI Consulting Group.

“THE WAY LAW FIRMS DELIVER SERVICES WAS NOT IN LINE WITH WHAT CLIENTS WANT IN AN ECONOMIC DOWNTURN.”

—DEBORAH READ
“IF WE DON’T DO SOMETHING ON THIS JUSTICE GAP, WE’RE PUTTING AT RISK OUR ABILITY TO BE A SELF-REGULATING PROFESSION.”
—WILLIAM HUBBARD
Food service safety and revamping government may have little in common, but they show up as just part of the résumé for lawyer-entrepreneur Manik Suri.

A co-founder of the Governance Lab, which is out to improve how government works through “open and collaborative problem-solving,” Suri now leads MeWe, a company with an app focused on food-service regulation and compliance through mobile applications. His experiences as a White House intern showed him that government could be more efficient, and technology would play a large role. “We saw social and commercial technology that changed the way we do everything,” says Suri, 33, a 2011 White House intern with the National Economic Council. “And in government, we saw the opportunity to do more in that space.”

Suri says his year with GovLab inspired MeWe: “I saw an opportunity to use technology to improve government at the other end of the spectrum—hyperlocal—specifically focused on local government inspections.”

The MeWe CoInspect app, launched in 2014, is a tool for quality and safety inspections. It reminds workers about rules in real time, helps perform audits and line checks, and offers simplified code definitions, as well as reference pictures. “With the app, employees can take photos and make notes that are time-stamped, so it’s easier to see what is actually being done, and how well it’s being done,” Suri says.

“He’s deeply intellectual about how he approaches a problem, but he always has a plan to figure out what the real and concrete things are that can be done for solutions,” says Andrew Crespo. A criminal law professor at Harvard Law School, he and Suri lived together as undergraduates.

“He’s always trying to learn everything he can about each new challenge he encounters, and he does that by seeking out people and asking them questions in a way that’s really inviting,” says Crespo. “He’s a great conversationalist.”

—S.F.W.
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Exam passage rates have fallen, but battles over why and what it means are roiling legal education

**Bar Fight**

**By Mark Hansen**

David Frakt is a lawyer, a lieutenant colonel in the Air Force Reserve and a former law professor who has studied the relationship between LSAT scores, undergraduate grades, law school performance and bar passage rates. But he may be better known as the candidate for dean of the Florida Coastal School of Law in Jacksonville (which had a July 2015 first-time bar pass rate of 59.3 percent) who was asked to leave the campus in the middle of his presentation to faculty and staff. He had dared to suggest that the school was risking its accreditation by admitting too many students with little or no chance of ever becoming lawyers.

Frakt concedes that some applicants with modest academic qualifications can excel in both law school and practice, but he says there’s a point below which a candidate’s aptitude for legal studies and legal reasoning is highly predictive of failure. “However dedicated and skilled law professors and academic support staff may be,” Frakt maintains, “there is only so much they can do with students with no real aptitude for the study of law. They are not miracle workers.”

Frakt was shown the door in 2014, which may seem to be old news. The problem is that much of current bar passage news isn’t much different. To be plain, it has been lousy:

- The mean test score on the February administration of the Multistate Bar Examination fell significantly for the fourth consecutive time, down 1.2 points from 2015 to a dismal 135—it’s lowest score since 1983.
- February’s decline followed an even bigger drop in the average score on the July 2015 administration of the exam, which fell 1.6 points from July 2014 to 139.9, its lowest level since 1988. (July and February results are not comparable because the test pool is smaller and has more repeat test-takers.)
- And last year’s poor showing followed the single biggest year-to-year drop in the average MBE score in the four-decade history of the test, from 144.3 in 2013 to 141.5 in 2014.

The numbers don’t lie, but proffered explanations for the descent in bar exam scores leave serious questions about what’s happening with law school admissions, legal education and even the quality of legal representation in the future.

The ongoing downward slide in MBE scores comes as no surprise to Erica Moeser, president of the National...
Conference of Bar Examiners, the Madison, Wisconsin-based nonprofit that developed and scores the 200-question multiple-choice test, part of every state’s bar exam except Louisiana’s.

Moeser says the cause of the current slump is “deceptively simple.” So simple, in fact, that she doesn’t know how anybody could think otherwise. It started, she believes, with the sharp drop in law school applications that began in 2011, when the job market for newly minted lawyers dried up, and would-be students—hearing horror stories about new graduates with six-figure debts who couldn’t find jobs—turned to other post-grad-degree fields such as business or medicine.

That was the same year, not coincidentally, that the ABA Section of Legal Education and Admissions to the Bar began requiring schools to disclose more detailed—and more meaningful—information about law graduate employment outcomes.

The drop-off in demand forced many schools to dip deeper into the applicant pool to fill their incoming classes, Moeser says, admitting students with weaker academic credentials—primarily Law School Admission Test scores and undergraduate grade point averages—than they had ever previously accepted.

Because LSAT scores correlate strongly with MBE performance, which accounts for half of the grade on most bar exams, Moeser says, it was almost inevitable that the students who started law school in 2011 (most of whom would have taken the bar exam in 2014) would perform worse than the graduates who sat for the exam the year before.

And since both enrollments and the LSAT profiles of incoming classes have continued to fall every year since 2011, she says, there’s no reason to think that bar pass rates will improve anytime soon.

“Why that would surprise anybody is surprising to me,” she says. “What would surprise me is if LSAT scores dropped and bar pass rates didn’t go down.”

THE DISSENTERS

But other legal education experts argue the relationship between LSAT scores and bar pass rates is anything but simple. There are those—including many law school deans, legal ed section officials and the Law School Admission Council, which administers the LSAT—who don’t subscribe to Moeser’s theory that a drop in the former necessarily leads to a decline in the latter.

While the council says the LSAT is a valid measure of certain cognitive skills important to success in law school, it insists the test should not be used to predict bar pass rates.

“The LSAT was designed to serve admission functions only,” according to one of its cautionary policies. “It has not been validated for any other purpose.”

And section officials say Moeser’s premise may well be true, but it has never been proven. While LSAT scores in general have some predictive value, they say, they can be way off with respect to some people. Besides, every state’s bar exam is different. And some schools are better than others at turning applicants
with low academic predictors into successful lawyers.

“Just because academic credentials and bar pass rates have gone down at the same time doesn’t mean that one caused the other,” says Bill Adams, the section’s deputy managing director.

And some law school deans say Moeser is flat-out wrong.

“The facts don’t support her premise that greedy law schools are filling their seats with unqualified students,” says Nick Allard, president and dean of Brooklyn Law School (which had a July 2015 first-time bar pass rate of 84.5 percent).

So goes the debate, while potential students, law schools and future employers watch and wonder: When will the descent stop?

A WARNING

Moeser says she never intended to become a lightning rod for the issues roiling legal education. She only wanted to warn deans about what she and her staff were witnessing when they tabulated the results from the July 2014 exam.

So she sent the deans a memo expressing her concern over the drop in scores and assuring them that the results, which had been checked and rechecked, were correct: “all [indicators] point to the fact that the group that sat in July 2014 was less able than the group that sat in July 2013,” she wrote.

The phrase less able struck a nerve with many deans, who demanded an investigation into the “integrity and fairness” of the test and the release of all data the National Conference of Bar Examiners had relied on for that less-able determination.

But Moeser rebuffed them: While she regretted using the term, she remained confident in the correctness of the reported scores.

Critics at first blamed the poor showing on a software glitch affecting test-takers in 43 states, who had trouble uploading their answers on the essay portion of the test the evening before they took the MBE. But Moeser said the NCBE’s research found no differences in the results between test-takers in jurisdictions that had used the software and those that didn’t.

When last year’s national mean score took another dip, critics blamed the addition of a seventh subject—civil procedure—to the exam beginning with the February 2015 administration. But Moeser once again rebuffed them, citing internal data indicating the seventh subject had no impact on test-takers’ performance. She also suggested that nobody should have been surprised to hear that the MBE now included questions on civil
“Whether other factors have contributed to the drop in bar pass rates remains an open question.”
—Jerome Organ

procedure, which has been part of every state’s bar exam for as long as anyone can remember.

Then critics began to question the content of the exam, contending that it doesn’t test the right things or that it doesn’t test things that are relevant to a lawyer’s daily practice. Some, including Allard, have even suggested doing away with a bar exam altogether.

But Moeser says the material included on the MBE has been put together by a team of volunteer experts and has been validated by a 2012 job analysis commissioned by the NCBE into what new lawyers say they do and what they need to know to do it.

And she wonders why anybody would suggest doing away with the exam, which she considers an indispensable consumer safeguard against unqualified practitioners.

“Why we would allow anybody to become licensed without an entry-level assessment of their abilities is beyond me,” she says.

ENTRY EXAM

For the vast majority of law school applicants, the LSAT is a hassle they must labor through.

