Appeals courts are dismantling stricter voter ID laws enacted after the Supreme Court opened the door for such measures.
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UNDERWATER
Although the federal state of emergency has ended, struggles persist for the residents of Flint, Michigan.

34 | Voting Blocks
Appeals courts are dismantling stricter voter ID laws enacted after the Supreme Court opened the door for such measures.
By Mark Walsh

44 | Who’s to Blame?
Residents of Flint, Michigan, hope lawsuits and criminal prosecutions will hold decision-makers accountable for the poisoning of their water supply.
By Wendy N. Davis

54 | Turmoil in the Pacific
The Trans-Pacific Partnership raises questions about how disputes should be resolved between governments and private corporations.
By Steven Seidenberg
Letters

President’s Message
Veterans Day offers lawyers the opportunity to aid those who protect our rights and freedoms.

Opening Statements
A firm rolls out wellness coaching and classes to help employees attain “emotional fitness.”

An attorney creates a museum enshrining artifacts of failed relationships and broken hearts.

New book releases explore the polarization of politics and the judiciary.

For lawyers married to military personnel, a new partnership aims to make practicing easier.

Short takes and fast facts on the law. / Cartoon of the month: See last month’s contest winner, and craft a caption for the current cartoon.

Ten questions for the Boston attorney who negotiated a $100 million settlement against Uber.

Docket
NATIONAL PULSE Lawsuits aim to put iconic folk songs back in the public domain.

NATIONAL PULSE The North Carolina Supreme Court invalidates a cyberbullying law on First Amendment grounds.

SUPREME COURT REPORT Can Miami sue banks for loss of income under the Fair Housing Act?

Practice
STORYTELLING How lawyers can break free from the clock to deliver persuasive arguments.

ETICS A Texas opinion says lawyers may use a competitor’s name to gain an advantage when advertising online.

WORDS Probing the use and overuse of parentheses and brackets.

Business of Law
LAW SCRIBBLER At TBD Law, a group of attorneys brainstorm about the law practices of the future.

LAW PRACTICE Brexit offers lawyers in the U.K. an opportunity to help clients navigate uncharted waters.

INSURANCE Cybersecurity coverage offers law firms critical protection.

LAW BY THE NUMBERS The latest data shows who’s afraid of cybercrime.

SOLOS AND SMALL FIRMS Need a reputable expert witness? It will cost you.

Your ABA
Fred Kray protects the rights of pit bulls and others facing death sentences under “dangerous dog” ordinances.

An LA attorney combines two fields she’s passionate about: art and the law.

The Center for Innovation will drive efforts to develop new methods of delivering legal services.

Federal legislators put greater emphasis on meeting the needs of students who are homeless or in foster care.

Precedents
Twenty-two million TV viewers watch an assisted suicide by a man who made a career provoking both the law and the ethics of the medical profession.
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ANALYZE ALL THE SHADES OF GRAY.

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BAR TIPS

“Bar Fight,” September, page 48, unfortunately gets mired in its own minutiae. In doing so, the bigger picture becomes obscured by its too-close examination of scores and rates. This is not a problem unique to the legal profession; this is a national crisis. At all levels, American schools are failing.

Having graduated 47 years ago near the top of my class from Boalt Hall, having been a California Bar Exam grader, having chosen to teach law at a third-rate school for three decades followed by a stint teaching undergrads at a well-regarded state university, and as the father of a gifted child in a “superior” public school, I have borne witness to the decline of American education for a very long time.

Young people are every bit as intelligent as their elders. They are highly adept at using electronic devices and possessed of inexhaustible access to information. Yet, fewer and fewer of them are capable of engaging in critical thinking or writing cogently and persuasively. This phenomenon is observed in every discipline.

In doubt? Invite a senior faculty member from your local university for drinks and ask some probing questions.

Thomas Goetzl
Bellingham, Washington

Some 42 years ago, I went into a criminal law class at the University of Arkansas in Fayetteville. The teacher was a lady named Hillary Rodham who had an extremely bright future. I did my first year’s work there but ran out of funds and was forced to transfer to the night law school at Little Rock, which had a number of high-quality teachers. I went to school from 6 to 10 p.m., after working as an insurance claims adjuster during the daytime.

I don’t believe LSAT scores are nearly as good a predictor as your author, primarily because they don’t gauge drive, ambition or determination—not to mention study habits. Undergraduate grades are a much better gauge of ultimate success in law school. One has to do more than perform one Saturday to accumulate an undergraduate grade point average. That takes diligence and devotion, just as law school does.

We should dispose of bar exams. As long as our law schools are accredited and continue to do a good job, we should trust their degrees to mean something. If bar exams truly protected the public, I’d be all for their continuation. But I have known too many absolutely incompetent people who fooled bar examiners.

Ray Baxter
Benton, Arkansas

CORRECTION

“Bar Fight,” September, page 48, mistakenly identifies the University of St. Thomas School of Law in Minnesota as among those law schools with a high percentage of unemployed graduates, due to an editing error. The chart “The Bottom 10” (page 53) should have named St. Thomas University School of Law in Florida, which had bar passage rates of 72.09 percent for the Florida exam and 67.42 percent for all test takers.

The Journal regrets the errors.
The practice of health law is professionally challenging and demands dedication. We recognize the firms and attorneys below for answering this call to professionalism, for engaging the challenging health law issues of the day, and for their efforts to address healthcare clients’ complex problems.

**Midwest**

1. Polsinelli PC
2. Foley & Lardner LLP
3. Dinsmore (tied)
4. Hall, Bender, Killian, Heath & Lyman, P.C. (tied)
5. Husch Blackwell LLP
6. Quarles & Brady LLP
7. Sibley Austin LLP (tied)
8. Thompson Coburn LLP (tied)
9. Krieg DeVault
10. Brennan Mann & Diamond (tied)

**Northeast**

1. Nixon Peabody LLP (tied)
2. Verrill Dana LLP (tied)
3. Ober | Kaler
4. Mintz Levin
5. Pepper Hamilton LLP
7. Venable LLP (tied)
8. DLA Piper LLP (tied)
9. Robinson & Cole LLP (tied)
10. Stevens & Lee

**South**

1. Waller Lansden Dortch & Davis, LLP
2. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
3. Bradley Arant Boult Cummings LLP
4. Butler Snow, LLP (tied)
5. Stites & Harbison PLLC (tied)
6. Polsinelli PC
7. Bass, Berry & Sims PLC
8. Bravassele Sash & Wilson LLP (tied)
9. Husch Blackwell LLP (tied)
10. Haynes & Boone LLP

**Southeast & DC**

1. Hogan Lovells US LLP
2. Crowell & Moring LLP (tied)
3. King & Spalding (tied)
4. Sidley & Austin
5. Polsinelli PC
6. Kilpatrick Townsend & Stockton LLP
7. Nelson Mullins Riley & Scarborough LLP (tied)
8. Williams Mullin (tied)
9. Arnall Golden & Gregory (tied)
10. Greenberg Traurig, LLP (tied)
11. Mintz Levin (tied)

**West**

1. Hooper, Lundy & Bookman, PC
2. Polsinelli PC
3. Davis Wright Tremaine LLP
4. Foley & Lardner LLP
5. Sheppard, Mullin, Richter & Hampton LLP
6. DLA Piper LLP (tied)
7. Montgomery & Andrews (tied)
8. Schweback, Williamson & Wyatt (tied)
9. Steel Rives LLP
10. Keating Jones Hughes PC

The Health Law Section has been the voice of the health law bar for the past 18 years. As the profession’s standard-bearer, our central mission is to lead and shape the national discussion on pressing health law issues of the day.

This national leadership is accomplished through our unparalleled resources, unrivaled depth and breadth of expertise, and the backing of ABA’s over 402,000 members.

This list was determined by reference solely to Health Law Section membership as reported to the American Bar Association. Recognition is solely honorary in nature and not because of any qualification, skill or ability. No endorsement by ABA is granted, directly or indirectly, nor should be construed.
Serving Those Who Served

Veterans Day offers lawyers opportunity to aid those who protect our rights and freedoms

Phyllis, an elderly veteran in Wyoming, was disabled, homeless and losing hope. While living on the streets, Phyllis had lost her identification card and all her personal paperwork. As a result, she was unable to apply for food stamps, housing and other assistance.

Looking for help, Phyllis went to a program providing food, clothing, health screenings and benefits counseling to homeless veterans. Fortunately, attorneys with Legal Aid of Wyoming were participating in the event.

After sharing her information, Phyllis received the assistance she needed to apply for a new Social Security card, a copy of her birth certificate and a state-issued identification card. Then Legal Aid of Wyoming helped her access Medicaid, food stamps and veterans’ benefits.

As it turned out, many of her problems were solved simply by working with lawyers. That is why the American Bar Association has launched the Veterans Legal Services Initiative.

Veterans suffer from many challenges, including combat exposure, redeployments and long separations from family members. Medical services can solve some problems. But too many veterans return from active duty to confront urgent legal issues, including evictions, child-custody disputes, wrongful benefits denials and credit complications.

According to a study by the U.S. Department of Veterans Affairs, legal expertise is needed to solve at least half of the top 10 problems that lead to veterans’ homelessness.

The Department of Housing and Urban Development has estimated that almost 40,000 veterans are without homes. Veterans make up 20 percent of the male homeless population, while the fastest growing homeless population is women veterans. About 1.4 million other veterans are considered at risk of homelessness due to poverty and lack of support networks. We can and must do better.

When my law firm volunteered at a homeless shelter in Atlanta, I learned firsthand that many of the men we met were veterans. That is unacceptable. Veterans are men and women who risked their lives in defense of our liberty and to protect a just rule of law. These rights and freedoms speak to the core of our profession. It is only appropriate we repay veterans for their sacrifices.

Our Veterans Legal Services Initiative is led by a 20-member volunteer commission that will harness the vast expertise of ABA membership and our extensive nationwide relationships. Chairing the commission is Nanette DeRenzi, a retired three-star vice admiral and Navy Judge Advocate General, and Dwight Smith, who has provided invaluable leadership to numerous ABA entities.

The commission met in late August and is already working on access to legal services, strategic communications and resource development that will allow veterans and service providers to get the help they need. The most up to date information on the initiative can be found at www.ambar.org/veterans.

We want to engage with law schools and bar associations to promote legal-services incubators that can deliver services to veterans while providing valuable training for new and underemployed lawyers. We also will encourage medical-legal partnerships that pair VA medical facilities with lawyers to solve clients’ legal problems. And we will create a national web portal and other strategies, such as a veterans’ legal check-up, to help veterans identify their legal needs.

Additionally, we will work to expand on a pilot project from two years ago involving the ABA’s Veterans Claims Assistance Network and the Department of Veterans Affairs. It provided pro bono help to veterans whose benefit claims were caught in a massive backlog. This joint venture of the ABA and the VA showed a new path forward for resolving claims.

We are also planning veterans-specific pro bono days around Veteran’s Day and Memorial Day. It’s not too late for you and your colleagues to volunteer to help at a Veterans Day event. I invite you to participate with your local or state bar association, or a local pro bono services provider. Learn more at www.celebrateprobono.org.

With your help, more people like Phyllis will find the legal assistance they need to regain the stability and dignity of a home and a good job. We can help so many veterans. Lawyers like us are the key.
‘Emotional Fitness’ for Lawyers

Firm rolls out wellness coaching, classes for employees

AT KIRKLAND & ELLIS, LAWYERS WHO SEEK TO ENHANCE their “emotional fitness” now can enroll in the Life XT program, a series of live classes and online videos designed to promote resiliency against stress and increase productivity.

Life XT is based on the book Start Here: Master the Lifelong Habit of Wellbeing, which bills itself as a cross-training program for happiness and health. Life XT was developed in conjunction with health care researchers and neuroscientists with the goal to enhance lawyers’ ability to cope with the pressures of the profession.

“As lawyers, we’re always dealing with thorny problems and are always on demand for our clients, which generates a lot of stress,” says Linda Myers, a member of Kirkland’s management committee. The firm’s chair had read Start Here and turned to Myers, a “seven-day-a-week exerciser,” to investigate bringing the program to Kirkland’s lawyers.

Life XT includes one-on-one wellness coaching, meditation and yoga classes, with content available in person and online. Kirkland piloted the program with 60 Chicago-based attorneys last fall. It was so well-received that it’s now being rolled out firmwide with all 1,400 U.S. attorneys eligible to participate.

It’s been popular, and there’s a distinct business rationale for adopting this program, according to Myers. “Being a lawyer is a very high-stress job. The people here are bright and capable—they have a lot of options [of places to work]. We invest in recruiting and training them, so we want to find ways to help them stay here,” she explains. “With Life XT, we’re giving them a set of tools to be happy and productive at work. It contributes to the firm’s morale and esprit de corps when we show our lawyers that we’ll spend time and money on them. And if they’re more well, it’s good for the organization.”

Life XT’s website says the program can increase a team’s health by 21 percent and its focus by 16 percent. Myers adds: “It’s too soon to tell if our health insurance costs will go down, but that would be another great upside.”

—Leslie Gordon
Lawyer Creates Heartbreak Museum

Artifacts convey stories of doomed love

A TUBE OF TOOTHPASTE MIGHT NOT SEEM like an item worthy of an exhibit. But it’s exactly the kind of artifact that the Museum of Broken Relationships wants to showcase.

Items that are part of a story. A story of a failed relationship. A story to which everyone can relate, says attorney John Quinn.

“These objects and stories come from all over the world, and you realize [broken hearts are] a universal human phenomenon,” Quinn says.

Quinn was on a family vacation in Zagreb, Croatia, when a guidebook led him to the original Museum of Broken Relationships. Crowdsourced exhibits that featured artifacts from love lost captured his imagination.

“It was a very compelling overview of the different relationships people have,” says Quinn, who reached out to the owners of the Croatian museum before he opened his own museum in Los Angeles.

The Museum of Broken Relationships is about 5,000 square feet and takes up two floors in a space previously occupied by Frederick’s of Hollywood. For Quinn, who founded the litigation firm Quinn Emanuel Urquhart & Sullivan, starting a museum was a natural fit—he’s an art enthusiast and avid collector, and he knows business. While Quinn isn’t actively involved in the day-to-day operations of running the museum, he says he understands the connection visitors feel.

“The stories reflect and convey the whole range of human emotions,” Quinn says.

Although having a museum might seem like a huge departure from law, the business trial attorney says a symbiosis exists. He explains that “litigators know about broken relationships,” and that every lawsuit really is the result of a failed relationship.

Alexis Hyde, the museum’s director, says she loves the museum because it makes art accessible.

“I really liked the message that we’re all in this together. We’re all the same. ... It happens to everyone — no matter who or how you love,” Hyde says.

The museum opened in June, with 115 objects on display. According to Hyde, thousands of people have toured the exhibits, which are submitted by anonymous donors.

A Peter Pan doll on display was bought by a man when he was 25, to always remember to be energetic and childlike. Now in his 50s, he thinks that he’s lost that relationship with his inner child.

The toothpaste was sent in because every night the donor would put toothpaste from that tube onto the couple’s toothbrushes. That was their ritual. Even after they broke up she kept using the toothpaste. But once the tube was finished she realized she had to move on. She donated the tube of toothpaste to the museum.

“People are sharing things that, at one point, were very important to them,” Quinn says.

Hyde says some of the stories are sad, but in the end she thinks people can learn a powerful lesson. “Time heals all wounds,” she says, adding that “eventually” everyone gets to that place. —Cristin Wilson
What’s on the Shelf?
New releases explore the polarization of politics and the judiciary

Partisan politics and a politicized judiciary provide the backdrop for several new nonfiction books available this fall, including a memoir by one of the Bush administration’s most divisive figures and a collection by a Supreme Court justice who has become a pop culture icon.

My Own Words
by Ruth Bader Ginsburg
Fans of the pioneering jurist now can hear directly from Justice Ruth Bader Ginsburg herself. My Own Words is Ginsburg's first book since she joined the Supreme Court in 1993. It provides an engaging summary of her thoughts on the issues of our times, starting with a school newspaper editorial on the new U.N. Charter when she was only 13.

Ginsburg collaborated with Mary Hartnett and Wendy W. Williams on the book, a collection of writings, lectures and speeches on topics that range from gender equality to constitutional interpretation to being Jewish.

Appointed by President Bill Clinton, Ginsburg has been a prolific writer and public speaker, and this compilation is a testament to her influence on the law and jurisprudence.


True Faith and Allegiance: A Story of Service and Sacrifice in War and Peace
by Alberto R. Gonzales
He was a lightning rod in the Bush administration, with a tenure that was both history-making and mired in controversy. As the first Hispanic-American attorney general of the United States, Alberto R. Gonzales broke new ground. But scandal dogged his term as White House counsel and U.S. attorney general, ending with President George W. Bush requesting his resignation in 2007.

Now Gonzales states his case in a new memoir, True Faith and Allegiance: A Story of Service and Sacrifice in War and Peace, which he says wasn’t written to change minds about his tumultuous years in Washington. He says it was a personal history for his sons, so they know what he was responsible for and why he did what he did.

“Lawyers disagree with some of the decisions and opinions of the Bush administration. I accept that,” Gonzales says. “Did we make mistakes? Yes. That’s what’s going to happen in this kind of job, and I accept that. My hope is that people understand we did the best we could under difficult circumstances.”

Gonzales’ memoir takes a glimpse into his childhood as the son of Mexican migrant workers and the devout upbringing that framed his conservative and religious views. A Harvard Law School graduate, Gonzales worked in private practice before then-Gov. Bush brought him on as general counsel. Bush later named him secretary of state of Texas and appointed him to the Texas Supreme Court before tapping him for the White House counsel post and later attorney general.

Gonzales’ memoir provides a bird’s-eye view of decision-making during one of the most polarizing and terrifying periods of recent American history, from the harrowing moments after 9/11 to the creation of the war on terror.

“The president wanted to avoid war,” Gonzales says. “On the other hand, because of the 9/11 attacks, he was not going to allow the U.N. to dictate to him whether he could use force to protect America. Our job was to ensure the president had legal authority domestically and internationally to use force.”

Gonzales’ memoir might not satisfy those who seek deeper answers to scandals that included the firing of nine U.S. attorneys general. Vilified by the press and targeted by congressional Democrats, his tenure ended amid a flurry of Senate hearings, accusations of perjury and partisan confrontation about whether he was competent to run the Department of Justice.

Despite being asked to leave by President Bush as his office became embattled in controversy, Gonzales has nothing but praise for his former employer. “He was a terrific client, deferential to my advice. I always thought he was someone special—that was my perspective.”

Now in private practice, Gonzales is realistic about how True Faith and Allegiance might be perceived. “My sense is people who like me are going to like the book, and people who don’t like me are not going to like the book. But it’s my story.”

(Continues on next page)
A Boost for Transient Attorneys

Partnership makes practice easier for lawyers who have military spouses

ELIZABETH JAMISON KNOWS HOW HARD IT IS TO be a lawyer married to someone in the military—to move from state to state while also building a legal practice. Jamison’s husband’s job as a helicopter pilot in the Navy has taken them from California to Florida to Rhode Island and now Washington, D.C. Over the course of four years, it’s left the family law attorney looking for creative ways to stay working.

“I relied mostly on contracting out to other attorneys because I wasn’t confident in my ability to connect with clients in San Diego while working remotely,” Jamison says.

Jamison is president-elect of the Military Spouse JD Network—a group with about 1,200 members who are lawyers married to members of the military. A big part of her job is to make it easier for the group’s members to keep being lawyers, under challenging circumstances.

For example, the MSJDN has worked with state bar associations to create rules that allow military spouses to temporarily practice law without taking that state’s bar exam. As of Sept. 15, 20 states had such rules in place, Kansas being the latest.

Now, the network has begun a partnership with online lawyer matchmaker Legal Services Link that could be just the solution its constituents need.

Legal Services Link is a platform that will seem familiar to anyone who’s used Thumbtack or TaskRabbit to find a handyman or a plumber. The site lets potential clients post their legal needs—what sort of help they seek, where they’re located and how much that they hope to spend. Then the lawyers who have paid to register with Legal Services Link can respond, offering their services. Legal Services Link also provides attorneys free listings in its lawyer directory.

Co-founder Matthew Horn says Legal Services Link’s aim is to help more people get more legal assistance while also giving lawyers a new tool to build a client base and maintain their practices. The site was founded in 2015 and has about 400 lawyers signed up so far. Horn says about 300 legal projects have been posted, with business mostly centered in and around Chicago.

“Fortunately, the old dating saying ‘There’s someone out there for everyone’ is equally as true in the legal industry—there’s an attorney out there for everyone,” he says. “The problem now is that they can’t find one another. We intend to change that.”

Horn met MSJDN representatives at the National Conference of Bar Presidents midyear meeting in February, realized they had extremely compatible interests, and set about finding a way to work together.

