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The Rules on Rules

REGARDING “PARENTHETICAL HABITS,” November, page 26: brilliant—I’m still laughing. The Bluebook’s (like all) “rules” are “made to be broken,” not just because they’re often silly and misguided pronouncements by the students proliferating them but because they are rules.

As I’ve taught my students for years, break any rule you wish, any time you wish—provided you meet two requirements: (1) know why the rule exists (that is, what purpose it serves and the risks of not following it) and (2) have a good enough reason for breaking it. What’s “a good enough reason”? Any reason that’s good enough for you—if you know what you’re trying to accomplish, who you’re writing to, and how you’ve chosen to come across.

Andrej Thomas Starkis
Milford, Massachusetts

APPRECIATE THE TURMOIL

Thanks for “Turmoil in the Pacific,” November, page 54, as the subject matter has been largely ignored by a mainstream media that would rather report the latest Kanye/Kardashian fiasco.

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ABA JOURNAL JANUARY 2017
However, you may want to add that a negative side effect of an investor-state dispute settlement decision within the U.S. is that the legislature may end up repealing a federal law in response to an ISDS action or settlement—often counter to the well-being of the electorate.

You may also want to add that an ISDS settlement is not appealable within U.S. courts, thus requiring the U.S. to live with the decision (i.e., pay penalties) or repeal the law as discussed above.

David Gottardo
Oak Park, Illinois

WHAT WE KNEW

Bryan Garner’s tribute to the eloquence of Justice Robert Jackson (“Powerful Eloquence,” October, page 24) as revealed in his June 1943 opinion in West Virginia State Board of Education v. Barnette appears to credit Jackson with a kind of divine prescience that allowed him to anticipate the Holocaust—an event that Garner claims was generally unknown (to Jackson and to others) at the time of the opinion. Garner characterizes as "haunting" Jackson’s statements that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters" and that "only the unanimity of the graveyard" is the eventual product of "compulsory unification of opinion." He asks readers to recall that "it was 1943, and nobody in America knew anything about the horrifying extent of Hitler's death camps.”

This is an egregious error on Garner’s part, unfortunately repeated by many others. Distorted histories of World War II and poorly taught modern history courses have caused many of us to believe that our government was unaware of the horrors of the Holocaust until concentration and death camps in Germany and Eastern Europe were invaded by Soviet and American troops in 1944 and 1945. The intelligence is to the contrary.

The U.S. government was one of the major participants in the public declaration of Dec. 17, 1942, which stated: “German authorities ... are now carrying into effect Hitler’s oft-repeated intention to exterminate the Jewish people of Europe.” The Allied Declaration describes the deportation of Jews to Eastern Europe and ominously observes: “None of those taken away are ever heard from again.” Regrettably, the press and the governments of both Britain and the United States largely suppressed or minimized information about the ongoing annihilation of the Jews at the hands of the Nazis.

Garner’s oversight does not detract from his other astute observations about the texts he analyzes or the eloquence of the Supreme Court justice he so aptly extols. But his misstatement nonetheless demands correction. As the Allies themselves acknowledged, they knew precisely what the Nazis were doing while the Final Solution was a work in progress. Indeed, given what they knew, a legitimate and robust debate continues as to whether the Allied response to the ongoing Nazi exterminations of Jews—as well as their ex post facto response at Nuremberg and in other judicial proceedings—was morally or legally adequate. This is the question we should be addressing in the 70th anniversary year after the first phase of the Nuremberg trials.

Tony J. Tanke
Davis, California

NOT ONLY A NATIVE ISSUE

Regarding “Children of the Tribe,” October, page 40: Perhaps the fault lies with the dependency system, not the Indian Child Welfare Act. There is almost nothing I can see, other than venue, that implicates the ICWA.

This situation is played out daily in dependency courts for non-Native American children. There is a preference for kinship options and especially those with other siblings. I have no doubt that foster families become attached to the children in their care, but they are given clear boundaries. The state caseworker apparently failed to enforce them. A foster family cannot be allowed to decide when or if a child gets to visit family members. That is the agency’s job. This isn’t about tribal connections or race—this child is reportedly being raised in a non-Native American household either way and is not being raised with native traditions. The adults involved need to realize this should be about a little girl’s welfare, not about adults staking out an ideology or political agenda.

Teresa Bliley
Meadville, Pennsylvania

CORRECTIONS

“The 10th Annual Blawg 100,” December, page 52, should have stated that nearly half of law bloggers responding to our survey are in law firms or legal departments with 20 or fewer employees. Also, more than 80 percent indicated that they follow their blog’s metrics or social sharing activity. And Keith R. Lee should have been described as a partner in a three-lawyer firm.

Contents, December, page 1, should have stated that Julianne Hill wrote the “Jailhouse Warehouse” feature.

The photo credit for “Mobile Justice,” December, page 9, should have read: courtesy of Mitchell Hamline School of Law.

The Journal regrets the errors.
New Year, Bright Future

The ABA improves the legal profession and serves its members

As we embark on a new year, our thoughts turn to the future. Where is our profession headed? What new challenges will our justice system face? What is the future of legal education? Whatever questions arise, we know that the American Bar Association will lead.

As we prepare to meet our challenges, I remain confident in our association's success because it is constructed on a sound foundation.

The ABA is the voice of America's legal profession. In that role, it develops model rules and guidelines, advocates for legislation and policies critical to our profession and justice system, and speaks out when lawyers or the justice system are under threat.

As a nonpartisan organization, the ABA represents a diverse membership that does not agree on every issue. ABA leadership welcomes all lawyers and strives to accommodate the views of our more than 400,000 members. Our big tent is our strength.

Since 1936, our House of Delegates—a body of approximately 550 elected delegates who represent every state bar as well as larger local bars, ABA sections and divisions, and other national legal organizations—has met twice a year to create policies for the association. Policy is adopted after thorough and constructive debate. Each issue receives a full hearing where all sides can be heard. Any ABA member can engage in the process and put forth a resolution. Every member has a voice.

The ABA Board of Governors, with 44 members, meets four times a year. It has the authority to act and speak for the ABA, consistent with previous action of the House of Delegates, when the House is not in session. The Board, which is divided into various committees, discusses long-range priorities, evaluates programming, and encourages collaborative and innovative programs among association entities. It also develops policies to ensure the prudent financial management of ABA resources.

At our most recent Board of Governor's meeting in November, we engaged in a planning session to set criteria about how the ABA would allocate resources moving forward to ensure a healthy future. I am confident our future is bright. The ABA will continue our work to ensure everyone has access to justice. Through our Governmental Affairs Office, we will make our voice heard and our positions known to policymakers. Through our Rule of Law Initiative and other international programs, the ABA will promote justice around the world.

Of course, the ABA's reach goes much farther. We improve the profession through activities ranging from promoting diversity and inclusion to supporting pro bono work.

Ultimately, we improve the profession by serving our members. We provide valuable resources like marketing, managing law practices, and getting ahead of what’s new in technology. There is nothing wrong with looking at the ABA and asking, “What’s in it for me?” Fighting for the rule of law and access to justice are vital goals, but discounts and ways to improve a lawyer’s life and practice serve an important role as well.

The ABA has more than 3,500 entities that specialize in various areas of the law. No matter your interest, the ABA has a group for you. For law students and young lawyers, we provide opportunities to network or to find a niche. The ABA offers more than a thousand hours of continuing legal education, many free or at discounted prices. This is just one area where ABA members reap benefits from the association. We also provide member discounts on services from rental cars to refinancing student loans. You can find all these at www.ambar.org/membership.

Our new ABA Blueprint program offers small-firm and solo practitioners administrative assistance in running their firms, leaving them more time to do what they entered the profession to do: practice law. ABA Blueprint offers resources from practice management software to health insurance and everything in between. Check it out at www.abablueprint.com.

As 2017 begins, we are ready to face the future. For lawyers and law students, ABA membership means having your voice heard and making your work more productive. Won't you ask your friends and colleagues to join us?
A BURGEONING GROUP OF LEGAL ENTREPRENEURS is hoping to tap into the nationwide demand for low bono work. Nonprofit law firms have been popping up, and they provide benefits to clients as well as founders.

However, this type of law practice is a fairly new concept, and the economic viability and legal nuances of 501(c)(3) status still are open questions.

But the savings to an underserved population can be significant. For example, if someone has an uncontested divorce and children under 18, lawyers at Open Legal Services in Salt Lake City can help for about $375, not including court fees, says Shantelle Argyle, a co-founder of the nonprofit law firm.

Because of its tax-exempt status, the firm has a much lower overhead and can pass savings on to customers.

Some benefits Open Legal Services receives as a 501(c)(3) include less expensive legal malpractice insurance through the National Legal Aid and Defender Association and discounted health insurance through the Utah Nonprofits Association.

In the past year, Argyle has visited six bar associations and law schools, sharing how she’s built a practice focused on consumers who desperately need lawyers but don’t qualify for legal aid services and can’t afford traditional rates. Her office, which she co-founded with A. Daniel Spencer in 2013, now employs eight lawyers. The duo (who were 2015 ABA Journal Legal Rebels) were on target to earn about $450,000 for the 2016 fiscal year, says Argyle, whose annual salary as executive director is $50,000.

She knows of at least 36 other groups that either have formed nonprofit law firms or are in the process of building them with varying degrees of success. Some get substantial business from court or legal aid referrals, while others say making client connections has been a struggle.

Also, although most of the nonprofit law firms have IRS letters that designate 501(c)(3) status, some tax lawyers wonder whether the designations would withstand IRS audits.

“It’s just not enough that law firms charge lower fees and represent low-income individuals,” says Bruce Hopkins, a Kansas City, Missouri, lawyer whose work focuses on representing tax-exempt organizations. “That’s very nice, and it’s certainly a service that could be provided, but that wouldn’t make it tax exempt.”

The difference, Hopkins says, is the IRS would likely distinguish between low and moderate incomes and the indigent. An IRS representative did not respond to the
**Opening Statements**

"ABA Journal’s inquiries about the issue. “Everyone you talk to you will tell you something different, especially if they do not specialize in nonprofit law,” Argyle says.

Many lawyers who perform this kind of work, including Argyle, expect to qualify for the Public Service Loan Forgiveness program. Part of the College Cost Reduction and Access Act of 2007, the PSLF program automatically includes 501(c)(3) employers. Those eligible must work in public service for 10 years and make 120 qualifying loan payments after Oct. 1, 2007.

“That was part of the reason our first team of attorneys joined,” says Jared Milrad, who founded Civic Legal Corps in Chicago in 2013. The office sets hourly rates based on clients’ incomes and household sizes, according to its website.

“Everyone paid something—we wanted to get away from being fully dependent on a grants and funding model,” says Milrad, who moved out of state and no longer works with the organization. “It’s a burgeoning field. There’s a particular concern around the justice gap, and how nonprofit law firms will help low- and middle-income families.”

Lee DiFilippo, an Austin, Texas, lawyer, also recently opened a nonprofit law firm. A former corporate lawyer, much of her work at DiFilippo Holistic Law Center focuses on representing women in family law cases.

“It’s been a struggle, to be honest, partially because I’m doing this by myself,” DiFilippo says.

She’d like to leave firm brochures with legal aid groups but says her requests were denied. She’s also found that traditional legal advertising hasn’t worked. People in general tend to find lawyers untrustworthy, she explains, and many haven’t known what to make of her law firm.

“Most of her referrals come from private practice attorneys. “I want the client they don’t necessarily want—people who have limited means, and their issues aren’t really sexy,” DiFilippo says. “That’s perfect for me because that’s what I want to do.” —Stephanie Francis Ward

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**#BlackLawyersMatter**

Hashtag has inspired a movement to increase representation in law

When third-year law student Micah Green came across the hashtag #BlackLawyersMatter in an online article, he quickly realized it was more than just a catchy phrase. Green decided to create a website and put the hashtag on T-shirts and other apparel, which he sells to raise money for scholarships at his school, the Florida Agricultural and Mechanical University College of Law in Orlando.

But Green’s website isn’t just a retail store: Beyond the T-shirts, he’s hawking enlightenment about the cause. “It’s more so information,” Green says. “We are spreading information.”

The origination of #BlackLawyersMatter has been attributed to attorney Yolanda Young, who runs the website On Being a Black Lawyer. The hashtag has been spreading through the African-American legal community, with recent law grads posting photos to social media sporting the T-shirts. Civil rights attorney Benjamin Crump also wore one while he spoke at the Democratic National Convention in July 2016.

Green says the fact that about 95 percent of prosecutors in this country are white and only about 5 percent of all attorneys are African-American is a problem—one that’s playing its way out in our judicial system with unfair sentencing and high rates of incarceration. Green hopes that the hashtag will propel awareness, and that people who are upset about unfair treatment will realize that protesting isn’t the only avenue for change.

“People should stop protesting and start reading legal books and learn that the pen is stronger than the knife,” Green says.

Shani C. Mitchell thinks her work as one of the few black prosecutors in Rochester, New York, provides crucial balance. She became involved with Green’s crusade when he asked her to participate in a fundraiser after he read an article she wrote about mentoring youths for careers in law. Mitchell says she supports Green’s efforts because more African-American prosecutors are needed to make a difference. For example, according to NAACP statistics, five times as many whites use drugs as blacks, yet blacks are sent to jail for the offense at 10 times the rate of whites.

“As a black person, I believe I can review these cases and wield my power—that being my [prosecutorial] discretion, which better the community and the defendants as a whole,” Mitchell says.

But lawyers of color aren’t just needed in the criminal context, says Atlanta-based attorney Chris Chestnut. They also can have a huge impact in civil suits, particularly in personal injury cases, he says, in which lawyers have to comprehend the totality of a client’s circumstances. This might mean taking into account the impact that someone’s life had for his or her family and the community as a whole. He says you can’t limit a person’s worth to the value of his or her assets.

“What if he [mentored or] coached little league? You have to go into the community to extract that narrative,” Chestnut says.

That kind of investment and empathy is rare, he says, adding: “Black lawyers matter very much.” —Cristin Wilson
Plentiful Family Benefits

Law firms provide innovative programs that cater to moms

THE LACK OF FEMALE REPRESENTATION in the upper echelons of law firms has sparked a new wave of hand-wringing and analysis. One explanation is that women, often the primary caregivers, are overwhelmed by the conflicting responsibilities of work and childrearing.

“When you look at overall attrition, women tend to opt out earlier because they think they won't be able to balance their work and parenting,” says Joanne S. Ollman, chief professional resources officer at Proskauer Rose in New York City.

Statistics show that U.S. law firms have difficulty retaining and promoting female attorneys. In 2015, the National Association of Women Lawyers reported that only 18 percent of law firm equity partners were women. According to the New York City Bar Association, women made up only 19.7 percent of law firm partners there. At the same time, women represent 47.3 percent of the JDs awarded in the country, according to the American Bar Association.

In an effort to retain and attract female lawyers, some law firms have begun rolling out programs to help working mothers. An increasing number of firms are providing targeted counseling for women to help them manage the stress of being working mothers.

Others provide programs to subsidize day care and help in emergency child care situations. Latham & Watkins, which has more than 2,200 lawyers and more than 30 offices worldwide, is helping ameliorate the concerns of new moms through the launch of a groundbreaking breast milk shipping program. Under the program, Latham pays for new moms on work travel to ship home their breast milk to their babies. Latham thinks it's the first law firm to provide breast milk shipping as an employee benefit. The program recently expanded to include spouses and domestic partners of employees.

“Latham has done a very good job of encouraging new parents to come back when they are ready, and they are making it as easy as possible,” says Hayley Gladstone, an associate in the firm’s Chicago office and global co-chair of the firm’s parent lawyers group. “This program allows women added flexibility and choice in how they return home.”

Latham also has private lactation rooms in all U.S. offices, and nursing lawyers can request refrigerators in their offices and locks on their doors.

Proskauer, an international law firm with more than 750 lawyers in 13 offices, recently introduced a program to help primary caregivers make a smooth transition back to work after they have a child. The program allows primary caregivers, usually mothers, to work part time for the first six months and yet get paid for full-time work.

“Many women face the anxiety of hitting the ground running after having a baby,” Ollman says. “This program signals to them that we expect the transition will take some time.”

Law firms aren’t the first businesses to provide unique benefit programs to help female employees, says Erika Collins, a New York-based partner and co-chair of Proskauer’s international labor and employment law group.

The trend began years ago, with Silicon Valley companies battling over qualified applicants, especially women. Companies began to provide programs to give financial assistance with egg freezing, surrogacy and adoption.

Collins predicts some law firms will follow suit and begin to provide more benefit programs to assist women during their transition back to work. She says multinational employers can face challenges with cutting-edge programs globally because “laws differ significantly country to country when it comes to certain areas, like egg retrieval and surrogacy.”

Although innovative programs might well attract and retain women, Collins warns there could be repercussions for benefits that appear to exclude men.

“Companies should be aware that, by giving a benefit to female employees and not their male employees, there could be potential for discrimination claims from male employees,” Collins says.

—Anna Stolley Persky
Pass-Fail
Georgia bar exam mistake takes toll on 90 law students

Imagine that you spend countless hours studying for the bar exam. You take the exam. You are told that you failed. Then you find out that you did, indeed, pass the exam after all.

That's exactly what happened to 90 students in Georgia, who were told they failed the July 2015 or February 2016 exam when they actually passed.

For John Sammon, chair of the Georgia Board of Bar Examiners, individually calling all 90 students who were told they supposedly failed the exam was the only option.

"The conversations took anywhere from 10 to 30 minutes," he says. "I explained what happened and what we were doing to correct the problem, and everybody appreciated the phone call. I also met with some of the students in person. "It was important to me that they also have a personal apology and explanation," Sammon adds. "We talked about them being sworn in and about reimbursement of fees. I did not want the calls to seem rushed or perfunctory."

One of the students who received a call from Sammon was AJ Lakraj. He graduated from Emory University School of Law in May 2015.

Lakraj took the exam in July, started a job with the Barrett & Farahany employment and labor law firm in Atlanta, and was notified in October 2015 that he had failed.

"I remember the list was in alphabetical order, and I didn't see my name," Lakraj recalls. "My heart dropped, and I just stared at the computer screen, sat at the side of my bed and just sat there for hours. I felt like I had lost everything. I put in the time and the effort, and you feel you have to retake it, and there was doubt that I'd even want to do that again.