LSAT scores are converted to a scale of 120 to 180 through a process known as equating, which adjusts for the difference in difficulty between tests. Every LSAT score is reported with a percentile rank, which reflects the percentage of test-takers scoring below a reported score based on the three-year-prior period. Score 180, the 99.9th percentile, and you’d beat 99.9 percent of all test-takers for the 2012-2015 test cycle. Score 152, and you would be in the 51st percentile.

Moeser has been tracking changes in schools’ first-year enrollment and the reported LSAT scores of incoming students in the bottom quarter of the class. Students at that level and below are most likely to struggle on the bar exam and to experience disappointment in the job market, she notes. They are also the students who are most likely to pay the full sticker price of their legal education: Students with higher scores are more likely to be courted with tuition discounts.

Her staff analysis shows no schools have been getting both higher LSAT scores at the top of the bottom quarter of new students and increased enrollment.

“The fact that there are no schools in that quadrant suggests there’s a problem,” she says.

Moeser believes her assessment has been vindicated by others, including Jerome Organ. He’s a law professor at the University of St. Thomas (bar pass rate of 83.61 percent) in Minneapolis who studies changes in law school demographics.

Organ has documented the decline in entering class credentials over the past six years, noting both a decrease in the percentage of students with LSAT scores above 160 and a corresponding increase in the percentage of students below 150. He says the percentage of high scorers has dropped from about 41 percent in 2010 to 32 percent in 2015, while the percentage of low scorers has risen from about 14 percent to 24 percent.

And for law schools, Organ’s research shows, the lowering pool means more schools have a lower average score for the entering class. The number of schools with about half their new students scoring 160 or more fell by more than one-third, from 77 in 2010 to 49 in 2015. And the number of law schools with a quarter of the entrants’ LSAT scores below 150 more than doubled, from 30 to 75.

The number 145 used to be quite a meaningful point in LSAT scores. Six years ago, Organ says, no law school had an entering class with a median LSAT score below 145, and only four schools had bottom-quarter LSAT scores below 145. Last year, there were seven schools with median LSAT scores below 145 and 23 with bottom-quarter LSAT scores below 145.

But though Organ says he generally agrees with Moeser, he believes that at least some of the decline in bar pass rates is due to the 2014 software glitch and that subject added to the MBE last year, which he says has arguably made the test tougher.

Derek Muller, a professor at the Pepperdine University School of Law (bar pass rate of 68.7 percent), now believes the decline in the quality of the applicant pool is largely responsible for the drop in bar exam scores. Once a doubter, he now worries that the July 2014 test results show the beginning of a troubling trend. Pepperdine’s first-time bar pass rate dropped nearly 3 percentage points between 2013 and 2014, and another 9 percentage points between 2014 and 2015, but was still just above California’s statewide average of 68.2 percent.

Because the graduating classes of 2016, 2017 and 2018 have had incrementally worse applicant profiles than the graduating classes of 2014 and 2015, Muller says, the news going forward is grim.

“Whether other factors have contributed to the drop in bar pass rates remains an open question,” he says, “but the continuing decline in student quality suggests this is not a one-time thing but a structural and long-term issue with significant consequences for legal education and the profession.”

REPORTS OF WAR

In a report released last year, Kyle McEntee, a dedicated advocate for legal education reform, tossed a bomb: “We cannot allow an increasing number of law students to enroll in a quest that is unlikely to succeed when the stakes are so high,” according to a report issued by McEntee’s watchdog organization Law School Transparency. “Declining LSAT scores of admitted students is the first indicator of a potential bar passage
disaster that won’t be evident for three years to the students who are affected and four years to the ABA.”

The report drew a strong rebuke from the LSAC. Its president, Daniel Bernstine, issued a press release saying the findings were based on “misunderstandings” and “demonstrably false” claims. Bernstine cited the LSAC’s test-use guidelines, which say the LSAT does not measure all of the attributes that can predict the probability of eventual bar passage or professional success. He also said the LSAC has long cautioned against drawing conclusions from such fine distinctions in LSAT scores. But McEntee, the Law School Transparency executive director, and Frakt, who chairs its national advisory council, defended their report, which they said had been very careful to explain that the risks of a low LSAT score could be offset by a strong academic performance or a law school’s ability to educate students with marginal academic predictors. And they challenged schools to publicly release the internal data they use in making admissions decisions.

“LST should not be criticized for pointing out uncomfortable truths,” they wrote in a response to Bernstine on the Faculty Lounge blog. “Until LSAC, or the law schools identified by LST as having problematic admissions practices, comes forward with actual data to refute the conclusions in the LST report, general attacks on the validity of the report should be taken with a large grain of salt.”

Salt is not what some educators are adding to the debate.

Brooklyn’s Allard says the deans have never received a satisfactory explanation from Moeser for the biggest drop in the average MBE score in recorded history. He also says Moeser’s assertion that the decline in student quality is the reason for the drop has never been proven and that she has no data to back it up.

He says there are much better predictors of law school performance than the LSAT, including undergraduate GPAs, law school grades and post-undergraduate work experience. And he insists his school’s students are “every bit as qualified” today as they ever were, if not more so.

But the bottom-quarter LSAT score of Brooklyn’s incoming class has dropped 10 points since 2010, from 162 then to 152 last year. And he had no ready explanation for why his school’s graduates’ first-time bar pass rate fell 9.5 percentage points, from 94 percent in 2013 to 84.5 percent in 2014, and another 3.5 points to 81 percent last year.

Allard says bar pass rates have always fluctuated. But he says his school’s pass rate has always been “very high” and remains “significantly above” the statewide average.

Instead, he says the overall drop in scores, both in New York state and nationwide, raises “fundamental questions” about whether the bar examination process “fairly and adequately” measures test-takers’ readiness to practice.

Allard suggests that both the LSAT and the bar exam have outlived their usefulness. And he says there’s no good reason why qualified graduates
of ABA-approved schools should have to take a bar exam, which is very expensive, takes too long to prepare for and provides a poor measure of competence.

“Not a single lawyer would tell you that it tests anything you need to know to practice,” he says.

Stephen Ferruolo, dean of the University of San Diego School of Law (bar passage rate of 72 percent), says he’s still waiting for Moeser’s explanation of the scoring of the 2014 exam. Not because he wants to use it against her, he says, but to help him do his job as dean.

His school’s first-time bar pass rate has fallen from 74.6 percent in 2013, but remains above the statewide average of 68.7 percent. But he says he won’t be satisfied until it reaches 80 percent.

He also says there’s a growing disconnect between what the bar exam tests and what lawyers do in their daily practice. That disconnect will become even greater next year, he says, when the California bar exam is reduced from three days to two, keeping a full day for the MBE but cutting the amount of time devoted to performance testing from six hours to 90 minutes.

“We have a problem that needs to be fixed,” he says. “And I think we should be working together to find a solution rather than pointing fingers at one another.”

Ferruolo says nothing should be off the table for discussion, including shortening the bar exam to a few core subjects, allowing students to take it after two years of school and eliminating it altogether.

ABA STANDARDS

The ABA’s legal education section, which accredits 206 law schools, uses bar passage rates to measure a law school’s compliance with two accreditation standards: Standard 301 (the educational program) and Standard 501 (the quality of admitted students).

Standard 301 says that “a law school shall maintain a rigorous program of legal education that prepares its students upon graduation for admission to the bar and for effective, ethical and responsible participation as members of the legal profession.” Standard 501 (a) requires a law school to maintain sound admission policies and practices. And Standard 501 (b) prohibits a law school from admitting applicants “who do not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”

Factors to be considered in assessing a school’s compliance with the standard include the academic and admission test credentials of the entering class, the academic attrition, the bar passage rate and the effectiveness of the school’s academic support program.

Barry Currier, the ABA’s managing director of accreditation and legal education, says the accreditation process is not designed to make advance judgments about a school’s performance.

“Until a school puts these students through its program, we can’t possibly know how well they will perform,” he says. Some students with low academic predictors go on to become successful lawyers, he notes, and nobody wants to deprive anybody of the opportunity to try.

So the assessment process is set up to look back at how a school has performed over time with the students it admits: how many graduate, how many pass the bar, how many flunk out or leave for other than academic reasons.

The ABA re-accredits schools every seven years. The section also issues annual questionnaires the schools are required to complete. Big changes in the data are flagged

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The Bottom 10
Law schools with the most unemployed

These 10 law schools had the highest percentage of new graduates unemployed and looking for employment in 2015, 10 months after graduation. Bar passage rates show the percentage of 2014 graduates who passed the bar for the state in which their school was located and for all 2014 graduates who took a bar exam. Employment figures for 2015 show 59.2 percent of all new graduates got full-time, long-term jobs that require a JD degree.