A partnership now is in its infant stages. Both sides hope the arrangement will be a boon to all, with network members receiving discounted premium services and Legal Services Link gaining access to more than a thousand transient attorneys who are trying to stay active in a profession that heavily favors staying in one place.

“The adoption of technology by both clients and attorneys is making it easier for mobile populations like our members to maintain a career,” Jamison says. “I wish I would have had Legal Services Link when I was hanging my own shingle.”

—Arin Greenwood
**Opening Statements**

**Friendlier Skies**

Airlines are keeping customers happier this year. Complaints filed with the Department of Transportation during the first six months of the year are down 12% compared to the same period last year. Complaints about delays, cancellations and misconnections were down 14% during the first half of 2016. However, grievances filed about discrimination were up, and complaints about treatment of disabled customers also grew by 17%. The most criticized U.S. airlines were American and United.

*Source: transportation.gov (Aug.17).*

**Last Word**

The Supreme Court, in *Moore v. Texas*, will consider whether a legal analysis drawn from John Steinbeck’s *Of Mice and Men* meets constitutional requirements after the Texas Court of Criminal Appeals adopted “the Lennie standard” to determine “mental retardation” in a death penalty case, listing seven factors needed to spare someone like Lennie from execution. Steinbeck’s late son said of the case: “The character of Lennie was never intended to be used to diagnose a medical condition like intellectual disability. ... I am certain that if my father, John Steinbeck, were here, he would be deeply angry and ashamed to see his work used in this way.”

*Source: newyorktimes.com (Aug. 22).*

**Cartoon Caption Contest**

**CONGRATULATIONS TO** Brent R. Cromley of Billings, Montana, for garnering the most online votes for his cartoon caption. Cromley’s caption, far right, was among about 200 entries submitted in the *Journal’s* monthly cartoon caption-writing contest.

**JOIN THE FUN** Send us the best caption for the legal-themed cartoon at right. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, Nov. 13, with “November Caption Contest” in the subject line.

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

*“Really, our only issue is how to divide the nest egg.”*  
—Brent R. Cromley of Billings, Montana
Fare Fight

‘Sledgehammer Shannon’ is going after industries on behalf of workaday folks

NICKNAMED “SLEDGEHAMMER SHANNON,” this Boston lawyer doesn’t take on cases; she takes on industries. She’s forced restaurants, clubs and caterers across the country to fairly tip their servers. She’s won fair wages for delivery drivers, exotic dancers, call center workers, house cleaners, cable guys and more, and she’s taken on corporations and institutions such as FedEx and Harvard University.

Now, Shannon Liss-Riordan and her Boston-based firm are at the forefront of employee misclassification cases that emerge from the new “sharing economy.”

You've been all over the news for the Uber case. Do you think high-profile lawsuits such as this one have influenced other shared-economy companies to adopt more worker-friendly policies?

Yes. I am really proud of the fact that there's a growing list of companies like Skype, Instacart and Luxe Valet that have decided to go the other way—either from the get-go or they've made changes. Companies are seeing this litigation, and they don't want to be caught up in it, so they put policies in place so they don't have to fight these battles. I consider that a big victory, and it shows that the litigation I've been doing serves an important purpose.

In the middle of the complex Uber negotiations, you took a break to take and pass the California bar. Was that something you planned?

I had a growing list of cases in California, and one defense lawyer thought he was being very crafty and smart by challenging my admission to the bar. He showed the judge this large stack of cases I had pending in California and said, “She can't keep practicing on a pro hac vice basis.” I said, “Your honor, I will take the California bar.” I did, and I passed. His tactic backfired, and now he'll be seeing a lot more of me.

Why do you think people choose to take jobs in the shared or gig economy, even if they realize they might not be paid fairly?

One of the reasons the gig economy has been growing in popularity is that people really do value flexibility. It's a trend we've been seeing in the workplace in recent decades, but the gig economy takes that to a different level. Just because you set your own hours doesn't mean you are completely autonomous and you own your business. You're not your own boss—you're doing work set up for you and relying on their customers. It's one of the oldest tricks in the book.

You're one of only a handful of practicing lawyers in the country who also owns a pizza parlor. After you successfully
represented employees in a lawsuit against a chain of pizza restaurants, the restaurants ended up on the auction block and you bought the Harvard Square location. How has being this type of business owner affected how you approach your practice?

It’s given me good perspective on the kinds of things employers deal with. I think about what it means to be a good employer. Even though I have excellent managers, it’s a lot of work; and I don’t underestimate what business owners go through. But my job is always to make sure businesses think about their employees and do not cross the lines that have been drawn by the laws.

What do your kids think of it?

It’s pretty much every kid’s fantasy to have their parents own a pizza place.

Let’s talk about your life before you became a lawyer. Before you went to law school, you worked for the legendary congresswoman and women’s rights trailblazer Bella Abzug. What was that like?

She was a great inspiration. I learned a lot about how to put ideas into action. No goal was too lofty. She’d just say, “Here’s what we’re going to do,” and we’d do it.

How did you get that job?

Through grit and determination. I had gotten involved in political organizing in college. I wasn’t from a particularly political family, but once I was in college and was exposed to what was going on in the world, I got fired up and got involved. I decided that after graduation, I would go to New York and work with a women’s organization. So I got a directory of all the women’s groups in New York, and I called them all.

Did your work in political activism prepare you for law school?

No. I decided I wanted to go to law school because I wanted to have a concrete way to use the skills that I had, to harness this energy in a concrete way to improve people’s lives. I knew how much people’s jobs affected their lives, so employment law was a natural place for me to put my energies. I went into law school knowing this was the kind of work I wanted to do.

I have to ask about your nickname, “Sledgehammer Shannon.” How did that come about?

After we won the federal court trial for the skycaps here in Boston, we had a big victory party. It was very rowdy, and one of the skycaps called me “Sledgehammer Shannon.” It got picked up in a *Boston Globe* story, and it carried on.

Are you OK with it?

Yeah. It’s kind of funny. People who know me personally think “You are such a nice person!” But it shows that when I am in the courtroom, I let it all out. I can be pretty passionate about what I am fighting for, so to the extent it refers to that, I am proud of it.

—Jenny B. Davis
As he hitchhiked around the country in 1940, Woody Guthrie got sick of hearing Irving Berlin’s patriotic hit “God Bless America” on car radios and jukeboxes. So the itinerant folk singer penned his own anthem in response—with lyrics that challenged the concept of private property. He called the song “This Land.” Five years later, Guthrie included the lyrics in a booklet of 10 songs he’d written. He printed copies and put a 25-cent price on the cover—along with “Copyright 1945 W. Guthrie.”

That same decade, striking tobacco workers in Charleston, South Carolina, lifted their voices to an old African-American spiritual, vowing that they’d triumph: “We Will Overcome.” Or did
they sing “We Shall Overcome”? At some point, someone tweaked the lyrics, which had been evolving for decades. The word will became shall, and the phrase down in my heart changed to deep in my heart.

Those new words were on the page when Ludlow Music applied for a copyright in 1960, crediting Zilphia Horton, Frank Hamilton and Guy Carawan—not as authors of the original song but as the people who'd written new verses and a new arrangement. The company filed for another copyright in 1963, adding more verses and another name: Pete Seeger. But were these people responsible for the words in the most famous verse? Or do those words belong to the public?

These questions are at the heart of two class action complaints filed this year in federal court in New York. The attorney pursuing both is Mark Rifkin of Wolf Haldenstein Adler Freeman & Herz in New York City. He made headlines in 2015 when he won a lawsuit that ended Warner/Chappell Music’s claim on the copyright for “Happy Birthday to You.” Now, he’s taking on a publisher that administers two of America’s most famous folk songs.

“The work we do in these cases ... is serving the public interest,” Rifkin says, emphasizing that artists have to have freedom to create something new based on older works that belong in the public domain. “ ‘This Land’ and ‘We Shall Overcome’ have a common element, which is the way folk music is created in this country. People take work that is already in existence, and they change it—maybe a little, maybe a lot—and they make it their own.”

Paul LiCalsi of Robins Kaplan in New York City represents the defendants in the two suits. He says he’ll be able to prove that his clients—Ludlow Music and its parent company, the Richmond Organization—have valid copyrights. He also argues that “This Land Is Your Land” (as it’s dubbed since a 1956 copyright) and “We Shall Overcome” deserve to be protected from commercial exploitation.

“It’s not so cut-and-dried that this attempt to put this in the public domain is really such a great thing for the culture and for the public,” he says. “If ‘We Shall Overcome’ is in the public domain, what’s to stop a hamburger franchise from saying ‘We shall overcome greasy burgers?’”

LEGAL DISHARMONY

In the litigation regarding Guthrie’s song, Brooklyn rock band Satorii is suing to get back $45.50 it paid for a license to cover “This Land Is Your Land.” The group also wants to release a different version, combin-

“If We Shall Overcome is in the public domain, what’s to stop a hamburger franchise from saying ‘We shall overcome greasy burgers?’”

Paul LiCalsi, partner at Robins Kaplan

ing Guthrie’s lyrics with a new melody. According to the lawsuit, Guthrie took his melody from an old hymn that’s known variously as “Fire Song,” “When the World’s on Fire” and “O My Loving Brother.”

The lawsuit argues that Guthrie’s copyright on his lyrics began in 1945, when he printed that booklet. Guthrie died in 1967, and his heirs didn’t renew that copyright when it expired in 1973. But LiCalsi insists that the 1945 songbook doesn’t qualify as a publication.

“We’ve never seen any indication that copies of this thing were sold by Woody to the public,” he says. “At the most, he gave one or two to Alan Lomax, who was his record producer [and] gave one maybe to a manager.”

Rifkin disagrees, saying, “It was obviously offered to the public.”

Folkways Records released a record with Guthrie singing “This Land Is Your Land” in 1951, with the lyrics in the liner notes—but no copyright notice. Finally, Ludlow registered a copyright for the song in 1956, calling it “an unpublished work” and identifying Guthrie as the author of the song’s words and music.

Satorii’s lawsuit argues that this copyright—still administered by Ludlow, with 75 percent of royalties going to Guthrie’s family—is invalid. Woody Guthrie’s daughter Nora Guthrie told the New York Times in July: “Our control of this song has nothing to do with financial gain. It has to do with protecting it from Donald Trump, protecting it from the Ku Klux Klan, protecting it from all the evil forces out there.” (The Woody Guthrie Foundation, where she is president, declined to make her available for an interview.)

In the other suit, a California nonprofit, the We Shall Overcome Foundation, wanted to make a documentary about the civil rights anthem, but Ludlow denied permission to include the song. Another plaintiff, Butler Films, paid $15,000 for a license to use three seconds of “We Shall Overcome” in the 2013 movie The Butler. The producers wanted to feature the song in several prominent scenes, but Ludlow demanded $100,000, a cost the producers say is too much.

Rifkin argues that the 1960 and 1963 copyrights don’t cover the song’s melody or its most famous words. But LiCalsi says the wording change is covered by those copyrights.

“This is a very simple change, but it was obviously a profound change,” he says. “The word will is somewhat passive. It’s an expression of faith that things will change someday.” The song became more assertive with the word shall, he says. “Significantly, it was that version ... that caught the imagination of the movement that became popular.”

Rifkin’s lawsuit questions how LiCalsi’s clients can hold a copyright on those words when it isn’t clear...
Is Cyberbullying Free Speech?
North Carolina Supreme Court invalidates a cyberbullying law on First Amendment grounds, and other challenges might follow

By David L. Hudson Jr.

Bullying is a persistent problem for educators and lawmakers, particularly with the ubiquity and popularity of social media platforms. The problem has become so embedded in the culture that 23 states have cyberbullying laws. Cyberbullying appears to be somewhat less frequent than face-to-face bullying, but the consequences may be even more severe,” says social psychologist Elizabeth Englander, who directs the Massachusetts Aggression Reduction Center at Bridgewater State University. “Issues like trauma, depression, anxiety, academic problems and social problems can result from cyberbullying.”

Schools have responded by amending anti-bullying codes to include cyberbullying in their social media policies, and at least 18 states have criminal laws on cyberbullying, according to Justin W. Patchin, co-director of the Cyberbullying Research Center and a criminal justice professor at the University of Wisconsin at Eau Claire. “The media and the public are paying attention to this problem because of high-profile incidents where cyberbullying was implicated in suicides,” he says.

But free-speech advocates say the breadth and vagueness of the statutory language in many of these laws puts them in jeopardy. And if a recent case in North Carolina is any indication, the debate could be headed for the U.S. Supreme Court. In 2009, North Carolina legislators passed a criminal cyberbullying statute. The law makes it illegal for any person to use a computer or computer network to “post or encourage others to post on the internet private, personal or sexual information pertaining to minors” with the intent to intimidate or torment a minor.

Robert Bishop faced misdemeanor charges under North Carolina’s cyberbullying law for posting negative comments under a sexually themed photo of a high school classmate in Alamance County. Bishop allegedly called his classmate “homophobic” and “homosexual,” and used vulgarity toward the classmate in other posts.

CONDUCT VS. SPEECH
Bishop was convicted in state district court and state superior court. The North Carolina Court of Appeals affirmed the superior court conviction and rejected Bishop’s First Amendment challenge to the law. According to the appeals court, the law regulated conduct, not speech. Even if the law reached speech, its impact was only incidental.

On further appeal, the North Carolina Supreme Court recognized that the law directly criminalizes speech. “Posting information on the internet—whatever the subject matter—can constitute speech as surely as stapling flyers to bulletin boards or distributing pamphlets to passersby—activities long protected by the First Amendment,” the high court wrote.

The court also determined in State v. Bishop that this criminal law that targets speech has to pass strict
The Docket

The decision is not terribly surprising because of the breadth of the statutory language, says James C. Hanks, author of School Bullying: How Long Is the Arm of the Law? (published by the ABA). “In this day and age, we have to put up with some annoyances,” Hanks says.

Hanks says it is not the first time a court has invalidated a cyberbullying law. The New York Court of Appeals invalidated Albany County’s cyberbullying law in 2014 in People v. Marquan M. The court wrote that “the text of Albany County’s law envelops far more than acts of cyberbullying against children by criminalizing a variety of constitutionally protected modes of expression.”

“The wording of the North Carolina statute doesn’t require any harm being shown to the victim,” Hanks explains. “This is different from most of the other civil and criminal laws pertaining to bullying. Most of them require a link to some negative effect upon the victim. Key language missing is language such as ‘likely to cause another person harm.’ ”

Volokh doesn’t think such laws should aim to ban cyberbullying. “If they want to ban true threats of violence, for instance, they can,” he says. “If they want to ban unwanted speech to a person, they can do that, just like many telephone harassment statutes do. But if a legislature wants to ban nontargeting, nonlibelous but distressing or offensive speech about a person, online or offline, that violates the First Amendment.”

Patchin has been studying cyberbullying with Sameer Hinduja since 2002, who also co-directs the Cyberbullying Research Center and is a professor in the School of Criminology and Criminal Justice at Florida Atlantic University.

Patchin says some people do “interpret these rulings as evidence that we cannot restrict online speech at all. I don’t agree with that approach. We just have to be careful in how we craft these laws.”

Patchin thinks criminal law should be employed only as a last resort, especially when the behaviors involve adolescents. “But, if efforts by schools and parents fail, then there should be an additional mechanism to address egregious examples of harmful online speech,” Patchin says.

Criminal prosecutions for cyberbullying are relatively rare. “There’s no good data on this question, but I regularly ask police officers how often they charge, and it isn’t often,” he says.

Englander agrees. “My impression is that cyberbullying is not frequently prosecuted as a crime,” she says.

“These kinds of cases make me feel for educators, who really don’t have sufficient guidance from the courts,” says Patchin. “Police officers struggle with these issues, as well.”

The legal landscape is less than clear, and Patchin thinks that it will take more litigation to resolve the constitutionality of many of these laws.

“Eventually, the U.S. Supreme Court will have to address the constitutionality of a criminal cyberbullying law,” he says. “The bottom line is that we need to sort this out. There are certain things that people shouldn’t be able to say online. There definitely is a line somewhere, but the courts haven’t really defined where that line is.”

scrutiny, the highest form of judicial review. The North Carolina high court reasoned that states have a compelling interest in protecting minors “from physical and psychological harm.” However, the court determined the law had many problems.

The court noted that the law did not require that the subject of an online post suffer an injury as a result of the post. Thus, the law “sweeps far beyond the state’s legitimate interest in protecting the psychological health of minors.”

The court also noted that the law failed to define the key terms intimidate or torment, which the state contended should be defined as “to make timid, fill with fear” and “to annoy, pester or harass,” respectively.

“The protection of minors’ mental well-being may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance,” the court wrote. “However laudable the state’s interest in protecting minors from the dangers of online bullying may be, North Carolina’s cyberbullying statute ‘create[s] a criminal prohibition of alarming breadth.’ ”

UCLA law professor and free-speech expert Eugene Volokh, who filed an amicus brief on behalf of the Electronic Frontier Foundation, says the North Carolina law criminalized much of protected speech. He explains that the law could cover “a girlfriend’s excoriating her cheating ex-boyfriend on a Facebook post or people emailing each other about some high school cheating scandal.”

“Such restrictions on people’s ordinary self-expression and discussion can’t be proper,” Volokh says. “Indeed, it seems quite likely that giving a teenager a criminal record for such speech would itself be extremely distressing and in rare cases can itself lead to suicide. People should be nice to each other, but the law can’t enforce such a requirement, even in the interests of protecting minors.”

GOING TOO FAR

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Blaming Banks

Court to decide whether Miami can sue banks under the Fair Housing Act for loss of tax revenue

By Mark Walsh

The mortgage-lending practices of the nation’s largest banks and their effects on inner-city neighborhoods will be the backdrop in a U.S. Supreme Court case to be argued in November.

The legal question essentially involves whether a city can be an “aggrieved person” under the Fair Housing Act of 1968 and thus have standing to seek redress for the harms caused by alleged discriminatory practices.

In 2013, the city of Miami filed separate but substantially similar lawsuits against Bank of America, Citigroup and Wells Fargo, alleging that the banks violated the FHA by engaging in discriminatory lending practices that resulted in a disproportionate number of defaults by black and Latino homebuyers.

These defaults, in turn, harmed property values and resulted in a loss of tax revenues to the city, the suits contend.

“They were targeting minority buyers for riskier loans,” says Robert S. Peck, the president of the Center for Constitutional Litigation, a Washington, D.C.-based public interest law firm that represents Miami.

The city’s case contends that the banks aimed predatory loans that carried more risk, steeper fees and higher costs at minority customers than did those offered to white customers in similar situations.

The alleged predatory loans included those with higher interest rates than what were established by federal benchmarks, interest-only loans, balloon payment loans, loans with prepayment penalties, and adjustable rate mortgages with teaser rates.

An analysis conducted for the city showed that a black Wells Fargo borrower was about four times more likely to receive a predatory loan than a white borrower with similar underwriting qualifications was. A Latino Wells Fargo borrower was about 1½ times more likely to receive such loans than a similarly situated white borrower was, court papers say.

The suit alleged that by steering minority borrowers into such predatory loans, the banks caused their properties to fall into foreclosure more rapidly than for white borrowers. This deprived the city of tax revenue and required it to spend more to battle the resulting blight conditions.

The banks sought dismissal of the suit by arguing that the city lacked standing under the FHA because it fell outside the statute’s “zone of interests,” and that the banks’ actions could not be sufficiently tied to the harms cited by the city.

A federal district court agreed and dismissed Miami’s suits in 2014. But in 2015, a panel of the 11th U.S. Circuit Court of Appeals at Atlanta revived the suits.

The 11th Circuit said the phrase “aggrieved person” in the FHA extends standing as far as it can go under Article III of the Constitution. It also held that the city’s allegations were sufficient to meet the housing law’s proximate-cause requirement. The city’s suit alleged “the [banks’] discriminatory lending caused property owned by minorities to enter premature foreclosure, costing the city tax revenue and municipal expenditures.

“Although there are several links in that causal chain, none are unforeseeable,” the court panel said.

TWO SOCIETIES

The big banks are facing such FHA suits not just from Miami but from a
The Docket

The growing number of other cities, “Municipalities are seeking damages — earmarked for their own coffers — that are vastly greater than what the Justice Department has claimed for direct victims of [housing] discrimination,” according to an amicus brief filed in the Supreme Court by the American Bankers Association and eight other banking groups.

Two of the banks asked the Supreme Court to review the 11th Circuit decision, and the justices will hear arguments on Nov. 8 in Wells Fargo & Co. v. City of Miami and Bank of America Corp. v. City of Miami.

Two terms ago, in Texas Department of Housing and Community Affairs v. Inclusive Communities Project Inc., the Supreme Court ruled 5-4 that disparate-impact claims are cognizable under the Fair Housing Act. That was a separate question than the one presented in these new cases. But the result was a surprise to many who expected the justices to rein in litigation under the FHA.