"I had two buddies who I was close to in law school, and both of them passed it, and I was even embarrassed to talk to them. I just sat there crying."

Lakraj went into work the day he received the bad news.

"My boss urged me to come in, and she was sympathetic and told me I'd still have my job. My intention wasn't to come in to get her sympathy; it was to go in to show I had value to the firm. At that moment in time, you feel your career is over."

A law student's job prospects can hinge on passing the bar exam. Mike Sims is a graduate of the University of Texas at Austin School of Law and president of the popular bar-preparation course Barbri.

He knows how hard students study for the bar and how overwhelming it can be to find out they failed.

"Failing the bar exam is emotionally and physically devastating," he says. "Most of these people have never failed at anything before. It's a tough job market, and being a JD without a law license makes it even tougher."

Fortunately, Lakraj already had a job when he doubled down to study for the bar a second time. He went on to retake and (again) pass the exam in February 2016.

"I was angry that I went through the whole process of taking the bar exam twice when I didn't need to," he says. "I don't think that anybody can
According to Sammon, the errors happened during a recalculation of the test takers’ scores. The Georgia Board of Bar Examiners always reassesses essay answers from applicants whose initial scores fall within five points of passing.

However, after regrading those 90 tests to assign a “pass” on the essay portion, the change was not properly calculated by the computer to boost the final, scaled exam score to a “pass.”

Despite the debacle, Sammon is certain that he and the Georgia board have taken the proper steps so the problem never recurs.

“What we have done is hire a psychometrician to handle the calculations of the scores,” Sammon says.

“That’s the primary step, and we’ll always use the services of a psychometrician. Our goal is to conduct a fair and reliable exam with reliable results, and we’re confident the problem will never happen again.”

—Karen Schwartz

CONGRATULATIONS to Arthur W. Bodek of New York City for garnering the most online votes for his cartoon caption at right. Bodek’s caption was among more than 75 entries submitted in the Journal’s monthly cartoon caption-writing contest.

JOIN THE FUN Send us the best caption for the legal-themed cartoon above. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, Jan. 8th, with “January Caption Contest” in the subject line.

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

“Do you really expect this court to believe that this was your original idea, and that a light bulb just went off in your head?”

—Arthur W. Bodek of New York City
During football season, this Omaha lawyer spends Sundays as an official for the NFL.

EVERY FALL, PLENTY OF LAWYERS HAVE AN OPINION about football. The difference is that Clete Blakeman’s opinion matters.

That’s because Blakeman delivers his decisions straight from the field in his role as a professional football official for the NFL. During the week, Blakeman represents plaintiffs in personal injury and wrongful death cases as a partner at Carlson & Burnett in Omaha, Nebraska. On football-season Sundays, however, he leads an officiating crew of seven as they call games that range from preseason openers to the Super Bowl.

A former college player—he was backup quarterback for the Nebraska Cornhuskers in the ‘80s—Blakeman started refereeing during law school and never stopped. Now, about 30 years later, he’s on top of his game, approaching his positions in the legal field and on the playing field with equal passion and precision.

How do you manage these two very demanding roles?

They blend together really well. My weekdays are the law, and weekends—from July through the end of February—are all about football. Usually, I know my schedule of where I will be, football-wise, a month in advance, but I just have to be flexible. I take it week to week and day to day.

Have you ever had scheduling issues?

There have been times when I’ve had conflicts that have arisen from late game assignments or travel—I am trying to get home from Pittsburgh on a Sunday night, and I have depositions scheduled on Monday morning. In situations like that, other lawyers and judges have been very accommodating. People ask, “How do you do it?” and I say, “I have a lot of help. Help from other lawyers, judges and people who realize what I do and what it takes to do what I do.”

Did you always want to rise up the referee ladder to the NFL?

Yes. It’s just a passion. I’d be officiating in high school, but I’d see college games and think, “That would be cool—what do I have to do to get there?” I spent seven years in the Big 12 [Conference]. Then I started looking at NFL games on Sunday and thought, “Is it possible to get to that level?” You just start setting internal goals. “How good can I get? How far can I go from where I am?”

You’ve been called a referee who listens rather than dictates. Listening to your clients also is critical in law. Is listening a skill that you’ve consciously developed?

I don’t know if it was a conscious effort; it just kind of developed over the years. I do think listening is an undervalued component of communication. I don’t have all the answers, so I try to take everything in—whether it’s with my clients, judges or my crew on Sundays. To me, it’s part of respecting the person you’re communicating with: I’ll listen to you; I’ll hear what you’re saying; and I expect the same thing—that you’ll respect what I am saying. It’s an evaluation process.

But you still have to make fast decisions, right?

Yes, you’d be surprised at how quickly everything happens on the field. I may be making five, 10, 15 decisions in a couple of seconds: Holding? Not holding? Did he grab the mask? Did he not grab the mask? It all happens; boom, boom, boom. It’s similar to a trial setting—you’ve got to be at the edge of your seat, listening and concentrating. If you miss something, it could be the most important thing that happens at trial.

How has social media affected you as a referee?

Social media has changed what we do dramatically. I try to stay away from reading social media stuff. It’s just gotten out of hand in many ways. For example, if someone’s team loses on Sunday, the fans have the means to
Hearsay

$100 Million

Rapper Dr. Dre will be back in court facing allegations he owes $100 million in unpaid royalties to former hedge fund manager Steven Lamar, who helped launch the Beats line of headphones. A California appeals court has revived the claims that Dr. Dre and Beats Electronics breached a 2007 settlement in which Lamar was to receive 4 percent of the price of every headphone set sold.

Source: law.com (Sept. 21, 2016).

CYBERPIMP?

Carl Ferrer, CEO of internet classifieds company Backpage.com, has been charged with operating the website as an “online brothel” that facilitated sex trafficking. Ferrer faces counts that include pimping a minor and conspiracy to commit pimping. California authorities say 99 percent of Backpage’s worldwide income comes from “adult” listings, including escort ads that feature minors.

Source: therecorder.com (Oct. 6, 2016).

Numb to Plumbers

A California appeals court tossed the murder conviction of a defendant whose key alibi witness was a plumbing contractor after Los Angeles County Superior Court Judge Eleanor Hunter gave this warning to potential jurors about prejudging witnesses in the case: “I’ve had horrible experiences with plumbers. ... So if I hear somebody is coming in and I hear he’s a plumber, I’m thinking, ‘God, he’s not going to be telling the truth.’ So obviously I have already prejudged that person, and I wouldn’t be able to be fair.”


The Top Spots

A new ranking shows the 10 top law schools where students who go into the private sector earn more in a year than what their law school debt is. The top five based on salary-to-debt ratio are the (1) University of Texas at Austin, (2) the University of Alabama, (3) Boston College, (4) Brigham Young University and (5) the University of Wisconsin at Madison.

Source: usnews.com (Nov. 1, 2016).
On a chilly October morning, a 24-year-old man stands outside Chicago’s Richard J. Daley Center, pulls out his black Rawlings baseball glove and punches it a few times. This talisman, as beloved as his Chicago Cubs, was a Passover gift in 2002. He was just 10 years old then, but he wrote on it a nickname he always thought reflected his true self—Hans B.

Assigned female at birth, Hans was given a different name—a female name—by his
Orthodox Jewish parents, who were part of a community that traditionally segregates children by gender during school and prayer services. Hans knew at age 3 that he was male but waited until last year to live as a man, coming out to his family, community and the world. He had begun testosterone treatments three months earlier. Still, there was much work to do.

Today, he will stand before a judge with Brittany Morgan-Glenn, a third-year student at the John Marshall Law School, and Kelly Burden Lindstrom, supervising adjunct professor and staff attorney, at his side. By the end of the day, Hans will be his legal name and his gender marker will be male, allowing him to travel, bank and find work more easily.

Lacking proper identification that matches a person’s name and gender marker is impractical, says Lindstrom. “You can’t get a job because you don’t present what your gender marker says on your driver’s license. Or you’ve gotten the offer, but wait: You don’t look like Joe Smith.”

Lindstrom and Morgan-Glenn’s work is part of the Name & Gender Marker Change Project that the law school’s Pro Bono Program & Clinic launched in July. Students provide free legal services to transgender people, helping them navigate federal, state and local laws to obtain corrected passports, licenses and other documents.

“Every time I pull out an ID that doesn’t match my identity, I have to put myself in a compromised position, and my safety is at stake.” (To protect his privacy, Hans asked that his last name and the name he was given at birth not be revealed.)

Hans’ fears of being outed and for his safety are real for him and the 1.4 million American adults who identify as transgender, according to the Williams Institute at the UCLA School of Law. In 2011, a survey by the National Center for Transgender Equality and the National LGBTQ Task Force found about 90 percent of trans people experience harassment, mistreatment or discrimination at work. And 78 percent of K-12 students reported harassment, 35 percent physical assault and 12 percent sexual violence. The stressors are so high that 41 percent of transgender and gender nonconforming people attempted suicide, the study found.

At press time, the center was finishing work on a follow-up, the U.S. Trans Survey, scheduled for release on Dec. 8, 2016.

Fewer than 60 percent of transgender and gender nonconforming people have updated the gender marker on their driver’s licenses or state identification cards, while only 26 percent have updated their passports, reports John Marshall.

Changing gender markers on birth certificates is another matter. Illinois and many other states require a court order to change or amend them, a letter from a surgeon certifying gender reassignment surgery or both, according to Lambda Legal, an organization that advocates for LGBT rights. California, the District of Columbia, Iowa, New York, Oregon, Vermont and Washington have removed surgical requirements. And Tennessee is the only state that specifically forbids the correction of gender designations on birth certificates of transgender people.

**LAW AND SENSITIVITY**

In the semesterlong program affiliated with the LGBT advocacy group Equality Illinois, John Marshall students study laws related to the transgender community and receive sensitivity training.

“One of the most valuable skills as an attorney is the ability to listen. It’s one of the things they don’t teach you at law school,” says Kylie Byron, an associate at Seyfarth Shaw in Chicago. Byron, who wrote the ID document instructions in the current edition of the Guide to Name and Gender Marker Changes for Illinois, has lectured the class about the challenges facing the trans community.

“Whether the client at the clinic will not have a whole lot in common—economically, socially—with the law student. But the primary job of the student lawyer is to listen and identify a set of needs that they themselves have never had.”

“It is offering emotional support as well,” says Morgan-Glenn, who walked through the process with Hans. “The client knows someone is there advocating for you, and you don’t have to go through this alone.”

In Illinois, the legal process for name and gender marker change usually takes about six to eight weeks, a time frame that fits in one 16-week semester.

Typically, a potential client calls the clinic through a referral, and a student takes down initial information. Then they check to make sure the petitioner has no felony charges during the past 10 years, was never convicted of fraud or identity theft, and is not a sex offender.

After filling out the paperwork, the client meets with the student during a 20-minute intake session. Then they go to court to file a petition for a name change and fee waivers. “For transgender people to get [the paperwork] done on their own, with the language of the forms and where you do filing, it can be overwhelming,” Morgan-Glenn says. “It’s emotional for them.”

Next, petitioners must publish notice of their intent to change their name and the court date in a general circulation newspaper, typically the Chicago Daily Law Bulletin, for three weeks. On the appointed court date, the law student and a licensed attorney accompany their client to the five-minute hearing. The judge checks the client’s state identification, certificate of publication, birth certificate, passport and other documents before approving the name change.

The client’s gender marker is changed at the Office of the Secretary of State on a new driver’s license or state ID. The Illinois Department of Motor Vehicles requires clients to have medical documentation stating they are undergoing transition; however, unlike other states, Illinois’ DMV does not require individuals to have...
After a delivery driver noticed an emaciated and dehydrated puppy while making a stop at a Pennsylvania farm last summer, he urged the pup’s breeder to give up the sick animal so it could get immediate care. The puppy’s skin was infested with maggots and smelled of rotting meat. It was unclear whether the 7-week-old dog would survive. Janine Guido, founder and president of Speranza Animal Rescue, was determined to try. She named him Libre, meaning freedom, and got the sick pup to a veterinarian’s office.

Libre’s rescue and recovery were documented on both the Speranza Animal Rescue’s and the veterinary clinic’s Facebook pages, where thousands of fans awaited every update. Those same thousands were outraged, however, when Susan Martin—director of the Lancaster County Society for the Prevention of Cruelty to Animals and tasked with enforcing the state’s animal cruelty laws—announced she would not be pursuing charges against Libre’s breeder, Benjamin S. Stoltzfus. Martin said in a statement that she “found no evidence” that Stoltzfus “had been neglecting this dog.”

Libre’s fans posted angry Facebook messages protesting the decision and created online petitions calling for justice. Lancaster County District Attorney Craig Stedman filed a petition to suspend Martin’s animal control license, though she later resigned before a court hearing. Stedman’s office then filed charges against Stoltzfus, who pleaded guilty and was fined the maximum $750.

PUNISHING ABUSERS

The Libre case prompted Stedman to strengthen protections against animal cruelty. He said in a statement that “prosecutions and investigations will be more professional and decisions to charge or not charge more consistent and fair to everyone.”

But that wasn’t all. Pennsylvania Sen. Richard Alloway introduced a bill, called Libre’s Law, which would make animal neglect—a felony. “Animal abusers deserve to receive a punishment that fits the heinous nature of their crimes,” Alloway said at a rally in September. “Libre’s story inspired me to take the next steps to ensure no

gender reassignment surgery.

There are robust LGBT-oriented clinics at other schools too. Brooklyn Law School’s LGBT Advocacy Clinic opened in 2016. Students handle family law, immigration, civil rights and other matters. “There are more people who are comfortable about identifying as transgender, and their issues are becoming more visible, meaning there are more calls for attorneys,” says Susan Hazeldean, an assistant professor of law and the founder of the clinic.

Cornell Law School’s LGBT program is a “cross between a clinical program and externship program,” says Sally Fisher Curran, an adjunct professor. Each student works on several name and gender marker changes and handles bigger legal issues, such as custody negotiations for transgender children.

Students take a two-hour class surveying LGBT legal issues, then work with the community one day a week through the Volunteer Lawyers Project of Onondaga County, located in Syracuse, New York.

“There is a huge demand. We get one or two calls a week for gender and name change issues,” Curran says.

John Marshall hopes to partner with law schools downstate to bring services to people outside Cook County, Lindstrom says. In addition, the American Bar Association’s Commission on Sexual Orientation and Gender Identity is supporting efforts to replicate the program at other schools, says commission director Skip Harsch.

After Hans’ successful hearing, he’s beaming with a huge smile and an official new name. “It’s a huge moment, the biggest moment of my life so far,” he says. “Transition is the best thing that ever happened to me.” Hans adds. “I want others to feel like I do right now—to feel the world is a safe place, and they can come out and transition.”

Animal Advocacy

Lawmakers are strengthening animal cruelty measures across the country

By Arin Greenwood

After a delivery driver noticed an emaciated and dehydrated puppy while making a stop at a Pennsylvania farm last summer, he urged the pup’s breeder to give up the sick animal so it could get immediate care.

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animal is forced to endure the kind of awful treatment that nearly took the life of this kind-hearted animal.”

Alloway’s bill is yet another move by lawmakers across the country who are seeking to strengthen animal rights as the pet industry continues to grow. The American Pet Products Association estimated that Americans would spend $62.75 billion on furry and feathered friends in 2016, up from $38.5 billion in 2006 and $21 billion a decade before that. But spending on pets doesn’t necessarily mean they’re well-cared for; they still need protection.

More legal protections are coming into place as a growing number of advocates are working on their behalf. “There is an undeniable trend in motion,” says Cory Smith, director of public policy for companion animals at the Humane Society of the United States. “People love their pets, and pets are interwoven throughout the fabric of our society.”

The first animal welfare law was created in the Massachusetts colony in 1641, and New York became the first state with an animal cruelty law nearly two centuries later. Other states eventually followed by passing felony cruelty statutes in the years to follow. The federal Animal Welfare Act was signed into law in 1966, prompted by a stolen pet dog named Pepper who was sold into research.

Various animal laws continue to be passed and are reaching into new realms. Oregon’s legislature, for example, passed a first-of-its-kind law in 2013, recognizing that animals “are sentient beings capable of experiencing pain, stress and fear.”

In 2015, Tennessee became the first state to allow good Samaritans to break into hot cars to save dogs in distress. Similar measures have begun to spread. In the fall, California became the seventh state to pass the law.

And last April, the U.S. Sentencing Commission voted unanimously to raise the recommended minimum sentences for dogfighters to 21-27 months, up from a range of six-12 months. The commission was prompted, in part, by nearly 50,000 letters from the public asking for the change.

These new laws are having “an immediate, tangible impact on suffering animals,” says Animal Legal Defense Fund attorney Lora Dunn, who is part of an ALDF team that tracks yearly improvements in animal protection laws across the country.

There have been advances in the civil realm as well. For example, in the early 2000s, state legislatures began allowing for the creation of legally binding “pet trusts”—money set aside to care for a pet after the owner’s death. This past June, Minnesota became the 50th state to pass such a law.

PAW POWER
Animal lawyer Adam Karp, once described as “St. Francis with a briefcase,” also points toward a handful of cases in which plaintiffs collected large awards in wrongful death and vet malpractice lawsuits. These cases demonstrate, he says, that courts are moving beyond the old view, that pets “were literally valueless.”

Pets are still considered property, but these rulings signal that the law is beginning to realize their roles as family members. “Larger awards unswervingly signal that animal lives matter,” Karp said via email.

Other developments include special units in prosecutors’ offices to handle animal cruelty charges, as well as dedicated animal cruelty courts. In 2016, Connecticut became the first state to allow judges to appoint pro bono lawyers or law students as courtroom “animal advocates.”

Anti-tethering laws, under which dogs may not be kept tied up on chains for extended periods of time, are becoming common at the city and county level. Hundreds of jurisdictions now also have ordinances that prohibit puppy mills, requiring pet stores only to sell rescue animals instead of commercially bred cats and dogs.

Even law schools are beginning to catch up. The Animal Legal Defense Fund finds that while only nine law schools had animal law classes as late as 2000, that number increased to 151 by 2015.

MORE EFFORTS
But observers say the work is far from over, which perhaps reflects animals’ still unsettled status in society. “I see changes on specific issues. But not necessarily on the overall way we treat companion animals,” says Valparaiso University law professor Rebecca Huss.