<table>
<thead>
<tr>
<th>Law school</th>
<th>Percentage unemployed</th>
<th>Bar passage rate—state</th>
<th>Bar passage rate—total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Southwestern</td>
<td>30.55</td>
<td>66.05</td>
<td>56.08</td>
</tr>
<tr>
<td>Florida Coastal</td>
<td>28.36</td>
<td>73.1</td>
<td>61.24</td>
</tr>
<tr>
<td>Santa Clara University</td>
<td>28.31</td>
<td>66.05</td>
<td>60.66</td>
</tr>
<tr>
<td>Liberty University</td>
<td>26.23</td>
<td>74.61</td>
<td>62.79</td>
</tr>
<tr>
<td>Thomas Jefferson</td>
<td>26.14</td>
<td>66.99</td>
<td>49.05</td>
</tr>
<tr>
<td>University of San Francisco</td>
<td>24.7</td>
<td>66.94</td>
<td>64.29</td>
</tr>
<tr>
<td>Cooley</td>
<td>23.55</td>
<td>72.35</td>
<td>52.73</td>
</tr>
<tr>
<td>Pacific McGeorge</td>
<td>22.81</td>
<td>66.34</td>
<td>64.06</td>
</tr>
<tr>
<td>St. Thomas University (Fla.)</td>
<td>22.42</td>
<td>72.09</td>
<td>67.42</td>
</tr>
<tr>
<td>Charlotte</td>
<td>22.37</td>
<td>69.66</td>
<td>57.93</td>
</tr>
</tbody>
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for further review and may prompt an inquiry, he says.

All such inquiries are confidential unless a school is publicly sanctioned. But the section may be “in conversations” privately with some schools over their compliance with the standards. (Rebecca White Berch, chair of the section’s governing council, says more than half of all ABA-approved schools are responding to questions raised by data reported on their last questionnaires, but she hasn’t said how many of the questions are about admissions standards.)

Still, the section’s bar pass standard, by all accounts, leaves a lot to be desired. Critics say it is too lax and too riddled with loopholes to hold schools accountable for their admissions decisions. And in June, a Department of Education panel recommended the ABA be suspended from accrediting new law schools for one year.

In fact, only two schools, both in California, have been placed on probation for violating the bar pass standard in the past decade or so: Whittier Law School in Costa Mesa and Golden Gate University School of Law in San Francisco. Two other provisionally approved California schools—the University of La Verne College of Law in Ontario and Western State College of Law in Irvine—were denied full accreditation over low bar pass rates; both have since been fully accredited.

A law school can meet the standard by showing its first-time bar pass rate in three of the five previous years is no more than 15 percentage points below the average for ABA-approved schools in states where its graduates took the exam. Or it can show that 75 percent of its graduates who took a bar exam in three of the five previous years passed.

The section’s governing council, responding to widespread concerns over the nationwide drop in bar pass rates, is proposing to simplify and strengthen the standards.

Under the proposed new standard, a law school would have to show that 75 percent of its graduates who take a bar exam within two years of their graduation pass.

The council is also proposing to provide a new means of enforcing the requirement that a law school only admit applicants who appear capable of graduating and being admitted to the bar. That proposal would create a rebuttable presumption that a law school with an attrition rate above 20 percent (not including transfers) is in violation of the standards.

Both proposals, if approved by the council in October, would be reviewed by the ABA House of Delegates at the 2017 midyear meeting in Miami in February. If the House concurs, the changes would take effect immediately. The House can also refer the changes back to the council for reconsideration, but the council has the final say on any amendments to the standards.

DEFYING THE NUMBERS

Kevin Cieply is president and dean of Ave Maria School of Law (bar passage rate of 47.8 percent) in Naples, Florida, which had one of the lowest entering class LSAT profiles of any school in the country in 2014, including a 25th percentile LSAT score of 139. He says the school has since taken “significant and aggressive” measures to increase its LSAT profile, including launching an ambitious recruitment campaign, creating a new scholarship program for well-qualified applicants and appointing a new director of admissions steeped in experience at assessing and evaluating the academic potential of students.

Though Ave Maria has raised its median LSAT score five points in one year, its July 2015 first-time bar pass rate was down nearly 9 percentage points from the year before, and the lowest among 11 schools in the state. Florida’s statewide average was 68.9 percent.

Cieply says he expects bar pass rates will improve this year and next year, but doesn’t expect to see the full effect of the changes until 2018, when last year’s entering class will graduate.

“It’s not like flipping a switch,” he says. “It doesn’t happen overnight.”

Charnele Tate, who scored in the mid-140s on her LSAT, graduated from Ave Maria in 2014, passed the bar on her first try and now works as an assistant public defender in Lee County, Florida.

Tate thinks the LSAT is good only for predicting how somebody will do on an exam. And she says she knows people who did very well on the LSAT but flunked out of law school or failed the bar exam.

Tate has about $240,000 in student loan debt, which worries her, but she hopes to take advantage of the Federal Public Service Loan Forgiveness Program for people who work continuously in a governmental capacity and make 120 on-time payments for 10 years.

Still, she’s frustrated by the fact that many of her friends who didn’t go to law school are now making more than her, and she worries about what she will do if Congress does away with the loan forgiveness program before she puts in her 10 years.

“I try not to think about it, but it’s always in the back of my mind,” she says.

Vouching for Ave Maria’s graduates is John Schmieding, vice president and general counsel of Arthrex, a Naples-based maker of orthopedic surgical devices.

Schmieding has hired two of its students as interns, and
one Ave Maria graduate is now in charge of the company’s global products liability litigation. He has met a lot of lawyers in his 20-plus years of practice, but he says none could hold a candle to her. “They’re doing something right over there,” he says.

YEAR THREE

July’s bar pass results will begin trickling out this month, adding results to the debate over whether past declines were aberrations or the start of a worsening trend.

And, after five years of consistently bad news, things may finally be looking up for law schools. Total first-year enrollment, which had fallen 29 percent between 2010 and 2014, has essentially been flat for the past two years, dropping about 2.2 percent to around 37,000 between 2014 and 2015, ABA statistics show. And more than one-fourth of all schools raised their LSAT averages for the bottom quarter last year, including six schools with 3 percentage point increases, Moeser says.

And according to Organ’s analysis of application data as of early March, there may be an applicant pool of about 57,500 this fall, up about 5.5 percent from last year’s 54,500.

A Robert Half survey released in June found 31 percent of lawyers responding predicted their firms would add legal jobs in the second half of 2016. However, the previous year’s study had 29 percent of respondents predicting the same increase, and while the percentage of 2015 graduates employed in full-time, long-term, bar-passage required or preferred jobs was up slightly from 2014, the actual number of graduates hired into such positions declined by 7.3 percent, from 30,234 in 2014 to 28,029 in 2015.

Organ says part of the decline is probably attributable to dropping bar passage rates. But it may also be the result of shrinking job market conditions.

The employment numbers could be seen as a cautionary tale, Organ says, suggesting the good news for the profession on the applicant front may be short-lived.
A law prof and a journalist team up to open records and drive more accountability in law enforcement

by lydia lylye gibson
photographs by wayne slezak

“I think this will be our Ferguson.”
Sitting in his office at the University of Chicago Law School just over a year ago, attorney and professor Craig Futterman was talking about a video almost no one had seen. It was a dashboard-camera recording of a white Chicago police officer killing a black teenager.

The details, then still unconfirmed, rang with an ominous echo of the police shooting of Michael Brown, whose death in a Missouri street sparked weeks of protest.

Futterman, who runs the university’s Civil Rights and Police Accountability Project, hadn’t seen the video yet either; but he’d been pushing the city to make it public for months, ever since a confidential source had called and described it to him. “An execution,” Futterman’s source had called it. He searched for his own words. Finally he said simply, “This kid, his name is Laquan McDonald.”

Soon nearly everyone would know that name. Late last fall, a year and a month after the October 2014 shooting, a Cook County judge ordered the video released following a Freedom of Information Act lawsuit brought by independent journalist Brandon Smith. Futterman was one of Smith’s lawyers. Released Nov. 24, the video showed what Futterman knew it would: a dark street on the city’s Southwest Side, a 17-year-old with a knife, boxed in by cops and squad cars and then, as he edges away from them toward a construction fence, an officer emptying his gun into the teenager’s body.

The furor was immediate. Protests disrupted Chicago’s posh Michigan Avenue retail district during the Christmas shopping season. The U.S. Justice Department announced an investigation into the incident and
the wider “patterns and practices” of the Chicago Police Department. Police Superintendent Garry McCarthy was fired within a week, Cook County State’s Attorney Anita Alvarez lost her job in this year’s March primary, and Mayor Rahm Emanuel found himself similarly imperiled as his approval ratings sank and protestors howled for his resignation. And the officer who killed McDonald, a 14-year veteran of the force named Jason Van Dyke, was charged with first-degree murder the same day the video went public. In the months since, the political landscape around Chicago policing has shifted dramatically, and an extensive overhaul of the system that investigates and disciplines misconduct is under way.

These watershed events sprang largely from the work of Futterman and journalist Jamie Kalven, whose yearslong investigations into police abuse have uncovered hard truths about many Chicagoans’ experiences with officers whose sworn job is to protect them.

Sparked by a nationwide firestorm of protest over alleged police misconduct, especially involving shooting deaths of black males, there’s been a movement among legal, government and media organizations to create databases that inform the public about misconduct allegations and shootings by officers. These databases also provide criminal defense attorneys with potentially valuable information. And the efforts of Futterman and Kalven represent a highly successful campaign using government records to expose the failure of those governments to hold law enforcement accountable for its actions.