In his majority opinion, Justice Anthony M. Kennedy underscored the historical backdrop of the fair housing law being enacted at a time of great social unrest and said the nation had been moving toward two societies, “one black—one white.”

In the Miami case, Wells Fargo stresses Justice Kennedy’s observation in Inclusive Communities that the FHA’s central purpose is to “eradicate discriminatory practices within a sector of the nation’s economy.”

The banks sued by Miami say “the Fair Housing Act is about discrimination. It’s not about tax revenues or anything like that,” according to Neal K. Katyal, a Hogan Lovells partner who represents Wells Fargo in the case.

“And the banks are also saying: This is a really long chain of causation” alleged by the city, Katyal noted at a panel discussion about the Supreme Court in late September. “It’s a kind of several-step theory.”

Katyal argued that the city of Miami falls well outside the limitation on zones of interests imposed by the FHA. He pointed to a 2011 Supreme Court decision in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964.

In Thompson v. North American Stainless LP, the high court held that the term aggrieved in Title VII permits a suit by a “plaintiff with an interest ‘arguably [sought] to be protected by the statutes’ … while excluding plaintiffs … whose interests are unrelated to the statutory prohibitions in Title VII.”

The 11th Circuit, in the Miami cases, thought it was bound by dicta in three Supreme Court opinions from more than 30 years ago.

In Trafficante v. Metropolitan Life Insurance Co. in 1972, Gladstone, Realtors v. Village of Bellwood in 1979, and Havens Realty Corp. v. Coleman in 1982, the court discussed that the term aggrieved in the FHA extends as far as Article III permits.

But in each of those cases, according to Katyal, the discussion was unnecessary to the case at hand.

That led Justice Antonin Scalia, in the court’s unanimous opinion in Thompson, to refer to the language on a “person aggrieved” in those earlier opinions as “ill-considered” dictum.

Katyal also argued that the city of Miami’s claims are too remote from the banks’ actions to be actionable.

“In that sense, the city is no different from the innumerable other individuals and entities that suffered economic losses after the collapse of the American housing market,” the Wells Fargo brief states.

Bank of America makes similar arguments in a merits brief filed by William M. Jay of Goodwin Proctor. (Both Katyal and Jay declined to be interviewed.)

“Several cities and counties have seized upon [the FHA] in an attempt to force large financial institutions to make up for shortfalls in municipal budgets,” the brief states. “And they contend their suits are proper because the FHA imposes no statutory limit on who may sue.”

“Those who were denied access to housing and those who suffered the effects of racial segregation are within the zone of interests,” the Bank of America brief says. “The municipal plaintiffs are not.”

ENDING A CYCLE OF BLIGHT

Peck, representing Miami, says that “if you look at the underpinnings of the Fair Housing Act, it was enacted because of widespread discriminatory housing practices but also about the fact that this discrimination was plaguing our cities.”

He points out that the high court’s 1979 decision in the Gladstone case upheld municipal standing under the FHA in the case of a village that sued a realty firm under the act regarding racial steering. Gladstone remains the key precedent on point supporting Miami’s suit, Peck says.

“The discriminatory mortgage-lending practices at issue here directly harm the city’s fair housing efforts; deprive it of the benefits of an integrated community; rob properties and neighborhoods of their value; diminish tax revenues; and demand extra police, fire and safety attention, draining the city’s resources,” Peck wrote in a brief.

“The FHA was intended to end that cycle of urban blight, and Miami’s lawsuit plainly furthers those interests.”

Moreover, he argues that the 2011 Thompson decision does not help the banks as they contend because that decision’s definition of an aggrieved person under Title VII’s employment context does not control the interpretation of similar language in the FHA.

Peck argues that while Title VII is focused on discriminatory motives behind an adverse employment decision, the FHA is focused on broader results. He also contends that Miami has sufficiently pleaded proximate cause between the banks’ actions and the harms on the city by providing detailed evidence of statistical disparities between minority and white borrowers tied to policies that caused the disparities.

Cities and banks across the country will await the Supreme Court’s answer in these cases.
Listen: Billy Pilgrim has come unstuck in time.
Billy has gone to sleep a senile widower and awakened on his wedding day. He has walked through a door in 1955 and come out another one in 1941. He has gone back through that door to find himself in 1963. He has seen his birth and death many times, he says, and pays random visits to all the events in between.
—Kurt Vonnegut Jr., Slaughterhouse-Five

One of the joys of getting older is that now, when rediscovering a book, it is almost as if I am listening to the story for the first time. Sometimes the story completely absorbs my attention and interest. This happened when I listened to Slaughterhouse-Five during a summer drive to Maine.

The plot: Billy Pilgrim, a traumatized WWII vet, returns to the ’burbs in Ilum, New York. Pilgrim remains a prisoner forever inside himself, trapped in the horror of his wartime past. (Pilgrim, like Vonnegut—who appears as both a character in and narrator of his novel—was a prisoner of war in Dresden as it was firebombed and destroyed by the Allies.)

There is the delicious plot twist that transforms the story into Vonnegut’s custom blend of dark comedy and science fiction: Pilgrim is abducted by aliens, transported to the planet Tralfamadore and bred with the lovely earthling movie star Montana Wildhack. On Tralfamadore, moments exist independently from one another, and stories do not unfold in a linear or orderly way. As a result, Pilgrim finds himself thrown about in time; he time-travels from one place to another, from present to past to future and back again in a disordered progression of disconnected moments that make no sense to Pilgrim but, miraculously, make for a marvelous story.

For Vonnegut, a former creative writing teacher at the Iowa Writers’ Workshop, Slaughterhouse-Five provides a playful critique of how all storytellers manipulate time, shaping and ordering events into compelling and coherent stories. This is true for the stories that lawyers tell. When we construct our stories, whether ordering evidence in a trial or drafting the statement of the case in an appellate brief, it is as if we too have been temporarily abducted by aliens and transported to the planet Tralfamadore. “Real” time (the ticking of the clock) is no longer controlling and we are compelled, like Pilgrim, to travel in story-time.

Driving back from Maine, I pulled off the interstate and scribbled down this takeaway: As Billy Pilgrim experiences after his alien abduction, all lawyer-storytellers become unstuck in time. We may not suffer the same fate as Pilgrim, who is committed to a mental hospital after he publishes his revelations about his time travels. But we will certainly lose credibility if our use of time for persuasion becomes too obvious, seems false, or is simply too far-fetched for our audience to believe in or follow.

CONSIDERING CHRONOLOGY
How do we order events and then move about in time when telling law stories? The starting point is chronology, suggesting a linear sequence of events that replicates the order of how events purportedly happened in real time.

Novelist and writing teacher David Lodge observes: “The simplest way to tell a story, equally favored by tribal bards and parents at bedtime, is to begin at the beginning and go on until you reach the end or your audience falls asleep.” Narrative theorist Gerald Prince explains: “The arrangement of situations and events in the order of their occurrence—‘Harry washed; then he slept’—observes a chronological order, whereas ‘Harry slept after he worked’ does not.”

In law, we typically attempt initially to tell our stories chronologically. Why? Clarity, credibility and causality. The first two reasons are obvious; the third, perhaps the most important, is less frequently identified.

Clarity and credibility. Juries and judges appreciate and need a linear chronological timeline upon which they can order and affix the events of a story. Sean Grennan, a playwright, observed in the ABA Journal after serving on a jury how a printed, chronological timeline ordering events in a complex torts case locked in the jury’s narrative (See “Unsolicited Advice,” April, page 26.) As Grennan puts it, the timeline provided “clean storytelling in a crushproof box.” There is a presumption that chronological order embodies how events transpire in the real world, arousing the least suspicion in the audience (especially an audience of skeptical jurors) because the telling does not seem manipulated by the narrator.

Causality. But we employ chronology for another important reason—a chronological sequence presupposes crucial causal relationships between the events depicted in a story. What do I mean? All storytellers rely on the...
powerful psychological presumption that sequence and causality are intertwined, that earlier events in a story cause what happens next. This effect is exaggerated in legal storytelling where, on the one hand, juries are admonished not to go beyond the evidence presented at trial in shaping their narratives and, on the other, assigned to determine causal responsibility for narrative outcomes in verdicts and judgments.

ON ‘ANACHRONY’

Unfortunately, there isn’t, umm, “time” to identify all the ways that lawyer-storytellers intentionally and unintentionally depart from chronology whenever we tell law stories. Here is one technique narrative theorist Prince identifies that enables storytellers to travel in time:

*Anachrony: A discordance between the order in which events (are said to) occur and the order in which they are recounted: a beginning in media res followed by a return to earlier events constitutes a typical anachrony. In relation to the ‘present’ moment, the moment when a chronological recounting of a sequence of events is interrupted to make room for them, anachronies can go back into the past (retrospection, analepsis, flashback) or forward into the future (anticipation,
Practice

prolepsis, flash-forward)."

Do lawyer-storytellers employ anachrony? Of course we do. For example, I am reading a brief in a criminal appeal that begins with the story of the trial beneath a header (The Trial and Issues on Appeal). The brief then returns in time via flashback to the story of the horrific crime itself that led to the trial and the court's evidentiary ruling at issue on appeal.

Story-time is reshaped, emphasizing the procedure while downplaying the crime itself. The same happens in the courtroom, often without the audience's awareness, when attorneys arrange presentation of evidence and witnesses, organizing the trial story strategically, reordering time to achieve persuasive purposes.

In the state criminal trial of Los Angeles Police Department officers for the Rodney King beating, defense attorneys successfully slowed down time into what narrative theorists label a "stretch." They did this by replaying a slow-motion, frame-by-frame version of the famous video of King's beating that defused the cumulative power of the imagery.

BEGINNINGS AND ENDINGS

There are numerous other ways that legal storytellers time-travel. For example, we slow down story-time when we present complete scenes (showing rather than telling) and speed up time by employing summaries (telling rather than showing).

Likewise, we predetermine the length (discourse time) of our stories when we select a beginning or choose an ending point to give meaning and closure to the events depicted in the tale.

Contrast this with Tralfamadorian stories, where, Vonnegut wrote, "there is no beginning, no middle, no end, no suspense, no moral, no causes, no effects. What[Tralfamadorians] love in [stories] are the depths of many marvelous moments seen all at one at a time."

In Slaughterhouse-Five, time just runs out. And Vonnegut simply employs the mocking irony of an exotic bird's refrain as an exit line: "[This story] begins like this: Listen: Billy Pilgrim has become unstuck in time. It ends like this: Poo-tee-weet."

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

Keyword to Success

Texas opinion says lawyers may use a competitor's name to gain an advantage when they advertise online

By David L. Hudson Jr.

As more potential clients search for attorneys online, lawyers are finding new ways to gain a competitive advantage in advertising.

One strategy is to employ techniques to ensure that the lawyer’s name will appear on the first page of search-engine results.

Search-engine companies allow lawyers to buy specific words or phrases—called keywords—that will cause their names and ads to pop up when prospective legal consumers use them. Keywords are not sold exclusively to one user, so the same keywords may be used by a number of advertisers.

In a process known as competitive-keyword advertising, a lawyer will buy the name of another lawyer or firm as a keyword. As a result, the name of Lawyer A and, perhaps more important, a link to Lawyer A’s website, will be displayed on the search engine’s results page anytime a potential client calls up Lawyer B’s name using the search engine, even if Lawyer B did not authorize Lawyer A to use Lawyer B’s name as a keyword.

This kind of keyword-based advertising might seem like marketing hardball. But the real question for lawyers is whether the practice violates any ethics rules.

Only a few states have tackled that issue. The Professional Ethics Committee for the State Bar of Texas posed this question in its Opinion 661, issued in July: "Does a lawyer violate the Texas Disciplinary Rules of Professional Conduct by using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search-engine company?"

The committee concluded that lawyers do not violate the Texas rules when they use the name of a competing lawyer or law firm as an advertising keyword.

The committee also cautioned that a lawyer’s statements in the ads must not contain false or misleading communications and must comply in all respects with applicable rules on lawyer advertising.

CONFLICTING VALUES

While Texas’ disciplinary rules do not specifically address the issue of keyword advertising, the committee considered it in the context of two rules that relate to advertising generally. Rule 7.01(d) states that a lawyer “shall not hold himself or herself out as being a partner, shareholder or associate with one or more other lawyers unless they are in fact partners, shareholders or associates.” And Rule 7.02(a) prohibits a lawyer from engaging in “a false or misleading communication about the qualifications or the services of any lawyer or firm.”

The opinion concludes that under “normal circumstances,” a lawyer’s use of a competitor’s name as a keyword does not violate either Rule 7.01(d) or Rule 7.02(a)(1).

“The advertisement that results from the use of Lawyer B’s name does not state that a lawyer shown in webpages showing search results, it appears highly unlikely that a reasonable person would be misled into thinking that every loading lawyer is Lawyer A and Lawyer B are partners, shareholders or associates of each other,” the opinion states. “Moreover, since a person familiar enough with the internet to use a search engine to seek a lawyer should be aware that there are advertisements presented on webpages showing search results, it appears highly unlikely that a reasonable person would be misled into thinking that every search result indicates that a lawyer shown in the list of search results has some type of relationship with the lawyer.
SNEAKY OR SAVVY?

Several ethics experts agree that the Texas opinion reaches the better conclusion, even while acknowledging that the use of a competitor’s name in keyword advertising gives rise to a bit of unease.

“I am conflicted regarding whether the lawyer conduct described in this opinion is sneaky conduct or whether it is just savvy advertising,” says Meredith J. Duncan, a professor at the University of Houston Law Center who teaches professional responsibility.

“Either way, I do not think that it is false and misleading... It is just a means by which to have an advertisement appear on a search-engine result page. As I fail to see how such conduct is dishonest or unfair—the lawyer is not lying or being deceptive about anything—I am much more persuaded by Texas’ treatment of this issue. It can seem a bit sneaky; but at the same time, it strikes me as smart use of the internet to draw attention to one’s firm without crossing any line into dishonesty or misrepresentations or fraudulent conduct.”

But an ethics opinion issued by the North Carolina State Bar applies the opposite interpretation of its version of Rule 8.4 to support its finding that a lawyer’s use of a competitor’s name in keyword advertising violates the North Carolina Rules of Professional Conduct. “Dishonest conduct includes conduct that shows a lack of fairness or straightforwardness,” states 2010 Formal Ethics Opinion 14, which was adopted by the council of the North Carolina bar in April 2012. “The intentional purchase of the recognition associated with one lawyer’s name to direct consumers to a competing lawyer’s website is neither fair nor straightforward.”

Texas and North Carolina are not the only jurisdictions to examine the issue. In March 2013, the Standing Committee on Advertising of the Florida Bar approved an advisory opinion that found the practice of competitive-keyword advertising to be “inherently misleading.” But the bar’s board of governors vacated the opinion.

Meanwhile, some law firms haven’t taken too kindly to the practice and have filed lawsuits against rival firms. In Wisconsin, personal-injury firm Habush Habush & Rottier sued Cannon & Dunphy in 2013, when the rival firm bought its name under the state’s invasion of privacy statute. A state intermediate appellate court ruled in Habush v. Cannon that the state’s privacy law “does not cover bidding on someone’s name as a keyword search term.”

In such a case, Duncan says, “I don’t know of any cause of action that would be appropriate for this factual situation. If it doesn’t implicate privacy considerations or other tort actions, I don’t see what remedy should be available.”

MOVING TO THE FOREFRONT

The growing acceptance of competitive-keyword advertising does not surprise Ellen Murphy, a professor at Wake Forest University School of Law who teaches contemporary ethics.

“I think this is another example of technology outpacing regulation,” she says. “I also think this is inevitable. Otherwise, we are going to regulate specific platforms and specific functions on particular platforms. It is too inefficient to try to regulate each and every technological advancement.”

Duncan predicts that more states will address the competitive-keyword advertising issue. “I imagine this will come up more frequently, especially because North Carolina and Texas have reached opposite conclusions in considering an identical scenario,” she says.
Parenthetical Habits
On the use and overuse of parentheses and brackets  By Bryan A. Garner

In 1680, an anonymous “well-wisher to the attainments of children” wrote A Treatise of Stops, Points, or Pauses. At only 19 pages, this punctuation guide is a slight affair. The parenthesis, he says, is “a Note made of two great Semi-circls, or half Moons; thus, ( ).” Adding: “These do, and always must include, or inclose one, or more words of a perfect sense in a Sentence, which may be used, or omitted, and yet the Sense remain inte.” The related marks we call brackets he termed “crotchets,” or “Two Semi-quadrats thus, [ ].” He had little to say about brackets except urging the reader to go find examples in the margins of books, so that “you will thereby be the better enabled to understand their use, wherever else you meet with any.”

We’ve come a long way, no doubt. Today we know that parentheses have five primary uses and brackets three. Let me run through these uses briefly.

What are the five uses of parentheses? First, they set off an inserted phrase, clause or sentence that you want to minimize. Example: “My friend Shivaun (who sometimes spells her name Siobhan) has founded a group of Ireland-loving lawyers.” Second, they can enclose a clarifying appositive or attribution. Example: “The prosecutor (Reynolds) assured us that he’ll give us seven days’ notice.” Third, they often introduce shorthand or familiar names. Example: “The Federal Aviation Administration (FAA) is a party.” Fourth, they surround letters or numerals in enumerations: (1), (2), (3), etc. Finally, they denote subparts in a citation: 12(b)(6).

That’s all pretty familiar.

Now for the three uses of brackets. (Don’t you wish we still called them “crotchets”?) First, they often enclose an editorial comment, correction, explanation, substitution or translation that wasn’t in an original text that’s being quoted. Example: “He said, ‘I think there’s little doubt that [Clarence] Darrow was the finest lawyer of the 20th century.’” Second, in most of the literary world, they enclose parenthetical material that appears within material already within parentheses. Lawyers are a little different here: We tend to use “kissing parentheses.” So “( )” isn’t an unusual sight in legal writing where most of the literary world would have “[]”.) You follow? Of course you do. Third, they sometimes denote subparts in a citation, especially in looseleaf legal sources whose citations contain successive numbers: § 126(6)(b)(i).

Now I know what you must be thinking: This is indeed the most gripping opener I’ve ever written for this column. Hold onto your hats, folks.

Both parens (as they’re informally called) and brackets present some pesky problems for legal writers, even when “correctly” used. In particular, they are pretty grossly overused. They have their place, mind you, but they shouldn’t be pullulating on your pages.

UNINTENDED CONSEQUENCES
In the mid-1990s (if memory serves), the 16th edition of The Bluebook first came out with a rule that every citation prefaced with the word See must be followed by an explanatory parenthetical—something like “(holding that ... )” or “(stating that ... ).” Before that time, The Bluebook was almost exclusively for scholarly writing, where all the citations are sensibly in footnotes. Explanatory parentheticals were no big problem: They just lengthened the footnotes in which source materials appeared, and they became necessary adjuncts to most citations. That way, the reader wouldn’t have to go look up every case cited to understand why it had been cited.

But that very same mid-1990s Bluebook contained a new “practitioner section,” for the first time offering guidance to practicing lawyers in their briefs and other court papers. All the practitioner materials were typeset in Courier, suggesting that this abominable typeface was somehow preferred. And it showed all citations interspersed in the body of practitioner materials. Meanwhile, it retained the parenthetical requirement for “See” citations.

The effect of these two innovations was to lengthen the average citation threefold or fourfold, thereby separating consecutive sentences by many lines, especially if the practitioner was ill-advised enough to include a string citation.

In this cascade of unintended consequences, practitioners got into the “parenthetical habit” and started trying to boil down most case explanations to mere parentheticals, so no cases were discussed contextually anymore in actual paragraphs. Citations with their trailing parenthetical cabooses started occupying most
of the pages, which became visually repulsive. Lawyers started breaking their “paragraphs” twice or so per page, making it apparent to any moderately astute observer that they weren’t really writing paragraphs at all. A few words would appear at the beginning of a “paragraph,” and the sentence would conclude with a quotation. Then two more citations introduced by “See” would follow, each with its Bluebook-mandated parenthetical.

After that, there’s a paragraph break and a repeat of the same pattern. This can go on for dozens of pages at a stretch. In fact, it often does in the average brief.

As a result, judges have started reading differently. They no longer actually read. They skim instead, trying to get the lawyer’s drift. They glance at the cases, turn the pages quickly and have a hasty glimpse of the fragments of lawyerly prose. They no longer expect real paragraphs because they so seldom see them. Meanwhile, iPad reading has now made it easier than ever to flick over pages that never actually get read.

This shift has largely taken place over the past 20 years. So when people ask: “Has legal writing gotten worse in recent years?” you can answer yes without suspecting that you’re just being an old fogy. It has gotten objectively worse because of all the unintended consequences of two changes in The Bluebook: the requirement of parentheticals and the issuance of a retrograde practitioner section.

An introspective lawyer or judge who thinks about it will immediately realize how different it is to “read” a brief and to read a good article in good newsmagazines. You must calm down and sit back and savor. Not so with 99 percent of legal writing.