Huss notes that even with the tougher laws, animal cruelty is still common. No one is sure exactly how common, since it’s only just starting to be tracked by the FBI. “If things had really changed for animals, I think we’d be seeing fewer cases,” says Huss. “Individual cases—we might have more of a remedy, but we don’t seem to be changing the culture enough to make a real difference in a lot of animals’ lives.”

There’s also a call to begin the process of protecting the animals who’ve been excluded from nearly all the laws that protect cats and dogs—the millions of cows, pigs and chickens raised and killed on American farms every year.

“Farmed animals have been completely left out of legal progress,” says Mariann Sullivan, co-founder of the nonprofit Our Hen House. “At a very minimum, I would like to see cruelty laws, which prohibit unnecessary suffering, applied to the treatment of all farmed animals and enforced.”

Since his rescue, Libre the puppy has grown stronger and healthier. And Guido adopted him, calling him “the poster boy for animal cruelty and neglect”—a nickname she gave him when Libre’s Law was introduced.

The Pennsylvania Senate unanimously passed the law in October. It was folded into a package of animal protection bills but did not get a vote on the floor of the House. National Rifle Association lobbyists, concerned that legislative language in the package could affect pigeon shoots, were blamed for the holdup.

Sen. Alloway plans to bring the bill back in the new year.
The surprise election of Donald J. Trump to the presidency caused tremors at the White House, in Congress and in world capitals. But the most lasting impact may be at the Supreme Court.

With Justice Antonin Scalia’s death last February, Democrats were the closest they’d come to a liberal majority on the high court in 50 years. But the gambit by Republican leaders in the Senate to refuse to give a hearing to Judge Merrick B. Garland, President Barack Obama’s nominee for the seat, paid off with Trump’s election.

“We would have had the most liberal court since the late 1960s” had Garland or another Democratic appointee been confirmed, says Roger Clegg, the president and general counsel of the Center for Equal Opportunity and a former Department of Justice official under Presidents Ronald Reagan and George H.W. Bush. “But we’re not going to have that now.”

Brianne Gorod, the chief counsel of the progressive Constitutional Accountability Center, says it was “certainly disappointing that a new progressive majority appears not to be coming in the near term. ‘We’ll have a conservative court, but we’ll have a court where some progressive victories are still possible,’ she says.

THE NOMINEES

Trump has vowed to select a nominee from two lists he put out during the campaign that totaled 21 possibilities. The combined list is made up of reliably conservative names, all but one of whom is a sitting federal or state court judge. (U.S. Sen. Mike Lee of Utah, the son of former U.S. Solicitor General Rex Lee and a former law clerk to Justice Samuel A. Alito Jr., is the only nonjudge, and he quickly disavowed interest.)

Kellyanne Conway, Trump’s campaign manager, said soon after the election that the president-elect was committed to choosing from the list of 21 for the Scalia vacancy. (Trump also vowed during the campaign to use the same names for other vacancies, but most political and legal analysts put less stock in that promise.)

John G. Malcolm, director of the Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies, says that Trump’s political instincts led him to realize that many conservatives were skeptical of his commitment to their ideals.

“He put together a thoughtful and dynamic list that managed to assuage the concerns of a lot of conservatives,” says Malcolm, who saw six of the eight names he provided to Trump end up on the list of potential nominees.

Besides Lee, Malcolm’s suggested names that made the list were William H. Pryor Jr. of the 11th U.S. Circuit Court of Appeals at Atlanta; Diane S. Sykes of the 7th Circuit...
A SHOWCASE FOR JUDGES
Malcolm and Severino were among the attendees at an event that occurred just over a week after the election, and became the place to see and be seen for Supreme Court enthusiasts—the Federalist Society’s National Lawyers Convention.

The group’s meeting at a Washington hotel had been planned as a major tribute to the late Justice Scalia. That program went on as planned, and included speeches by Justices Alito and Clarence Thomas and panel discussions about Scalia’s jurisprudence.

In the large hallway outside the ballroom of the Mayflower Hotel, however, the mood was ebullient. Many society members acknowledge they had deep reservations about Trump as the Republican presidential nominee, but they seemed comfortable with the sudden change in fortune his election meant for the future of the Supreme Court and the rest of the federal judiciary.

As many as 20 of the high court candidates on Trump’s list were present for the convention, with nine of them serving as panel moderators, allowing them some generally noncontroversial exposure. For example, Pryor—considered by some analysts to be a leading contender—moderated a panel on federalism and the separation of powers, where he stressed that Scalia understood that “real constitutional law” was about the “governing structure” of the Constitution.

“It’s a mistake to think the Bill of Rights is the most important feature of American democracy,” Pryor said.

Meanwhile, on the same day the Federalist Society convention opened, two former U.S. solicitors general were a few blocks away, weighing in on the future of the Supreme Court.

Donald B. Verrilli Jr. served as President Obama’s solicitor general from 2011 until 2016. He told an audience of business executives and lawyers at a Bloomberg Next event that a presidential administration typically engages in “really intense vetting” of the top Supreme Court candidates.

“It’s possible, but optimistic” that a nominee would be chosen, confirmed and on the court by the time of its last argument session for this term in April, says Verrilli, who joined the law firm Munger, Tolles & Olson to open a new Washington office after leaving the solicitor general post.

Theodore B. Olson, a Gibson Dunn & Crutcher partner who served as President George W. Bush’s solicitor general from 2001 to 2004, told the same crowd that there could be a “somewhat prolonged process” to confirm Trump’s nominee in the Senate despite its Republican control.

“There is going to be a certain amount of payback from Democratic senators because of this 10-month delay since Justice Scalia passed away,” Olson says. “I would be very surprised if someone is in place before the end of the term.”

Verrilli says that despite the strong likelihood that Trump will nominate a conservative, that person “isn’t going to be a carbon copy of Justice Scalia. In some rough sense, the court is going to return to the equilibrium of the last five years.”

That’s a period that saw progressive victories on the Affordable Care Act, marriage equality and disparate-impact discrimination in housing, he notes, but also conservative victories in areas such as limiting the Voting Rights Act of 1965.

“That’s the world the court is returning to” with Trump’s pick, Verrilli says.

AN AGING COURT
Adam Winkler, a law professor at the University of California at Los Angeles, agrees that Scalia’s replacement isn’t likely to shift the court too far to the right, except for perhaps in some areas of criminal law where Scalia’s originalist approach led him to vote with the court’s liberal bloc in supporting the rights of criminal defendants.

“Of course, we don’t know when the next vacancy will arise,” says Winkler.

Supreme Court observers seem to have the birth dates of the justices etched in their memories. Justice Ruth Bader Ginsburg is 83. Justice Anthony M. Kennedy is 80. Justice Stephen G. Breyer is 78. A vacancy in any of their seats in the next four years would give Trump the chance to cement a conservative court for a generation or more.

“The odds are high that in the next four years, there will be one or more additional vacancies,” says Malcolm.

If that happens, whether or not Trump feels compelled to draw on his original list, groups such as Heritage and the Federalist Society will be more than happy to supply more names.
In just one of the great scenes in Woody Allen’s 1977 film *Annie Hall*, which won an Oscar for best picture, Alvy Singer (played by Allen) is alone with Annie Hall (Diane Keaton) for the first time. The scene unfolds like this:

**Alvy**

-gestures toward photos on an apartment wall-

They’re wonderful, you know … they have, uh … a quality.

[A subtitle on the bottom of the screen reveals Alvy’s thoughts as he speaks: “You are a great-looking girl.”]

**Annie**

I would like to take a serious photography course soon.

[Another subtitle reveals Annie’s thoughts: “He probably thinks I’m a yo-yo.”]

**Alvy**

Photography’s interesting, ’cause, you know, it’s—it’s a new art form, and a, uh, a set of aesthetic criteria have not emerged yet.

[The next subtitle appears as Alvy speaks: “I wonder what she looks like naked.”]

Allen’s screenplay, co-written with Marshall Brickman, also won an Oscar, partly because of its clever and subtle use of subtext in several scenes. Many experts view legal trials as a courtroom corollary to the dramas that unfold in film and literature. And one of the devices that can be very effective in a courtroom trial, as in film and literature, is the use of subtext to go beyond evidence and testimony to show jurors and judges what the case is really about.

A cardinal rule in screenwriting is: “Never write a scene on the nose.” That is, a scene should never be about what the characters say it is about. In the movies, characters’ spoken words and their visual actions—or inaction—should direct the viewer toward a purposeful subtext: pointing toward what the scene is really about and suggesting how the scenes fit together to propel the plot forward.

Screenwriting guru Syd Field, who died in 2013, put it simply: What is crucial occurs “below the surface of the scene … what is unsaid rather than what is said.”

Allen playfully violates this cinematic conceit by making Alvy’s and Annie’s inner thoughts explicit through the subtitles displayed across the bottom of the screen. Of course, Allen also is making an insightful observation about interpersonal communications: The distance between our spoken words and our inner thoughts increases as the stakes are raised in dramatic situations. We become strategic thinkers who may seldom, if ever, reveal what we mean or express what we desire. Perhaps, at least in Allen’s neurotic world, we often aren’t even sure what we want or what we intend.

**ON THE TRAIN TO SHADY HILL**

The use of subtext often is even more complex in modernist literature. John Cheever was especially masterful at purposefully employing and exposing complex subtext within the tightly structured and highly compressed form of a short story. Cheever’s use of directed subtext is twofold: First, his dialogue, somewhat akin to Allen’s comedic literalism, reveals the inner lives of his characters. Second, Cheever simultaneously directs readers toward another intended subtext: Specifically, he masterfully exposes the shadowy and dark cultural landscape beneath the apparently benign surface of the comfortable upper-class, post-World War II social milieu that these characters typically inhabit.

In *The Art of Subtext: Beyond Plot*, Charles Baxter, who writes novels and short stories and teaches creative writing at the University of Minnesota, summarizes the plot of Cheever’s short story “The Five-Forty-Eight”: “The central character, a businessman named Blake, has had an affair with his secretary, the appropriately named Miss Dent. When the affair is over, he sees to it that Miss Dent is fired.” Baxter describes Blake as “a completely loathsome suburbanite who keeps up the appearance of gentility in business and at home, but whose inner life is hypocritical and self-deluded.” And Dent is “a lunatic of sorts, but in Cheever’s story she is a messenger of fate. … She is the ax to open the frozen sea of Blake’s soul.” One evening after work, Dent pursues Blake to Grand Central Terminal in Manhattan, sitting next to him on the commuter train heading back to his home in suburban Shady Hill and announcing that she has a gun pointed at his belly. Dent, Baxter observes, is the “focusing agent” in the story and the train car becomes, in Cheever’s own words, a “dismal classroom.”

Cheever’s story exposes gender power imbalances, social cruelty and sexual abuse—a directed sociological or cultural
subtext beneath the guise of suburban gentility as it excavates depths in the characters’ inner lives—what is beneath the surface of who we are and what we pretend to be.

The artful use of subtext is equally important in many litigation stories. I was reminded of this recently when I binge-watched two topically related television programs about O.J. Simpson: The first was Ezra Edelman’s ESPN documentary *O.J.: Made in America*, exploring Simpson’s story and trial as part of a larger cultural and historical tapestry. The second program was the Emmy Award-winning FX docudrama *The People v. O.J. Simpson: American Crime Story*, focusing on the trial itself from the perspectives of the lawyers within it, based on Jeffrey Toobin’s book *The Run of His Life: The People v. O.J. Simpson*. It was Edelman’s contextual five-part documentary that made me recall the compelling imagery and the complex sociological and cultural subtext of those times.

Simpson’s story remains vivid to me even though it unfolded more than 20 years ago. I recall how work stopped at the law school where I teach. There was a television in the lounge, and our academic community was transfixed by the bizarre, complex, yet overdetermined imagery of the initial chase. Simpson, a well-known and even beloved sports hero who built a decent acting career, was purportedly a passenger in the back of the infamous white Ford Bronco with its darkened windows, driving down an interstate highway in Los Angeles with a fleet of police cars in slow-motion pursuit, their flashing lights aglow. In Baxter’s words, we all became “hypervigilant observers” of the scene, like Blake in Cheever’s story with a gun pointed at his belly, “forced through desperate circumstances to gaze upon the world in an abnormally attentive way.”

What was this scene about anyway? What was happening inside the white Bronco? Did Simpson really have the gun pointed at his own head? How could this mythic sports hero and entertainment celebrity possibly be a murderer? Was he trying to escape? Simultaneously, the scene already implicated an impossibly complex subtext of a dark postmodern social landscape that the realist Cheever could neither have anticipated nor imagined.

THE JOY OF SUBTEXT

In a chapter titled “The Art of Staging” from his book on the use of subtext, Baxter cites French novelist Gustave Flaubert’s famous dictum “To make anything interesting, you simply have to look at it long enough.” Baxter further observes: “In not knowing how to look … we begin to fixate on the constituent materials and find ourselves diving under the surface.”

Of course, fate and circumstance—not artistic intentionality and design—shaped the initial imagery of the chase scene in Simpson’s story. In turn, the opening scenes quickly implicated complex themes and a cultural subtext about celebrity, sex, sports, race and racism, along with a murder mystery and a story about systemic corruption—all explored in Edelman’s documentary.

It is through staging that literary artists move from clotted details “beyond plot” toward directed subtext. Baxter observes how “literature is often born out of baffling physical details, an overabundance that tells us that the world’s surface is readable only when we don’t quite know how to pose the right question to it.” Effective trial lawyers, like literary artists, know how to pose the right questions. Akin to Cheever and Allen, artful lawyers construct
the staging, especially in confrontational and dramatic courtroom scenes, that directs their audience—jurors and judges, and sometimes the public—toward intended readings of dramatic subtext.

Simpson’s defense team constructed courtroom staging that transformed the “baffling [evidentiary] details” into an artfully composed subtext. Jurors interviewed in Edelman’s documentary, for instance, identified one singularly transformational scene at trial as the demonstration when defense attorney Christopher Darden had Simpson try on the bloodied black gloves that seemed too small for Simpson’s hands. This courtroom drama was the product of artful staging. As Toobin suggests both in his book and in the docudrama, the imagery was provoked and manufactured by the defense team.

In his closing argument, defense attorney Johnnie Cochran employed a well-crafted rhyming couplet making explicit the meaning of the crucial glove scene that he himself had instigated: “If it doesn’t fit, you must acquit.” What was equally masterful was how Cochran purposefully wore the black gloves as he spoke, as if the fingers of his black-gloved hand pointed toward his intended reading of the larger and unstated cultural and sociological subtext—raising issues of racism, conspiracy, police corruption and systemic injustice.

Likewise, the defense’s dramatic cross-examination of Los Angeles police detective Mark Fuhrman was another crucial scene staged for the jury. Here, the subtext exposed was Fuhrman’s inner thought processes beneath the surface of the words spoken during his direct examination and captured in transcripts. Unlike the gentle comedic literalism of Alvy Singer’s seduction of Annie Hall, this subtext was about Fuhrman’s racism, deceitfulness and fundamental dishonesty. In this well-staged and highly charged scene, defense attorney F. Lee Bailey was cast in the role of the “focusing agent,” akin metaphorically to Miss Dent in Cheever’s story when she holds a gun to Blake’s belly in the dismal classroom of the commuter train.

The defense employed artful staging throughout the trial, in which Simpson was acquitted, to direct jurors toward a purposefully composed subtext. In doing so, Cochran and his team pulled back the screen, moving beyond plot in the “trial of the century.”

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

Not So Fast

Lawyers advising clients on marijuana laws may run afoul of ethics rules even in states where the drug is legal

By David L. Hudson Jr.

Ethics

Once a staple of this country’s underground economy, marijuana is steadily becoming an accepted product in the legitimate market. With more than 30 states or U.S. territories permitting marijuana for various types of medicinal uses, and a few states even legalizing its recreational use, lawyers are increasingly being called on to advise clients on their marijuana cultivation businesses.

If anything, the trend toward legalization appears to be picking up steam. On Election Day, voters in Arkansas, Florida and North Dakota approved medical marijuana initiatives. Recreational marijuana initiatives were approved in California, Maine, Massachusetts and Nevada (as of press time, Maine was undergoing a ballot recount).

A key question is whether a lawyer advising a client on the cultivation, sale or use of marijuana under state law runs afoul of professional conduct rules given that such activities are illegal under federal law, which still classifies marijuana as a Schedule I controlled substance under the Controlled Substances Act. Under the CSA, it is illegal to manufacture, distribute or dispense a controlled substance. In other words, cultivating marijuana, even for medicinal purposes, violates federal law regardless of whether it is permitted by state law.

The Board of Professional Conduct in Ohio addressed this question in Opinion 2016-6, issued Aug. 5, a month before the state law permitting the cultivation, processing, sale and use of medical marijuana under a state licensing and regulatory framework went into effect on Sept. 8.

Opinion 2016-6 cites Rule 1.2(d) of the Ohio Rules of Professional Conduct, which prohibits an attorney from assisting a client in conducting the lawyer knows is illegal. That rule “does not distinguish between illegal client conduct that will, or will not, be enforced by the federal government,” the opinion notes.

Thus, a lawyer violates the Ohio Rules of Professional Conduct if he or she helps a client file an application for a marijuana license, represents a client before medical marijuana regulatory boards or crafts or negotiates contracts with vendors for medical marijuana businesses—all legal activities under state law—because they are illegal under federal law.

“Unless and until federal law is amended to authorize the use, production and distribution of medical marijuana, a lawyer only may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law and explain the scope and application of state and federal law to the client’s proposed conduct,” states the opinion. “However, the lawyer cannot provide the types of legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact with medical marijuana businesses.”

The opinion also says that a lawyer’s personal use of medical marijuana may constitute a violation of Rule 8.4(b), which prohibits activities that may reflect adversely on the lawyer’s honesty or trustworthiness, or Rule 8.4(d), which prohibits conduct reflecting adversely on the lawyer’s fitness to practice law.

JUSTICE WALKS SOFTLY

While this interpretation may strike some as draconian, there does not appear to be an active movement to start punishing lawyers working in the marijuana field. Indeed, the U.S. Department of Justice in 2013 issued a memorandum stating that its general policy is not to interfere with the medicinal use of marijuana pursuant to state law, provided that the state tightly regulates and controls the market.