TRUST ISSUES

Futterman talks often about trust—and about how little of it exists between Chicago police and the citizens who, arguably, need their help the most: residents of the troubled neighborhoods on the South and West sides. Most are African-American or Latino, and their distrust is as old as the city’s problematic history with race and justice, but it’s also borne out by present-day grievances and revelations.

That situation was highlighted in April in a searing report by a mayoral task force created to assess the city’s police accountability system. Its executive summary calls for the police superintendent to publicly acknowledge “CPD’s history of racial disparity and discrimination,” and criticizes the city and the police union for turning “the [police] code of silence into official policy.”

As much as the release of the McDonald video ignited anguish and fury, it also points the way forward, says Futterman, who continues to sue for more records connected to the inquiry into McDonald’s death. He helped draft a proposed
city ordinance that would require video from police shootings to be released within 48 hours. “Trust begins with honesty,” he says. “It begins with transparency. If the problems are racism, institutional denial, secrecy, impunity and a lack of accountability, that’s where the solutions lie, too.”

That could serve as a summary of the past 16 years for Futterman, who founded the Civil Rights and Police Accountability Project, part of the University of Chicago’s Edwin F. Mandel Legal Aid Clinic, when he joined the University of Chicago law faculty in 2000. A former public defender, Futterman had returned to his hometown, after a year teaching public interest law at Stanford University, his alma mater.

Bald and broad-shouldered with a basketball player’s wingspan and a slightly wounded smile, Futterman exudes a perpetual kinetic energy, like someone forever working at a knot.

The ideas he and his students wrestle with—inequality, racism, abuse—have never been abstract to Futterman. Growing up, he occupied two worlds. One was in Niles, Illinois, a suburb northwest of Chicago. There his parents lived and he went to school, where he was just another Jewish kid roaming the halls of Maine North High School.

“Other world was his grandparents’ Auburn Gresham neighborhood. When white flight swept through, his grandparents stayed. Eventually they were the only whites on the block.”

“Some of my closest friends who became like family—who were family—were African-American,” Futterman says. “People who looked after me like a son and a little brother, who kept me out of trouble.”

It was clear early on that the existence his black “play brothers” navigated was very different from his own. There were times, he knows, when his white skin saved him. “Like any kid, I was an adolescent. I didn’t do everything right,” he says. “But I was able to go on to college, was able to go on to law school. That wasn’t so … for virtually everybody I know from those neighborhoods. Many of those folks who I consider family didn’t make it.”

“Some have been killed. Some got addicted to drugs, some got drawn into violence. Some are in jail, and some remain in jail,” he says. “And there were many who were equally, if not more, talented than I was, more intelligent. But I had opportunities they didn’t have. It’s just that simple.”

By the time he arrived at law school in 1988, there was a fire in him. Gerald López, now a professor at UCLA School of Law, was Futterman’s mentor at Stanford.

“He was filled with intense and joyous energy,” López recalls. “The things he regarded as injustices he was not going to stomach—and not going to have other people told they weren’t injustices and they should swallow it and get on with their lives.”

The author of *Rebellious Lawyering*, López helped found Stanford’s Lawyering for Social Change program. Futterman fit right in, López says: “When you get somebody like that, … you just want to help keep what’s inside him alive and help him understand how to make it productive, so that all that passion doesn’t turn on itself.”

FROM CLASSES TO CASES

At the University of Chicago, Futterman takes on a handful of second- and third-year law students each year and coaches them through the work of real cases with flesh-and-blood clients: suits on behalf of people alleging police abuse and civil rights violations, criminal defense for people falsely arrested and accused. The students, he says, are “learning how to use their legal reasoning, yes, but they’re also learning what it means to be a lawyer—what it means to be responsible for representing another human being.”

Increasingly the litigation Futterman and his students work on is aimed at prying loose the long-shut files of the city of Chicago and the police department. Until last fall’s engulfing crisis, the case consuming Futterman was *Kalven v. Chicago*, a seven-year odyssey of a FOIA lawsuit that ended with a 2014 appellate decision opening Chicago’s police misconduct files to the public. It was a stunning ruling. In the *Chicago Daily Observer*, social activist Don Rose wrote: “It will stand with some of the landmark public-interest cases in the past half-century.”

Plaintiff Kalven is a writer and human rights activist in Chicago. By the end of 2014, he and Futterman had in their hands hundreds of documents pertaining to citizen complaints against officers—allegations of harassment and verbal abuse, illegal searches, excessive force and more. By the end of 2015, the two had 56,000 misconduct records; the files came in huge batches from City Hall, and they included investigations into every citizen complaint filed since January 2011.

It was Kalven who found a witness to the McDonald shooting soon after the incident and, with a FOIA request, obtained a copy of the autopsy report, which directly contradicted police accounts of the shooting (for that reporting he was awarded the 2016 Ridenhour Courage Prize in March).

According to the department, McDonald had lunged at the officers before being shot in the chest. That assertion seemed dubious even before the video came out: The city had approved a $5 million settlement with McDonald’s family before a lawsuit was even filed. The autopsy report revealed McDonald had been shot 16 times. In a February 2015 story for Slate.com (which later won a George Polk Award in Journalism), Kalven enumerated each of McDonald’s gunshot wounds—bullets struck his arms, legs, torso, neck and back—and concluded, “The autopsy makes one thing clear: The account of the incident given by the police cannot be true.”

Eleven months later, the video offered a definitive refutation. And it showed, in grainy black and white, Futterman says, an important transformation. Before Van Dyke arrived, the other officers on the scene were
following good procedure: surrounding McDonald, keeping their distance, calling for backup. “But then the cowboy shows up,” Futterman says, and immediately after the shooting, they begin to fall in line behind Van Dyke.

“That’s the code of silence,” says Futterman. “The killing is shocking, but what happened afterward was utterly routine and shows more than anything the systemic problems.”

STOPPING ‘THE GREAT BONFIRE’

Older police misconduct files, except those specifically named in Kalven, remain closed and contested: In October 2014, as city officials were preparing to release abuse allegations dating back to 1967, the Fraternal Order of Police, which represents Chicago’s rank-and-file officers, sued citing collective bargaining agreements that required discipline records to be destroyed after five years.

“The great bonfire.” Futterman calls the potential purge. But the bonfire seems unlikely to happen. In July, an Illinois appeals court ordered all the records be made public, unanimously overturning an earlier injunction that had blocked their release. The panel concluded that the clause ordering their destruction was “legally unenforceable.” The police union may still appeal the ruling to the state supreme court.

“I don’t see the need for these files to survive forever, like Spam,” says FOP’s president, Dean Angelo. “If Jamie Kalven and Mr. Futterman get their way, guess what? Every unsubstantiated complaint and administrative infraction is on your file, in your jacket, forever.”

Inside thousands of boxes of reports are documents dating to former police Cmdr. Jon Burge’s tenure at Area Two headquarters, where he and his detectives tortured dozens of black suspects during the 1970s and ’80s. And there’s the rise and fall of the department’s notorious Special Operations Section, disbanded in 2007 after an investigation revealed that its officers were running a robbery and kidnapping ring. And there are untold numbers of ordinary complaints, which together might illuminate, Futterman says, the patterns and practices the Justice Department is investigating.

The already-unsealed misconduct files hint at the analytic possibilities of the full data set. The records from 2011 to 2015, plus the few from the early 2000s that were part of the Kalven lawsuit, are now fully public in a massive, searchable online database called the Citizens Police Data Project. The Invisible Institute, a journalism nonprofit Kalven founded and directs, undertook most of the work of assembling the data tool.

(In January, the project won a $400,000 grant from the John S. and James L. Knight Foundation.)

The database offers a crisp picture, Futterman says, of “a broken system.” Kalven puts it another way: “The knowledge to reform the system exists within the system, within this data. The patterns of misbehavior are so highly concentrated that if you wanted to intervene and stop it, you could.”

Here are a few of those patterns:

• Despite the fact that since 2004, according to a Better Government Association report, Chicago has paid out more than $600 million to settle police-abuse lawsuits, officers are rarely punished. The rate of discipline is about 3 percent for the 56,459 complaints in the database.

• Out of 8,923 officers with at least one allegation against them, only 1,288 ever faced punishment, and usually that was light—a reprimand or a suspension of less than a week.

• More than half of the disciplined complaints stem from personnel violations such as “wearing the uniform wrong, insubordination, being late for work, not showing up for work,” explains WuDi Wu, a data analyst and former law student of Futterman’s who’s been sifting through the data for nearly two years. “They’re getting punished for those more often and with a harsher punishment than for something like false arrest or illegal search.”

• Black officers were more likely to be penalized, and more harshly, than white officers, and complaints by white citizens were more likely to be upheld; whites made up only about 20 percent of the total number of complainants, but roughly 60 percent
of their allegations were found to have merit.