THE BRACKETS CRUTCH

Brackets add to the agitation that legal prose induces. These rectilinear bacilli seem to reproduce themselves within quotations. Whereas most of the literary world will tacitly change a word from uppercase to lowercase, lawyers scrupulously show every such change by bracketing the letter that has been altered. It’s common to see a parenthetical that says “(stating that “[t]he need to protect [an] actual pending federal proceeding[ ] may prove significant” if “[s]tate judgments are disregard[ed]”).” Beautiful. These brackets are insecurely shouting, “I’m a legal insider. No, I really am!”

In that last example, the first brackets show a change from uppercase to lowercase; the second indicates an interpolation; the third that “proceeding” has been changed from plural to singular—hence a character dropped so that the paired brackets are empty; the fourth is a case change again; and the fifth is a changed inflection for “disregard.” An exaggeration, you say? Hardly.

But it gets worse. The lazy legal writer, having long since forgotten how to write real paragraphs, thinks the ideal brief or motion contains a maximal number of words from authoritative sources and a minimal number from himself or herself. Quote every little snippet you can, even a three-word phrase that requires two bracketed alterations: “An action may be ‘[d]ismiss[ed]’ in whole [or in part] without [a] [c]ourt order[.]”

Legions of legal writers would rather say that than paraphrase: “The court may dismiss an action in whole or in part without order,” followed by a citation.

The really weird part of this is that these writers are proud of all the brackets. The misplaced pride seems especially endemic among law review alumni. Empty brackets are a great source of joy to these folks, who have begun using them not to show the loss of a word’s inflection at the end but to signal the deletion of one or more words—the rightful place of ellipsis dots. So today you see punctuational solecisms like this: “When a direct action against a liability insurer is permitted [ ], joinder has not been required.”

What’s needed instead of empty brackets there is “...”.

Earlier this year, I encountered a law student who was bracketing the beginning of quotations superfluously. I asked what was going on. He said, “Isn’t it a rule in legal writing that all quotations must begin with a bracketed character?” No kidding. Brackets so over-populate our writing that neophytes are deducing false rules about them.

So much for the “well-wisher of children” who thought in 1680 that correct uses of brackets could be inferred from looking at lots of examples. At some point between 1680 and 2016—I pinpoint it in 1996—nefarious forces took over in legal writing. Today brackets and parentheticals are misused often enough to make any sensible reader crotchety.

The writing moral: (1) If you’re citing authorities in the body of your writing (as opposed to footnotes), avoid citation parentheticals to ensure that you have adequate paragraph development. (2) If you’re quoting something, do everything reasonably possible to avoid brackets; paraphrase here and there if necessary to spare your readers the puzzlement caused by excessive bracketing.

TBD Law Takes Off

Session has lawyers sharing achievements and challenges  By Reginald F. Davis

AT A SMALL TABLE IN A VERY LARGE ROOM, two lawyers discuss fixed client fees. They are from neighboring states, of similar experience and both in estate and trust practices, but facing the differences that come with jurisdictional regulations. Still, they find enough common ground for one, who has used fixed fees for 25 years, to help the other, who is trying to make them work for his office. Then they leave together to walk to St. Louis’ Gateway Arch before the next TBD Law session begins.

This scene I witnessed in the middle of TBD Law, a three-day gathering of 57 lawyers—and it was about as far from traditional legal conferences and CLE sessions as you can get. Small groups were formed and reformed; games aimed at sharing experiences and practice problems were played; and by the end of the sessions, plans for new practices that would be relevant five years from now were presented to loud applause.

“At TBD Law, we are going to build the law practices of the future and then drag the rest of the profession along with us,” Sam Glover, editor-in-chief of Lawyerist, says not immodestly. But as a lawyer who has been blogging (and publishing and podcasting) for nearly a decade to help solo and small-practice lawyers find, learn, use and share information on innovative ideas in practice, the goal isn’t far from his usual activities.

LAWYER CAMP

TBD Law is the product of discussions between Glover, Lawyerist CEO Aaron Street and Matt Homann, a facilitator of what must be called “unconferences” and the founder of the Filament conference center in St. Louis, where the August event was held. During those discussions, the creators sought out the perfect name, eventually realizing, according to Homann, that TBD—to be determined—was perfect.

The TBD Law format is a mix of retreat, encounter session and summer camp with an evening of St. Louis barbecue, bowling and pool to kick things off. The $1,250 registration fee included food, lodging, snacks, drinks and that private bowling and pool room. And for an event with plenty of legal technology discussion, tweeting, smartphones and PowerPoints were discouraged.

As Homann said the first morning, this would not be your typical “sage from the stage” presentation. Three things were quite different about the organization of the event: “curation” of attendees, vendor involvement and the sharing of information among everyone there.

TBD Law attendance is by invitation only. The idea...
is to bring together lawyers who have already used legal technology and innovative ideas to form their regular practices. It’s also to avoid the often-futile attempt to bring lawyers new to these ideas up to speed while experienced practitioners wait for presenters to tell them something they haven’t heard.

The lawyers in attendance have handled everything from freelance tech practice to defense of citizens’ gun rights, yet they are united in a commitment to be ahead of the changes facing law practice.

Vendor sponsors participate in all the activities. Rather than create a salespersons’ row of booths, representatives are part of the crowd. “These guys have been thinking about this for a long time,” Homann said. “They have knowledge to share.”

**FIRM INTERACTIVE**

Interaction among attendees was nearly constant. The session began by writing three practice priorities onto a small card. (Mine included “bring in millennials.”) Later activities included writing “haiku-ish” descriptions of their clients, their practice and “why does it matter?”

Meals were brought in, and lunch or dinner conversations often continued into the beginning of the next session. Time was provided to keep in touch with offices during the day.

The final event involved the future-practical: Volunteers announced law practices they would like to create that would be vital and profitable five years hence. When someone asked whether current legal ethics rules should be considered, a strong majority agreed that current ethics rules would not apply in five years.

Those new firm ideas ran from a comprehensive clinic involving law students, solo lawyers, retired attorneys and incubator services to an online dispute resolution service that could serve as a LegalZoom killer. There was even a firm to allow attorneys to invest in other attorneys’ practices, whose advocates promised they could provide funding for any of the other ideas presented. Summaries of the presentations are posted on the Lawyerist blog.

Another TBD Law will be presented in February, with a serious effort to diversify the group beyond the few women and people of color there (I was the only black participant). That diversification will also mean that some who attended the first session will not be allowed back.

It should be another session with, as Homann said: “a group of people who have great things to offer, and things they need help with.”

*Reginald F. Davis, the editor of the Business of Law section, is a guest Scribbler this month. Victor Li will return to the column next month.*
Good Times?

Uncertainty about leaving the European Union gives UK lawyers a boost

By M.A. Stapleton

LONDON—As the United Kingdom continues to operate in limbo after its historic vote to leave the European Union, law firms offer advice and counsel as their clients navigate the uncharted waters.

In the nationwide June referendum, U.K. voters decided to leave the EU, making it the first country to do so. Many questions surround how and when the departure will take place. Prime Minister Theresa May has said the earliest the formal process will begin is early next year.

Sarah Garvey, a professional support lawyer at Allen & Overy, says clients have moved past the initial shock following the vote and are trying to make plans for the future.

“The government are formulating their position, and that’s a process that will take several months,” she says. “Once that’s done, you’ll see a lot more focus on what Brexit will look like, and that’s when clients will move from a wait-and-see attitude to doing something more.”

Nicholas Brittain, a partner at Sidley Austin, says the firm is helping clients by advising them individually until more clarity about the situation becomes available.

“At the moment, it’s planning, instructing the clients and being aware of the current situation of the EU with businesses, and being able to react when there’s more certainty,” Brittain says. “It’s a good time to be a lawyer.”

Charles Bankes, a partner at Simmons & Simmons, says given the complexity of the historic situation, this is exactly the time for lawyers to do great work.

“It’s a time for the best lawyers to shine and to provide wise and informed counsel to their clients,” he says.

BREXIT STRATEGY

Leaving the EU throws up scores of legal queries in virtually every area of law: constitutional, regulatory, corporate, employment, environmental, intellectual property, tax and others.

“That’s a challenge for law firms, as there’s a whole range of issues in many different areas of law,” Garvey says. “The other challenge, of course, is you don’t know what the model is.”

British law firms used a variety of tools to inform their clients about the implications of the vote. Briefing papers, conference calls, podcasts, hotlines and webinars sprang up, and many posted dedicated Brexit pages on their websites.

Allen & Overy began preparing in earnest in February with a working group composed of lawyers across practice groups to create a plan. Among its actions, the firm wrote detailed specialist papers, distributed a playbook to financial clients and presented road shows in Amsterdam, Brussels, Luxembourg, Madrid and New York City. The day after the vote, the firm hosted a client call to outline the key issues.

They initially expected about 500 clients to join in, but more than 1,700 listened to the call.

Sidley decided soon after the vote to approach clients individually to answer specific questions they might have. The firm also created a cross-committee to coordinate the information sent out.

“We said to our clients, ‘You should be watching what’s happening in these areas but not reacting to it,’ ” Brittain says. “They should plan rather than panic.”

The Law Society, the independent professional organization for British solicitors, also published reports, shared a podcast and provided weekly updates for its members in the aftermath of the Brexit vote. The Law Society also has called upon the prime minister to safeguard the ability of solicitors to practice across the EU.

As the initial shock wore off, Brittain says, clients slowly are getting used to the idea. “I think on the whole, clients aren’t panicking unduly. I think they’re concerned about the effect on business but have come to the conclusion this isn’t something that’s going to happen in a few weeks,” he says. “They can now settle down and look for opportunities, because there will be opportunities, too.”

The U.K. must formally declare its intention to separate from the EU in a process known as Article 50 of the Lisbon Treaty. May announced last month that Article 50 will be triggered in March 2017. Then the country will have two years to negotiate the terms of withdrawal.

May has created the Department for Exiting the European Union. David Davis, the department’s secretary, said in September that it had amassed legal bills of 268,711 British pounds (about $355,000) in its two months of existence.

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Cyber Coverage

Separate policy, certain provisions needed for data protection

By Karen M. Kroll

NEARLY A QUARTER of law firms with 500 or more attorneys have experienced a cybersecurity breach, according to those who responded to the ABA's 2015 Legal Technology Survey Report. So there's no question that securing online information is on the mind of many law firm leaders. And so is the need for cybersecurity insurance.

“It's something you must have,” says Robert Owen, a New York City-based partner with Sutherland Asbill & Brennan. A firm victimized by a cyberattack may need to hire experts to investigate the breach, reassure clients, stanch any reputational damage and address possible regulatory inquiries. “There's a whole host of risks,” Owen says.

An endorsement to a firm's property and casualty policy typically provides just a "sliver of coverage," says Eileen Garczynski, senior vice president with specialty broker Ames & Gough in McLean, Virginia. For instance, an endorsement might cover the cost to restore data, but not any fines stemming from the breach.

PRIMARY FIRST

An effective cybersecurity policy must have several provisions. First of all, it should be a primary policy. “A primary policy responds first,” Garczynski says. It wouldn't require the firm to turn to its professional liability coverage first.

The Lewis Baach law firm also looked for policies that would cover pre-existing problems, says Katherine Toomey, a Washington, D.C.-based partner there. That could include a virus in the firm's system at the time the policy was obtained that hadn't been detected.

Law firms also will want to assess the additional services the insurer offers, Owen says. For example, some insurers retain forensics experts for use in cyber investigations. The firm should know if it will be required to use the insurer’s expert. If so, it will want to evaluate the experts’ qualifications.

Some coverage is limited to personally identifiable information, such as Social Security numbers. “You want it to cover a breach of anything protected under attorney-client privilege,” Garczynski says.

Conduit coverage also is critical, says Jim Rhyner, senior vice president and specialty law firm segment manager with Chubb. This protects the firm if another entity suffers damages because of a breach in the firm's system.

Applying for cybersecurity insurance often requires documenting the cybersecurity practices in place at the firm. The insurer may ask whether the firm encrypts data, if it has implemented an information security plan that addresses the network as well as portable devices, and if employees receive security training.

“We're focused on a culture of risk mitigation versus just risk transfer,” says Erica Davis, vice president with insurer Zurich North America.

While it's in the insurer's interest for its policyholders to have implemented such policies, law firms also benefit. “The questions they ask,” Owen says, “are a great educational process.”

INFORMATION SHARED

The Legal Services Information Sharing and Analysis Organization, launched in 2015, provides an industry forum on security threats facing the global financial services sector. Law firms can share information that will help members prevent and respond to cyber and other risks. This includes information on threat alerts, vulnerabilities and best practices.

Cybersecurity insurance costs vary with the size and type of firm. Garczynski provides a few rough estimates: small to midsize firms might pay between $500 and $7,500 for $1 million in coverage, while larger firms could pay from $40,000 to $60,000 for policies providing $2 million to $3 million in coverage.

Rhyner notes that the relatively small levels of equity on which many law firms operate could be quickly consumed in a cybersecurity breach. The coverage offers “true balance sheet protection,” he says.
WHO’S AFRAID OF CYBERCRIME?
CLIENTS ASK THE BIGGEST FIRMS ABOUT SECURITY THE MOST

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SECURITY OF LEGAL DOCUMENTS IS AN ISSUE heated to a boiling point by the internet and continual news reportage on data breaches. The 2016 Legal Technology Survey Report gives some perspective on how this issue is being handled by firms large and small.

THE SURVEY RECEIVED about 800 responses to questions on technology basics and security, including:
- Has your firm had a full security assessment conducted by an independent third party?
- Has a client or potential client ever asked you to complete a security questionnaire?
- Has a client or potential client ever provided you with a document or guidelines on security requirements?

THE RESULTS SHOW that, in general, as firms get larger, security issues get more consideration and discussion. But looking at last year’s results for the first question, that interest was reported to be higher in 2015 than 2016.

The six-volume 2016 Legal Technology Survey Report is available online at Shop ABA.
Source: 2016 Legal Technology Survey Report by the ABA Legal Technology Resource Center.

FIND MORE LINKS TO DATA AND OTHER PRACTICE STATS AT ABAJOURNAL.COM/LAWBYTHENUMBERS.
Skill Drill

For an expert witness, consider reputation, location and cost
BY MARC DAVIS

JASON TURCHIN, a Weston, Florida, lawyer, has successfully used expert witnesses from fields in which there are not many experts, including the relatively new field of automobile air bag injuries.

“One of the most unusual experts we’ve used was an arborist,” says Turchin, a personal injury and wrongful death attorney. “He was a professor and scientist who explained to a jury how a tree nut breaks down. The case concerned a client who slipped on a tree nut in a Wal-Mart parking lot.”

The arborist explained the life cycle of a tree nut, proving to the jury that it fell from a tree a week before the accident and should’ve been removed from the parking lot during routine cleanups.

An articulate, persuasive expert witness with excellent credentials can be the deciding factor in winning a case.

“An expert witness can cost anywhere from $200 to $1,000 an hour,” says Chris Hamilton, an attorney at Standly Hamilton in Dallas specializing in civil litigation, personal injury, product liability and medical malpractice. “We also pay for their travel, lodging and other expenses.”

Expert witnesses “typically help me prepare for a case, for deposition, discovery and trial,” Hamilton says. “Then I prepare them for the case.”

“If you pick a quality witness, they stand up very well to cross-examination,” he says. “The difference between winning or losing a complex case can hinge on the testimony of an expert witness. They’re worth the price.”

EXPERTISE

That price, however, can run to six figures.

“An expert witness with excellent credentials can cost more than lawyers,” says Ashish Mahendru, a commercial litigator practicing in Houston. Mahendru specializes in breach of contract, partnership and commercial disputes, intellectual property theft and other business-related issues. “A forensic accountant may cost $150,000,” he says.

Mahendru advises clients in advance about the costs and the value of an expert witness. He relies on local experts he’s used previously. But he may also search online for an expert with a rare specialty and sometimes asks attorneys who have previously opposed him in court for recommendations.

Aside from their testimony in court, expert witnesses may also be called to give depositions and for discovery, according to Turchin. If both plaintiff and defendant parties stipulate, and if a judge permits it, experts may testify in court via Skype or closed-circuit TV.

Experts who give opinions in language a layperson can understand are more effective than expert testimony given in medical or technical jargon.

“If a case comes down to a battle of the expert witnesses, the expert who relates better to a jury usually wins them over,” Turchin says. “Juries like things simple,” he says.

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The sky is the limit.

“My airplane is a very complex machine. Safely navigating the airspace requires quick access to information about engine systems, traffic, weather and more. I cannot imagine flying a plane without instruments, it would be chaotic!

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

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Partner and Attorney
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Appeals courts are dismantling stricter voter ID laws enacted after the U.S. Supreme Court opened the door for such measures

By Mark Walsh

THE RULINGS CAME QUICKLY this past summer in a steady drumbeat that pleased progressives and disappointed conservatives.

A strict voter identification law in Texas—blocked. A North Carolina law that required voter ID, which reduced early voting and changed registration procedures—struck down for not only having discriminatory effects but also for having been passed with a racially discriminatory motive. North Dakota’s voter ID law—blocked because of bias toward Native Americans.

Under an election law in Wisconsin, one federal district judge ordered an affidavit procedure for those without ID; days later, another district judge struck down provisions that limit early voting and increase residency requirements.

The string of recent rulings deals serious blows to measures advanced by many Republicans in the name of election integrity, while others view them as discriminatory.

The rulings indicate that “there is a limit in how far states can go in rolling back voting rights before the courts are going to step in,” says Richard L. Hasen, a professor of law and political science at the University of California at Irvine School of Law and the founder of the authoritative Election Law Blog.

“Still, this is an ongoing battle,” he says. “The one thing we know for certain is these battles won’t be over when the 2016 election is decided. They will go beyond that.”

Kristen Clarke, the president and executive director of the Lawyers’ Committee for Civil Rights Under Law, a Washington, D.C.-based nonprofit that opposes strict voter ID and similar restrictions, says courts are starting to see these measures for what they are.

“These are not measures aimed at combating fraud or preserving the integrity of the election process,” she says. “These are laws that attempt to make it more difficult for certain kinds of voters to participate, particularly African-Americans and Latinos.”

Hans A. von Spakovsky, a senior legal fellow and the manager of the Election Law Reform Initiative at the Heritage Foundation in Washington, D.C., has a less enthusiastic reaction to the spate of decisions.

“I don’t use the word absurd lightly, but I think it applies to some of these decisions,” says von Spakovsky, a former federal elections official and Department of Justice lawyer who has long advocated for strict voter ID and other election-protection measures. “What I do believe is going on is that the challengers, their lawyers and some of these judges are gaming the system.”

MORE TO THE POLLS

The more immediate effects of the rulings were debated on the campaign trail.

Sen. Tim Kaine, the Virginia Democrat who is Hillary Clinton’s vice presidential running mate, says the effect of the ruling by the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, striking down North Carolina’s voter ID law (and other provisions) could lead to an additional 100,000 people going to the polls in that state this month.

In late August, a divided U.S. Supreme Court
rejected a request from North Carolina to overturn the appeals court ruling and bring back the voter ID requirement, reduce the number of early voting days, and end a preregistration program for young voters. The high court’s one-page order provided no explanation, but the justices split 4-4 along their traditional ideological lines, with the conservatives indicating they would grant the stay with respect to most of the challenged provisions.

North Carolina is a presidential battleground that President Barack Obama won in 2008 but Mitt Romney, then the Republican nominee, won in 2012. The race was decided by fewer than 100,000 votes out of more than 4.3 million cast each election.

Republican presidential nominee Donald Trump decried the string of court rulings that block voter ID laws, saying in August that it would lead to a “rigged” election in which some people may vote 10 times. He later upped that prediction to 15 times.

“Why not?” Trump said in an August interview with the Washington Post. “If you don’t have voter ID, you can just keep voting and voting and voting.”

That is a scenario most election experts say is not plausible, and several of the court rulings on voter ID laws addressed whether a problem of voter impersonation was a significant interest supporting such laws at all.

Besides citing a mound of expert evidence, the recent court rulings related a series of personal stories of those unable to vote because of ID laws that created unusual hardships. The 5th Circuit at New Orleans cited the troubles of Floyd Carrier, an 85-year-old Texas retiree who was born at home and who, with help from his son, contacted three counties to try to obtain a birth certificate needed to get proper ID to vote. Although he was known to election workers at his polling place, he was not permitted to vote and not even provided a provisional ballot.

In North Dakota, a federal district judge cited the case of Richard Brakebill, who was denied the right to
vote in 2014 because he had an expired driver’s license and a tribal ID that did not have his current residential address. He had tried to update his driver’s license but lacked his birth certificate.

In Wisconsin, a federal district judge cited the case of a voter he called “Mrs. Smith,” who was born in 1916 and petitioned the state’s Division of Motor Vehicles for help to track down her birth certificate to get the state ID she needed to vote. State employees were able to find her name in the 1930 U.S. census, but they couldn’t link that to a birth certificate in Missouri, where Smith was born.