“As far as I know, no attorney has ever been disciplined for providing typical services to someone who is obeying state law on medical marijuana,” says Robert Mikos, an expert on federalism and drug law who teaches a course on marijuana law and policy at Vanderbilt University Law School in Nashville, Tennessee.
Many experts say the Ohio Board of Professional Conduct reached an appropriate conclusion. “Opinion 2016-6 employs an exclusively textual approach to the issue, and its literal parsing of the Rules of Professional Conduct is correct,” says David F. Axelrod, a partner at Shumaker, Loop & Kendrick in Columbus, Ohio, whose practice includes advising clients on compliance with the state’s medical marijuana law. “Nonetheless, it makes no sense on a policy basis. For instance, one of the considerations that supports allowing attorneys to advise clients in this situation is that attorney discipline is state-based, and the state should interpret its own rules in a manner consistent with other state laws.”

A handful of other states have considered the same question of whether federal law trumps state laws on the issue of how lawyers may advise clients in the medicinal marijuana business, but their conclusions vary. In its opinion, the Ohio Board of Professional Conduct cited Colorado, Connecticut, Hawaii and Maine as being in accord with its conclusion. But some states, including New York, have gone the other way.

“There is a disagreement across the states about whether ethics boards should look to the content of federal law or should look to federal enforcement policy,” says Mikos. “New York has issued an interpretation of Rule 1.2 that concludes that it is permissible for lawyers to provide advice to marijuana business owners because of the nonenforcement of federal policy.”

In September, the Ohio Supreme Court responded with alacrity to the advisory opinion issued by its professional conduct board when it added a new subparagraph to Rule 1.2. The newly adopted Rule 1.2(d) states: “A lawyer may counsel or assist a client regarding conduct expressly permitted under Substitute H.B. 523 of the 131st General Assembly [Ohio’s medical marijuana law] authorizing the use of marijuana for medical purposes and any state statutes, rules, orders or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding federal law.”

Many experts applauded the Ohio Supreme Court’s expeditious response. “This is definitely the proper course of action when there is an ethics opinion, like the one in Ohio, that restricts a lawyer in advising a client concerning what is legal under state law and may be illegal under federal law,” says Peter A. Joy, a professor and director of the criminal justice clinic at Washington University School of Law in St. Louis. “A lawyer has to know that he or she can give advice without facing possible discipline, and it is proper to change the ethics rules to make that clear.”

Axelrod’s view is that there never should have been a conflict in the first place. “It would have made more sense for the Board of Professional Conduct to invite input from members of the bar and the supreme court before issuing the opinion,” he says. “Interestingly, it took the Ohio Supreme Court fewer than two weeks after issuance of 2016-6 to direct its staff to prepare a draft amendment to the rules to clarify the services attorneys can offer clients seeking to comply with the state’s new medical marijuana law.”

**MAKING AMENDS**

Other states that have changed their versions of Rule 1.2, or are considering such amendments, include Alaska, Colorado, Hawaii, Illinois, Nevada, Oregon and Washington. (The state versions of the rule generally follow the language of Rule 1.2 of the ABA Model Rules of Professional Conduct, but the Model Rules do not have a provision that addresses the marijuana issue.)

“Colorado presents an interesting case study,” says Axelrod. “After passage of Colorado’s medical marijuana law, the Colorado Bar Association Ethics Committee generated an opinion permitting Colorado lawyers to use medical marijuana, but declining to address whether it would violate the rules for lawyers to advise clients on marijuana-related matters. With the advent of recreational marijuana, however, the same committee generated an opinion similar to Ohio’s Opinion 2016-6. The Colorado Supreme Court responded by adopting Comment 14 to its Rule 1.2, permitting lawyers to advise clients concerning matters they reasonably believe to be permitted by Colorado law. The U.S. District Court in Colorado, which has adopted the state ethics rules, proceeded to opt out of the operative parts of Comment 14, leaving open the possibility that it may discipline federal practitioners for advising clients on marijuana-related matters.”

A key question, Axelrod says, is how the federal government will respond to the increasing legalization of marijuana for medicinal purposes at the state level.

“I am inclined to believe that with more states permitting the cultivation and use of marijuana in some form, the train has left the station, and it’s too late for the federal government to return to enforcing a blanket prohibition,” he says. “Nonetheless, the policies under which the federal government has acted with restraint are revocable at the whim of our new president and/or his attorney general,” Axelrod adds.
A Lost Art
Read any good book reviews lately? Probably not—and here’s why that can be a bad thing
By Bryan A. Garner

Unless you’re a longtime reader of bar journals and law reviews, you probably haven’t noticed that book reviews have all but disappeared from those publications over the past couple of decades. Once upon a time, bar journals and law reviews typically devoted many pages to book reviews. Now they’re a rarity for three primary reasons.

First, the internet has changed everything. Today you can find short book reviews on sites such as Amazon.com. These range from highly informed (rare) to absolutely worthless (abundant). Some will give a “star rating,” often based on such things as whether the book arrived on time and whether it had a crumpled dust jacket. Also, many of the gushing “reviews” seem to have been written either by the author (under a disguised name) or friends of the author. Computing specialists have actually developed bots to detect fake reviews.

Reviewers seem to prefer posting online reviews, so they can “seed” the field. That is, if they like or dislike a book, they try to get their views out early, so others will hesitate to disagree. If the book is written by a friend, positive reviews are thought to bolster its popularity. If the book is written by a competitor or an intellectual nemesis, negative reviews can poison perceptions. Once the review is published online, others (including bookselling websites) will provide a link to it, thereby enhancing its influence.

Second, when it comes to law reviews, student editors have lost the impetus to publish book reviews. As professor Steven Lubet of Northwestern University’s Pritzker School of Law in Chicago tells me, law-student editors have no good way of evaluating long essay reviews. Meanwhile, “they are unfamiliar with the genre of shorter reviews—of the 800-word variety that appear regularly in other disciplines—they don’t seem to value those.”

A few years ago, Sanford Levinson, a law professor at the University of Texas at Austin School of Law, speculated in a thoughtful and informative essay in the Texas Law Review that the explanation for vanishing book reviews might lie in the desire of student editors to avoid having to explain to local faculty why their books haven’t been chosen for reviews. (For this reason and many others, we probably need more faculty-edited law reviews.)

Third, it might well be that less demand for serious book criticism exists simply because fewer serious readers exist. Although a recent study found that 92 percent of college students prefer reading physical books to e-books, reading today must compete with the onslaught of viral videos, podcasts and smartphone games—not to mention the ceaseless torrent of distractions from our innumerable social media platforms. Allied to this cognitive competition is the view that reading about books is an indirect, derivative activity—some people say they would rather read the book than read about it.

REVIEWS THAT CLICK
This goes to the crux of the matter: What does a book review accomplish? It helps readers decide which of the many new books merit their attention. It keeps readers abreast of recent developments in fields of interest and provides new ways of thinking about various disciplines. It also allows readers to scan through new offerings within their specialties and to broaden their horizons by discovering issues and ideas in related fields. Browsing through reviews is akin to roaming the aisles of a brick-and-mortar bookstore (itself a critically endangered species). Although the selection is narrower, it’s a way of glimpsing the merits of publishers’ current offerings.

The question of merit is important in a book review. Any competent reviewer goes beyond mere description to make a fair statement of the book’s contents and overarching themes. A good review assesses the book’s importance in the field. Readers can reasonably expect some guidance about what the book promises in the way of new information and the reviewer’s informed opinion about whether or how well the book delivers on its promises.

Naturally, this type of guidance presupposes expertise. No reviewer can give a first-rate assessment of a book without some prior knowledge about the topic. Someone asked to review a book in an unfamiliar field either should decline the assignment or at least take a crash course.

Also, of course, it’s important for reviewers to avoid books on which their impartiality could reasonably be questioned. Bias torpedoes credibility. It would have made no sense for Charles Alan Wright to review Moore’s Federal Practice or for James W. Moore to review Moore’s Federal Practice on Words.
Wright’s *Federal Practice and Procedure*.

Some reviewers can’t seem to bring themselves to say a negative word. Often they haven’t done their homework, and they assume that the “safe” course is a superficial encomium—or what Anthony Trollope, the 19th-century novelist, called “greasy adulation.” Praise lavished without knowledge, with no critical understanding of other works that have preceded the book at hand, disserves readers. Reviewers should assess the book’s significance within the context of the existing literature. Perhaps the ideal tone is that of the omniscient narrator, tending toward kindness but never failing to be honest in the evaluation.

**A SUPERLATIVE SCOUNDREL**

But if uncritical praise is a fault in reviewing a book, so is querulous nitpicking and uncivil sniping. Trollope referred to being “cut up into mincemeat for the delight of those who love sharp invective.” Although the caviling reviewer might feel a temporary ego boost, this approach also disserves readers. It’s one thing if the prose in the work being reviewed is indictable as unbearably unidiomatic, stilted or dull. These things certainly detract from the author’s message, and they can be worth pointing out. But to dwell on a couple of uncharacteristic peccadilloes, at the cost of giving the book a thoughtful and fair evaluation, reflects more poorly on the reviewer than it does on the author. And if a mistake is to be called out, it must surely be a mistake—an erroneous allegation of error is reprehensible.

The “trashing” review calls to mind the satirical works of British author Stephen Potter on gamesmanship, one-upmanship and similar ploy-filled topics. In his book *Lifemanship*, Potter included a chapter that focused on “book-reviewmanship.” The way to review a book negatively without actually reading it, said Potter, is this: Go to the middle of the book, say page 347; find the biggest footnote you can with a string citation; locate an author, say John Moncrieff, in the middle of that footnote; and there you have your lead: “Although James Fiddle purports to have written a ‘seminal’ book on primogeniture in English law, in fact many of its conclusions derive from John Moncrieff’s 1967 article on the subject. Yet Moncrieff’s contributions to the field have been relegated to a single paltry footnote on page 347.”

This formula for a negative book review requires about 30 seconds of effort. Pure fiction, you say? There was once a man who habitually did something like that. His name was William Kenrick (1725–1779). The son of an English corset maker, he constantly wrote scurrilous attacks on his more famous contemporaries, such as lexicographer Samuel Johnson and playwright Oliver Goldsmith, trying to manufacture controversy where there was none. If his incitements met with stoic silence, he would move on to other literary victims. “His vanity led him to fancy himself equal to any task without serious study,” states the *Dictionary of National Biography*, which describes him as a “superlative scoundrel” who “seldom wrote without a bottle of brandy at his elbow.” This scandalmonger, a precursor to the internet troll, was never without illustrious enemies.

Whether it’s a worse fate for a book to be subjected to this type of flame-throwing reviewer or to be ignored altogether is debatable. For the time being, though, law-related books mostly endure the latter fate—with no change in sight.

*Bryan A. Garner, the president of LawProse Inc., is the author most recently of The Chicago Guide to Grammar, Usage, and Punctuation and Garner’s Modern English Usage. Since 1995, he has been editor-in-chief of Black’s Law Dictionary.*
BUILDING
21ST-CENTURY LAW FIRM
What should a 21st-century law firm look like?

Over the last 100 years, the ABA Journal has been chronicling the legal profession, its changes and challenges. But in the last decade or so, the speed of change has been supercharged by the computer and its myriad uses. Just one track of the revolution: from dictating letters to inputting briefs on a desktop to having clients fill out online intake forms to pulling up research in the courtroom on a tablet. The process of practicing law and running a law office has gone through sea changes that even the most lofty of lawyers must face.

Still, the general operation of most law practices has resisted change like the bulwark of a seawall. Make that a cracking seawall.

In recent times, the Business of Law section of the Journal has tried to shine a light on what’s happening in the way law firms are operating and the choices law firm leaders have in running their offices and providing services to their clients. We have featured technology reaching into the cloud, process management to the granular level, and legal services that complement or compete with traditional law offices. Almost all of these products and processes have gotten some use by one law firm or another—some by many, a few by most.

THE CHALLENGE OF NEW

But what if a law firm were built looking at all the 21st-century options—virtual law, online practice management, cybersecurity, social media, new-client intake, digital devices, and on and on? What could that law firm look like? And how might it change law practice for the century?

That is the thinking behind this new series. From this issue through December
Richard Susskind, in his book *Tomorrow’s Lawyers: An Introduction to Your Future*, claims that legal institutions and lawyers are poised to change more radically over the next two decades than they have over the last two centuries. The future of legal service, he says, will be a world of virtual courts, internet-based global legal businesses, online document production, commoditized service, legal process outsourcing and web-based simulated practice. Legal markets will be liberalized with new jobs—and new employers—for lawyers.

Pretty daunting, right? If not downright frightening.

I’d like to share another daunting prediction. By 2020, 40 percent of all working Americans will be self-employed (according to an Intuit study reported by Bloomberg News a few years ago). Now the legal profession has a disproportionately higher number of graduates who eventually end up self-employed, so by my calculations and some rudimentary math, this means by 2020, approximately 68 percent of all private practice attorneys will be solos. What are the odds you will be a solo, too, if you’re not already?

**Making It Work**

I’d like to share the story of how I looked for my lawyer a couple of years ago when my husband and I had to
our personal wills. I had a strong referral. I didn’t have a phone number, just the lawyer’s name. I did a Google search and came up empty. I checked legal directories. Nothing. I then used search terms for trusts and estates and my geographic area. Nothing. But someone else’s name did pop up several times. She started talking to me—literally. She had educational video snippets of herself talking about issues facing those who want to create a will. She talked about my problem of selecting a guardian for our child, should something happen to us, not about herself. She invited me to call her, or I could chat with her right there if I wanted. If she wasn’t available I could leave her a text message online, and she would call me back; or I could schedule my own appointment on her online calendar.

I was hooked. I clicked over to her blog. I read some great on-point articles. She invited me to download a free checklist of what to consider when thinking about a will. I could follow her on Twitter and like her professional Facebook page if I wanted to. She was talking to directly to me.

Then I realized she practices nearly two hours away. I didn’t have the time or inclination to travel that far. But wait. She had an element of her practice that allowed us to consult online, pay online, exchange documents online, even electronically sign online. If I wasn’t comfortable with the signatures, I could use a local notary. Everything was from the comfort of my home, or I could meet with her if I chose to.

I liked her, felt comfortable with her—all because of how she presented herself online. There were some testimonials. But I also did my own additional research. I checked her out on some online ratings sites to see if there were any reviews of her work by other clients. I saw she’d written some articles for local papers. I immediately called. I got a great professional voice service (not live) that allowed me to leave a message, and it was personalized.

She called me within two hours, which the voice service said she would. After our online consult, I hired her and handled everything but the final signatures on our wills online.

**WHAT THEY WANT**

Clients don’t want to have to struggle to find the right lawyer or fight to work with the right lawyer.

Whether you practiced law in the 19th or 20th centuries or do so in the 21st, we have to agree that some fundamentals will never change. You want to get clients. You want to do the legal work. You want to make a decent living doing the work you love. In serving your clients, you have three primary obligations:

* To the rules of professional conduct—ethics—as well as your own moral compass.
* To due diligence as an advocate.
* And to work done in a timely, effective manner and always in your clients’ best interest.

One caveat: What defines due diligence and a timely and effective manner is increasingly influenced by technology. Your use of technology will ultimately dictate your longevity in the profession.

What also will never change is how one gets clients. We have to agree that nothing replaces word of mouth.

You’ve hit the zenith in your professional career if 100 percent of your business is referrals from satisfied clients and your colleagues who respect you, and you have so much work from this source that you can pick and choose your clients and refer a bulk of these referrals to other attorneys. But you have to start somewhere.

Referrals are the brass ring. In order to achieve this level, produce consistent, excellent work and consistent, excellent marketing of your message throughout your professional career.

What has changed and will continue to change is:

- The manner in which we deliver our marketing message.
- The manner in which we work with our clients.
- The manner in which we actually deliver our legal services (the entire representation and workflow process).

**CLIENT-CENTRIC**

The philosophy you must embrace to have a successful solo or small-firm practice is that your firm exists to serve your clients. It must be client-centric.

Every choice you make—from who your clients are, how they learn about your services, how you communicate with them, how you serve them from the time they walk in the (virtual) door to the completion of their matters and beyond—must be from the viewpoint of the client.

This client-centric approach will encompass numerous areas, as I showcased with my own story. Consider everything: marketing and social media, self-publishing and video, how the phone is answered, the form of payments you will accept to virtual offices, unbundled legal services, law practice management solutions, e-discovery, technology in the courtroom and more.

Do not let this intimidate you. Remember, the principles of representing your clients will never change. The methods of engaging with your clients will be constantly evolving. The way you produce your work product will be constantly evolving. And your clients are evolving, too.

If you take the time to educate yourself on the tools necessary to help you be the most efficient and effective advocate for your clients, you will become the consummate 21st-century lawyer. Good luck.

Susan Cartier Liebel has been teaching, writing and speaking about how to start a solo legal practice for 16 years. A 2009 ABA Journal Legal Rebel, she is the founder and CEO of Solo Practice University. With more than 1,600 users and 1,500-plus individual classes, SPU includes representatives of over 200 U.S.-based law schools as well as law schools abroad.
One thing seems certain: The trends currently shaping the legal profession do not point to a continuance of the status quo. The delivery of legal services is changing—although it is not entirely clear how that change will come and what it will mean for lawyers practicing today. To be ready for whatever comes, you must be nimble above all.

To be nimble, you must cut overhead and experiment constantly.

There are two important reasons to reduce your overhead:

• The downward pressure on fees—from clients and competitors—isn’t going anywhere. You have to find a way to charge less. (That doesn’t mean you have to get used to the idea of making less money. Keep reading.)

• You need to be able to take calculated risks. The only way to find out what will make your firm successful in five, 10 and 15 years is to experiment, and you can tolerate more risk if less of your income is committed to overhead.

You still need to spend money to make money, obviously. But you need to be smart about your spending. Put a premium on flexibility and be wary of lock-in. Now is probably not the time to purchase a new server or sign a five-year lease. But neither is it the time to sign up for practice management software if it won’t let you export your data in a useful format.

Spend money when there is a clear benefit and always with a view to the long-term implications of your spending.

Once you can take calculated risks, start taking them. Conduct at least one experiment every time you complete a task, such as handling a new client or answering discovery. Get your team together (or if you are solo, sit down alone) and ask three questions:

• What went well that we should keep doing?

• What didn’t go well that we should stop doing?

And yet, lots of lawyers are living in the past. When I asked about the capital of Kyrgyzstan, how many of you reading this just thought “I don’t know,” and it didn’t even occur to you to switch browser tabs or pick up your phone?