• Similarly, while the vast majority of complaints are made by residents of poorer neighborhoods, the ones that stick are more often made by those from wealthier areas. “So according to the city,” Futterman says, “the victims of police brutality mostly live in middle- and upper-income neighborhoods—white neighborhoods.”

• Dig a little deeper, and something else becomes clear: Abusive cops are a small fraction of the force. Many police officers go their whole careers without a single complaint; the average, Futterman says, is about 1½. In a force of about 12,000 officers, those with 10 or more complaints make up only 10 percent.

“Our data suggests that every day there are a huge number of unexceptional and constructive interactions with police,” Kalven says. Overlooking that would be a mistake.

But the bad guys really stick out. And some of their names are famous.

• Jerome Finnegan, a former Special Operations officer now in prison for corruption (and for ordering a hit on a fellow cop he believed was cooperating with investigators) tops the database, with 68 complaints. He was never disciplined for any of them.

• Ronald Watts, who went to jail for stealing money from drug dealers, had 22 complaints; only one, a personnel violation, was sustained.

• Van Dyke, now charged with murdering McDonald, had amassed 20 allegations, including for racial slurs and use of force. None were found to have merit, though a civil lawsuit against him for racial slurs and use of force. None were found to have merit.

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“In May, a Chicago Tribune investigation detailed how the police union had bargained away salary increases in exchange for greater protection from scrutiny and citizen complaints.

A PROJECT’S LAST DAYS

Kalven and Futterman’s battles began in a corner of the city that has since vanished. In the early 2000s, Stateway Gardens, one of the high-rise projects along a 2-mile stretch of continuous public housing on South State Street, was in its last days, emptying of residents and close to demolition.

Kalven had been a fixture there for a decade. He grew up a couple of neighborhoods over, in Hyde Park’s academic enclave, the son of Harry Kalven Jr., a First Amendment scholar who taught for 30 years at the University of Chicago Law School.

Lean and winsome, Kalven radiates an easy and almost immediate intimacy.

Kalven arrived at Stateway in 1993, first as one of several community organizers holding monthly candlelight vigils against the neighborhood’s violence, and later as almost a neighbor himself. He started a project to turn vacant lots into gardens and parks and another to offer social services and job training. He made friends among the dwindling population, set up an office in an empty first-floor unit, served as a consultant to Stateway’s resident-led advisory council. The place became a kind of home.

All the while, he was collecting stories, as much a witness as a writer. And he set up a website, The View from the Ground (the Invisible Institute grew out of this project) to document the housing project’s waning days and the daily lives of its scattering inhabitants.

“I recruited reality,” he says. “It was a way of attacking the disconnect between official narrative about what was happening in places like Stateway and observable reality.”

His thinking went like this, he says: “If nobody goes to these places, and if the people who live there are presumptively unreliable and discredited as witnesses to their own experience, then this stuff can keep spinning and churning forever without ever being held accountable to reality.”

Doomed and isolated (the last buildings came down in 2007), Stateway was still full of community life, Kalven found. "The very fact of abandonment can create an intensity of community life and mutuality," he says. But it was also a place where social problems implicit everywhere became concentrated and magnified.

Among those problems: police abuse. The View from the Ground described racial slurs and routine excessive force. It was common, Kalven wrote, for cops to plant drugs on residents and to shake them down for money.

“For years,” he wrote, “friends at Stateway have told me that certain officers could be counted on to show up at the development on the first and 15th of the month—on check day.”

It was there that he and Futterman formed a partnership. At Kalven’s suggestion, Futterman started bringing students to the housing project. Only 20 blocks or so from campus, Stateway was “10 minutes away and a world apart,” Futterman says. The original intent was to bear witness. Futterman and his students would record evidence of abandonment and neglect—leaking pipes, crumbling walls—in hopes of improving conditions for the remaining residents.

Pretty quickly, though, Futterman and his students turned their attention, as Kalven had, to the police. “Residents were regularly harassed, stopped, searched; put up against a wall, the police car, the buildings and spread-eagled,” Futterman says.

“That was just normal.”

Deborah Pugh, an attorney in Illinois’ Office of the State Appellate Defender, was among those students who saw Stateway in the early 2000s. She remembers realizing that “the Fourth Amendment has a completely different meaning depending on what neighborhood you live in.”
“To continually allow these documents to remain secret was to prevent any systemic change.”

—Samantha Liskow

“We were observing and documenting these bands of officers who seemed able to engage in some of the most callous cruelty with impunity,” Futterman says. “Over the next few years, he and his students sued the city and the police department on behalf of several residents.

One of them was Diane Bond, a public school janitor. She and other residents had been tormented for years by a group of elite tactical police officers known as the Skullcap Crew. In a dispatch called “Kicking the Pigeon,” Kalven reported that one night in 2003, as Bond stepped outside her door, Skullcap officers put a gun to her head and forced her back inside, where they cuffed her, slapped her and threatened to plant drugs. They tore her unit apart. One officer, she told Kalven, ordered her to disrobe in front of him. Then he and others hauled Bond’s son out of another room and commanded him to beat up a man they’d grabbed down the hall.

Kalven helped Bond file a complaint against the officers. In April 2004, Futterman and his students helped her sue the city and the police department. To establish a pattern of abuse, during discovery he asked for misconduct records on the officers involved. Among the documents he received was a list of 662 officers who had amassed 10 or more complaints between 2001 and 2006.

But it and the other misconduct records were sealed under protective order. As Bond’s attorney, Futterman could see them, but Kalven could not. So as Bond v. Urreras wound through the federal court system and toward a $150,000 settlement, Kalven petitioned in 2007 to intervene and make the complaint files public. Chicago city council members joined the petition. The Chicago Tribune and the Sun-Times, the Chicago Reader, the New York Times and the Associated Press filed an amicus brief.

Kalven’s lawyer in the petition was Samantha Liskow, then an attorney with Loevy & Loevy. (She has left full-time practice but remains involved with Kalven-related litigation.) For years she had chafed at the protective orders keeping police misconduct files sealed, sometimes challenging the protective orders in court.

“From my perspective, to continually allow these documents to remain secret was to prevent any systemic change,” she says. “Or any real analysis of whether and how the city was responding to complaints.”

HOW TO MEASURE CHANGE

After a victory in the first round, the petition failed on appeal; and in 2009 Kalven, Liskow, Futterman and his students sued under FOIA in Illinois circuit court. Five years later, the appellate ruling opened the documents. (The Chicago corporation counsel’s office did not respond to attempts to get its comments on the litigation.)

When Futterman is asked about the “meaningful change” he hopes to see—in the city, the police department and the culture of policing—he’ll tell you about a project that has nothing to do with a courtroom. It’s headquartered in the Invisible Institute’s offices, a low brick building around the corner from the U of C’s steam plant.

There, for four years, Kalven, his staff and Futterman and his students have met with local black high school students to discuss and document their everyday experiences with police.

The initiative, the Youth/Police Project, began as an effort to educate black teenagers about their constitutional rights. But Kalven says, “Pretty quickly it became clear that we had a lot more to learn from them than we had to teach them. The center of gravity shifted.”

In videos, the teens describe police attention that is almost always unwelcome; for some, being stopped and searched and having their names checked for warrants happens almost daily. Many describe frightening encounters.

In a March working paper on their findings, Kalven, Futterman and project director Chaclyn Hunt wrote, “Students’ knowledge of unchecked police power informs every encounter between them and police... Nearly every student with whom we spoke has a friend or family member who has been beaten, arrested, tased or shot at the hands of the police.”

The videos are affecting—all those young faces, hurt expressions and rueful smiles. Futterman and Kalven use them in police training sessions and show them to policymakers. Recently, Futterman says, President Barack Obama asked to have a copy sent to the White House.

When the pair ask the students if they would call 911 when in trouble, the answer is almost always no. “And these are the ‘good kids,’” Futterman says. “They’re not dropouts; they’re not out on the streets. And they’re experiencing that kind of alienation.”

The day the McDonald video was released, Futterman was in court on another case. When he went home that evening, he sat down on the couch next to his wife and cried.

“You know, as much as I’d fought for the truth to come out, pushing and pushing and pushing for a year,” he says, “it’s still a video of a kid getting shot to death. And it’s still an execution being broadcast around the world.”

He went to bed feeling devastated, torn about whether he’d done the right thing. He woke up the next morning feeling better—“still hurting, but at peace,” he says, “and remembering why, no matter how much it hurts, why we fought. And why we fight.”

Lydialyle Gibson is a freelance writer and former Chicagoan now based in Boston.
New ABA President Linda Klein is using what she learned in visits with lawyers around the country to chart her policy initiatives for the coming year

By Terry Carter
Before she was handed the gavel last month to begin a year as ABA president, Linda A. Klein had gone the extra mile—and literally many more. She traveled the country meeting with small groups of lawyers, including state and local bar leaders, but mostly Main Street lawyers from small towns to big cities. The mission: Find out what they want and need, and what the association might do to help.