“Because she was born in the South, barely 50 years after slavery, her story is particularly compelling,” the judge wrote. “But it is not unique.”

**SETTING THE STAGE**

Two Supreme Court decisions laid the foundation for the raft of voter ID laws and other election measures passed by the states in recent years.

In 2008, in *Crawford v. Marion County Election Board*, the high court issued a fractured 6-3 judgment that upheld Indiana’s voter ID law against a 14th Amendment constitutional challenge that it unfairly burdened the right to vote.

Justice John Paul Stevens wrote a plurality opinion that concluded the record in the case did not support a facial challenge to the Indiana law, which was one of the first voter ID laws adopted in the country. Earlier this year, at the 7th Circuit judicial conference, now-retired Stevens called Crawford “a fairly unfortunate decision” but said he thought he would vote the same way in the case, again based on the record the court had before it.

Meanwhile, the Supreme Court’s 2013 decision in the Alabama case *Shelby County v. Holder* opened the door for the adoption of more voter ID measures.

That decision struck down Section 4 of the Voting Rights Act of 1965, which established the coverage formula for the separate provision—Section 5—that required states and localities with a history of discrimination in voting to gain federal approval of changes in voting, which includes redistricting efforts and election procedures.

Once such covered states no longer had to submit to the federal “preclearance” process, several moved quickly to adopt voter ID and other measures.

“Very few cases would even be here but for the Supreme Court’s gutting of the Voting Rights Act” in the *Shelby County* decision, says Denise Lieberman, a senior attorney with the Advancement Project, a Washington, D.C.-based civil rights organization that led the challenge to the North Carolina law.

Edward Blum, the retired stockbroker and former unsuccessful candidate for Congress who organized the legal assault on the Voting Rights Act in *Shelby County*, says he was somewhat surprised to see the strict voter ID regulations take hold in more than 30 states after the Supreme Court decision.

Blum says his main interest in organizing the challenge to the coverage formula of the Voting Rights Act was his opposition to racially gerrymandered districts. “For the most part, I’m right down the middle on voter ID laws, he says. “I think there should be some form of voter ID. Nearly every Western country requires some form of it. On the other hand, some of the requirements may be too stringent.”

The string of recent rulings gave election law experts and others plenty to chew on.

**MAKING A WAY IN TEXAS**

On July 20, the full 5th Circuit got the ball rolling on the summer’s rulings with a lengthy decision about Texas’ voter ID law.

The 5th Circuit ruled 9-6 that the Texas law has a racially discriminatory effect on African-American and Latino voters, in violation of Section 2 of the Voting Rights Act. The court ordered a federal district judge to come up with a remedy for the presidential election.

The Texas law is notable for the types of identification considered acceptable, which included valid state driver’s licenses and identification cards, U.S. passports and citizenship documents, an “election identification certificate” or a Texas license to carry a concealed weapon.

Those potential voters who apply for the election ID certificate, which was designed to serve those who could not obtain acceptable forms of ID, still had to have a birth certificate. Some had to drive up to 250 miles to the nearest state Department of Public Safety office to apply for the certificate. By this spring, the state had issued only about 650 certificates.

In 2014, a federal district court struck down the state’s application of the voter ID law, holding that a disproportionate share of about 600,000 registered voters and 1.2 million eligible voters in the state who lacked the requisite forms of identification were black or Latino. (The Supreme Court, over a dissent by Justice Ruth Bader Ginsburg that was joined by Justices Sonia Sotomayor and Elena Kagan, backed a stay that allowed the law to remain in effect for the 2014 midterm elections.)

The 5th Circuit, in its July ruling in *Veasey v. Abbott*, upheld the “discriminatory effects” finding and ordered the district court to consider whether state lawmakers had acted with discriminatory intent. But it said the latter question could be addressed after the presidential election. In the short term, the appeals court required the district judge to establish a procedure for those who lacked the proper documentation to be able to cast ballots on Nov. 8.

Judge Edith H. Jones, writing for the dissenters, said, “Requiring a voter to verify her identity with a photo ID at the polling place is a reasonable requirement widely supported by Texans of all races and members of the public belonging to both political parties.” The majority’s suggestion that the measure was enacted with discriminatory purpose was “inflammatory and unsupported,” she said.

In August, a federal district judge in Corpus Christi, Texas, approved a settlement agreed to by state officials that voters without the state-approved ID should be able
to sign a declaration that they faced “reasonable impediments” in obtaining one.

Those voters must be allowed to cast a regular ballot after they show an alternative form of ID, such as a voter registration card, utility bill or other form of government ID that’s not on the state’s list.

“It looks like there will be an avenue for those without acceptable photo ID,” says Leah Aden, senior counsel with the NAACP Legal Defense and Educational Fund, which was among the groups behind a challenge to the Texas statute.

**CHANGES IN NORTH CAROLINA**

The day after the Supreme Court decided *Shelby County* in 2013, and North Carolina no longer had to gain federal approval for its changes in voting, Republicans who had become the new majority in the state legislature announced plans for an omnibus bill that overhauled election procedures.

Before proceeding with that bill, lawmakers requested data on the use, by race, of a number of voting practices in the state. The General Assembly then enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African-Americans.

Besides requiring strict photo ID (and eliminating many alternative forms of identification found to be used heavily by African-Americans), the bill that passed eliminated same-day voter registration, reduced the early voting period from 17 to 10 days (thus canceling one of two “souls to the polls” Sundays promoted in black churches), and ended provisional voting for out-of-precinct voters and preregistration for 16- and 17-year-olds in the state.

Amid the initial legal battles in the challenge to the law, North Carolina lawmakers passed a bill that amended the photo ID requirement to allow those without acceptable ID to declare that they faced a “reasonable impediment” to getting such ID. A federal district court then conducted separate trials on most of the voting changes in one and on the revised ID measure in the other.

On the merits, the judge ruled against the plaintiffs and upheld all of North Carolina’s changes.

It was a different story before a three-judge panel of the 4th Circuit, which unanimously struck down...
the changes on July 29. The court held that the provisions were enacted with racially discriminatory intent in violation of the equal protection clause of the 14th Amendment and Section 2 of the Voting Rights Act.

“The new provisions target African-Americans with almost surgical precision,” wrote Judge Diana Gribbon Motz for the panel in *North Carolina State Conference of the NAACP v. McCrory*, “… and, in fact, impose cures for problems that did not exist. Thus, the asserted justifications cannot and do not conceal the state’s true motivation.”

(The panel ruled 2-1 that the reasonable-impediment change to the photo ID law did not cure the discriminatory intent violation for that provision. Thus, it fully voided the ID provision, along with the several other provisions at issue.)

“The 4th Circuit is saying here that context and history matter,” says Lieberman of the Advancement Project, one of the groups behind the challenge to the North Carolina measures. “It matters that [the state] did all this stuff without any real government interest.”

Republican lawmakers vowed to appeal, saying the decision was a partisan one by three judges appointed by Democratic presidents.

“Photo IDs are required to purchase Sudafed, cash a check, board an airplane and even vote at the most recent Democratic convention,” wrote Republican Gov. Pat McCrory in an August essay in *USA Today* after the decision. “North Carolina implemented this commonsense measure to maintain the integrity of honest and fair elections and joins more than 30 other states that require an ID to vote.”

When the U.S. Supreme Court divided 4-4 on North Carolina’s request for an emergency stay to reinstate its provisions on Aug. 31, most observers saw it as a sign that it was unlikely the eight-member court would undo the recent appeals court decisions against voter ID laws before this year’s election.

“In the interim, this really empowers the lower courts, both the federal courts of appeals and the state supreme
courts” on pending voting rights cases, said law professor Hasen in an Aug. 31 post on Election Law Blog.

‘LESSER OF TWO EVILS’ IN WISCONSIN

Two different federal district judges issued rulings in July regarding voting practices in Wisconsin; and by August, the 7th Circuit at Chicago had gotten involved in one of the cases.

On July 19, Judge Lynn Adelman of Milwaukee issued an order that said Wisconsin voters who had difficulty obtaining the specified forms of photo ID still would be able to vote by filing an affidavit at the polling place.

Sean J. Young, a senior staff attorney with the American Civil Liberties Union, which is backing the challenge in that case, says the affidavit option, which would allow voters without ID to cast regular ballots and not provisional ones, was “the lesser of two evils.” “Provisional ballots are extremely confusing to voters and even to election workers,” Young says. “There’s no guarantee they will be counted. We thought it was important that these votes not be treated like [they were cast by] second-class citizens.”

On July 29, U.S. District Judge James D. Peterson of Madison ruled in a broader lawsuit in One Wisconsin Institute v. Thomsen that challenges numerous provisions enacted after Republicans took control of the legislature and the governor’s mansion in 2011. Peterson said he was bound by circuit precedent to reject a facial challenge to the state’s voter ID law.

“but the rationale of these [precedents] should be re-examined,” Peterson wrote. “The evidence in this case casts doubt on the notion that voter ID laws foster integrity and confidence. The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities.”

He ordered changes in the process by which voters may obtain such documents from the state’s Division of Motor Vehicles. He also struck down measures, such as a 28-day residency requirement to register to vote and limitations on in-person absentee voting.

The state vowed to appeal both opinions, and because of the cases’ procedural posture they went before separate 7th Circuit panels. On Aug. 10, a panel that had dealt with previous appeals in the case of Frank v. Walker issued a stay of Judge Adelman’s injunction, which made it easier for those without proper ID to file affidavits.

On Aug. 26, the 7th Circuit issued a unanimous en banc ruling that declined to review the stay of the injunction. The court said time was short, and it was convinced that Judge Peterson’s ruling in One Wisconsin Institute meant that voters will be able to get the temporary credentials needed to cast ballots by initiating the state ID process, even if they don’t have all the necessary documents.

NO ROADBLOCKS IN NORTH DAKOTA

A federal district judge issued an injunction on Aug. 1 that blocked North Dakota’s strict voter ID law, saying it was unfair to Native Americans.

“The undisputed evidence before the court reveals that Native Americans face substantial and disproportionate burdens in obtaining each form of ID deemed acceptable under the new law,” wrote Judge Daniel L. Hovland of Bismarck in Brakebill v. Jaeger.

The state’s law allowed current driver’s licenses, state ID cards, a tribal government-issued ID card or alternatives approved by the secretary of state (but not college or military ID cards). The judge cited evidence that 23.5 percent of Native Americans in the state lacked a valid form of voter ID, compared with only 12 percent of non-Natives.

MORE BATTLES AHEAD

Litigation still is percolating in other states. In late August, a panel of the 6th Circuit at Cincinnati blocked a federal district court ruling, which had barred Ohio from eliminating its Golden Week, a five-day period about a month before Election Day when voters could register to vote and cast an early ballot at the same time.

In a variation of voter ID requirements, a panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled 2-1 in September that the U.S. Election Assistance Commission must remove a requirement for proof of citizenship for a mail-in federal voter registration form that the commission approved in Alabama, Georgia and Kansas.

Civil rights groups say the requirement could have disenfranchised thousands of potential voters. Kansas is the only state that seeks to enforce the requirement this year, with state representatives saying such fears were speculative.
The debate regarding state-level measures doesn’t begin to address voting changes that take place at the local government level, especially in the jurisdictions that formerly had to seek federal preclearance under Section 5 of the Voting Rights Act. These include changes, such as polling place movements and reductions and purges of voter rolls.

Clarke of the Lawyers’ Committee says the measures show the need for Congress to draw up a new coverage formula that could restore the preclearance requirements of Section 5.

(Despite the Shelby County decision’s dismissal, on constitutional grounds, of reams of congressional findings generated when the Voting Rights Act was re-authorized in 2006, many progressives think that the decision can essentially be overturned legislatively.)

“States should see the writing on the wall,” Clarke says. “But we don’t have Section 5, so the reality is we will have to fight in the courts.”

Blum, the force behind the Shelby County decision, says the flurry of litigation in states that were covered by Section 5 (such as North Carolina and Texas) and those that weren’t (such as North Dakota and Wisconsin) shows that “the system is working as it should.”

“That is, if you have a beef, you have to go through the same process, no matter which state,” Blum says.

Mark Walsh has covered the U.S. Supreme Court for more than 20 years and is a regular contributor to the ABA Journal.
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Who’s to Blame?

Residents of Flint, Michigan, hope lawsuits and criminal prosecutions will hold decision-makers accountable for the poisoning of their water supply

By Wendy N. Davis

For LeeAnne Walters, the first sign of trouble came in the summer of 2014, when her 4-year-old son Gavin developed rashes after coming into contact with the water.

In July, Gavin and his twin, Garrett, both suffered scaly patches of skin that peeled after bathing. Several months later, Walters noticed her hair was falling out in large clumps that collected on her pillow and in the shower. Even her eyelashes were falling out.

By that time, the water coming out of her faucet was a dark rust color.

That November, tests of the water in her Flint, Michigan, home revealed that the concentration of lead was 104 parts per billion. The level at which the Environmental Protection Agency recommends updating pipes or adding anti-corrosives is 15 ppb, but some experts say that no level of lead is safe to ingest.

Her family immediately stopped drinking the water. Nonetheless, tests conducted on Gavin four months later revealed a blood-lead level of 6.5 micrograms per deciliter. Anything above 5 micrograms indicates lead poisoning.

“Anger doesn’t begin to cover it,” the mother of four says of her feelings about the situation. “I want the people who allowed this to happen to be held accountable.”

Walters, like numerous other Flint residents, is suing as a result of the disaster. But whether and when anyone will be held accountable is a lingering question for her and thousands of others affected. With lawsuits and criminal prosecutions being added to court dockets, there’s plenty of finger-pointing.

THE COST OF SAVING MONEY

Flint’s now infamous water problems stem from an ill-fated attempt to save money by disconnecting from the Detroit Water and Sewerage Department, which had provided the city with water from Lake Huron for decades.
The Flint Water Crisis: A Timeline

November 2011
Gov. Rick Snyder approves a state takeover for the economically distressed city of Flint and appoints former Mayor Michael Brown as the first in a series of emergency managers.

August 2012
A second emergency manager, Ed Kurtz, takes over.

March 2013
Flint’s city council votes 7-1 in favor of a resolution to purchase water from the Karegnondi Water Authority instead of the Detroit Water and Sewerage Department. The contract is to take effect after the KWA, which also distributes water from Lake Huron, completes a pipeline to Flint. The measure is expected to save the city $19 million over eight years.
Faced with budget deficits, Flint was ordered into receivership in 2011 by Gov. Rick Snyder. The move enabled him to appoint a series of emergency managers to run the troubled city, which had seen its population shrink to 100,000, from double that figure in the 1960s. Today, 41 percent of the city’s residents live below the poverty line in the struggling city, which is 57 percent black, 36 percent white and 4 percent Latino, according to the U.S. Census Bureau.

One of those emergency managers, Darnell Earley, was in charge of the city in April 2014, when officials made the disastrous decision to switch water sources from Lake Huron to the Flint River. The move was supposed to be an interim measure through 2016, when a new pipeline would let the city connect with the Karegnondi Water Authority, which drew its water from Lake Huron.

Government officials repeatedly assured Flint residents that the water was safe. In fact, however, the Flint River was so corrosive it ate away at the pipes in the city, causing lead to leach into the water supply, poisoning the city’s residents—including 9,000 children younger than 6. While lead can be toxic to anyone, its effects on young children are particularly devastating. The well-documented array of symptoms caused by lead poisoning in children includes damage to the nervous system, bones, kidneys and hearing, as well as speech and language impairments.

Later, during state legislative hearings on the crisis, it emerged that Flint’s water hadn’t been treated with chemicals that would have made it less corrosive to pipes, a fix that would have cost only $150 a day. But before anti-corrosion chemicals could be added, the city needed to upgrade its equipment, which would have cost an estimated $8 million.

**Beyond Lead**

In addition to dangerous lead levels, the Flint River also may have had more pollution than Lake Huron: Soon after the switch, E. coli bacteria were found, prompting advisories to boil the water. Officials boosted the chlorine levels to control the bacteria, but a byproduct of chlorine is trihalomethanes—which can pose independent health risks, especially in people with compromised immune systems.

On top of those problems, Flint also saw an increase in Legionnaires’ disease, which sickened 91 people and claimed 12 lives after the city switched water supplies. This was an extraordinary number: Typically, between six and 13 cases per year are confirmed in Genesee County.

At General Motors’ Flint plant, the water was so corrosive it rusted engine parts. The car company was able to disconnect from the Flint River in December 2014 and hook up to the water used by nearby Flint Township.

Flint residents didn’t have this option. Families had no choice but to accept water from the Flint River until October 2015, when the city reconnected to Detroit Water and Sewerage. That move came several weeks after Dr. Mona Hanna-Attisha, director of the Michigan State University and Hurley Children’s Hospital Pediatric Public Health Initiative, reported that the percentage of children in Flint with above-average levels of lead in their blood had almost doubled since the city stopped using water from Lake Huron. In one Flint neighborhood with especially high amounts of lead in the water, the proportion of kids with lead poisoning had tripled from 5 percent to almost 16 percent.

Even after the city reconnected to Detroit Water and Sewerage, the crisis continued. In January...
2015, the federal government declared a state of emergency, which remained in effect until this August. By then, lead levels in Flint’s water had fallen between 50 and 80 percent.

As of mid-2016, numerous lawsuits had been filed in federal and state courts against Michigan and Flint officials, including Gov. Snyder. Some have been brought as class actions, while others were brought on behalf of individual parents, such as Walters. Nonprofits, including the NAACP and the Natural Resources Defense Council, have also sued.

‘It’s incredibly troubling to see how long the situation
persisted, and to see how long government officials at every level were aware of the problem before any meaningful action was taken," says Dimple Chaudhary, a senior attorney with the Natural Resources Defense Council. The NRDC is asking for an injunction that could require the government to replace all the lead service lines in the city at no cost to Flint residents.

"There are still open questions about how damaged the pipes are and how the system will be able to implement corrosion control," Chaudhary says.

**SICKNESS AND IMMUNITY**

Melissa Mays, lead plaintiff in several of the class actions, says many Flint residents have suffered the kinds of physical ailments that warrant compensation.

"Everybody I talk to is sick," says Mays, who helped launch the activist group Coalition for Clean Water.

Two years ago, Mays worked for five different radio stations as a music promoter and went to the gym at least four days a week. Now she suffers from debilitating arthritis, bone spurs and seizures, and she recently had polyps removed from her stomach.

Her three sons, ages 11, 12 and 17, have brittle bones; her middle child recently broke two bones in his wrist. Her husband now has dizzy spells so severe he’s missed work.

While there’s no real question that the water was contaminated, it’s not yet clear whether Flint residents will be able to prove their illnesses were caused by the water, as opposed to other factors. And even if they can, obtaining civil judgments against a state governor and other heads of agencies won’t be easy, given that Michigan confers immunity on its high-ranking officials for decisions made while carrying out their responsibilities.

Sovereign immunity, an established common law concept, protects government entities and their employees from civil lawsuits. Michigan codified that principle in its Governmental Tort Liability Act, which provides that the governor and heads of agencies are immune from liability for torts committed in the course of their duties.

By contrast, the statute allows for suits against lower-level officials who have acted with “gross negligence”—defined by Michigan’s immunity law as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”

Some plaintiffs are attempting to defeat an immunity defense by contending that government officials violated the constitutional rights of Flint citizens. A federal civil rights law, 42 USC § 1983, provides for civil rights lawsuits against state actors regardless of immunity laws.

But the plaintiffs in Flint may face an uphill battle in a civil rights case, according to Peter Hsiao, an environmental lawyer with Morrison & Foerster in Los Angeles. "I think a court is going to look very critically at a claim that these actions amounted to a violation of civil rights," he says.

The plaintiffs in Flint raise several different constitutional claims, including allegations that officials violated residents’ rights to due process of law by endangering their “fundamental liberty interest to bodily integrity,” as well as claims that officials engaged in racial discrimination.

One of the civil rights claims that’s drawing attention centers on allegations that officials affirmatively created a situation that endangered residents of the city. That theory, known as “state-created danger,” dates to the 1989 Supreme Court case *DeShaney v. Winnebago County*, brought on behalf of a 4-year-old boy who suffered brain damage after being beaten by his father. The boy’s lawyers argued that child welfare authorities who were monitoring the home violated his civil rights by failing to protect him from his father.

The Supreme Court rejected that position but wrote in the opinion that government employees could violate people’s civil rights by affirmatively endangering them.

Subsequent decisions elaborated that government employees must act in a way that “shocks the conscience” before they’re liable for violating people’s rights by...
The Genesee County Health Department declares an emergency.

Flint reconnects to Detroit Water and Sewerage.

November 2015
The EPA says in a memo that all water systems serving more than 50,000 people must have corrosion controls.