According to the 2015 ABA TechReport, lawyers use Facebook at about half the rate of the general population. Facebook, Google and messaging apps aren’t just about marketing; they are about participating in present-day society. At an alarming rate, lawyers don’t.

In the law itself, you can argue that moving slowly and adapting reluctantly is a feature, not a bug. But when it comes to serving clients, it’s a malfunction. Why not start your new firm (or give your existing firm an upgrade) with strategies that take advantage of the trends shaping the future?
Business of Law: Special Edition

- What should we try next time? That should give you some ideas. Deliberate, constant, iterative experimentation is what will help you improve your practice constantly and stay on top of new opportunities and challenges as they arise.

2. DIGITIZE YOUR PRACTICE

In order to be nimble, you should digitize the files, procedures and other information you use in your practice. You can be far more nimble—not to mention secure—if all your files are scanned, backed up to the cloud and encrypted.

But don’t stop at scanning documents. Work on creating document templates for automated assembly. Maybe let your clients fill in the blanks for the first draft. Whenever you can save time and increase accuracy by automating a process, do it.

3. TAKE ADVANTAGE OF THE INTERNET

As a cyborg lawyer, your online presence is part of who you are. In fact, your website is often the first thing people see even after getting a word-of-mouth referral.

Your website should, first and foremost, serve to introduce people to you. Make it reflect your firm and vice versa. If you have a slick, responsive website but a shabby, disorganized office and you are terrible about getting back to people, fix that. If you have disorganized office and you are terrible about getting back to people, fix that.

What if a company came along in the next year or two with an app or a service model that solves your clients’ legal problems in a way that cuts deeply into your firm’s client base? How did they do it?

What if a company came along in the next year or two with an app or a service model that solves your clients’ legal problems in a way that cuts deeply into your firm’s client base? How did they do it?

4. RETHINK THE CLIENT EXPERIENCE

Lots of people with legal problems don’t hire lawyers to help solve them, and cost is only one reason why.

How many other successful modern businesses force their customers to communicate primarily by phone and mail, emphasize in-person meetings at inconvenient times and places, use lots of impenetrable jargon and documents, and charge a bunch of money for unpredictable results?

The Department of Motor Vehicles comes to mind. And lawyers.

Maybe people don’t want to hire lawyers because it’s an expensive, unpleasant experience most of the time. Maybe we could put some effort into designing a smooth, client-centric experience. If the experience can’t be effortless, maybe we can minimize frustration instead of adding to it. And maybe in some cases, we can figure out ways to do less work, charge less and still deliver the high-quality legal service the client needs.

5. RETHINK YOUR BILLING MODEL

There is nothing wrong with hourly billing—unless it is the only thing you offer. The case for alternative fee structures has been made at length and in detail, by me and many others. There is no reason to repeat it here. The point, in sum, is that for some types of services, alternative fee arrangements make sense.

You should have a toolbox full of billing options so you can suit the fee arrangement to the legal service the client needs from you. Offer options. Experiment with unbundled services, flat fees and subscriptions to see if you can find a better way to charge for the services you offer.

6. OUTSOURCE WHAT YOU CAN

Most lawyers handle some work that could be handled more efficiently and effectively by someone else. Sending work to a trusted contractor can free up your time and skills for more valuable work.

For example, a receptionist’s job is easy to outsource. A good receptionist service will probably save you money while making you look good. Or do you know a smart lawyer who needs flexibility? Why not see if he or she will handle a discrete task for you, like reducing oral agreements to a first draft.

Outsourcing requires you to carefully lay out your procedures, but once you do, you should be able to smoothly integrate an outside contractor into your workflow.

7. BE A TECHNOLOGY ADVISER

It is long past time for lawyers to shed their reputation as Luddites and become knowledgeable technology advisers to our clients.

There are too many legal issues tied up in the way people and companies use tech to entrust it all to the IT department.

If you represent businesses, you should be talking to them about how to implement litigation holds within their document management system. If you create estate plans, you should be discussing digital assets. No matter what kind of case you handle, you should be advising your clients about secure communication tools and practices.

Becoming a trusted technology adviser where the law intersects with technology will make you a more valuable legal adviser, but it may also open up opportunities to solve problems you and your clients aren’t even aware of now.

8. DISRUPT YOURSELF

Finally, here’s a thought exercise to get you thinking about how to move your law practice into the future:

What if a company came along in the next year or two with an app or a service model that solves your clients’ legal problems in a way that cuts deeply into your firm’s client base? How did they do it?

Don’t fight the hypo. One way or another, it happens.

When you figure it out, consider doing it first. Disrupt yourself. Every day you wait, the likelihood increases that someone beats you to it.

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JANUARY 2017 ABA JOURNAL ||
THE MEDIA AND LAWYERS WRESTLE WITH THE QUESTION: SHOULD SOME STORIES BE FORGOTTEN? By Terry Carter

In September 2016, a newly formed committee of four editors at the Tampa Bay Times hosted the first of what will be quarterly meetings to develop policies for requests to remove or alter stories in online archives. This is yet another disruptive twist for journalism in the digital age: the possibility of erasing the historical record.

The committee at Florida's largest newspaper, based in St. Petersburg, acted on such a plea at its first gathering: A woman wanted the committee to delete a story from years earlier in which she spoke with a reporter while she was interviewed for a job with a “naked maids” cleaning service when she was 19 years old. The woman now works in the more traditional business world, and the paper's managing editor, Jennifer Orsi, thought it wasn't fair for that instance in her life to define her now.

“Sometimes people don’t realize something may come back at them in ways they don’t expect,” says Orsi, who spearheaded the creation and is a member of, “for lack of a better term: the Web Content Review Committee.”

Consideration of such a request was unheard of before the internet, when news stories were clipped and folded in pouches filed in newsroom libraries for use by staff. For the public, newspaper archives went on microfilm or microfiche in libraries, searchable only by the approximate publication date (if known) and showing entire news pages at a time. That is nothing like the precise, instantaneous results that have come to be expected online. The historical record was there, but access wasn't as easy or ubiquitous as the click of a mouse was.

Now, an obscure story from decades ago might appear on the first screen when a name is run through a search engine. And increasing numbers of people, sometimes represented by lawyers, want such stories “unpublished”—the word was coined for this phenomenon.

The Times editors decided to remove the story, but some mitigation and complication might make it a one-off situation. The feature had been published by the newspaper’s
longtime competitor, the *Tampa Tribune*, which the *Times* acquired in May 2016 and whose archives it inherited. So the *Times* didn’t do the reporting, and no one on staff knew the original circumstances, Orsi explains.

“Traditionally, our policies don’t change concerning what’s published online,” she says. “The feeling is don’t unpublish the newspaper; don’t change online archives. But over the years, we’ve had some requests where it is more difficult to say no or involve reasons we hadn’t contemplated before the internet had been around for a while.”

Anecdotal evidence indicates that requests to unpublish have picked up in the United States since the Court of Justice of the European Union in 2014 created the so-called right to be forgotten. It is law for citizens in the 28-member countries that comprise the European Union.

Significantly, the court in *Google v. Spain* didn’t require a Spanish newspaper to delete from its archives foreclosure notices published years earlier. It instead said the plaintiff could ask a search engine to delist items because the items are “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing” and in the “light of the time that has elapsed.”

Google sometimes casts itself as the card catalog in a huge library, and the EU court’s decision left the book on the shelf while requiring removal of the card from the index. (Critics argue that Google’s role is more involved and complex, that the search engine’s secret algorithmic rankings, selecting some results instead of others, amounts to curation.) A search of the man’s name on the newspaper’s website still would provide the foreclosure notice.

**WHOSE LAW APPLIES?**

Google soon developed procedures to deal with requests to delist stories in Europe, although doing so only where the person resides: Information about someone in France, for example, would be removed from that country’s domain, google.fr. But in March 2016, the French agency for privacy regulation, the Commission Nationale de l’Informatique et des Libertes, fined Google for not heeding its order to scrub links worldwide on google.com.

Last May, Google appealed what it considers an attempt at extraterritorial law, forcing a kind of censorship on people in other nations. A decision in the case is expected this year.

“France has no territorial jurisdiction over the U.S., but it’s purporting to tell Google to delete content from the U.S. market, the Canadian and Mexican markets, and others,” says Jonathan Peters, a lawyer who teaches journalism at the University of Kansas. He chairs the First Amendment subcommittee of the civil rights litigation committee in the ABA Section of Litigation.

“You have to worry about what message that sends to more autocratic regimes around the world,” Peters says. “Frankly, if you tried to create

“SOMETIMES PEOPLE DON’T REALIZE SOMETHING MAY COME BACK AT THEM IN WAYS THEY DON’T EXPECT.”

—Jennifer Orsi
“FRANCE HAS NO TERRITORIAL JURISDICTION OVER THE U.S., BUT IT’S PURPORTING TO TELL GOOGLE TO DELETE CONTENT FROM THE U.S. MARKET, THE CANADIAN AND MEXICAN MARKETS, AND OTHERS.” —Jonathan Peters

privacy protections, much more information about Americans is available to buy from data brokers—companies that gather information from public records, social media posts, online searches and purchases, and other footprints from life carried out increasingly on the internet. The brokers crunch and categorize the data or sell it raw. It could show, for example, that someone recently visited an internist, searched the internet for information about diabetes and ordered prescription drugs from Canada. Some businesses, institutions or agencies might find that useful.

CUTTING THE FLOW
While laws and regulation in the United States are more hands-off concerning the flow of personal information, some changes are underway. In October, the Federal Communications Commission approved sweeping new privacy rules for broadband providers, such as AT&T, Comcast and Verizon. Those providers won’t be able to use or share with third parties a person’s personal data—which can be used for personalized advertising—without permission. It had been up to individual consumers to ask that it not be done.

The following week, the Center on Privacy and Technology at Georgetown University Law Center issued a report on the fast-growing use of facial recognition technology by law enforcement agencies, noting that more than 117 million Americans (about half of all adults) are in those databases. Several big-city police departments are using or exploring the possibility of using real-time face-recognition surveillance cameras.

Law professor Frank Pasquale at the University of Maryland says that with the rise of search engines and data brokers and the real-time scoring they generate, “tech-enabled glasses like Snapchat Spectacles or Google Glass could use facial recognition tech to instantly estimate, for anyone you meet, what your income, sexual orientation, political party or credit score is.”

Law and policy still haven’t worked out the fast-emerging impact of the mosaic of new technologies. Thus, the broadband companies complain that the new FCC rules put them at a disadvantage with the likes of Facebook and Google, which are regulated by the Federal Trade Commission, as are the data brokers.

This and other legal distinctions likely will be thrashed out more in the coming years as privacy races to catch up with technology. “Our law’s approach to privacy has been playing a game of whack-a-mole with technology and with, at best, mixed results,” says Ronald Krotoszynski, a professor at the University of Alabama School of Law and author of Privacy Revisited: A Global Perspective on the Right to Be Left Alone.

He provides an example: The U.S. Supreme Court in the 2012 decision U.S. v. Jones said police must have a warrant to plant a GPS tracking device on a car. But with still and video traffic cameras and license plate readers installed in many police cars, it’s easy to get around that Fourth Amendment zone of protected privacy. “If the Supreme Court does not rethink privacy principles with the effects of technology in mind, we simply won’t have any,” Krotoszynski says.
the right to be forgotten in the U.S., it would instantly violate the First Amendment.”

The Reporters Committee for Freedom of the Press and 29 other U.S. news media organizations had sent a letter to the French agency, the CNIL, before it slapped Google with a nominal fine and an ultimatum, saying the demand on the search engine behemoth is an “unacceptable interference with what people in other nations can post and read on the internet.”

Although the First Amendment’s talismanic sway in the United States isn’t likely to diminish anytime soon, the push and pull between privacy and free speech is increasingly playing out here as the right to be forgotten becomes a bigger part of the debate.

A comparison of two cases, one here and one in Norway in 2009, illustrates an underlying difference in mindsets between the United States and Europe.

In Norway, a woman convicted of murder won a privacy lawsuit against a newspaper that published a photograph of her, in tears, outside the courthouse moments after the verdict in the high-profile case. The European Court of Human Rights decided in Egeland v. Norway that it was “a particularly intrusive portrayal” of her, to which “she had not consented.”

But here, the 2nd U.S. Circuit Court of Appeals at New York City ruled in 2015 in Martin v. Hearst Corp. that a woman, whose arrest records were expunged under Connecticut’s erasure law after prosecutors dropped charges against her, could not force a newspaper to remove stories about her arrest from online archives. The court noted that, although the woman can now legally swear under oath that she has never been arrested, the statute “cannot undo historical facts or convert once-true facts into falsehoods.”

The appeals court said that although the story about the arrest did not include an update about the case being dropped, it “implies nothing false about her.” But that points to another aspect of digital archives: the relative ease of updating.

Canada’s largest newspaper, the Toronto Star, will put subsequent information about acquittals or dropped charges at the top of an online story in boldface type when someone requests it and provides proof. Other publications with similar policies tend to put the
“THERE ARE CASES THAT KEEP ME UP AT NIGHT THINKING ABOUT THESE PEOPLE BECAUSE THEY ARE SO DESPERATE.”

—Kathy English

archives as part of the Associated Press Managing Editors online credibility project (now named the Associated Press Media Editors). Her report, The Longtail of News: To Publish or Not to Publish, included the results of survey questions answered by 110 news editors in Canada and the United States, providing statistics on whether, when and how they might update archived stories, change them or even unpublish them.

While most news organizations indicated they were generally against unpublishing stories, 78.2 percent said they should sometimes do so; 67 percent said they would when information in them is inaccurate or unfair; 20.9 percent said they might delete a story when, although accurate, it has outdated information that could damage the person’s reputation in the community.

“It was such an intriguing issue,” English says of her project of about eight years ago. “But I’m beginning to wonder whether we, as journalists, have really thought through the human implications of this, where a story never disappears. I just don’t know what the alternative is.”

As news organizations and Google began to wrestle with demands to make information disappear, new forces came into play, including reputation management companies and the use of search engine optimization to change results. Businesses, such as ReputationDefender, charge thousands of dollars to push negative results downward in Google searches by seeding the web with positive links that rise to the top.

But that strategy can backfire. The University of California at Davis was hammered in 2016 news reports for having paid $175,000 total to two reputation management companies to scrub the web of negative results for searches that concerned a 2011 video-recorded incident, when campus police used pepper spray on students protesting sitting peacefully on the ground. Several state legislators called for the already-embattled university president to resign.

For its part, Google produces a regularly updated transparency report, available online, with statistics that concern requests it receives to provide information to the government or others, to remove information, and how its data is affected by law and policy. The report recently showed that since 2014, when Google implemented the process in Europe for requests to remove search results, it had received at least 647,000 of them, concerning about 1.8 million URLs. It has removed 43.2 percent of them, with the largest single fraction being about 15,000 from Facebook.

Google has been chary of providing details about the circumstances of those removals. But in 2015, researchers found the search engine giant had accidentally left some code in its transparency report that provided just that. The hidden information showed that less than 5 percent of requests were from criminals and high-level public figures (lower than expected), with 95 percent of them made by ordinary citizens, according to Julia Powles, a researcher at the University of Cambridge Faculty of Law who specializes in the law and policy of data sharing and privacy.

In a chart that accompanied a piece she wrote for Slate in 2015, examples of 15 successful requests ran beside a list of 16 that were rejected. From the descriptions of individual cases, it appears Google generally finds in favor of someone who has been swept up in a news story through no fault of his or her own, but not for someone irked by negative stories or accurate information about that individual.

Two examples: A woman whose husband had been murdered decades earlier succeeded in having an article, which included her name, delisted. But a media professional lost his bid for delisting four links to news stories that reported embarrassing content he put on the internet.

NEW LAW STEPS IN

In the United States, the First Amendment typically holds sway in the face of challenges to web content widely recognized as reprehensible, such as revenge porn and mug shot shakedowns. Legislative remedies for those specific categories are increasing.

With significant increases in the past couple of years, 34 states and the District of Columbia have criminalized various aspects of revenge porn, and federal legislation was proposed last summer, according to the Cyber Civil Rights Initiative. The CCRI was started by Holly Jacobs—who was a victim herself in 2013. It has grown into a support network and information clearinghouse, and has advised many of the states and Congress on legislative proposals.

The CCRI also was influential in
CARVING OUT ANOTHER PATH

U.S.-based proponents of increasing the scope of the right to be forgotten point to areas in law and policy that already do so in certain categories. These include the Fair Credit Reporting Act’s seven-year time limit on bankruptcy information and 10-year limit on civil judgments that appear in credit ratings, as well as expungement laws and, more routinely, not reporting criminal convictions of juveniles.

In a more recent example, California’s so-called online eraser law went into effect in 2015 and required various kinds of online services to remove, upon request, content posted by someone under 18 at the time. And the “ban the box” movement is growing fast to stop the use of questions about criminal history on job applications, moving any background check to later in the hiring process after qualifications have been determined. So far, 24 states have policies in place, and President Barack Obama instructed federal agencies to do so in 2015.

“The U.S. has a robust tradition of expungement and concealing bankruptcy and juvenile crime and more,” says Marc Rotenberg, a professor at Georgetown University Law Center and president and executive director of the Electronic Privacy Information Center in Washington, D.C. He thinks that if everyone’s personal history is readily available on the internet, including their worst or most embarrassing moments in life, it has a chilling effect on free expression.

“This country, from the beginning, has been about a second chance,” Rotenberg says. “Culturally, I think the differences [from Europe] have been overstated.”

But this should not be for Google or other search engines to decide, says Jonathan Zittrain, a Harvard Law School professor and faculty director of the Berkman Klein Center for Internet & Society at Harvard University.

If a nation enacts substantive law, it—privatizes what should be public law,” says Zittrain, noting that otherwise the search engines will have incentive to simply delist information rather than risk appeals and fines. “That’s an awful way to design an adjudicatory system.”

Eugene Volokh, a UCLA School of Law professor, argues that carving out parts of the historical record can be a slippery slope. He thinks, for example, that the removal rules for credit ratings might be unconstitutional.

“Let others be the judge of whether you are a different person now,” Volokh says. “If I’m going to hire a babysitter or other employee, I might want to know what someone has done.”

(Volokh was commissioned by Google in 2012 to write a paper in response to the possibility of anti-
trust regulation of its search results because they might be used in conjunction with advertising that promotes Google's own products.)