A sketch of just one of her many listening-tour itineraries over more than a year illustrates Klein’s unusually granular and personal effort: On the evening in June 2015 that the ABA Board of Governors finished its meeting in Washington, D.C., she flew to Minneapolis and then to Fargo, North Dakota, so she could attend a breakfast gathering the next morning with three dozen or so lawyers, an atypically large group by her standard for personal connection in the initiative. She then traveled by car down I-29 for a 5 p.m. get-together with lawyers in Sioux Falls, South Dakota, and the next morning she drove to Mason City, Iowa, for a lunch meeting with another group of lawyers.

“She did a lot of listening, asked very good questions, and the Main Street lawyers were responding,” says Thomas C. Barnett Jr., executive director of the State Bar of South Dakota, who helped Klein develop the detailed itinerary and who was with her in Sioux Falls. He says the No. 1 concern for most of the lawyers—primarily in solo or small-firm practices—is the economics of practice management in trying to make a profit with less stress in a fast-changing profession where they’re competing with automated, low-cost legal help online.

Klein, who took office at the close of the 2016 ABA Annual Meeting in August, more than heard them; she has launched a plan to help. She is a big-firm lawyer in Atlanta—the senior managing shareholder with the Caldwell & Berkowitz—but she is known as a very cautious with the budget.”

One of Klein’s several ambitious presidential initiatives for the coming year, she says, “is going back to basics, back to what members need of the bar association.” To that end, she has tasked the new Working Group on Emerging Member Benefits, which can rely on the association’s big-size buying power to get low rates on goods and services, with “a strong focus on solos and small firms.” For example, she says, “we’ll be looking at the creation of a web portal offering a suite of services to make small firms’ daily operations much more efficient and more productive.”

While “membership is job one,” as Klein puts it, her signature effort as ABA president will be a far-reaching, comprehensive program to bring needed legal services to military veterans. The effort has three main goals: Create centralized resources in an online portal; develop policy on the legal needs of veterans; and support the delivery of those legal resources.

The plan is to bring together best practices already in place around the country, without supplanting state and local efforts, and to identify gaps to create capacity where there is none, says Clyde J. “Butch” Tate II of Burke, Virginia, a retired Army major general who is a special adviser to Klein’s new Commission on Veterans’ Legal Services.

‘THE REAL DEAL’

“When this came along I decided to just observe for a while, because I wanted to make sure it would be something meaningful,” says Tate, formerly the Army’s deputy judge advocate general, its second-ranking lawyer, who chairs the ABA Standing Committee on Legal Assistance for Military Personnel. “It didn’t take long for me to realize Linda’s the real deal, committed and focused on this not being just a one-and-done scenario. Those three goals can be accomplished in her one year, and her accomplishments can be sustained. It was very intentionally crafted. That sold me.”

Klein says she came to understand the scope of veterans’ legal needs through a pro bono lawsuit her firm brought in Atlanta to stop the attempted closing of a large homeless shelter downtown, an effort led by some businesses and civic groups that are critical of its presence there and joined by the city. Many of those who stay at the shelter are veterans, she says, enduring chronic unemployment, driven to substance abuse, or suffering physical or mental health problems possibly related to their military service.

“Men and women signed a paper saying they’d die for us in defending our country and liberty. And to see the justice system fail these people—of all people—lawyers have to answer our own call to action, our own oath on their behalf,” Klein says.

As a former chair of the ABA’s Tort Trial and Insurance Practice Section, a past council member for the Section of International Law and a longtime member of the House of Delegates who served as 2010-12 chair, Klein is one of those politically savvy doers and achievers who likely doesn’t sleep much—otherwise, how could it all get done? Her law practice includes construction, higher education and the pharmaceutical industries, as well as employment law and dispute resolution.

EMPHASIZING INCLUSION

In 1997, Klein became the first woman to serve as president of the State Bar of Georgia, where she led a successful effort to get the state legislature to fund legal services organizations in hiring lawyers to represent victims of domestic violence. She has served on the boards of a variety of entities and is a former president of OnBoard Inc. (formerly the Board of Directors Network), which promotes the inclusion of women on public and private corporate boards, as well as in leadership positions. She was a 2004 recipient of the ABA’s Margaret Brent Women Lawyers of Achievement Award.

Inclusion is more than a catchword for Klein. She has, for example, begun plans for interactions between local lawyers and legal groups with the ABA Board of Governors when that body holds its four scheduled meetings during the year. She has particular interest in bringing in non-ABA members for those sessions, which will include Miami in conjunction with the 2017 midyear meeting and New York City, where the 2017 annual meeting will be held in August.

Klein’s own venue choices for the board’s other two meetings during her year reflect her geographic prerogative, but also her penchant for productive practicality: Atlanta, preferably downtown rather than the affluent, uptown Buckhead section to which conferences gravitate; and Detroit. Those meetings will be closer to the Main Street lawyers, she says, “and these are more affordable meetings where we can meet with members of the local bar and be very cautious with the budget.”

Klein’s bent for inclusion usually has a pipeline component. And one of society’s major pipelines is its education system, beginning with elementary, middle and high schools.

Klein’s new Commission on the Lawyer’s Role in Assuring Every Child’s Right to a High-Quality Education is studying what lawyers can do to ensure that these rights, spelled out in federal law, apply to one and all, no matter the geographic location or neighborhood, race, disabilities or family situations. “It’s going to focus a lot on policy,” says Klein, who adds that the commission will look at “what lawyers can do to help and where there are gaps.”

To be sure, there will be no gaps in Klein’s schedule for the next year.
Citing studies showing that the civil legal needs of nearly 80 percent of poor people and 60 percent of moderate-income people in the United States are going unmet, the commission released two issues papers in the span of nine days that re-ignited an impassioned debate over the best ways to close that gap in access to legal services and what types of providers should be part of that effort. On March 31, the commission announced it was gathering information and comments relating to legal services providers that are not covered by the rules governing traditional law firms to determine whether developing a regulatory structure for these entities would benefit the public. Then on April 8, the commission took on an even more contentious matter, releasing an issues paper requesting comments on the merits of alternative business structures, including the question of whether nonlawyers should be allowed to have an ownership interest in law firms. This was the ABA’s second try in the past five years at coming to terms with the ABS issue. The Commission on Ethics 20/20 took a hard look at the issue before deciding in 2012 against making any policy recommendations.

But if the plan also envisioned the possibility that enough consensus would develop on those issues to support policy proposals unveiled at the 2016 ABA Annual Meeting in San Francisco, that part didn’t quite work out. The commission did not submit any resolutions for consideration by the House of Delegates, but its final report was released and can be viewed online.

Predictably, the future commission’s ABS paper got the most attention from commenters—and some of the most vehement opposition. “On behalf of the Section of Family Law, we pose the following question: What part of ‘No!’ do you not understand?” wrote Marshall J. Wolf of Cleveland, one of the ABA section’s delegates to the House. Michael W. Drumke of Chicago, who chairs the Section Officers Conference, wondered why the ABA seemed willing to consider “adopting practices and policies that its members oppose or have opposed in the past” and predicted that these policies would “inevitably dictate cuts in service to our members, which will cause us to continue to bleed members.”

Others were no less resolute in their opposition to ABS. The Association of Defense Trial Attorneys, for instance, blamed nonlawyers looking to make a profit while the Solo, Small Firm and General Practice Division argued that it was “insulting” to
assume that the legal services currently being provided by small firms and sole practitioners were inadequate. Many also contended that the comment period, which closed May 2, didn’t give them enough time to prepare appropriate responses to the questions posed by the commission in its paper.

CLOSE THE GAP
Advocates of ABS, including legal services providers such as Avvo and LegalZoom, did not share those concerns. LegalZoom, for instance, pointed to its purchase in December of Beaumont Legal in the United Kingdom and maintained that accepting alternative business structures would allow lawyers to fully realize the benefits of technology and close the gap in access to legal services. Zuckerman Spaeder, based in Washington, D.C., the only large firm to weigh in, noted that the possible harm to the legal profession was “overstated” and that the evidence “does not support” the idea that more lawyers will engage in unethical behavior with an ABS model in place.

With so much attention being given to the ABS issues paper, the commission’s request for comments concerning regulation of legal services providers resulted in a relative dearth of responses. But some legal services providers voiced concerns that the issues paper was overly broad and could be interpreted to apply to the entire legal tech industry. A few days before the comment period ended on April 28, the commission sought to clear the air. Andrew M. Perlman, the dean at Suffolk University Law School in Boston who serves as vice-chair of the commission, offered assurances that it has no intention of regulating the entire legal tech field. The issues paper “was not intended to address, and we never even discussed regulating, the entire legal technology industry,” said Perlman in an interview with legal journalist Bob Ambrogi. “That’s much broader than anything that’s ever been discussed.”