December 2015
New Flint Mayor Karen Weaver declares a state of emergency.

Dan Wyant, director of the Michigan Department of Environmental Quality, resigns.

January 2016
Genesee County declares a state of emergency, as do Gov. Snyder and President Barack Obama.

Michigan’s chief medical executive tells Flint residents to use lead filters or drink bottled water.

Michigan Attorney General Bill Schuette says he has launched an investigation.

February 2016
Mayor Weaver says it will cost $55 million to replace pipes.

April 2016
Schuette charges three officials with misconduct, conspiracy to tamper with evidence, neglect of duty and violating the state’s Safe Drinking Water Act. The defendants are Mike Glasgow, Flint’s former lab and water quality supervisor; and two Department of Environmental Quality officials, Mike Prysby and Stephen Busch.

Lead Litigation Beyond Flint

THE WATER CRISIS IN FLINT is unique in many respects, but the city isn’t alone in facing allegations regarding lead in the water supply. This year alone, lead-poisoning lawsuits were brought against officials in Chicago and New Jersey, and another lawsuit in Washington, D.C., is expected to go to trial soon.

The lawsuit in Chicago, which was filed in February by three residents, alleges that an initiative to replace water mains resulted in higher lead levels in the drinking water. The plaintiffs allege that officials didn’t adequately inform residents how to reduce their risks. For example, the complaint says the American Water Works Association recommends that after a service line replacement, people should remove the faucet aerator and run cold water for at least 30 minutes.

In Newark, New Jersey, a group of parents sued the city, Gov. Chris Christie and other officials over contaminated water in the schools. That lawsuit came several months after officials said that about half of Newark’s schools had unacceptably creating a danger.

Lawyers for the plaintiffs in Flint believe they can meet those standards. Michigan officials “made a deliberate decision not to use standard processing of the water to make it safe,” says Michael Pitt of Royal Oak, who represents plaintiffs in several of the lawsuits.

“Not only did they create the danger; they prolonged it,” he says. “Unfortunately, people died because they lied,” he adds, referring to residents struck by Legionnaires’ disease.

“And maybe some people are going to die from the lead poisoning.”

Pitt notes that a federal judge refused to dismiss a recent lawsuit alleging that officials with the Philadelphia Housing Authority created an environmental hazard that endangered residents in that city.

In that matter, three families who resided in the Hill Creek Apartments say employees of the Philadelphia Housing Authority exposed tenants to asbestos. The employees allegedly discovered asbestos while fixing leaky pipes and crammed the substance into a wall instead of disposing of it.

Lawyers for Michigan’s governor argue that the cases against him should be dismissed. Among other arguments, they say the 6th U.S. Circuit Court of Appeals at Cincinnati only recognizes the state-created danger concept when the state causes a risk of individuals being harmed by “third parties.”

THE WATER CRISIS IN FLINT

Dan Wyant resigns as Michigan DEQ director

On Jan. 21, Michigan DEQ Director Dan Wyant, who served under former Gov. Snyder, announced he was resigning effective immediately. Wyant, a DEQ employee for 20 years, served as interim director when former DEQ Director Bill Schuette was running for attorney general. Wyant said his decision was made for personal reasons, but didn’t comment on any controversy in Flint. He said he wasPDF created with FinePrint pdfFactory Pro trial version www.pdflactory.com

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high lead levels in the water.

A 2009 lawsuit alleging lead poisoning as a result of water contamination in Washington, D.C., centers on alleged contamination dating to 2001. Virginia Tech’s Marc Edwards—who also tested the water in Flint—told a congressional panel that the lead contamination problem in D.C. in the early 2000s was “20 to 30 times worse” than Flint’s, according to the Washington Post.

Despite the attention drawn by lawsuits over water poisonings, the greatest proportion of lead poisoning cases in children are caused by paint in deteriorating homes, according to Anita Weinberg, a clinical professor at Loyola University Chicago School of Law and chair of Lead Safe Illinois.

Weinberg points out that lead in the water supply may have different consequences than lead in paint, given that people can take steps to reduce the risk of poisoning due to water contamination. For instance, she says, most filters will screen out lead from the water. Also, simply letting the water run for a while before drinking from the tap can help get rid of the lead. “Whether or not you’re at risk because of lead in water has to do with how long your water has run before you drink from a faucet,” she says.

Traditionally, young children have suffered lead poisoning after eating paint chips (or dust from chips that had disintegrated). The federal government banned the use of lead in home paint in 1978, but many older homes still have lead-infused paint inside. The Centers for Disease Control and Prevention estimates that children in at least 4 million households are being exposed to high levels of lead, and that half a million U.S. children under the age of 6 have blood lead levels higher than 5 micrograms per deciliter.

Numerous lead-poisoning lawsuits have been brought against landlords. In addition, some plaintiffs have attempted to proceed with class actions against paint manufacturers.

The lead paint industry defeated those cases in seven states, but in 2013 Judge James Kleinberg of Santa Clara County, California, ruled that Sherwin-Williams Co., NL Industries Inc. and ConAgra Grocery Products Co. violated California’s public nuisance law by promoting lead paint even though they should have known of its dangers.

Kleinberg ordered the companies to pay $1.15 billion to 10 local governments that sued, including Los Angeles County and the cities of San Diego and San Francisco. The defendants have appealed the decision.

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May 2016
Glasgow pleads no contest to a misdemeanor charge of neglect of duty.

June 2016
Schuette sues Veolia and Lockwood, Andrews & Newnam and other related companies, alleging they caused the crisis to “occur, continue and worsen.”

July 2016
After an investigation by special prosecutor Todd Flood, Schuette charges six more state employees—three Health and Human Services staffers and three from the Department of Environmental Quality—with misconduct and willful neglect of duty.

August 2016
Virginia Tech’s Edwards says new research shows lead levels in Flint’s water have fallen between 50 and 80 percent since 2015. The federal state of emergency ends.
Contaminated water, Snyder’s lawyers argue, is not a third party. However, plaintiffs countered in a brief filed in September that “It is illogical to claim that public officials cannot be held liable for creating a danger and injuring a plaintiff, whereas they may be held liable if they created or increased a risk of harm that was carried out by a private third party.”

OFFICIAL DIFFICULTIES

Proving that Michigan officials’ decisions amounted to a civil rights violation also could be difficult because doing so will require proof that the problems with Flint’s water were the result of misconduct that surpasses simple negligence.

“One of the problems with establishing a substantive constitutional violation is that you have to make the case that the conduct goes beyond a simple tort,” says Robert Allen Sedler, a law professor at Wayne State University. “That may be a heavy burden.”

Sheldon Nahmod, a professor at Chicago-Kent College of Law, says the litigants likely will have to show that the government officials followed at least a “de facto” policy—meaning that they “were aware of the risk and continued in their course of conduct.”

Nahmod, author of the treatise Civil Rights and Civil Liberties Litigation: The Law of Section 1983, adds that there isn’t a great deal of precedent on the subject because environmental matters typically are dealt with in court through enforcement of environmental laws.

Proving a civil rights violation isn’t the only hurdle for the plaintiffs. Government officials also argue that a separate federal statute, the Safe Drinking Water Act, precludes all other causes of action. That law, originally passed in 1974, aims to comprehensively protect the country’s drinking water.

In April, U.S. District Judge John Corbett O’Meara agreed with that argument and dismissed a civil rights lawsuit brought on behalf of several Flint residents and a local business. That case, Boler v. Earley, was filed in January by prominent Baltimore attorney William H. Murphy, who recently struck a $6.4 million settlement for the family of Freddie Gray—a 25-year-old who died after suffering a spinal injury in police custody.

The suit, which names a host of official defendants including Darnell Earley (one of the former emergency managers of Flint), Gerald Ambrose (another former emergency manager of Flint), Dayne Walling (former mayor of Flint), the city of Flint, Gov. Snyder, the state of Michigan, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services, contained allegations that Flint residents’ constitutional rights were violated.
O’Meara ruled that the Safe Drinking Water Act precluded the plaintiffs from pursuing civil rights claims. “The crux of each of plaintiffs’ constitutional claims is that they have been deprived of ‘safe and potable water,’” O’Meara wrote. “Plaintiffs’ allegations are addressed by regulations that have been promulgated by the EPA under the SDWA.”

He relied on a 1992 decision, Mattoon v. City of Pittsfield, by the 1st Circuit at Boston, which also found that the Safe Drinking Water Act precludes civil rights lawsuits resulting from water contaminations.

“Comprehensive federal statutory schemes, such as the SDWA, preclude rights of action under Section 1983 for alleged deprivations of constitutional rights in the field occupied by the federal statutory scheme,” the appeals court wrote in Mattoon, which stemmed from a lawsuit on behalf of 68 Berkshire County, Massachusetts, residents who alleged they came down with giardiasis, commonly known as “beaver fever,” after drinking contaminated water.

The Michigan plaintiffs are appealing O’Meara’s decision.

OTHER REMEDIES

Even if officials like Snyder are immune from damages lawsuits, the plaintiffs have other possible avenues of recourse. Some, such as Walters, are pursuing lawsuits against outside firms, including the Houston-based engineering firm Lockwood, Andrews & Newnam Inc. and Chicago-based Veolia North America, which reviewed the water distribution system. Both of those companies are also facing civil lawsuits by state Attorney General Bill Schuette.

Melville, New York, attorney Hunter Shkolnik, who is representing plaintiffs in one of the class actions, says he hopes Congress will create a fund to compensate Flint residents. He says his firm has hired lobbyists on Capitol Hill.

“We’re working the halls,” he says. “We’re getting very good traction there.”

Even if high-ranking officials are never held liable in civil court, criminal charges are possible. The attorney general recently indicted three low-level officials—Mike Glasgow, Stephen Busch and Mike Prysby—on charges including conspiracy to tamper with evidence. The complaint contains allegations that officials manipulated test results by telling residents to “pre-flush” the taps before gathering water samples that were tested for lead.

Glasgow, the laboratory and water quality supervisor, pleaded no contest to willful neglect of duty, a misdemeanor, in early May. He said he will cooperate with an ongoing investigation that could result in charges against other officials.

In July, Schuette charged six additional state employees with misconduct and willful neglect in office. Schuette hasn’t yet said who else he is investigating. But some residents hope the probe reaches the very highest levels of government.

“The emergency manager, to me, was simply the method of the madness. The madness was the governor,” says Trachelle Young, a former chief legal officer for Flint who now represents some of the plaintiffs suing over the water contaminations.

Young was one of the first lawyers to sue over the switch to the Flint River, in April 2015. She represented a coalition of community members who sought an emergency injunction that would have required the city to switch back to the Detroit Water and Sewerage Department. In June 2015, U.S. District Judge Stephen J. Murphy III in Michigan denied the request, writing that the plaintiffs’ legal theories weren’t yet developed.

Like others in Flint, Young is hoping to see more government officials involved in the water contaminations charged with crimes. As for the civil suits, Young says damages could be broad-ranging—from paying to replace pipes to medical monitoring to compensation for decreased property values.

Even though the lead levels in water overall had decreased by late summer, some say plenty of work still needs to be done.

“People still can’t drink their unfiltered tap water,” says the NRDC’s Chaudhary. “That’s really serious.”

And pockets of Flint still show unacceptably high levels of lead. “There are still hot spots,” Walters says. “There are a lot of things that need to be done. The longer it goes on, the worse the damage is.”

“The remedy’s going to be difficult,” Young says.

“We’ve got people who will never trust water again.”
A CONTROVERSIAL TRADE AGREEMENT RAISES QUESTIONS ABOUT HOW DISPUTES SHOULD BE RESOLVED BETWEEN GOVERNMENTS AND PRIVATE CORPORATIONS
The Trans-Pacific Partnership appears to be a long way from going into force, but as a political issue, it clearly has arrived.

There is little dispute over the potential impact of the Trans-Pacific Partnership. The massive multilateral agreement, which took 10 years to negotiate, would create a framework of new trade rules for the United States and 11 other countries bordering the Pacific Ocean: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, which together account for nearly 40 percent of the world’s economy.

Notably absent from the list of participating countries is China, which the United States deliberately excluded from the creation of the agreement in order to establish trade rules conforming to U.S. ideas. The United States has indicated a willingness to allow China to join the TPP later, after the agreement’s rules have been put into place. China, however, has not shown a significant interest in joining the TPP, partly because the country could not satisfy a variety of TPP standards. For instance, China’s online censorship would conflict with the TPP’s standards on electronic commerce.

Signed by trade ministers on Feb. 4, the TPP will go into effect after it is ratified by at least six countries that account for 85 percent of the combined gross domestic production of the 12 TPP nations. To reach that threshold, both the United States and Japan must ratify the treaty.

But signing the TPP was the easy part, since it was the trade ministers of the member countries who negotiated it. Ratification promises to be more problematic, since it requires legislative approval. The treaty faces strong opposition in many signatory countries, including Australia, Canada, Chile, Japan, New Zealand and the United States.

In the United States, it is something of a surprise that the TPP, which was negotiated in relative obscurity, has become a hot-button issue in the presidential election. President Barack Obama is the TPP’s primary champion, and in June 2015, he scored a political victory—with the support of Republicans in Congress over opposition from members of his own Democratic Party—when he was authorized to negotiate trade deals that cannot be amended or filibustered by Congress.

The GOP, which historically has favored free trade agreements, has shown little support for the TPP. Last year, Senate Majority Leader Mitch McConnell, R-Kentucky, told the Washington Post that if the administration proceeded with its plan to send the treaty for confirmation to Capitol Hill by this summer, the Senate would reject it. “It would be a big mistake to send it up before the election,” he said. “There’s significant pushback all over the place.” There is similar opposition to the TPP in the House.

The presidential nominees of the two major parties both have expressed opposition to the TPP. Republican nominee Donald J. Trump has called the TPP “a horrible deal.” Democratic nominee...
Hillary Clinton’s position on the treaty is a bit more complicated. Although she supported the TPP as Obama’s secretary of state, she now opposes it. In May, the Post quoted Clinton as saying, “I oppose the TPP agreement—and that means before and after the election.”

There is widespread opposition to the TPP outside of Congress and the campaign trail as well. Labor unions, environmental groups, internet freedom groups and consumer rights organizations warn that the agreement would enable corporations to export more manufacturing jobs to low-wage nations, limit competition and increase prices for pharmaceuticals and other high-value products by expanding U.S. standards for patent protections to other countries.

But that opposition doesn’t necessarily mean the TPP is doomed. Many establishment politicians, especially in the GOP, support the deal. So, too, do many large and powerful corporations, including Apple, Citigroup, Disney, ExxonMobil, Halliburton, Microsoft and Goldman Sachs, which many opponents interpret as proof that it must be bad for workers.

“It is definitely too soon to tell whether TPP will be ratified,” says Timothy C. Brightbill, a partner in the Washington, D.C., office of Wiley Rein and an ABA representative on the Industry Trade Advisory Committee in the Office of the U.S. Trade Representative. “Trade agreements are always close votes in Congress. I would expect it would be a challenging process for the TPP to gain final approval.”

Meanwhile, negotiations on a similar trade agreement that would span the Atlantic Ocean are proceeding under the radar, at least on this side of the pond. The Transatlantic Trade and Investment Partnership would establish new trade rules for the United States and members of the European Union, where it has triggered widespread protests.

Once the TTIP is finalized, ratification could be even more difficult than for the TPP, since the TTIP must be ratified by every member state in the EU, and that kind of unanimous support is far from a given. French Prime Minister Manuel Valls said in a speech to members of his political party, “I can tell you frankly, there cannot be a transatlantic treaty agreement. This agreement is not on track.”

READY TO RUMBLE

Both advocates and opponents of the TPP come to the debate with plenty of support for their positions.

Advocates maintain that the agreement will bring big economic benefits. The Office of the U.S. Trade Representative, which handled negotiations for the administration, maintains that the TPP will reduce or eliminate tariff and nontariff barriers across substantially all trade in goods and services. As a result, the gross domestic product of participating countries could rise by an average of 1.1 percent by 2030, according to the World Bank. The economic benefit for the United States, admittedly, would be below this average. The U.S. GDP would rise by just 0.5 percent by 2030, according to a study issued in January by the Peterson Institute for International Economics. Still, that equates to an additional $131 billion for the U.S. economy, supporters note.

Moreover, say supporters, the agreement offers important geopolitical
"THE TPP MEANS THAT AMERICA WILL WRITE THE RULES OF THE ROAD IN THE 21ST CENTURY."
—PRESIDENT BARACK OBAMA

benefits for the United States. "The TPP means that America will write the rules of the road in the 21st century," Obama said in a statement posted online. "If America doesn’t write those rules—then countries like China will. And that would only threaten American jobs and workers and undermine American leadership around the world."

Critics counter that the TPP will hurt, not help, the United States. The treaty would lower U.S. GDP by 0.54 percent after 10 years and cost the United States an estimated 448,000 jobs, according to a study issued in January by Tufts University.

Moreover, the TPP will worsen income inequality in the United States, says David Rosnick, an economist at the Center for Economic and Policy Research in Washington, D.C. He found that the TPP would boost incomes for the highest-earning 10 percent of the population, while decreasing income for all other workers above the poverty line. The Tufts University study concurred that the TPP would exacerbate income inequality. Competitive pressures on labor incomes, combined with employment losses, would "push labor shares of national income further down, redistributing income from labor to capital in all countries" that are parties to the TPP, the study states.

Public Citizen, the consumer rights advocacy organization created by Ralph Nader, warns that the TPP will allow unsafe food to be imported into the United States, boost medical costs by giving pharmaceutical companies new rights to keep lower-cost generic drugs off the market and undermine reforms affecting large banks and other financial institutions.

A POTENTIAL POWDER KEG

And then there is the TPP’s Article 9, which addresses what the agreement describes as investor-state dispute settlement. That chapter has become the focus of strident opposition from many who claim that ISDS dangerously undermines the ability of governments to set public policy.

ISDS "severely constrains environmental, health and safety regulation, and even financial regulations with significant macroeconomic impacts," wrote Joseph E. Stiglitz in a Jan. 10 op-ed in The Guardian, a British newspaper that publishes a U.S. edition. As a result, the TPP "may turn out to be the worst trade agreement in decades." Stiglitz is a Nobel Prize-winning economist who teaches at Columbia University in New York City.

At first, ISDS might seem to be one of the more innocuous provisions in the TPP. It enables a company operating in a foreign country to seek redress from that country when its business interests are expropriated or otherwise unfairly harmed by that country’s authorities. The aggrieved company may bring a claim for arbitration, instead of having to risk bias by litigating in a foreign country’s courts.

The arbitration would be conducted by a three-member panel that operates outside the supervision of any national court system. Unless the national parties decide otherwise, the complaining party would pick one private arbitrator, the accused nation would pick another arbitrator, and those two arbitrators would select the third member of the panel. The process would follow the rules of the International Centre for Settlement of Investment Disputes or
The Trans-Pacific Partnership has received opposition from groups around the world, resulting in demonstrations in many places, including (from left)...

the U.N. Commission on International Trade Law. If the panel were to find that the accused country acted wrongfully, the country would have to compensate the company for the economic harm it suffered. Awards would be enforceable in the courts of every signatory of the TPP.

In addition, a winning complainant could seek to enforce the award in the courts of other countries that signed the ICSID Convention, the New York Convention or the Inter-American Convention. That would allow enforcement in almost every country on the planet.

Investor-state dispute settlement isn’t some radical new legal innovation. It has been included in many international trade agreements over the past 50 years, says Robert E. Lutz II, a professor at Southwestern Law School in Los Angeles and a past chair of the ABA Section of International Law.

ISDS applies only against countries that accept it, as part of an international trade agreement, such as the TPP or the North American Free Trade Agreement. And ISDS doesn’t protect against all foreign government misbehavior. It provides compensation when a signatory country:

- Treats a foreign investor or company less favorably than domestic investors or companies.
- Fails to treat a foreign investor or company “in accordance with applicable customary international law principles, including fair and equitable treatment.”
- Expropriates a foreign investment or company without due process of law and payment of adequate compensation.

Over time, however, lawyers have prodded arbitrators to interpret these ISDS clauses in a surprisingly expansive way. As a result, settlement arbitrators have repeatedly ordered governments to pay millions of dollars when foreign companies’ anticipated profits were hurt by health, safety, environmental or labor protections.

In Metalclad v. Mexico, ISDS arbitrators ruled that Mexico indirectly expropriated the assets of a U.S. waste management firm and denied the firm “fair and equitable treatment” because the firm was denied a permit to expand a toxic waste facility onto an environmentally sensitive area. Mexico was ordered to pay $16.7 million to compensate the U.S. firm. In Abengoa v. Mexico, ISDS arbitrators found expropriation and unfair treatment when a Spanish firm was refused a license to operate a toxic waste disposal plant on a fault line near an environmental preserve. Mexico was ordered to pay over $40 million.