More recently, Volokh investigated the disturbing possibility that some reputation management companies are using fake plaintiffs to sue fake defendants for libel, so the two parties can then agree to a court injunction in which the defendant agrees to remove comments or other postings on the internet.

In the United States, Google will delist a webpage when a court has weighed in. Working with Paul Alan Levy, a lawyer with the litigation group at Public Citizen, Volokh found more than 25 of these suits around the country, including some in which reader comments were faked as pretext for targeting webpages as defamatory.

“The court doesn’t expect a fake lawsuit because you can’t get real money from a fake defendant,” says Volokh, who has written extensively about the problem on his blog, The Volokh Conspiracy. “The court sees a stipulation by the supposed defendant and often rubber-stamps it with an order that Google then implements. That’s a serious problem not just for the right to be forgotten but for defamation law itself.”

In a case of more customary abuse of process, a federal court threw out a lawsuit in August 2016 by a man who claimed that potential employers didn’t hire him because they learned online of his patterns of suing other employers. He claimed that online search providers, such as Google, Microsoft and several others, killed his chances of being hired because searches under his name turned up information about that litigiousness.

The court in the Western District of Pennsylvania signed off on a magistrate judge’s recommendation and report, in Despot v. Baltimore Life Insurance Co., which noted that the man had a “pattern of filing conclusory complaints against former and prospective employers,” and that because of his history in the federal courts, “his pro se status does not save his complaint.”

Sham lawsuits and unfounded ones are to be expected in the debate now underway in the United States regarding the right to be forgotten. The issues are complex, and the solutions are never easy.

“The main idea I try to get across is that there are going to be a lot of close calls, but there should not be in American law a blanket denial or a refusal of a right to be forgotten,” says Frank Pasquale, a professor at the University of Maryland Francis King Carey School of Law who specializes in the social implications of information technology.

Given our First Amendment and the underlying reverence for free speech, the path forward will be winding and largely ad hoc, albeit with attempts to formalize policy, as with the special committee at the Tampa Bay Times. But new norms surely will develop as speech and privacy find a balance in response to disruptive technology.
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The Gideon
Starved of money for too long, public defender offices are suing—and starting to win

By Lorelei Laird

In November 2015, word spread through New Orleans’ Lower 9th Ward that people were DJing and shooting a music video at the neighborhood’s Bunny Friend Park. Soon, several hundred people were packed into the one-square-block park, held in by a chain-link fence.

But when two groups started to fire guns at each other through the crowd, the merriment turned to chaos. Witnesses said people ran from one side of the park to the other, toppling part of the fence as they scrambled to get away. No one died, but 17 people were injured, including a 10-year-old boy. The city was outraged. Within a week, the New Orleans police had arrested their first suspect, 32-year-old Joseph “Moe” Allen, based on eyewitness identification.

Allen was charged with 17 counts of attempted first-degree murder—but his family insisted that he’d been in Houston at the time, shopping for baby clothes with his pregnant wife. They hired a private defense attorney, who was able to track down security camera footage to prove it. The day prosecutors dropped the charges, Allen’s family and defense lawyer Kevin Boshea celebrated with a press conference on the courthouse steps.

Watching this in the news, Orleans Parish Chief District Defender Derwyn Bunton was happy to see the exoneration—and the good work from a fellow defense lawyer—but also concerned about what it might mean for his office.

After years of cuts, his budget was down from $9 million to about $6 million, and he had just eight investigators for 21,000 cases per year. If Allen had been represented by a public defender, Bunton was sure an investigator would have sought out the security footage—but those videos typically are erased and overwritten within a few weeks. With such high caseloads, the PD investigator likely might not have gotten there in time, and Allen could have wrongly gone to prison.

“So I said, ‘We will not be complicit in that kind of injustice,’ ” Bunton says. “And we began to refuse cases at limits and at points where we could not ethically, constitutionally or within standards handle those cases.”

That meant putting certain serious cases on a waiting list—trying to find alternative counsel or asking defendants to wait until a public defender was free. Just days later, the American Civil Liberties Union and the ACLU of Louisiana sued, arguing that this violates defendants’ Sixth Amendment right to counsel and 14th Amendment right to due process and equal protection of the laws. Although the official defendants are Bunton and Louisiana State Public Defender James T. Dixon Jr., the complaint places the blame squarely on the Louisiana government.

That lawsuit might be the most high-profile indigent defense case of 2016. But it has competition. Indigent defense advocates are increasingly suing regarding inadequate funding for public defenders. Although past efforts have yielded decidedly mixed results, the latest round has seen some victories.
“There’s always been an enormous amount of litigation about public defense,” says Norman Lefstein, a professor at Indiana University’s Robert H. McKinney School of Law in Indianapolis and author of Securing Reasonable Caseloads: Ethics and Law in Public Defense, published by the ABA in 2011.

At least five lawsuits have reached successful decisions or settlements over the past five years—with a powerful ally in the Department of Justice. More are coming. In 2016, at least six states were sued—two in state supreme courts—regarding funding of indigent defense.

A CRONIC ISSUE

More than 50 years ago, the U.S. Supreme Court ruled in Gideon v. Wainwright that the Sixth Amendment requires appointed counsel for people who can’t afford an attorney on their own and face felony charges. In Argersinger v. Hamlin in 1972, the court extended that right to counsel to those charged with any crime punishable with imprisonment.

But the justices left it up to the states to determine how—and how much—to pay for indigent defense.

“The Gideon decision was a huge unfunded mandate,” says Lefstein, a special adviser to the ABA’s Standing Committee on Legal Aid and Indigent Defendants and a past chair of the Criminal Justice Section.

“Supreme Court decisions don’t come with a legislative appropriation.”

Because not much political upside to helping criminal defendants exists, many jurisdictions end up with a perennial funding problem. In 1983 and 2003, the ABAs standing committee marked the 20th and 40th anniversaries of Gideon with hearings on indigent defense funding. In both cases, the committee heard about extreme funding shortfalls, excessive caseloads and insufficient pay. Four years later, in 2007, the Bureau of Justice Statistics found that only about a quarter of county-based public defender offices reported having enough attorneys to handle their caseloads.

This has real consequences for defendants. Numerous studies that stretch from the 1980s to recent years show that public defenders meet with clients less quickly, file fewer motions, plea-bargain more often, and get charges dismissed less often than private attorneys do.

That’s reflected in the complaints for many of the recent indigent defense funding lawsuits. In Tucker v. Idaho, the ACLU of Idaho says plaintiff Tracy Tucker was jailed for three months pending trial, partly because his public defender was not present when it was time to argue for a reduction in bail.

From jail, he tried unsuccessfully to call his public defender 50 times. Two of the three meetings he did get with the attorney were in courtroom hallways with no privacy. Tucker’s attorney hadn’t conducted any meaningful investigation into the case 10 days before trial on a felony domestic violence charge, the complaint reads.

This matters because the majority of defendants—a 2014 study put it at 80 percent—use some kind of indigent defense. That means most Americans charged with a crime are at risk of bad outcomes partly caused by the quality of representation that they can afford.

But in the past few years, several developments have encouraged hope among indigent defense advocates. Chief among those developments, advocates say, is the increasing involvement of the DOJ. Since 2013, the department has filed at least five statements of interest and at least two amicus briefs in lawsuits that argued that local public defender funding is inadequate.

“That’s a big difference, [when] the nation’s top law enforcement agency says that the people suing the states are on the right side of history,” says David Carroll, executive director of the Sixth Amendment Center in Boston.

In addition, Carroll says, people who challenge indigent defense funding have started to rely on a 1984 Supreme Court decision, U.S. v. Cronic, which dealt with ineffective assistance of counsel.

When legal observers think of ineffective assistance of counsel, he says, they most often think of Strickland v. Washington, the 1984 case that established standards for when attorneys have been so ineffective that their client’s Sixth Amendment right to counsel has been violated. But Strickland deals with single defendants who bring post-conviction motions over completed trials. That makes it a poor tool for challenges to entire indigent defense systems and a favorite tool of defendants in those challenges.

But these days, Carroll says, plaintiffs increasingly look to Cronic. Decided on the same day as Strickland, Cronic lays out tests for when circumstances are so bad that courts may presume there will be ineffective assistance of counsel in the future.

The court said you can presume ineffectiveness if there were no counsel at all at a critical stage of the trial, or if there were a complete “breakdown in the adversarial process that would justify a presumption” of an unreliable conviction. The court referred to the situation in Powell v. Alabama, in which an out-of-state lawyer had less than a week to prepare for a death penalty trial, as an example of such a time. Then the court gave counterexamples of situations in which limited time did not create a presumption of ineffective assistance. The language is so unclear that it means whatever the trial judge wants it to mean.

Although the case is more than 30 years old, Carroll says it might not have been on attorneys’ radars because the criminal defendant in Cronic lost his ineffective assistance claim. But in 2010, the DOJ filed a statement of interest in Hurrell-Harring v. State of New York, a systemic challenge to indigent defense as it was then practiced in much of New York. In that statement, Carroll says, the department explained the tests created by Cronic’s line of cases: Courts may consider “structural limitations” to representation, such as underfunding of an indigent defense office, and absence of the “traditional markers of representation,” such as meaningful attorney-client contact.

“The focus on Cronic is opening up a lot of different possibilities because courts are deciding—rightfully in my mind—that the types of systemic
deficiencies we see around the country are Cronic violations,” Carroll says. “And it really is, I think, largely due to the Department of Justice clarifying what Cronic means.”

Perhaps because of that, observers say a few lawsuits are starting to see success in the courts. One of the most important such cases is Hurrell-Harring, arguably a direct predecessor to many of the currently pending crop of lawsuits. (Two other cases, from the Florida and Missouri supreme courts, were important but legally divergent; see sidebar, “When Public Defenders Become Plaintiffs,” at right.)

In Hurrell-Harring, the New York Civil Liberties Union sued on behalf of 20 indigent defendants, arguing that the state’s failure to adequately fund or oversee their local indigent defense offices violated their Sixth Amendment rights by leaving them with extremely poor representation. For example, the attorney for lead plaintiff Kimberly Hurrell-Harring advised her to plead guilty to a felony that could have been a misdemeanor. The attorney later was disbarred for falsifying documents when he couldn’t keep up with his workload.

The New York Court of Appeals, the state’s highest court, ruled in 2010 that the plaintiffs could sue regarding systematic problems that amounted to constructive denial of counsel. It expressly cited Cronic and rejected the defendants’ argument that plaintiffs should bring individual Strickland claims after conviction.

Hurrell-Harring settled on the eve of trial in 2014, with an agreement that the state would, among other things, fully fund and staff indigent defense in the five defendant counties. In summer 2016, the state of New York passed a law that extended that decision to every county, requiring full funding from the state by 2023. According to Robert Perry, legislative director for the NYCLU, current indigent defense costs in New York total $460 million to $480 million, suggesting that the state would pay that much if it assumed full responsibility for indigent defense spending. Gov. Andrew Cuomo has yet to sign this.

“We think it’s of historic significance,” Perry says. “This bill essentially takes the framework of the settlement in Hurrell-Harring and treats it something as a template for statewide reform of public defense services.”

Similar lawsuits are now popping up around the country. In addition to the New Orleans litigation, indigent defense lawsuits are pending in the Idaho Supreme Court; Fresno, California; Luzerne County, Pennsylvania; and the state of Utah.

In fact, Utah has a state lawsuit filed by the ACLU of Utah and a federal lawsuit from private attorney Mike Studebaker. Typically, these cases cite the Sixth and 14th Amendments, state constitutions and sometimes statutory rights. “Eventually, my hope is that we will get one of these cases before the United States Supreme Court,” Lefstein says.

BLUE STATE BLUES

Carroll describes Louisiana as ground zero of recent public defender litigation. But many of Louisiana’s problems can be traced to the state’s unusual funding structure, which combines state money with local funding generated by fines and fees. Most indigent defense funding, although it might be insufficient, is directly appropriated from local or state government budgets and therefore more stable.

Perhaps a more typically funded office is in Fresno County, California. With half a million people in the city and about a million in the county, Fresno might be the biggest city you’ve never heard of. Though it’s overshadowed by the twin behemoths of Los Angeles and the San Francisco Bay Area, it’s the largest city in California’s San Joaquin Valley and also is an agricultural center.

The county has a 27.5 percent poverty rate, which is about double the national rate of 13.5 percent as of 2015 statistics. And that sets its
indigent defense system up for trouble, according to the complaint in Phillips v. California, filed in July 2015 by the ACLU of Northern California. The large population means high demand for public defenders, but the tax base in the county is less able to shoulder the cost. And the state of California provides little financial help and no oversight, according to the lawsuit.

As a result, the lawsuit claims, indigent defense in Fresno has been underfunded since at least the 2008 recession. By 2012, the Fresno County Public Defender's Office lost more than half its staff to budget cuts. In fiscal year 2013-2014, the ACLU estimated that Fresno County public defenders were handling 40 to 80 hearings per day on court days, with caseloads of 418 felonies or 1,375 misdemeanors per year.

Those are staggeringly high caseloads, even for an indigent defense lawsuit. In the Idaho case Tucker, the complaint says Kootenai County public defenders handled about 300 to 400 cases of mixed type, which included felonies, misdemeanors and juvenile cases, in 2014. The ACLU of Utah alleges in Remick v. Utah that felony caseloads in the state can be as high as 250 to 300 per year. Another Utah case, Cov v. Utah, alleges that two public defenders in Washington County handled 350 felonies each in fiscal year 2015. And standards developed by the federal government in the 1970s—more on those later—suggest a maximum of 150 felonies or 400 misdemeanors per year.

But back in California, Fresno County’s problems go beyond caseloads, the Phillips lawsuit says. The attorney’s office has extremely high turnover—almost the entire legal staff was replaced between 2010 and 2014. Because attorneys who leave tend to be higher ranking, the remaining attorneys skew toward the less experienced. That means they routinely handle cases more serious than their job specifications say they should handle. That’s exacerbated by a lack of time or budget for training, the complaint says.

These problems extend to support staff, as well. Cuts to administrative staff and investigators in Fresno County have gone so deep, according to Phillips, that public defenders are expected to perform many administrative tasks themselves. That adds to their burden, and in the case of investigative work, this sets up a potential conflict for attorneys who could be called as witnesses in their own cases. And with just 10 investigators for more than 42,000 cases in 2013-2014, Fresno’s indigent defendants are at risk of losing crucial evidence.

Just ask Bunton, the lead Orleans public defender. “Oh, my God. Any good defense attorney will tell you if you have a choice as a client of a really good investigator or a really good lawyer, get the really good investigator,” he says. “That is where cases are made, is where they’re won and lost.”

Fresno County’s many problems constructively deny any meaningful representation to defendants, the ACLU of Northern California says. As in New Orleans, the ACLU places the blame not on the public defender’s office but on the county and state governments, which it says have abdicated their responsibilities under Gideon.

The case already has survived a demurrer (a California filing that argues failure to state a claim), although a Fresno County Superior Court judge dismissed the ACLU of Northern California’s petition for a writ of mandate. Among other things, the court rejected arguments that plaintiffs must bring individual Strickland motions.

More importantly, the demurrer ruling preserved the state of California as a defendant, says Novella Coleman, a staff attorney for the ACLU of Northern California. That means California can be accountable even though it has delegated indigent defense responsibilities to its counties.

While Coleman’s team is focused on Fresno’s problems, a victory against the state could open the door to challenges elsewhere in California. Carroll of the Sixth Amendment Center says it’s important to draw attention to those problems in a very “blue” state. “A lot of people think California is doing this right,” he says. “Too many people think this is a Southern problem.”

“Play the Gideon decision was a huge unfunded mandate. Supreme Court decisions don’t come with a legislative appropriation.”
—Norman Lefstein

CONSULTING THE ORACLE

In many ways, the debate about public defender funding is a debate about caseloads: How many cases can attorneys take before they can’t possibly be effective? And glaringly absent from that debate are references to recent, well-respected national standards.

Stephen Hanlon, a former chair of the Indigent Defense Advisory Group of the ABA Standing Committee on Legal Aid and Indigent Defendants, saw that personally when he represented Missouri State Public Defender Cat Kelly.

The case, Missouri Public Defender Commission v. Waters in 2012, was a showdown between Kelly, who had stopped taking new cases in certain parts of the state, and trial judges who thought they had no choice under the Sixth Amendment but to appoint public defenders.

Kelly’s office ultimately won that
fight (see sidebar, page 48). But the case got Hanlon, who spent 23 years as partner in charge of pro bono at Holland & Knight, thinking about standards. Although many think the ABA maintains numeric standards, it’s not true. The ABA’s Ten Principles of a Public Defense Delivery System includes statements such as: “Defense counsel’s workload is controlled to permit the rendering of quality representation.”

State laws and local standards exist, but only national, numeric caseload standards for public defenders were developed in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals, a project organized by the DOJ. The national advisory commission’s standards called for 150 felonies or 400 misdemeanors per year—numbers that many think are now too high, thanks to advances in forensic science, Supreme Court jurisprudence and more.

Lefstein would go further. “Nobody should give them the time of day because they not only are more than 40 years old, but they never had any basis in any form of data-gathering or empirical study,” he says. “They were basically drawn up by a small group of public defenders who said, ‘Well, probably the caseloads should not be any more than that.’”

Hanlon, now general counsel for the National Association for Public Defense, thought there was a better way. In Securing Reasonable Caseloads, Lefstein proposes that public defense organizations study their caseloads using Delphi methods, in which an expert panel determines what lawyers should be doing and how much time it should take, using a series of online questions followed by an in-person meeting. Hanlon wanted to try it, and he wanted to combine it with tracking public defenders’ time—as private law firms do—to generate reliable data on what they actually do.

Hanlon says Kelly “about fell off the table” when he suggested that her office would start tracking attorneys’ time permanently. That would be a radical cultural shift for public defenders, Hanlon says,
but necessary to demonstrate that defenders’ time really is strained by high caseloads. Hanlon got Kelly’s blessing, then began to look for a Missouri accounting firm to perform the Delphi arm of the study. Despite a considerable funding shortfall—he had a grant from the ABA standing committee for about a fourth of what he thought the study would cost—he enlisted accounting firm RubinBrown in St. Louis to complete the work at a considerable discount.

The 2014 study, The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards, disrupted the usual patterns of Missouri indigent defense funding. It gave the commission hard data to back up funding requests that had been ignored for a decade. For example, it found that the average time public defenders actually spent on a noncapital murder case was 84.5 hours; experts estimated that it should take 106.6 hours.