The issues paper on legal services providers did produce one piece of common ground. People and entities on all sides of the issue seem to agree that the current definition of what constitutes “the practice of law” is inadequate. Even the commission stated in its paper that defining the practice of law, and by extension, what constitutes the unauthorized practice of law, is “extremely difficult” and that individual state definitions are “notoriously vague and circular.” But there were differences in how to approach a new definition of the practice of law. The New York State Bar Association argued for a more inclusive definition that would focus more on what tasks were being performed so that courts would have a better idea of which activities of LSPs need to be regulated. The New Jersey State Bar Association took a more absolutist approach, saying “it would be a danger to the public and a disservice to the profession to allow nonlawyers to provide legal services” and calling for the commission to address the “underlying question of whether nonlawyer legal service providers should be permitted at all.”

The tech companies argued for a different approach. Avvo suggested that the ABA should take another stab at defining the practice of law, but that rather than trying to cover more ground, it should do what the British have done and only regulate a core set of legal functions. Meanwhile, Responsive Law in Washington, D.C., an organization that represents the interests of individuals in the legal system, recommended that a definition of “unauthorized practice of law” be limited to people who hold themselves out to be lawyers, but are not. “Any broader definition of unauthorized practice is beyond the proper authority of the bar,” said Responsive, who, along with Avvo, noted that regulation of LSPs by bar associations could run afoul of antitrust laws.

SEARCH FOR A SAFE HARBOR
Several commenters urged the commission to follow the example of the State Bar of Texas as a means of resolving this impasse. Texas has a “safe harbor” provision in its code that excludes from its UPL rule any products that “clearly and conspicuously state that the products are not a substitute for the advice of an attorney.” William T. Hogan III of Boston, who chairs the ABA Standing Committee on the Delivery of Legal Services; Richard Granat, founder of Granat Legal Services and CEO of DirectLaw Inc.; and Carolyn Elefant, an attorney in Washington, D.C., say the ABA should adopt a similar safe harbor provision so that tech companies and even law offices can still be innovative without being afraid of running afoul of the law. “Many solos and smalls won’t dare innovate because the consequences can be draconian,” said Elefant in her comments to the commission. “Let’s give solos and smalls a safe harbor to innovate, and if firms can demonstrate a good faith effort for undertaking an action, give them a pass if it infringes on ethics and doesn’t substantially harm consumers.”

The commission stressed in both issues papers that it has not reached any final conclusions on either regulating legal services providers or whether to recommend permitting alternative business structures. “I think what the ABA does best is act as an information aggregator and network facilitator,” says Laurel S. Terry, a professor at Pennsylvania State University’s Dickinson School of Law in Carlisle. “The ABA brings together people with very diverse perspectives and has the ability to convene more lawyers in the U.S. than any other organization.” She suggests setting up a webpage to which interested parties may continue to post documents, to debate the issues and stay informed on new developments. “I think it would be very useful if the commission created a place where these conversations could be ongoing,” Terry says.
Accreditation Question

ABA responds to panel’s threat to suspend its role

By Stephanie Francis Ward

Facing a Department of Education panel recommendation that the ABA’s accreditation power for new law schools be suspended for one year, the association has responded by filing a confidential comment.

“We think we’re in compliance with the standards,” says Barry Currier, ABA managing director of accreditation and legal education. “The Department of Education staff found us in compliance with the standards.”

A June discussion by the National Advisory Committee on Institutional Quality and Integrity swirled around enforcement of accreditation standards and the need for a response to law school costs, student debt and the lack of lawyer jobs. The fact that no law schools have had ABA accreditation withdrawn over the past five years and that the organization continues to accredit new ones while law school tuition rises and the number of jobs in the profession shrinks were all part of the debate.

“This feels like an agency that is out of step with a crisis in its profession,” said Paul LeBlanc, a committee member and president of Southern New Hampshire University, “out of step with the changes in higher ed and out of step with the plight of the students that are going through the law schools.”

The discussion was wide-ranging, including whether the panel even had the power to make such a recommendation under the rules set for it. And after the vote, it was noted that, should the Department of Education endorse the recommendation, the council of the ABA Section of Legal Education and Admissions to the Bar could appeal, delaying any action.

“I think there’s no story here,” Currier told the ABA Journal in July, “until the decision is made by the department. It’s premature to speculate on the outcome of a process that’s ongoing.”

RATIO REQUIREMENTS

Two years ago, the Department of Education tied career-college student aid to recent graduates’ income/loan debt ratios, and some wondered whether law schools might be next. At the same meeting that brought the ABA accreditation suspension recommendation, the panel voted to de-recognize the Acceding Council for Independent Colleges and Schools, a large group that accredits many for-profit colleges.

“The fact that the department is doing this to the ABA signals that there’s going to be a convergence on accountability looking at outcomes,” says David Mulligan, the CEO of Eduvantis, a business and marketing group that works with universities.

“The practical implication of this recommendation is not significant other than it’s a warning shot to accreditation bodies—not only the ABA—that the department is going to be holding them much more accountable,” says Mulligan, who advises law schools on downsizing as well as building nondues revenue.

In January 2017, the legal education section is to visit the University of North Texas Dallas College of Law, which has applied for provisional ABA accreditation. If the advisory committee recommendation is adopted by the agency, it’s unclear what that will mean for UNT Dallas, says Pete Wentz, a former associate dean at Northwestern University’s Pritzker School of Law.

“If it’s not the ABA, then who would accredit law schools?” asks Wentz, now an executive director with the strategic communications group APCO Worldwide. “I’d think the department would do its best to not accept the recommendation, or at least allow the ABA to meet the challenges or questions in the staff report.” Wentz thinks it’s unusual for the panel to make a recommendation different from the one made by department staff.

“The broader challenges to the ABA’s authority were a complete surprise,” says Deborah Merritt, a law professor at Ohio State University. “Nothing in the staff reports preceding the meeting suggested that there were serious concerns about the ABA’s status as an accredditor.”

PREVIOUS PRESSURE

That being said, Merritt notes the ABA has been under pressure about outcomes for law school graduates and accurate reporting by the schools. A pending ABA proposal seeks to require that 75 percent of ABA-accredited law school graduates who sit for bar exams pass the tests in two years, rather than the existing five-year requirement. An open hearing on the proposal was scheduled for Aug. 6 during the ABA Annual Meeting.

“I suspect the Department of Education recommendation will make this proposal more likely to get favorable comments,” Merritt says. The existing five-year standard is easy to meet, she adds, and has many loopholes.

Also, the ABA announced in June that for the first time it would be conducting random audits of jobs data provided by law schools for the class of 2015.

The committee’s recommendation could also nudge law schools, through ABA accreditation, to offer a more up-to-date legal education, which better serves the public’s needs, some law school critics say.

“To the extent that law schools and the ABA continue to want to create these elite institutions that all look alike, they’re living in the past, and the future is something different,” says George Critchlow, a professor emeritus at Gonzaga University School of Law. He’s the author of Beyond Elitism: Legal Education for the Public Good.

If the Department of Education were to take the same approach with law schools as it has with for-profit colleges, it could be “game changing,” says Paul Caron, a Pepperdine University School of Law associate dean. But he’s also skeptical about whether the ABA will vigorously enforce any student standards that they put into place.

“They need to move from task forces and reports to concrete action,” Caron says. “They’ve been good about having blue ribbon commissions put out thoughtful reports. Translating that into action, I suspect, is what the Department of Education would like.”

SEPTEMBER 2016 ABA JOURNAL | 67
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Local Hero

Dennis Archer receives the ABA Medal in recognition of a career that has had impact far beyond his home state of Michigan

By Martha Middleton

San Francisco holds a cherished place in Dennis W. Archer’s career at the ABA. It was in San Francisco that he attended his first ABA Annual Meeting in the early 1970s, and it was there that he took the helm in 2003 as the association’s first black president. So it was fitting that Archer received the ABA Medal, the association’s highest award, during the 2016 annual meeting while it was being held last month in the City by the Bay.

But Archer’s strongest ties, both personal and professional, are to his home state of Michigan and his hometown of Detroit, where he was born on Jan. 1, 1942. His family later moved to Cassopolis, a small town in the southwest corner of the Lower Peninsula, where he spent much of his childhood.

Archer received a BS degree in 1965 from Western Michigan University in Kalamazoo, and he received his JD in 1970 from the Detroit College of Law. He became a key player in state and local politics. He was an associate justice on the Michigan Supreme Court from 1986 to 1990, and he served as mayor of Detroit from 1994 to 2001. Archer was also chairman of Dickinson Wright, one of Detroit’s most prominent law firms, from 2002 to 2009. He now is chairman emeritus of the firm as well as chairman and CEO of a related practice that bears his name.

Archer “truly exemplifies the ‘conspicuous service to the cause of American jurisprudence’ the ABA Medal recognizes,” says Paulette Brown of Morristown, New Jersey, who presented the ABA Medal to him in San Francisco. Brown’s term as the first woman of color to serve as ABA president ended at the close of the annual meeting.

“He’s a lawyer’s lawyer—that’s who Dennis is,” says Robert E. Hirshon, a professor at the University of Michigan Law School in Ann Arbor who served as ABA president two years before Archer. Hirshon says Archer “has a breadth of knowledge combined with a deep understanding of the rule of law, with an expertise and commensurate understanding of politics and how the rule of law plays out.” In each of Archer’s positions, Hirshon says, “he has been recognized by his peers as being a leader, not just a member.”