Similar cases are ongoing. Costa Rica is fighting an ISDS proceeding over its rules protecting endangered sea turtles. Peru is battling over its rules to stop lead pollution. Germany is fighting such proceedings brought by Swedish energy firm Vattenfall AB, which is challenging Germany’s decision to phase out nuclear power.

“In contrast to court opinions, arbitration submissions and awards are often confidential,” states the website of the law library at Columbia University.

“This makes locating the awards much more difficult than locating court opinions. ... These awards are sometimes excerpts (and confidential information has been removed).” The Columbia site lists publications and websites that publish arbitration decisions.

CAUTIOUS GOVERNMENTS

The mere threat of an adverse ISDS ruling has caused countries to back away from actions to protect health, safety, workers’ rights and the environment. Here is one example: After Canada banned a toxic gasoline additive called methylcyclopentadienyl manganese tricarbonyl, it was forced into an ISDS proceeding by Ethyl Corp., which had been selling the additive in Canada. Ethyl argued that Canada’s ban diminished its anticipated profits and demanded that Canada pay the company all that it would have earned from selling MMT in Canada. The settlement panel handed down a preliminary ruling in favor of Ethyl. Before the arbitrators could issue a final decision, Canada settled. The nation repealed its ban on the additive, paid the firm $13 million in damages and legal fees, and posted ads saying that MMT was safe—even though Ethyl’s home country, the United States, bans its use in gasoline.

Some experts point to all this and conclude that investor-state dispute settlement is a pernicious impediment to public policy. “ISDS is a major problem that is undermining the rights of governments to regulate in the public interest,” says Lori M. Wallach, director of Public Citizen’s Global Trade Watch.

The Obama administration asserts that the TPP contains a new, improved ISDS chapter, which avoids past problems. The administration points, for instance, to Article 9.16, which states, “Nothing in this chapter shall...
be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.”

Lutz says, “Arguably, this completely prevents ISDS challenges to ‘environmental, health or other regulatory objectives.’” He notes that a similar provision in NAFTA protected the United States when an investor-state dispute settlement challenge was brought against California’s ban on the gasoline additive MTBE. The state had banned the additive in order to protect the environment and public health, and this ban did not unfairly harm a foreign company selling chemicals used to make the additive, an ISDS arbitral panel held in Methanex Corp. v. United States.

**ARTICLE SCRUTINY**

The NAFTA provision at issue in that dispute, Article 1114, Paragraph 1, has the same language as the TPP’s Article 9.16, except that the NAFTA provision protects only environmental regulations, while the TPP provision protects “environmental, health or other regulatory objectives.”

Brightbill also thinks highly of Article 9.16. “It is too soon to tell if this creates a complete firewall,” he says. “But the Obama administration has heard the concerns of TPP opponents and has tried in the text to respond to those complaints. Hopefully, this will create a better balance of the right to regulate and right to protect investments.”

Others doubt the effectiveness of Article 9.16. They note that the Methanex interpretation of Article 9.16’s language is at odds with the rulings in Metalclad and Abengoa. That’s not a problem for ISDS arbitrators, says Wallach, since they are not bound by precedent. Rather, the inconsistency is a problem for nations threatened with ISDS proceedings because they can’t know whether arbitrators will apply Article 9.16 in accordance with Methanex or Abengoa.

Moreover, skeptics add, there is a large loophole in the TPP’s Article 9.16: It protects only those regulations that are “otherwise consistent with this chapter.” So the article protects only those government actions that do not create ISDS liability—and thus do not need protection under Article 9.16. This provision is simply “irrelevant,” Wallach says.

Article 9.16 is further undermined by another provision in the TPP. Article 25.5, Paragraph 2 states that before taking regulatory action, signatory nations should “assess the need” for such action and “examine feasible alternatives.” ISDS arbitrators have used this language in other trade agreements to attack government regulations, and the same can be done under the TPP. “This gives the arbitral panel plenty of discretion to decide if the measure being challenged is strictly necessary or whether there were less intrusive measures that could be taken,” says Timothy A. Canova, a professor at Shepard Broad College of Law at Nova Southeastern University.

The TPP’s Annex 9-B imposes another limit on investor-state dispute settlement. It declares that nondiscriminatory government regulations that “protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.” Annex 9-B can thus protect public welfare regulations against ISDS claims of indirect expropriation. Suppose that tougher environmental standards prevent a foreign company from operating a toxic waste dump in some wetlands. These regulations would not directly expropriate the company’s toxic waste dump, but because they would prevent the dump from operating, the standards could constitute indirect expropriation. The foreign company might thus win an indirect expropriation claim under ISDS—were it not for Annex 9-B.

But Annex 9-B’s protections are limited. It is a defense only against claims of indirect expropriation. It does not protect against other common ISDS claims, such as discriminatory treatment or violation of customary international law principles. And these two sorts of claims have been the basis of repeated ISDS rulings against government efforts to protect the environment and public welfare.

Moreover, even the protection against indirect expropriation claims is qualified. Annex 9-B states that nondiscriminatory public welfare regulations “do not constitute indirect expropriations, except in rare circumstances.”

That creates a big loophole, Canova says. “The TPP doesn’t define ‘rare circumstances.’ That gives a lot of...
discretion to the arbitrators.” Canova has little faith that ISDS arbitrators will use their discretion fairly. That’s because the pool of potential arbitrators is largely composed of attorneys who bring ISDS claims. “When you look at who composes the arbitral panels, they are essentially lawyers who represent large corporations and investors in these types of suits,” Canova says.

One example is Railroad Development Corp. v. Guatemala. In that case, an ISDS arbitral panel considered whether Guatemala had violated customary international law principles when it initiated a process to revoke RDC’s contract to provide railway services.

The United States, El Salvador and Honduras filed submissions supporting Guatemala and urging a narrow interpretation of “customary international law principles.” These three nations, as well as Guatemala, asserted that customary international law principles arise only from agreements and decisions made by nations, not by interpretations made by arbitral panels. These countries also pointed to Annex 10-B of the Central American Free Trade Agreement, under which the ISDS proceeding was brought. The annex stated, in part, “The parties confirm their shared understanding that ‘customary international law’ ... results from a general and consistent practice of states that they follow from a sense of legal obligation.”

However, this treaty language and the representations by four of the treaty signatories did not hinder the arbitral panel. The panel conceded that ISDS arbitral rulings “do not constitute state practice,” but held such rulings are evidence of what state practice is. Then the panel adopted the broad interpretation of “customary international law principles” set out in a prior ISDS arbitration ruling, declaring that prior ruling “persuasively integrates the accumulated analysis of prior [arbitral] tribunals.” Applying the broad interpretation made by other arbitrators—not nations or their courts—the panel found Guatemala guilty of violating customary international law principles.

NO SMOKING

The TPP contains one exceptional new ISDS provision. Even critics agree this provision has no loopholes and will effectively halt ISDS claims against some public welfare regulations. The catch, however, is that the provision grants protection only to government efforts to control tobacco use.

Article 29, Paragraph 5 of the TPP states that a nation “may elect to deny” foreigners the right to bring ISDS “claims challenging a tobacco control measure.” If a nation makes this election, “such a claim shall not be submitted to arbitration” under ISDS. If a nation has not made this an election before the commencement of an ISDS
claim against a tobacco control measure, the country may make the election “during the proceedings.” Finally, if a nation elects to deny ISDS claims against its tobacco control measure, “any such claim shall be dismissed.”

A footnote states that “tobacco control measure” is to be interpreted broadly. “A ‘tobacco control measure’ means a measure related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labeling, packaging, advertising, marketing, promotion, sale, purchase or use, as well as enforcement measures, such as inspection, recordkeeping and reporting requirements.”

Critics of investor-state dispute settlement laud this provision as a powerful protection for government anti-smoking regulations. However, the strength of this provision provides a vivid contrast with the TPP’s other limits on ISDS. Why does the TPP not include similarly strong limits on settlement claims against other public welfare regulations?

Experts suggest that there is a policy reason for treating anti-tobacco regulations differently than other public health regulations. “Unlike alcohol or other types of drugs, any exposure can be dangerous,” Lutz says.

And there is a global commitment to curtail tobacco use. The World Health Organization Framework Convention on Tobacco Control has been signed by 180 countries (out of 196 U.N. member states), including all 12 nations that have signed the TPP. The framework convention requires all signatory countries to prevent and reduce tobacco use.

“One part of that treaty said that countries should not provide any incentives for the tobacco industry, and many would consider ISDS an incentive. So the carve-out is consistent with that. It provides for the ability of countries to regulate for the health and welfare of their citizens,” Lutz says.

HEALTH AND SAFETY ISSUES

TPP critics, however, dispute the rationale for treating tobacco control regulations differently than other public health or safety regulations. Tobacco is important, but it is no more important than many other public health issues, such as toxic waste or air pollution, they say. Yet the partnership provides no ISDS carve-out for these or other public health issues.

Supporters counter that exempting all health and safety regulations from ISDS would go too far. “Any regulation on behalf of the health and safety of citizens can be a cloaked protectionist action,” Lutz cautions.

So why did the authors of the TPP create a carve-out for one type of health regulation? The answer, suggest many experts, is politics. Philip Morris’ ISDS challenges to Australia’s and Uruguay’s cigarette packaging laws created a great deal of bad publicity for ISDS. The tobacco company’s actions “focused attention on ISDS,” and many people believed this “was an example of how ISDS could be misused to undermine important public health goals,” Brightbill says.

This had to be addressed if the TPP were to be ratified in the United States and other signatory nations. So the TPP negotiators added the exemption for tobacco control measures. “By mid-2015, adding a tobacco carve-out became a political imperative so the Obama administration could claim that the TPP’s ISDS regime was somehow fixed,” Wallach says.

The carve-out undermined ISDS but only to a very limited extent. “It was felt that for tobacco products, the danger of limiting public health regulations outweighed the danger of taking away legal recourse for these companies,” Brightbill says.

The Obama administration says there is no need to worry about any harmful ISDS arbitral rulings because all ISDS awards are subject to subsequent review, either by domestic courts or international review panels. This is true, but the reviews are extremely limited.

There is no substantive review of awards. Even clear errors of law or fact are not grounds for overturning an award. “There is no review of the merits of the case, the facts of the case or the arbitrators’ interpretation of ISDS standards,” Wallach says.

“ISDS awards can be reversed only for gross procedural error,” Canova says. And only certain types of gross procedural errors can result in reversal: The arbitral panel was not properly constituted; the panel manifestly exceeded its powers; an arbitrator was corrupt; the panel committed a serious departure from a fundamental rule of procedure; or the panel failed to state the reasons for its award.

Awards may be revised if new facts are discovered. “There is rarely an annulment or a modification in the amount of the award,” Wallach says.

Even if a nation does manage to get an ISDS award annulled, that does not necessarily end the matter. The foreign company that brought the arbitration may simply bring the dispute before another ISDS panel.

It is unclear how great a role investor-state dispute settlement will play in the upcoming ratification debate over the TPP. Yet for many, ISDS is reason enough to oppose the TPP. ISDS “is part of a corporate agenda to dilute government regulation,” Canova says.

“It is an attempt to rebalance, in a fundamental and dangerous way, the power of the state and investors and corporations. For me, it is a deal killer for the TPP. ISDS is a deal breaker.”

Steven Seidenberg is an attorney and freelance reporter in the greater New York City area.
Dog’s Best Friend

randie, an 11-year-old husky, was facing a death sentence. In early 2010, one of Brandie’s owners was walking her near their home in Broward County, Florida, which includes Fort Lauderdale. Brandie was on a leash, but the toy poodle mix that ran up to Brandie was not. Brandie bit the smaller dog, killing him.

At the time, Broward County had an unforgiving “dangerous dog” ordinance. Under the law, a dog found to have “killed or caused the death of a domestic animal in one incident” was to be impounded by animal control and then euthanized.

For six months, Brandie’s owners—Lon Lipsky and his wife, Beth—tried to get Brandie’s death sentence lifted, “losing at every turn,” Lipsky says. Then the couple read a story about another Florida dog, Ulu, from Marion County near Ocala in the northern part of the state, who had been saved with the help of Fred M. Kray, a lawyer in Gainesville. Kray got the court to scrap Ulu’s dangerous-dog designation, and in the course of litigation, attorneys for the county admitted their own harsh dangerous-dog ordinance was at odds with Florida
law and was unconstitutional. Ulu went home, and the law was changed.

The Lipskys reached out to Kray, who said he would help Brandie on a pro bono basis. "Everything changed once Fred got involved," Lipsky says.

Brandie’s isn’t the only dog who can thank Kray for her freedom—and life. A practitioner for about 40 years, Kray has built an extensive practice in the animal law field that includes cases about the Florida Deceptive and Unfair Trade Practices Act, pet lemon-law claims, pet store litigation over puppy mills, replevin actions for companion animals and veterinary malpractice.

In August, Kray was recognized for his work in animal law when the ABA’s Tort Trial and Insurance Practice Section presented him with its Excellence in the Advancement of Animal Law Award for 2016. The award recognizes a member of the section’s animal law committee who, in the words of the award citation, “through commitment and leadership, has advanced the humane treatment of animals through the law.”

RELENTLESS WORK ETHIC

Chris Green, the executive director of Harvard Law School’s Animal Law & Policy Program, says Kray earned the award through his untried efforts to protect dogs from unfair and unjust laws.

“His life’s work has been to ensure that each individual has access to due process, allowing them to be judged solely on the basis of their own conduct, rather than irrational fears or scapegoating,” says Green, a past chair and current member of the TIPS Animal Law Committee. “It often has been a thankless and controversial task, but one that Fred always believed to be just.”

Kray didn’t begin his career representing dogs and other animals. After graduating from the University of Nebraska College of Law in 1977, Kray moved to Florida, where he maintained a fairly traditional civil litigation practice in Miami and, starting in 2008, in Gainesville.

That changed more or less by accident in 1999, when Kray received a letter from the local animal control office. The letter alleged that Kray’s dog was unlicensed, and that he would need to pay a fine. There was only one problem: Kray’s dog had died weeks before he received the letter. Kray faxed the animal control office, advising officers of the dog’s demise. In response, he was given a trial date.

Kray describes what came next in his acceptance speech for the TIPS award: “The case was called. The animal control officer was sitting behind his computer and ratted off that I had a dog, it was not licensed as required on the due date, and I was therefore guilty. The judge looked at me and said, ‘What do you have to say about that?’ I said, ‘Well, first I’d like to ask the animal control officer some questions.’ The judge looked as if this was something that was happening for the first time. The animal control officer looked the same way.”

Kray followed up on tough examination by producing a box with his dog’s ashes. The judge, Kray says, looked at the animal control officer and said, “I think he’s got you there.”

This prompted Kray to wonder about the experiences of other pet owners. He was a seasoned trial attorney who could navigate the legal system and protect his rights. What about folks with fewer resources and less familiarity with the system?

So Kray began to take on animal-related cases. Since then, he has helped shape dangerous-dog laws through litigation, scholarship and blog posts that document his cases, so lawyers in other parts of the country can apply similar strategies.

STANDING UP FOR PIT BULLS

In the past five years, Kray also has helped lead the charge against breed-specific legislation—city and county ordinances that ban or otherwise restrict dogs by breed. These laws most often target pit bulls, and Kray maintains a website on the subject, Pit Bulletin Legal News. He also co-authored a book, Defending Against Dangerous Dog Classifications, published in 2012. His co-author is Adam P. Karp, who practices animal law in Bellingham, Washington.

Suing in federal court, Kray has so far been involved in getting two breed-specific ordinances struck down—in Moses Lake, Washington, and New Llano, Louisiana. Meanwhile, 20 states have passed pre-emption laws that prohibit local jurisdictions from passing or enforcing breed-based dog laws—most recently Arizona, where the statute took effect in the spring.

Other lawyers in the animal law field emphasize the importance of these efforts. “Much like criminal attorneys who defend some of society’s most maligned individuals—very often those that most need effective representation—Fred Kray has spent his career fighting to protect certain breeds of dogs from categorical prejudice,” Green says.

In the areas of breed-discriminatory legislation and dangerous-dog defense, Karp says, Kray has worked diligently in and outside of Florida to educate, inspire and challenge people’s dogs are never even taken away. “He gave them a second chance without having to fight for it like I did,” she says. “Fred just never gave up, and I have a lot to thank him for.”

Kray won Brandie’s freedom in December 2010. The county’s ordinance was changed shortly after that, in response to a separate lawsuit. Broward County now is in line with Florida law, so dogs are deemed to be dangerous if they have killed or injured a pet “more than once.”

The Lipskys got five more years with Brandie after Kray won their case. She died last December, having “lived out the rest of her life peacefully” with her owners in Georgia, where they’d moved for work reasons after Kray won the dog’s freedom. Kray got to see the Lipskys a few months before Brandie’s death, while he was in Georgia for a conference. “She was a special dog,” he says. “Fred’s become part of our family,” Lipsky says. “He saw something that was wrong. He felt like he had the power to right it. And he did.”

“Though nominally retired, he still labors for what captivates his heart—dogs of all kinds,” Karp says.

Kray supposedly retired—or at least drastically reduced his practice—about 15 years ago. But he’s also a lawyer who can’t say no. “I don’t know what you would call me,” he says. “If I see an animal law case that interests me, I will take it.”

There appear to be a lot of those still going around, raising important, fascinating and emerging areas of animal law that he continues to pursue. And besides, people keep asking him to save their dogs.

Sandra Shaw, Ulu’s owner, is grateful that Kray got her dog back home. She’s also grateful that his work might mean other
Alexandra Darraby really wanted to get to the Rothko. So did I. But we each had our own reasons for making the pilgrimage to the San Francisco Museum of Modern Art, where one of the major works of American artist Mark Rothko was on display.

For Darraby, Rothko epitomizes the stark power of contemporary art (meaning works by living or recently deceased artists) and modern art (going back to the early 20th century). And I wanted to see a work by the artist who first opened my eyes to the challenges and rewards of modern and contemporary art.

Fortunately, Rothko’s No. 14, painted in 1960 (he died in 1970), was one of the works available to view in the limited number of galleries open to visitors during the ABA Annual Meeting in August for the president’s reception at the newly renovated and expanded museum. The San Francisco Museum of Modern Art is affectionately known to city residents as SFMOMA.

But given my uncertain familiarity with modern and contemporary art, I decided it would be instructive to tour the open galleries, which contained an impressive if limited portion of the museum’s collection, with an ABA member whose knowledge of art would help me appreciate what we were viewing.

Darraby turned out to be an ideal companion for such a task. She is one of those fortunate lawyers who has been able to blend her personal passion with her professional practice. She comes from a family of amateur artists, and art in all its forms is an integral part of her life. She has studied art, taught art law at Pepperdine University School of Law in Malibu, California, and owned her own gallery for several years. In the early years of the Obama administration, Darraby was an art expert in Russia for the U.S. Department of State.

The founder and principal of the Art Law Firm in Los Angeles, Darraby handles virtually every kind of matter that involves architecture and design, museums, painting and sculpture—even antiquities issues. In the ABA, Darraby is a member of the governing committee for the Forum on the Entertainment and Sports Industries, and she’s a past chair of the forum’s division on arts and museums. She also is the author of the 2014 edition of Art, Artifact, Architecture and Museum Law, published by Thomson Reuters.

Darraby describes her practice as a great balance between art and the law. “It’s a perfect blend. I get to think and talk about art all day,” she said.

After sushi at the reception, we were joined by Tony Avelar, a local freelance photographer shooting the annual meeting for the ABA Journal, and we set out in search of Rothko’s No. 14.

TAKING THE TOUR

The “new” SFMOMA is something of a work of art itself. The museum reopened in May after closing in 2013 for the renovation, and the new facility is immaculate and attractive, full of light and space that gives the collection’s paintings, sculptures, photographs and other works room to breathe. What a media packet describes as the “transformed” museum has been expanded from 70,000 square feet of exhibit space to 170,000, allowing many more works to be displayed, including 260 works from the Doris and Donald Fisher Collection of contemporary art based in San Francisco. The renovated museum was designed by Snohetta, a firm based in Oslo, Norway, which now also has studios in San Francisco and other cities.
Darraby warmed up her powers of art analysis with a 1908 work by Henri Matisse, titled La Fille aux Yeux Verts (The Girl with Green Eyes), which applies a style on the border between post-Impressionist representational art and the abstract. The work combines a bold use of colors and shapes to depict a young woman. “But I don’t get a revelation about her personality,” Darraby said.

The next work along the way was a painting by Mexican artist Frida Kahlo, titled Frida and Diego Rivera, which, like the Matisse, made dramatic use of color, especially the artist’s red blouse and green shawl.

Finally, a couple of galleries away, we came upon the Rothko, which was a drastic departure from the works by Matisse and Kahlo. Like all of Rothko’s major works, No. 14 throbbed with enigmatic energy that stemmed from its use of strong, if not necessarily bright, colors presented in simple but compelling blocks.