The data was a “game-changer,” Hanlon says, in the Missouri State Public Defender Commission’s relationship with the state legislature, which hadn’t increased indigent defense funding in years. “Up until that time, we in the public defender system were using an old standard, an old caseload-capacity standard that was not tied to data or evidence. And so it was not convincing the legislature,” says Michael Barrett, Kelly’s successor as Missouri state public defender. “Now, armed with this Missouri project, it was compelling to the legislature.”

The first year the legislature saw that data, Barrett says, it voted to increase his office’s budget by $3.5 million. This was specifically targeted at conflicts of interest, which the state had been handling by bringing in lawyers from neighboring offices. With the Missouri project, the office was able to show how financially inefficient it was to pay attorneys to drive long distances, making the case to hire local private attorneys instead. The result was the largest increase in appropriations for the Missouri State Public Defender Commission in 15 years. But it didn’t stick; Missouri Democratic Gov. Jay Nixon vetoed the budget increase. When the legislature overrode that veto, Nixon simply didn’t release the money, which state law permits when revenues don’t match projections. (Nixon’s office notes that he eventually released $500,000, and that the indigent defense budget has risen 9 percent over the past seven years.) The next year, Barrett says, Nixon actually cut the indigent defense budget by $3.47 million, the same amount as the increase the legislature approved.

In 2016, the legislature again voted to increase indigent defense funding, this time by $4.5 million. Nixon released only $1 million. In July, Barrett’s office sued Nixon in state court, alleging he exceeded his authority because public defenders are part of the judicial branch. In August, Barrett appointed Nixon to represent an indigent defendant, a power given to Barrett by Missouri law.

“Shame on him. It’s outrageous,” Hanlon says. “He’s a lawyer. He knows that that system is systemically unconstitutional and unethical.”

But Nixon is termed out. Even if all the funds had been released, they would largely fund conflict counsel—not all the new attorneys and investigators Missouri needs. But the project still helps Barrett argue for more resources, he says. “We can demonstrate that there is no waste, that our attorneys are working as hard as they can on these cases,” he says. “And that bodes well for us.”

Hanlon adds that it also permits indigent defense leaders, such as Barrett, to manage their own offices more efficiently. And if litigation is necessary, he says, the data will be there.

Notwithstanding the lackluster start in Missouri, Hanlon has become an evangelist for this type of workload study as well as the ABA’s project director for multiple studies in other states. In late 2016, he expected to publish statewide time-tracking and Delphi studies of indigent defense systems in Colorado, Louisiana, Rhode Island and Tennessee. He’s also completed a study in Texas without ABA involvement and was in talks with at least four more states.

“When we have finally gotten our hands around a viable way of convincing legislatures, with reliable data and analytics, that additional funding is needed,” he says.

‘A HORRIBLE LEGACY’

After Bunton’s office in New Orleans stopped taking cases in January 2015, his attorneys got some pushback. “Some of the judges threatened us with contempt: ‘Take these cases, or I’m going to put you in jail,’” Bunton says. “They basically ignored ethics.”

As the financial crisis in Louisiana indigent defense has spread—14 of the state’s 42 public defender offices had service restrictions—more of that has been going on. Judges have ordered private attorneys to take cases for very low pay, leading to litigation from the attorneys. In Lafayette, a judge advertised for volunteer public defenders, Bunton says, expressly saying “no experience necessary.”

“When you see folks saying, ‘Come take a criminal case; no experience required,’ ‘Here, you’d better take this case, or I’m going to put you in jail,’ ... it seems to suggest that there are [people] in power who don’t believe poor people’s justice is worth much,” Bunton says.

Hanlon thinks that could come to an end soon, if data like the Missouri project’s gets traction with more state legislatures. Public defender offices now can generate reliable data that shows they are too overworked to provide effective assistance of counsel, he says.

Under the ABA Model Rules of Professional Conduct—which have been adopted by every state but California—public defenders have a responsibility as attorneys to turn down workloads that they can’t constitutionally, ethically and within standards handle.

“We’ve basically gone about the process of establishing systemic and ongoing violation of the Rules of Professional Conduct,” Hanlon says. “I’ve been practicing law 50 years now, and this is probably the legacy of my generation to the next generation of lawyers, unless we can turn it around now. And it’s a horrible legacy. We’ve all known about this.”
Another Shot

Short story by Elena O. Papoulias

Illustrations by Sam Ward
STAGGERING UP THE HILL, my guy carries his weapon close to his chest, his boots crunching the gravel beneath his soles. I direct him to look left, but somehow he ends up looking at his feet. The crunching stops and the air is silent. Suddenly, a flash of light pierces his blind spot on the right. I make him look up and run. His breathing gets heavier, boots pounding the dead earth, shells raining down with bodies sailing through the air. A cello in the background holds the rhythm of his steps, until it crescendos releasing a flurry of violins, each stabbing the dead air, their collective violence grabbing me until my hands morph into furious weapons and my guy starts shooting everything in sight. He runs faster. The hills fall away as a timpani roars slowly through the air, rising up with each flying body, until it reaches my eardrum and explodes. I taste gunpowder. Everything goes black.

My son and I look up in alarm to see my wife standing behind the television, plug in hand: “You leave me no choice, boys.” With that battle cry, my son turns and salutes me, “We had a good run, Sergeant.” “Great work, Private Anthony.” Resignedly, I retreat to my office, my son to school.

I make it to the office that morning as John starts leaving me a message; I pick up. “Johnny, I’m just walking in now.”

“Tommy boy, it’s 9 a.m. and you’re strolling into work now? That’s the life.”

“I had an early meeting and then ran to the office, wise guy.”

“I know I am, but that’s not why I called. I want you to come by court today, around 11 a.m., I have something I want you to see.”

“Today? I’m busy.” I could tell John knew that was a lie. “Tommy, I’m not asking, I’m telling you. You need to rip off the Band-Aid. This will help.”

“Yeah, OK sure. I’ll be there if you buy me lunch.”

“You know it. Bye.”

I spent that morning answering emails, returning calls and meeting with a new client. So I was busy. But John knew me better than that. As my best friend and as the assistant district attorney who just handed me a recent loss in court, he knew firsthand that I had spent the last few days moping around my office. I didn’t love losing—hated losing to him—but hated it more when the client walked away having lost more than just the case.

I got to court at 11:10 and slid into a pew in the back. Court felt like church to me whenever I sat in the gallery. You stood and sat on cue, the clerk and CSO attending to the judge like altar boys assisting each step of the service. I preferred a seat closer to the action, but Judge Harris was mid-monologue and I didn’t want to be a distraction by taking a seat up front.
"... when you have the opportunity to correct your actions and you don't. You understand, sir, that this is your third OUI offense?"
“Yes, sir.”
“And why shouldn't I say 'Three strikes; you're out'?"
“I understand if you do, sir.”
“Your honor,” Larry Holmes, defense counsel in this case, chimed in, “Mr. Williams’ prior OUIs did not result in criminal convictions. We ask that the court consider that fact when evaluating Mr. Williams’ conduct.”
“Counselor, I would be inclined to do that, but we are in a lifetime lookback jurisdiction. Mr. Williams is a repeat offender in this state. And even if we were in a different jurisdiction, I would not be persuaded to discount those earlier OUIs just because they involved crashing into shrubbery. Mr. Williams, do you understand that this time you crashed into a building at 2 a.m. that houses a day care facility during the day? Had it been 2 p.m., you would be in here for manslaughter. Do you understand that?”
“Yes, sir.”
Mr. Williams, easily 6-foot-3 with a rail-post spine, continued to look straight ahead. Although his perfect posture conveyed confidence, I could see, even from my bleacher seat, that his trembling left hand betrayed his nerves. Judge Harris must have seen it too. His tone softened.
“I'm told by the clerk that your attorney and the assistant district attorney propose a different resolution to this matter.”
Holmes piped up, “Your honor, we discussed the possibility of Mr. Williams being referred to Veterans Treatment Court so that he may receive a more tailored response to his case. Mr. Williams has a clinical diagnosis of post-traumatic stress disorder and suffers from substance abuse issues. Additionally, Mr. Williams has posed a suicide risk in the past. The ADA and I agree that, given these circumstances, the usual consequences imposed by the court on a repeat OUI offender would not address Mr. Williams’ mental health issues. We believe that the PTSD and substance abuse issues, along with the right consequences for the offense, can be effectively addressed in Veterans Treatment Court.”
Judge Harris returned his gaze to Mr. Williams, who maintained his flawless posture. “Mr. Williams, I'm inclined to grant this request, not because I don't view this conduct as serious, but because I believe that the chances you have been given were perhaps not the right ones. If you are willing to do the work, you can do better and I will never see you again. I want to never see you again. Do you

"TO THIS DAY, I NEED A BATTLEFIELD TO FEEL GROUNDED. I DON'T NEED THE GUNS OR THE FIGHTING OR THE ADRENALINE. I JUST NEED TO SEE THINGS IN A WAY THAT MAKES THEM LINE UP, ORGANIZED."
understand that, Mr. Williams?"
    "Yes, sir."
    "I will grant the request."
John turned to the gallery and nodded to me, smiling. I knew why I was here. He motioned me over while Mr. Williams and his lawyer approached the railing.
    "Tom, I'd like you to meet Sgt. Peter Williams."
I saluted Williams and he returned the salute. John went on: "Tom is one of the best lawyers I've worked with—no offense, Larry—and a helluva guy. He's worked lots of cases in combat vet court, all with positive outcomes. He's also a former Marine like you, so Larry and I thought he would be a good fit to represent you in this next step."
Mr. Williams looked directly at me: "Call me Pete."
    "Pete, I'd like to buy you a cup of coffee."

Pete watched me during that first meeting and barely spoke. He was tall even when sitting back and sipping his coffee. He looked me in the eyes when I spoke, but could he hear me? I remembered what I was like when I got back. We were trained to look people in the eye, so I did. But it felt false. I looked my family and friends in the eye, but I wasn't connected to them, to what they were saying, to what they were thinking, to who they had been when I was gone.
I explained to Pete that the next session of Veterans Treatment Court for new incomers would be in one month, that the judge would ask him about his story, that he would be assigned a mentor who would operate as a sounding board and would help to keep him accountable, that a
VA rep would be there to assist him with getting his benefits and whatever other help he needed, but that before any of this started, I needed to hear his story. My subtle plea for dialogue was met with silence, so I started talking.

"There is a part of my life that my family was not a part of. During that time, I wasn’t part of their lives either. There is no overlap. I don’t understand what they went through; they don’t understand what I went through. I choose not to talk to them about it. But what I will tell you—and I feel guilty telling them this, which is part of why I don’t—is that combat, the battlefield, guns, tactical plans, bullets, sand, Humvees: They all make sense to me. For a very long time, this life here, my family, didn’t make sense to me in the way war did. To this day, I need a battlefield to feel grounded. I don’t need the guns or the fighting or the adrenaline. I just need to see things in a way that makes them line up, organized. I just need to know that there are certain outcomes to anticipate, there are certain rules to follow. Like it was on the battlefield."

Pete sat a little more stiffly. I continued.

"Eventually, I found my way back to my family, to a life here. To get there, I swapped one battlefield for another. Walking into court is like walking onto a battlefield. Not because I’m expecting a fight, but because I know what can happen. I know what my position is; I know how to anticipate what the other side will do."
hasn’t happened yet.”

“So every night, after work, I sit at home and drink until the bad buzzing stops and the good buzz starts. Sometimes the bad buzzing doesn’t stop, so I get in the car and roll down the windows hoping the speed will cancel out the buzzing. Like maybe I’ll break the sound barrier or something? I know that’s not how it works, but that’s what I imagine. That’s how I ended up crashing into those bushes and the school.”

“You mean day care center,” I said.

“I mean school. The buzzing started during my second tour. We received intelligence that enemy combatants had taken cover in a local school. The intelligence could not confirm that there were no children in the school so we surveilled the property. After three nights, we didn’t see any kids, so we decided to get a little closer. We’re 20 yards from the school and we get pelted with gunfire. I’m sitting in our jeep next to my best friend when he gets shot in the neck. His leg kicks out, the car is in gear, so our vehicle crashes into the school. I blacked out. I couldn’t save him. All I could hear was the buzzing. And guess what? The school was empty. The intel was wrong. When I fall asleep now, all I see is that school with no kids, and I’m in our jeep alone, and I press down the accelerator and crash into the school with no kids because I’m shot in the neck. But none of that kills me. Two years later I crash into a day care in the middle of the night. I was so drunk I don’t even remember doing it. But I remember that school with no kids and I dream that I crash into it every night.”

I spent that Saturday at John’s house flipping burgers while he worked the smoker and the crowd. Our sons, dressed as Superman and Batman, took turns jumping off of a low retaining wall in the backyard. John looked up from the smoker, a new face beside him. “Tommy, this is our new neighbor from across the street, Max Savarese. Max, this is my best friend, Tom.”

“Welcome to the neighborhood.”

“Nice to meet you.” Max walked over and shook my hand, “John tells me that you work together.”

“Kind of. John is a prosecutor and I’m in private practice. Criminal defense and family law. John tries to punish the bad guys and I try to help them.”

“The Superman to your Lex Luthor,” Max suggested. John leaned away from the smoker, steam escaping from under the lid as he began to close it, “More like the Justice League. We’re on the same side. We both help people; we just go about it in different ways.”

“OK, Max, if you haven’t figured it out yet, John here fancies himself a Delphic oracle. Just go with it,” I warned him jokingly.

Max shared a knowing smile and turned to John, “OK, so when Tom defends a drug dealer, he’s helping people because he’s helping the drug dealer, right? And you’re helping the drug dealer how?”

“I’m looking at the long game. Slice and dice it however you want to; in the end, recidivism rates are at an all-time high. I’m hoping that, whatever the outcome, this defendant doesn’t repeat his crime, or any other. If the defendant stays out of trouble, that helps him and it helps the people that I represent. Win-win.”

“I thought somebody has to win and somebody has to lose.
Isn't that the point of going to court?” Max asked.

“The only truth in criminal law is that we are all losers, until we are all winners,” John ruminated.

“Go with it,” I mouthed to Max. He nodded.

John proceeded: “A criminal defendant walks into court and he is faced with three general outcomes: (1) he pleads guilty, receives his punishment and hopefully does harm no more; (2) he pleads not guilty, goes to trial, is found guilty, receives his punishment and hopefully does harm no more; or (3) he pleads not guilty, goes to trial, is found not guilty, receives no punishment, and hopefully does harm no more.”

“Are these scenarios assuming the defendant is guilty?” Max asked.

“No. It’s worse if they are actually not guilty and they face scenarios one or two. No, the point is: Everyone loses as soon as they walk into that courtroom. Whatever conduct brought them there will profoundly change their lives and the lives of those around them. The criminal defendant hopefully doesn’t repeat the crime, but now he has a criminal record—or at a minimum, a criminal history. That follows him. His family is put through the pain that goes along with court: the trial, the local news, the confrontation of the issues, the victims. The victims! What do the victims get? If there are victims, they may get some relief, a feeling of vindication, maybe even revenge. But from my experience, that doesn’t help. Many victims even feel guilt for feeling vengeful. It’s twisted, but that’s what it is.”

“So, how do you all become winners?” Max asked.

“You change the game,” John said. “It’s not about ‘win or lose’ in the traditional sense; you look for a solution that addresses the underlying conduct and minimizes the pain to the victims. It’s not fool-proof, but we do our best to find the least-bad solution for everyone involved. There is no formula to it.”

“Yeah, but you can’t help everyone. Some people don’t straighten out. Some people are just bad...” Max hesitated.

“Some people just can’t find their way out,” I added.

John had an answer to that, “Look, no one comes out of the womb saying they want to be a dealer or a...”
murderer or a criminal. No parent looks at their baby and says, 'Oh, I think little Joey here is going to grow up to be a sociopath.' Well, maybe they think that after the kid has been crying every night for a month straight—kidding. No really, what I'm saying is that we all get to where we are after a series of choices. No excuses, but getting to where those guys are is not an overnight trip. Helping the 'bad guy' means making sure he doesn't repeat his crime. That helps him and it helps the community around him in the long run. I'm on his side too."

"So you're on the nurture side of the debate?" Max asked.

"That's not my debate. I'm interested in what we do next. What do we need to do for this defendant, for these victims, for this community to make sure that it's more likely than not that we're not having the same conversation, facing the same problem down the road. Tom wants that too."

“I do. But to Max's point, some people are just lost causes. We can't win them all," I pointed out, reminded of my recent loss.

“We are all losers until we are all winners,” John repeated. “The lost causes are there to test us when we meet them again in the criminal justice system. We get another chance to get it right for them.”

John was right. I had a list of
frequent fliers—repeat clients that couldn't seem to get out of their own way. Maybe we'd get it right for them the next time. I let that thought simmer internally.

"John, the poet prosecutor, does your boss know you moonlight as a mouthpiece for the criminal defense bar?" I asked mockingly.

"Funny guy."

"Wise guy."

A loud crash broke our silence. Batman had Superman in a headlock.

The next time I met Pete was two days before his court date. By then, Pete had shared with me the sense of overwhelming guilt he had for not saving his buddy. He believed that his recurring nightmare of crashing into the school was his mind's way of punishing him for not dying that day. He shared with me the pain he felt every morning when he woke up, the paralysis he prayed for when he drank. He hadn't stopped drinking, but his license was suspended automatically after the third OUI, so at least he wasn't driving.

I asked him what he thought a good outcome would look like for him. "To get the buzzing to stop," he laughed, then stopped and looked straight at me. "To stop hating myself. For not saving Matt, whenever it was, the guilt won't fade away." Pete's hand. He stared at my hand and looked at me with an alarmed expression, "What do I do after the buzzing stops?"

"You can't wipe away your guilt, but you need to face it. When you complete your 30-day treatment program, and upon consent from your medical team, you will personally repair the day care facility you crashed into. Personally. On your own. You need to get it right, and I want you to start there." I thought that was a gutsy request, but Pete smiled broadly and nodded, "Yes sir." It was exactly what he needed.

I agreed to drive Pete to the residential rehab facility where he would begin his 30-day substance abuse treatment program. We got out of the car and I moved to shake Pete's hand. He stared at my hand and looked at me with an alarming sadness, "What do I do after the buzzing stops?" I looked him in the eyes, "You find another battlefield. You find somewhere, something that makes sense to you. A place where everything lines up, where everything is organized and logical, where you get it. And then you go to that place; you do that thing every day. You find another battlefield." Pete smiled at me and looked down. He took off his sunglasses and turned his face to the sun.