A TOUGH CHOICE

Archer clearly relishes the law as a vehicle for bringing positive changes to society. “I love being a lawyer, love our profession, love what we’re able to accomplish,” he says. Archer says his “legal training, integrity and honesty” have been keys to his success in other endeavors, helping him, for instance, “be the kind of mayor I wanted to be, to make a difference for my city.” During Archer’s final year on the Michigan Supreme Court, Michigan Lawyers Weekly named him the “most respected judge in Michigan.” Archer also served as president of the State Bar of Michigan in 1984-85 and was president of the National League of Cities in 2000-01.

While his subsequent accomplishments at the ABA may suggest otherwise, Archer’s initial decision on whether to throw in with the association was a close thing. Early in his legal career, Archer already had become active in bar associations for lawyers of color—he went on to serve as president of both the National Bar Association and the Wolverine Bar Association—but the ABA was a somewhat different challenge. He recalls entering a large meeting room at his first annual meeting filled with some 1,000 young lawyers, only three of whom (including himself) were black. He faced a tough choice. “I thought I could go back where it’s comfortable or I could stay and try to make a difference,” he says.

Choosing to stay involved started Archer on the road to many important contributions to efforts to bring greater diversity to the American legal profession. Brown, who credits Archer for inspiring her to become active in the ABA, says his work on behalf of diversity may be his most important and lasting legacy, and she acknowledged his role by naming him an honorary chair of the Diversity & Inclusion 360 Commission. It’s a view that many others share. Archer is a “drum major for justice, diversity and inclusion,” says Bernice B. Donald, a Memphis, Tennessee-based judge on the 6th U.S. Circuit Court of Appeals at Cincinnati who chairs the ABA’s Criminal Justice Section and is the first woman of color to have served as ABA secretary. “He is someone who believes passionately that every lawyer should be able to compete in the marketplace on his or her work ethic and merit.”

Archer is “an icon,” says Harold D. Pope III, a shareholder at Jaffe Raitt Heuer & Weiss in Southfield, Michigan, who was a minority member-at-large on the ABA Board of Governors from 2011 to 2014. “He has done so much for the profession and also done so much to further justice in America—not only for people of color but all people. There is no finer example of what a lawyer should be than Dennis Archer.”
History Lesson

The internment of Japanese-Americans during World War II offers a cautionary message for current political debates

By Rhonda McMillion

The ABA recently reinforced its opposition to government policies that discriminate against individuals by citing an action shortly after the United States entered World War II that stripped thousands of Japanese-Americans of their rights and property.

In a letter sent June 17, then-ABA President Paulette Brown expressed the association’s support for Senate Res. 373, “which recognizes the historical significance of the internment of Japanese-Americans during World War II and expresses the sense of the Senate that policies that discriminate against an individual based on race, ethnicity, national origin or religion would be a repetition of past mistakes.” Brown sent the letter to the resolution’s sponsor, Sen. Mazie K. Hirono, D-Hawaii.

While Hirono’s resolution addresses actions taken by the government more than 70 years ago, the historical lessons still resonate today as debate intensifies over whether U.S. borders should be closed to members of certain groups and whether Muslims should be required to register with the government.

“The ABA concurs with you that Americans need to be educated about, and mindful of, this dark chapter in our history and the circumstances that gave rise to it,” stated Brown in her letter to Hirono. “Your resolution is a reminder that our national experience has taught us that in times of crisis we must vigilantly guard against the dangers of overreaction and undue trespass on individual rights lest we betray our values and lose the very freedoms we are fighting to protect.”

President Franklin D. Roosevelt signed Executive Order 9066 on Feb. 19, 1942, authorizing military authorities to move some 120,000 Japanese-Americans—about 70,000 of them U.S. citizens—from their homes in parts of the West Coast that were designated as “military areas” to replacement camps further inland, often in some of the most remote and inclement regions in the Western desert or mountains.

Roosevelt justified his action by stating in the order that “the successful prosecution of the war requires every possible protection against espionage to national-defense material, national-defense premises and national-defense utilities.” Roosevelt didn’t suspend the order until December 1944, and it successfully stood a number of legal challenges. In 1944, for instance, the Supreme Court ruled 6-3 in Korematsu v. United States that the internment was justified in time of war as a matter of national security.

‘A GRAVE MISTAKE’

“It is sobering to recall that during the war, every branch of our government—even the judiciary—justified the exclusion, forced removal and incarceration of citizens and permanent resident aliens of Japanese descent as necessary for our national defense,” Brown stated in her letter to Hirono. “It took decades for our government to admit that the systematic deprivation of civil liberties was a grave mistake animated by racial prejudice, war hysteria and a failure of political leadership.”

President Gerald R. Ford formally rescinded Executive Order 9066 in 1976. And in 1988, President Ronald Reagan signed the Civil Liberties Act acknowledging the injustice of the internment, apologizing for the government’s actions and authorizing payments of $20,000 to each survivor. Feb. 19 is now designated as a National Day of Remembrance commemorating the internment of Japanese-Americans and the importance of upholding justice and civil liberties for all residents of the United States.

The ABA has expressed opposition during this Congress to legislative proposals to specifically delay or halt U.S. resettlement of Syrian, Iraqi or Muslim refugees. In correspondence to congressional leaders, Brown cited this country’s long-standing leadership in offering protection to the world’s most vulnerable populations. “As our nation struggles to address challenges posed by recent horrific attacks at home and abroad,” she wrote, “it is important we do so in ways that uphold the fundamental principles of our democracy.”

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

In the agonizing days after the assassination of John F. Kennedy, it became apparent to the nation's newly sworn president that much of what seemed so inexplicable needed to be explained. The murder of accused assassin Lee Harvey Oswald two days after his arrest had precluded any public trial, and any determination of his motive.

Glaring blunders by the FBI and the Dallas Police Department bred deep mistrust of traditional criminal investigation. Even more troubling, the sheer scale of the tragedy seemed to demand a grander conspiracy than the incongruous politics of a single troubled man. President Lyndon B. Johnson persuaded Chief Justice Earl Warren to head a bipartisan commission to investigate the murders. To work with him he appointed Sens. Richard B. Russell and John Sherman Cooper; Reps. Hale Boggs and Gerald R. Ford; former CIA Director Allen W. Dulles; and John J. McCloy, a lawyer and Johnson confidant.

By the time the commission handed over its findings on Sept. 24, 1964, its staff had compiled 26 volumes with sworn testimony from 552 witnesses, including bystanders, doctors, law enforcement officials, ballistics specialists and other forensic experts. They collected more than 3,100 exhibits and reviewed 25,000 interviews by the FBI. It was, in its time, the most extensive criminal investigation in American history.

However spectacular its volumes of documentation, its conclusions were remarkably direct: that Oswald and Jack Ruby, the man who murdered him, acted alone. But an increasingly insecure body politic received the report with begrudging acceptance or outright dismissal. And even now, more than 50 years after the fact, a majority of Americans still believe that the events of November 1963 involved a much broader conspiracy than was ever acknowledged.

The evidence against Oswald was compelling. Several witnesses saw a man with a rifle in the sixth-floor window of the Texas School Book Depository. Oswald's prints were found on a rifle and several boxes near the window, and on a bag used to carry the rifle. Oswald signed the mail order used to purchase the rifle and posed for pictures holding it. Ballistics experts determined that bullet fragments found in the president's car came from Oswald's rifle. And only 45 minutes after the assassination, two witnesses saw Oswald shoot J.D. Tippit, a Dallas patrolman who had stopped to question him in a nearby neighborhood.

Still, theories of sweeping conspiracy have flourished over the decades, many of which were investigated and analyzed by the commission: that Oswald was not the assassin; that another shooter had participated; that Ruby had been part of the plot; that the conspiracy might include the CIA, Cuban intelligence, wealthy anti-communists or the KGB. But none of these allegations sustained a credible challenge to the Warren commission's final conclusions.

In 1978, the House Select Committee on Assassinations confirmed that two of the three shots fired by Oswald had struck and killed Kennedy, but decided that a fourth bullet had been fired from another source. Even that conclusion was based on controversial acoustic evidence later found to be mistaken.

There were cover-ups. Oswald, a communist activist, was well known to the FBI. He had defected to the Soviet Union and returned to the U.S. with a Russian wife. Just weeks before the assassination, he had tried to shoot Maj. Gen. Edwin A. Walker, a well-known anti-communist zealot, at his Dallas home. Moreover, the commission discovered that the FBI had withheld embarrassing evidence of threats made by Oswald before the assassination, threats never handed over to the Secret Service.

But as spectacular as the crime had been, and as twisted as Oswald's trail of anger seemed, the commission concluded that Oswald acted not only alone but with a remarkably mundane motive. The day before the killing, he had sought reconciliation with his estranged wife, Marina. When he departed that morning for the depository, he left behind his wedding ring and $170 in cash. He was on his way to kill the president because he had been rejected by his wife.
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