Darraby brightened as we entered the gallery. “The installation is appropriate because it shows the work alone on the wall,” she said.

Darraby recounted her visit several years ago to the Menil Collection in Houston, which has an entire section devoted to works by Rothko. “It was the most compelling and moving and contemplative effect I’ve ever experienced, like I was in a place of worship,” she said. “Any artist who can accomplish that has done something special. It’s almost Zen.”

I told her about how a viewing of a Rothko painting triggered my appreciation for modern and contemporary art. “It’s fascinating that we come from different backgrounds, and yet we’re both drawn to the Rothko,” Darraby said.

“Yet, she said, “I don’t think he was painting for us, but for himself and some higher meaning.” Rothko’s work “doesn’t have any of the high-tech or special effects or other trappings, yet it changes the atmosphere of the whole room.”

‘THE ART HAS TO SPEAK’

Darraby was disappointed that we couldn’t visit the museum’s Agnes Martin gallery. She compares Martin’s work favorably to Rothko’s. Martin’s work isn’t “just about colors and patterns but an illuminating force you don’t expect from pastels,” which are tones that Martin uses extensively. “For me, there’s a spirituality to Rothko and a spirituality to Agnes Martin. I don’t know if the artist intended that, but it doesn’t matter.”

So Darraby consoled herself with a viewing of Edward Hopper’s Intermission, which depicts a woman sitting alone in a theater. She observed that many people find it easier to relate to figurative works because they depict things we recognize. Yet Hopper includes elements of abstraction in many of his works, and often he leaves the viewer wondering about the stories of the people in his works. Intermission, she said “is very enigmatic, like all his work. You bring your own story to it.”

Darraby said legal issues that relate to art are becoming more complex as the value of art, including contemporary works, continues to climb. “The front pages of every medium have art stories almost every day,” she said. “It’s because there’s so much money in art now.” Increasingly, some people are buying art primarily as investments, not to display, she said.

For herself, Darraby follows simple rules in collecting art. “I buy what I like,” she said. “I don’t buy what people tell me to buy. And the art has to speak to me, and it has to hold the wall.”
Go for Launch

The ABA’s new Center for Innovation will drive efforts to develop new methods of delivering legal services

By Victor Li

The ABA has wasted no time in implementing one of the recommendations made by the Commission on the Future of Legal Services in its final report.

The commission issued its Report on the Future of Legal Services in the United States on Aug. 6 during a program at the 2016 ABA Annual Meeting in San Francisco. In August, the ABA announced the creation of the Center for Innovation, a key recommendation made by the futures commission in its report. And on Sept. 1, the ABA unveiled its inaugural list of appointments to the center’s governing and advisory councils.

“The purpose of the proposed center is to position the ABA as a leader and architect of the profession’s efforts to increase access to legal services and improve the delivery of, and access to, those services to the public through innovative programs and initiatives,” stated the commission in its report. The center also will serve as a resource for ABA members, keep track of the ABA’s innovative efforts, and provide fellowships to collaborate with professions in the technological, entrepreneurial and design industries. In addition, the center will track the innovation efforts of the domestic and international legal services community.

“Closing the access-to-justice gap and making the legal system accessible to all people is of critical importance,” said ABA President Linda A. Klein of Atlanta in a news release. “The Center for Innovation will help bring together the best and most forward-thinking ideas for making our system more efficient and available.”

The need to adopt innovative approaches to close the gap in legal services delivery was an underlying theme for the futures commission as it went about its work for the past two years. “We must open our minds to innovative approaches and to leveraging technology in order to identify new models to deliver legal services,” said William C. Hubbard of Columbia, South Carolina, who appointed the commission as ABA president in 2014. “Those who seek legal assistance expect us to deliver legal services differently. It is our duty to serve the public—and it is our duty to deliver justice, not just to some, but to all.”

The commission also emphasized the importance of innovation in its report. “Innovation is an ongoing process that requires sustained effort and resources as well as a culture that is open to change,” states the report. In addition to working closely with others in the legal community, the new Center for Innovation “will seek vital input from and collaboration with technologists, innovators, consumers of legal services and those in public policy to develop new projects, programming and other resources to help drive innovation in the delivery of legal services.”

VOICES OF EXPERIENCE

The commission’s legacy is reflected in some of the appointments to the governing and advisory councils for the innovation center. Andrew Perlman, the dean of Suffolk University Law School in Boston who served as vice-chair of the commission, will chair the governing council. Other members of the commission who were appointed to serve on the 14-member governing council are Karl Camillucci, an attorney in Chicago; Margaret Hagan, a fellow at the Stanford Law School Center on the Legal Profession; Dana M. Hrelic, an attorney in Hartford, Connecticut; and Mary McQueen, president of the National Center for State Courts in Williamsburg, Virginia.

The 10-member advisory council includes former futures commission members Daniel B. Rodriguez, dean of the Northwestern Pritzker School of Law in Chicago; and James J. Sandman, president of the Legal Services Corp. in Washington, D.C.

The Center for Innovation also will have three special advisers: Hubbard; Judy Perry Martinez, a New Orleans attorney who chaired the futures commission; and William H. Neukom, a past ABA president and current president of the World Justice Project. Janet Jackson, the former director of the ABA’s Office of the President, will serve as managing director of the center.

“Extraordinary talent has been recruited from the tech and design worlds to join forces with respected leaders of the bar to govern the center,” Klein said. “This unprecedented collaboration will assure that out of the center will come a surge in legal services delivery innovations that will benefit the public for decades to come.”

DISPUTE RESOLUTION AND MORE

Perlman says the Center for Innovation already has several major projects lined up. The center will assist the ABA Judicial Division in implementing a court-annexed online dispute resolution pilot program in New York. “With court-annexed online dispute resolution, the parties resolve their dispute entirely online without ever having to step foot into a courthouse,” Perlman says. The program will cover consumer debt cases in New York, and, if it goes well, it could be expanded to cover other areas of the law.

“Our great hope is that this could be a useful solution for many types of cases throughout the U.S.,” says Perlman. The center also will participate in the development of guidelines and standards to help lawyers and bar associations administer regular legal checkups for individuals, another project recommended by the futures commission.

In the meantime, the center will take the lead in creating fellowships for recent law school graduates as well as midcareer lawyers. The purpose of the fellowships will be to allow lawyers to come to the ABA and work with experts at the center, as well as professionals outside the legal industry, to develop innovative projects that will help deliver legal services more efficiently.

“Young lawyers may have an idea they’d like to get off the ground,” says Perlman. “We can give them time and resources to pull that off. As for midcareer lawyers, we can help them retool and help them develop new ways of delivering legal services in their own practices.”

Perlman says the fellowships will be funded out of money that’s been allotted to the center by the ABA, and that the center also hopes to raise funds going forward.

“This has definitely been a labor of love,” Perlman says. “But I care very deeply about the future of legal services and how the ABA can advance its work as a leader in how legal services are delivered. It’s a privilege and honor for me to be part of it.”

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66 | ABA JOURNAL | NOVEMBER 2016
No Longer Overlooked
Federal legislation puts greater emphasis on meeting the needs of students who are homeless or living in foster care

By Rhonda McMillion

In the past, legislative efforts to improve the quality of elementary and secondary education generally overlooked the unique needs of children who are homeless or living in foster care. But that situation is changing under the Every Student Succeeds Act, which contains a number of provisions that seek to provide greater stability in school for children who come from those backgrounds. The ABA is working to guarantee that regulations being implemented under the act effectively meet the needs of those students.

“With this bill, we re-affirm that fundamentally American ideal—that every child, regardless of race, income, background, the ZIP code where they live, deserves the chance to make out of their lives what they will,” said President Barack Obama when he signed ESSA in December 2015. The act replaced the No Child Left Behind Act, which became law in 2007, and Obama said the new law “upholds the core value” of the original Elementary and Secondary Education Act of 1965 that “education, the key to economic opportunity, is a civil right.”

The ABA supports provisions in ESSA that:
• Ensure that students may remain in their schools when they enter foster care or change foster care placements, unless it is not in their best interest.
• Enroll students who are in foster care immediately in a new school when a school change is necessary without the records that typically are required.
• Facilitate the prompt transfer of records when a child in foster care enters a new school.
• Require school districts and child welfare agencies to have reciprocal points of contact for students in foster care, as well as a point of contact at the state level.
• Require local education and child welfare agencies to collaborate on developing and implementing plans for transportation when needed to keep students who are in foster care in their schools of origin.
• Improve the collection of data, particularly regarding high school graduation rates, on the progress of children.

Additional provisions require state and local education agencies to ensure that their plans under the act promote identification, enrollment, attendance and school stability for youths who experience homelessness. They also require local education agencies to reserve a portion of their education funding to support homeless children.

The ABA maintains that the improvements in the law will help to prevent students in foster care and homeless students from needlessly changing schools, keep them from falling further behind in their education with each move, and prevent overburdening the school systems serving both of these groups.

WORKING ON THE DETAILS
The Department of Education is developing final ESSA regulations based on several hundred public comments from more than 200 events and meetings.

In written comments submitted to the Department of Education in May, ABA Governmental Affairs Director Thomas M. Susman emphasized that “clear and timely information is critical to ensuring effective collaboration among state and local education agencies and state and local child welfare agencies to improve education stability and success for students in foster care.”

Citing the ABA’s emphasis on the importance of transportation services for children in foster care, Susman recommended that the regulations require local educational and child welfare agencies to work together to guarantee transportation for students is not interrupted.

To improve data collection and reporting, the ABA recommends that the definition of “foster care” under ESSA align with the federal child welfare definition and the stability requirements of the Fostering Connections to Success and Increasing Adoptions Act, which was enacted in 2008 to improve outcomes for children in foster care.

For purposes of reporting student achievement, the ABA supports the designation of students in foster care as a subgroup because of the unique educational needs of those students and the educational barriers that they face. In his comments, Susman pointed out that statistics for reporting high school graduation rates should include students in foster care at the time of graduation and those who lived in foster care at any time while they attended high school. This is so the statistics portray a more accurate picture of the educational experience of students in foster care, he says.

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 the editor of ABA Washington Letter, a Governmental Affairs Office publication.
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ABA Notices

2017 REGULAR STATE DELEGATE ELECTION
Eighteen states will elect State Delegates for three-year terms which will begin at the adjournment of the 2017 Annual Meeting. For states conducting elections and election rules and procedures on filing petitions, visit ABAJournal.com/magazine and click Your ABA-ABA Announcements.

2017 BOARD OF GOVERNORS ELECTION
At the 2017 Midyear Meeting, the Nominating Committee will announce nominations for district and at-large positions on the ABA Board of Governors for three-year terms beginning at the conclusion of the 2017 Annual Meeting. For the election deadlines, rules and procedures on filing petitions, visit ABAJournal.com/magazine and click Your ABA-ABA Announcements.

INDEX TO ADVERTISERS

<table>
<thead>
<tr>
<th>Advertiser</th>
<th>Web Address</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Advantage</td>
<td>ambar.org/advantage</td>
<td>42-43</td>
</tr>
<tr>
<td>ABA Insurance</td>
<td>ABAinsurance.com</td>
<td>IBC</td>
</tr>
<tr>
<td>ABA Health Law Section</td>
<td>ambar.org/health</td>
<td>7</td>
</tr>
<tr>
<td>ABA TECHSHOW 2017</td>
<td>techshow.com</td>
<td>IFC</td>
</tr>
<tr>
<td>Bloomberg BNA</td>
<td>bna.com/bltx2</td>
<td>3</td>
</tr>
<tr>
<td>LawPay</td>
<td>LawPay.com/ABA</td>
<td>5</td>
</tr>
<tr>
<td>Legal Talk Network</td>
<td>legaltalknetwork.com</td>
<td>6</td>
</tr>
<tr>
<td>Needles</td>
<td>needles.com</td>
<td>33</td>
</tr>
<tr>
<td>Paul Fredrick</td>
<td>paulfredrick.com/best</td>
<td>29</td>
</tr>
<tr>
<td>Thomson Reuters Firm Central</td>
<td>firmcentral.com</td>
<td>BC</td>
</tr>
</tbody>
</table>
American Bar Endowment 2016 Annual Report
Insurance That Makes a Difference

Created by the ABA in 1942, the American Bar Endowment is an independent §501(c)(3) public charity. For more than 70 years we have fulfilled our mission of generating funds for the support of legal research, educational, and public service projects through the sponsorship of insurance plans offered exclusively to ABA members.

ABE-sponsored insurance plans are:
- tailored to meet the needs of ABA members
- affordable priced
- backed by one of America’s most respected insurance companies, New York Life Insurance Company
- designed to give back through the nation’s only built-in insurance charitable giving feature

Over ABE’s history, our members who have contributed their available dividends have made it possible for ABE to make grants of over $130 million each to both the ABA’s Fund for Justice and Education and the American Bar Foundation in addition to several million dollars provided to other charitable and educational organizations.

For more information on the over 200 charitable and educational projects made possible with the support of member-donated insurance dividends, visit abandoned.org/dividends.

ABE 2015-2016 Policy Dividends
The American Bar Endowment is announcing the amount of policy dividends available from its group insurance programs. For each program, the approximate amount of net policy dividends as a percentage of premium paid is shown below.

- Life Insurance: 20 percent of premiums due and paid for the period June 1, 2015 through May 31, 2016.
- Disability Income: Premiums due and paid for the period November 1, 2014 through October 31, 2015 were less than claims and expenses incurred, consequently there will be no dividend.
- Hospital Money: 20 percent of premiums due and paid for the period November 1, 2014 through October 31, 2015.
- Accidental Death & Dismemberment: Premiums due and paid for the period August 1, 2015 through July 31, 2016 were less than claims and expenses incurred, consequently there will be no dividend.
- Excess Major Medical: Premiums due and paid for the period March 1, 2015 through February 28, 2016 were less than claims and expenses incurred, consequently there will be no dividend.
- Professional Office Overhead Expense: 41 percent of premiums due and paid for the period July 1, 2015 through June 30, 2016.

American Bar Endowment Statement of Activities
For Fiscal Years 2016 and 2015

<table>
<thead>
<tr>
<th>Changes in unrestricted net assets:</th>
<th>YEAR ENDED JUNE 30</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2016</td>
</tr>
<tr>
<td>Revenues and gains:</td>
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</tr>
<tr>
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<td>1,166,476</td>
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<tr>
<td>Hospital Money program</td>
<td>138,038</td>
</tr>
<tr>
<td>Excess Major Medical program</td>
<td>342,463</td>
</tr>
<tr>
<td>Accidental Death and Dismemberment program</td>
<td>281,144</td>
</tr>
<tr>
<td>Professional Office Overhead Expense program</td>
<td>39,240</td>
</tr>
<tr>
<td>Other programs</td>
<td>165,888</td>
</tr>
<tr>
<td>Insurance premiums paid</td>
<td>24,354,471</td>
</tr>
<tr>
<td>Management and general</td>
<td>277,082</td>
</tr>
<tr>
<td>Grants paid</td>
<td>6,494,534</td>
</tr>
<tr>
<td>Pension</td>
<td>1,006,152</td>
</tr>
<tr>
<td>Income taxes</td>
<td>83,884</td>
</tr>
<tr>
<td><strong>Total expenses</strong></td>
<td><strong>36,850,897</strong></td>
</tr>
<tr>
<td>Increase in unrestricted net assets</td>
<td>(5,402,677)</td>
</tr>
<tr>
<td>Changes in permanently restricted net assets:</td>
<td></td>
</tr>
<tr>
<td>Donations</td>
<td>10,636</td>
</tr>
<tr>
<td>Net unrealized and realized gains on investments</td>
<td>59,377</td>
</tr>
<tr>
<td>Increase in permanently restricted net assets</td>
<td>70,183</td>
</tr>
<tr>
<td>Change in net assets before cumulative effect of a change in accounting principal</td>
<td>(5,422,514)</td>
</tr>
<tr>
<td>Cumulative effect adjustment</td>
<td></td>
</tr>
<tr>
<td>Change in net assets after cumulative effect adjustment</td>
<td>(5,422,514)</td>
</tr>
<tr>
<td><strong>Net assets at beginning of year</strong></td>
<td>$118,303,128</td>
</tr>
<tr>
<td><strong>Net assets at end of year</strong></td>
<td>$118,303,128</td>
</tr>
</tbody>
</table>

AMERICAN BAR ENDEAVOR GRANT PAYMENTS MADE FOR 2015 AND 2016
<table>
<thead>
<tr>
<th>FY 2015-2016</th>
<th>FY 2014-2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Bar Association Fund for Justice and Education for support of its public service programs</td>
<td>$3,247,417</td>
</tr>
<tr>
<td>American Bar Foundation for support of its research programs and administration</td>
<td>$3,247,417</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$6,494,834</strong></td>
</tr>
</tbody>
</table>

To view the 2016 ABE Annual Report in its entirety, please visit: abandoned.org/aboutreport.asp

Members may request a refund of the available dividends attributable to their participation by submitting a written request by mail to the American Bar Endowment, 321 N. Clark Street, 14th Floor, Chicago, IL 60654-7646; fax to 312-986-6401; or email to dividends@abandoned.org. (Please be sure your member number is on the request.) Requests for refunds can be sent starting January 1st, but must be received no later than December 15th each year. When a request for refund is received, a confirmation will be mailed to you acknowledging the request. If the confirmation is not received within three weeks, contact ABE to confirm receipt. Members who donate their dividend to ABE to support its charitable mission are eligible for a charitable contribution deduction on their individual tax returns. Notice of the exact amount of contribution will be mailed in late January. Written requests for refunds must be submitted each year.
Kevorkian’s Last Suicide

On a Sunday evening in 1998, viewers of the perennially popular CBS news program 60 Minutes witnessed a videotaped death. Whether in horror or fascination, as many as 22 million people watched as 52-year-old Thomas Youk, withered from amyotrophic lateral sclerosis, accepted three injections from Jack Kevorkian, a controversial Michigan physician known colloquially as Dr. Death.

For more than 40 years, he made a career of provoking both the law and the ethics of the medical profession as a proselyte for assisted suicide. By the time 60 Minutes aired his tape of Youk’s death two months earlier, Kevorkian had already assisted in scores of suicides. He had lost his license to practice medicine in Michigan and California. Legislators wrote laws to help prosecutors stop him. Jurors struggled to balance Kevorkian’s brash moral certainty with the human suffering he claimed to relieve.

Born Murad Kevorkian, his parents were refugees of the 1915 Armenian genocide. In 1952, he graduated from the University of Michigan medical school, where he’d long shown a fascination for the subject of death and a predilection for challenging traditional medical values. In 1959, he suggested in a major political science journal that condemned prisoners be allowed to choose medical experimentation as a means of execution. The idea brought him professional contempt and an invitation to leave his post at the University of Michigan Medical Center. After a few years as an itinerant pathologist, Kevorkian spent the 1970s exploring art and music, even dabbling with a film on Handel’s “Messiah.” But on his return to Michigan in the early 1980s, he became enthralled with the implications of euthanasia as it had begun to be practiced in the Netherlands.

On the topic of physician-assisted suicide, Kevorkian became more than an advocate. He developed two “death machines”—the Thanatron and the Mercitron—allowing death-determined patients to administer their own suicide by intravenous injection or poison gas. Moreover, he sought serious financial backing for the development of suicide clinics, where individuals seeking to end their life could connect with health professionals who would help them die.

In 1990, Kevorkian’s efforts became more than philosophical. Janet Adkins, a patient with Alzheimer’s disease, asked him to allow her to use his Thanatron. In a makeshift death clinic inside Kevorkian’s Volkswagen van, Adkins became his first suicide assist. For that, Kevorkian was charged with murder, a charge later dismissed.

In 1991, he was present at the deaths of two women—Sherry Miller and Marjorie Wantz—and was again charged with murder. Kevorkian was tried and acquitted in May 1996, but by that November he had been present for the suicides of an estimated 46 people.

After three jury acquittals, a mistrial before a fourth and at least five dismissals by Michigan judges, Kevorkian became increasingly emboldened: a public character—part thanatological moralist, part carnival Barker in a sideshow of death. He dressed in colonial garb during one of his trials, taunted juries to convict him, and at one point, assisted in a suicide between sessions of his own murder trial.

With the 60 Minutes showing, however, all that changed. For the first time, Kevorkian had not simply assisted in a suicide but actually had administered the drugs that caused Youk’s death, all captured on a video he made himself. Three days later, Kevorkian was charged, once again, with murder.

On March 26, 1999, Kevorkian was convicted of second-degree murder. Sentenced to 10 to 25 years in prison, he served more than eight before being released in 2007 on the promise he would no longer assist in suicides.

In 1997, Oregon passed the Death with Dignity Act that permitted physicians to prescribe lethal drugs for terminally ill patients who meet a strict set of standards. Since the law’s passage, more than 1,545 qualified patients have received prescriptions for fatal drugs. Of those, 991 ultimately chose to die by their own hand.
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