I drove home grateful that I had been given another shot at getting it right.
Captivate us with your best original short story and WIN $3,000. Entries should illuminate the role of the law and/or lawyers in modern life and must be no more than 5,000 words. Deadline is May 31. Details and rules at ABAJournal.com/contests.
In April 2016, the judiciary committee of the California Assembly, one of the two bodies that make up the state’s legislature, called a hearing on what’s normally a routine bill to authorize the State Bar of California to collect dues for the coming year. But this hearing wasn’t so routine.

One by one, members of the committee castigated the bar for a series of recent scandals. Members were particularly upset by the revelation, brought anonymously to the legal press, that complaints alleging unauthorized practice of law had been gathering dust in a drawer.

Ultimately, the Assembly voted to tie 2017’s dues to major governance changes at the bar, including a study into de-unifying its trade association and regulatory functions. But then the bill got to the Senate, where key lawmakers opposed those proposed reforms. Despite several rounds of negotiations between legislative leaders and Chief Justice Tani Cantil-Sakauye, no bill was passed by the time the legislature adjourned on Aug. 31. (The bar is the administrative arm of the California Supreme Court.)

The legislature’s failure to authorize collection of dues doesn’t pose an immediate threat to the bar or its key operations, including attorney discipline. The bar has reserve funding to get it through the first four months of 2017, and the supreme court ordered interim dues in November, though at a slightly lower amount than 2016’s dues.

But the underlying debate about the future of the California bar is far from settled. That means 2017 could see a new round of reform proposals, pushback and threats to the state’s attorney
been discovered. Although bar policy required that the complaints be read within 20 days, the Daily Journal said, the majority had gone more than two months without an assignment.

That news came less than a year after a report from the California state auditor criticized the bar for lax discipline. Indeed, the California Supreme Court sent back 27 cases decided in 2011, the state auditor’s summary said. The bar ultimately handed down harsher sanctions (including five disbarments) in 21 of those cases.

And then there are the antitrust concerns. Under the U.S. Supreme Court’s 2015 decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission, state licensing boards don’t have immunity from antitrust lawsuits when they are controlled by active members of the profession being regulated. The court held that, to have immunity, state agencies must have either a majority of nonparticipants making decisions or meaningful state supervision.

This is important, according to professor Robert Fellmeth of the University of San Diego School of Law. He studies state regulation and antitrust concerns and says he believes North Carolina State Board could expose the bar to antitrust lawsuits from people who failed California’s notoriously difficult bar exam. Damages could run into millions of dollars, he wrote to state legislators.

“The bar’s system of regulation is basically indefensible. It is controlled by attorneys in cartel fashion,” says Fellmeth, who served as a court-appointed monitor of the bar between 1987 and 1992. “Lawsuits will come, certainly with treble damages and fees a part of it, [and] they will succeed.”

The fact that the state bar is supervised by the California Supreme Court is good enough to offset potential antitrust actions, says Hannah-Beth Jackson of Santa Barbara, who chairs the Senate Judiciary Committee.

“I believe that there is no antitrust concern because in California, the supreme court is the overseer,” says Jackson, a Democrat.

Fellmeth strongly disagrees. Under North Carolina State Board, he says, state supervision must be active—“underline the word ‘active,’ capitalize it and put it in bold”—and the California Supreme Court doesn’t meet that standard.

In September, Cantil-Sakauye directed the state bar leadership to come up with a policy for bringing any decisions that might raise antitrust concerns to the high court. Elizabeth Rindskopf Parker, the bar’s executive director, said in October that the bar’s general counsel was studying how to implement this order.

All of these issues played into the legislative battle over the dues bill. The assembly unanimously approved a bill that would have mandated a nonlawyer majority on the bar’s board of trustees to address the antitrust problem, and created a commission to study splitting the bar into a state agency that regulates lawyers and a separate private, voluntary trade group.

But the bill foundered in the Senate against strong opposition from Jackson and Cantil-Sakauye. And a major sticking point in negotiations, Stone and Jackson say, was the study to split the bar into two separate entities.

Stone says some in the assembly would have voted for de-unification right away. Jackson, for her part, felt that less drastic reforms should be given time to work first. In the end, Stone offered what he saw as a compromise, but Jackson did not accept it, and the legislative session ended with

Continued on page 70
NOT SO STANDARD

Legal ed section’s council and law deans voice different views on proposal to link accreditation to bar passage results
No ABA-accredited law school has ever been out of compliance with a standard regarding bar passage percentages, and that may indicate that the standard is not working well. Although some law school officials support a plan to tighten the standard, others are concerned about what it would mean for diversity—both in schools and in the legal profession—if the proposal is implemented.

Under the proposal approved in late 2016 by the council of the Section of Legal Education and Admissions to the Bar, being in compliance with Standard 316 of the section’s law school accreditation standards would require that at least 75 percent of an accredited school’s graduates pass a bar exam within a two-year time period. The ABA House of Delegates is expected to consider the proposal in February at the association’s 2017 midyear meeting in Miami.

The legal education section is recognized by the U.S. Department of Education as the national accrediting body for law schools in the United States. The House of Delegates may endorse the section’s changes in the accreditation standards or refer them back to the section for further consideration, but the section council has final authority over the standards.

If the proposal is adopted by the council, sanctions for not meeting the two-year bar passage requirement could ultimately include probation and withdrawal of accreditation, says William Adams, the section’s deputy managing director. The council has not yet determined what class would be the first to be covered by the requirement.

With the current version of Standard 316, there are various ways a law school can be in compliance. One is that at least 75 percent of graduates from the five most recent calendar years have passed a bar exam, or that there is a 75 percent pass rate for at least three of those five years. Also, a school can be in compliance if just 70 percent of its graduates pass the bar at a rate within 15 percentage points of the average first-time bar pass rate for ABA-approved law school graduates in the same jurisdiction for three out of the five most recently completed calendar years.

**SIMPLE AND CLEAR**

“I think one great virtue of the proposal is its simplicity and its clarity,” says Marc L. Miller, dean of the University of Arizona College of Law in Tucson. The proposal isn’t too strict, he adds, because graduates would have four attempts at taking the bar within the two-year time period.

“In a world where regulators say that it’s our job to admit people who can succeed, bar passage is one of those measures that’s legitimate and fairly straightforward,” Miller says. State exam data shows that his school’s bar passage rate for first-time test takers in July 2016 was 74 percent.

Kathryn R.L. Rand, dean of the University of North Dakota School of Law in Grand Forks, agrees the proposal is easier to understand. However, she isn’t sure how well bar pass rates indicate academic quality at smaller schools like hers because one or two student outcomes can change pass percentages significantly. Fifty-one of her school’s graduates took the bar as first-time test takers in July 2015, Rand says, and 39 were successful, which amounted to a 76.47 percent pass rate.

“The proposal is a little one-size-fits-all, and it seems a little rigid,” she says. “The bigger issue for me is how can we facilitate responsibly using the information regarding graduates’ performances on bar exams to improve law schools’ programs of legal education.”

Other law school deans say the proposal could hurt diversity in the profession. According to a letter that a group of deans sent to the legal education section council, 22 schools with a third or more minority students have had bar passage rates below 75 percent for the past five years.

“It’s a very rigid standard,” says Alfredo Garcia, one of the deans who signed the letter. He heads up Florida’s St. Thomas University School of Law, a Catholic institution in Miami Gardens. Data from the Florida Board of Bar Examiners shows the school’s bar passage rate for its first-time test takers was 45.5 percent in July 2016. According to Garcia, 66 percent of the students at his law school are Latino and 10 percent are black.

“Historically, blacks, Latinos and Puerto Ricans score much lower on the LSAT than whites,” Garcia says, “and schools like us take chances on those students and work with them. I’m fairly confident we could meet the proposed standard, but nevertheless, you don’t know.”

**MAKING THE CASE**

A hearing process determines whether a school is in compliance with a standard, Adams says, and schools are generally given up to two years to come into compliance. He adds that schools may be able to extend the time period through good-cause arguments for enhancing diversity.

At the council meeting, held on Oct. 21 in Chicago, member Jane Aiken expressed concern that council members did not receive data regarding diversity and bar passage rates. A vice dean at Georgetown University Law Center in Washington, D.C., she voted against the proposal. Greg Murphy, a Billings, Montana, lawyer who chairs the council and voted in favor of the proposal, responded that the council only received anecdotal information, and no data was submitted.

Raymond Pierce of Durham, North Carolina, a council member who previously served as dean at a historically black law school, told the group that majority schools with low bar passage rates frequently argue diversity as a defense, but their primary concern is filling seats. He voted in favor of the proposal.

“I think everybody in this room would agree that anything we do that would adversely affect diversity in the profession would be a bad thing,” says Maureen O’Rourke, the council’s chair-elect. The dean of Boston University School of Law, she also voted in favor of the proposal.

“ Those are some schools that are taking in students they know will have very little [chance] of passing the bar and being admitted into the profession,” O’Rourke says. “They’ve accumulated large amounts of debts that they have no way to pay back.”
Changing Times
Panelists look for ways to remove barriers to advancement for women at large law firms

By Liane Jackson

O
n a late October day in New York City, partners, law firm associates and in-house counsel gathered at the offices of Mayer Brown to confront issues of gender inequity in BigLaw and brainstorm ways to move the needle.

The discussion happened at a time when the state of diversity in the legal profession is sobering at best and dismal at worst, according to members of the panel brought together to address the issue.

Survey findings released by the New York City Bar Association, for example, indicated that, while women have made some gains at the 75 law firms that responded to the survey, the percentage of female first-year associates at the firms in 2015 was 45.2 percent, a decrease of five percentage points since 2004. The finding “raises concerns about erosion of the associate pipeline,” the report stated.

The survey further found that 35 percent of all lawyers at the firms in 2015 were women, “despite representing almost half of graduating law school classes for nearly two decades.” The survey found that 18.4 percent of women and 20.8 percent of minorities left the surveyed firms in 2015, compared to an attrition rate of 12.9 percent for white men, who accounted for 77 percent of equity partners.

Another recent study by Major, Lindsey & Africa, a legal recruiting firm headquartered in Chicago, found that male partners make 44 percent more on average than female partners make.

The title of the event at Mayer Brown— “Visible Difference: Reversing the Trend of Women Leaving Law Practice”—succinctly stated the dilemma. The program focused on best practices—what’s working and what isn’t—against a backdrop of recent class action lawsuits filed by female partners and recent reports of pay disparities and lack of diversity in large law firms. The ABA Journal partnered with Mayer Brown to produce the event, which included collaborative panel discussions in Chicago and New York.

“If we had an equal number of women in leadership roles at the firm, we wouldn’t have this problem,” said Mayer Brown partner Lisa M. Ferri, one of the panelists at the program in New York. “When women are on compensation committees, there is less disparity in pay.” The biggest challenge is attrition, she said. “Because of that, we don’t have a pipeline” that leads to partnership.

Ferri suggested that attorneys should get credit for the collaborative ways they serve the firm’s clients and not just for billable hours. She said firms also should find ways to share origination credit.

“There has to be an actual change in the firm or things that stand in the way of succeeding,” she said.

OLD SOLUTIONS AREN’T WORKING

The next level of change is going to require structural change, said Arin N. Reeves, founder and president of Nextions, a research and consulting firm in Chicago.

“How can we mentor women better? How can we sponsor women better?” said Reeves, who moderated the New York and Chicago programs. She said her recent research demonstrates that “we don’t need to do anything ‘more’ for women. We need to get out of their way” by removing barriers and challenges.

Gabrielle Lyse Brown, director of diversity and inclusion at the New York City Bar Association, presented data from its new report that showed that one in four New York firms has no women on its management committee, and one in eight has no female practice group leaders. The report also revealed that, of female partners at responding law firms, 85.2 percent were white, 7 percent were Asian or Pacific Islander, 3.6 percent were black, and 2.5 percent were Hispanic.

“Women aren’t monolithic,” Reeves said, noting that women of color face additional hurdles in their advancement. “There are different issues and challenges we face.”

Nate Saint-Victor, an executive director in the legal and compliance division of Morgan Stanley in New York City, noted that racial and gender bias is “still widespread” in corporate legal departments. Saint-Victor said mentoring women of color has been an effective tool. But every attorney in the position to do so has an “obligation to pursue a meritocratic environment within your organization,” he said.

“You can’t be who you can’t see,” said Saint-Victor, explaining that promoting female partners who “aren’t just tokens” can be an inspiration to associates who hope to move up through a firm. Diversity should be a goal in promoting other attorneys, as well, he said.

Adrienne D. Gonzalez of the Black Organization for Leadership and Development’s people and business resource group at Bristol-Myers Squibb said her company partners with law firms to groom diverse lawyers. Bristol-Myers Squibb also has adapted a business model to reflect the country’s changing landscape and promote inclusiveness internally as well as with its outside counsel, she said.

“What we know is that by 2050, this country will be more than 50 percent African-American, Asian-American and Hispanic,” Gonzalez said. “We have to be responsive to the fact that the country is changing. We can’t keep using the same formula; we need to evolve.”

PHOTOGRAPH BY WAYNE SLEZAK
ABA Techshow in Chicago gets revamped to cater to new and seasoned attendees

By Victor Li

Adriana Linares still remembers the challenges of attending her first ABA Techshow. But she says the experience served her well in the long run. “I was completely overwhelmed and totally lost when I went to my first Techshow 15 years ago,” says Linares, a law practice consultant with LawTech Partners in Winter Park, Florida, which she launched in 2004. “So when I got on the planning board, one of my goals was to see what I could do to make this conference better for all attendees.”

Linares now chairs the ABA Techshow Planning Board, which is implementing a makeover for the event this year. Techshow will run from March 15 to 18 at the Hilton Chicago on South Michigan Avenue. The hotel is one of the largest convention venues in the city. Presented by the ABA Law Practice Division, Techshow is the leading legal technology conference in the United States.

The revamped Techshow will introduce several new events and features while still providing two full days of traditional educational and informational programs organized under topical tracks that seasoned attendees have come to expect. As in past years, an expo will feature more than 100 vendors that provide a wide variety of products and services.

This year, Techshow also will emphasize communication and interaction among conference attendees. Linares says attendees will be grouped into different “communities,” such as litigators, family lawyers, estate planners, female rainmakers and ABA Journal Legal Rebels. Members of each group will be issued colored scarves, so they can be identified easily.

“The networking component is as important to Techshow as the speakers and tracks,” says Linares, who got the idea for the scarves from watching soccer matches in which supporters frequently wear them to show allegiance with their team. “This makes it easier for people to pick out the people they want to talk to.”

TEACHING TOOL

Another goal of this year’s Techshow will be to take ideas and concepts from the lecture rooms and expo hall and present them as legal education curricula. The new academic track was created after faculty and staff from several law schools, including the University of Missouri–Kansas City School of Law, IIT Chicago-Kent College of Law and the University of Illinois College of Law in Champaign, expressed interest in learning how to teach practice management and legal technology.

Members of the academic track will be encouraged to attend sessions and hit the expo floor during the first two days of Techshow, Linares says, before hosting a workshop to create a draft curriculum that schools may use to teach practice management and legal technology.

“A lot of law schools just don’t know where to start,” she says. “This would provide them with a basic curriculum that they could modify or change to suit their needs.”

The traditional track system also has been revamped. The Techshow board decided to eliminate certain tracks, including the Mac track, and instead will use a system of cross-tracks to highlight sessions that pertain to those areas. The speaker roster has been refreshed, as the board decided to rotate out some of the familiar names from previous Techshows in favor of newer faces.

A hackathon on March 15 kicks off Techshow and will focus on legal services for military veterans, one of the priority issues identified by ABA President Linda A. Klein of Atlanta. Klein will speak at an evening plenary session on March 17 about women in the field of legal technology.

SOUND LAWYER, SOUND MIND

Finally, borrowing a page from other conferences, such as the Clio Cloud Conference, Techshow will include a number of programs and events dedicated to promoting lawyer wellness, including a 5K run, and meditation and yoga sessions.

“We’re looking to bring a fitness and wellness component to Techshow, which is becoming more popular with conferences throughout the country,” Linares says. “Sometimes you need to give your brain a rest from all that tech overload.”
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The Constitution and Bylaws may be amended only at the Annual Meeting upon action of the House of Delegates. The next meeting is Aug. 14-15 in New York City. The deadline for any ABA member to submit proposals is March 10. For details, visit ABAJournal.com/magazine, Your ABA, ABA Announcements.
Mary T. Torres
ABA Secretary

2017 BOARD OF GOVERNORS ELECTION
The Secretary hereby gives notice that 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. The deadline for filing nomination petitions is Jan. 6. For the list of district and at-large positions, and election rules and procedures, go to ambar.org/bogelection and click Board of Governors Election.

NOTICE BY THE SECRETARY
The Nominating Committee will meet during the 2017 Midyear Meeting in Miami on Feb. 5, beginning with the business session at 9 a.m. and immediately followed by a forum to hear from candidates seeking nomination at the 2018 Midyear Meeting. This portion of the meeting is open to Association members. The Committee will then vote in closed session on nominations for officers and members of the Board of Governors of the Association for terms beginning at the close of the 2017 Annual Meeting. Contact Leticia D. Spencer at 312/988-5160 or leticia.spencer@americanbar.org with questions.
Mary T. Torres
ABA Secretary

California Split
Continued from page 63
no dues bill being passed.
The issue is likely to be back, and Dennis Mangers is a major reason why. Mangers, who recently stepped down after six years as a nonlawyer member of the state bar’s board of trustees, may be the state’s most prominent backer of de-unification.
Right now, the bar “is trying to be a trade association and a regulatory body on behalf of the people, and it’s not doing either very well,” says Mangers, a former state legislator. The bar’s board of trustees has 19 members: 13 lawyers and 6 nonlawyers.
Mangers believes bar leadership is often more concerned about internal politics on the trade group side than its public protection mission. Meanwhile, the bar’s status as a state regulatory agency puts substantial restrictions on its trade group work.

Dissent in the Sections
The state bar’s sections—which, like ABA sections, are voluntary and organized around practice areas—also are chafing under state-agency rules. In 2015, the legislature subjected sections to the state’s open meetings law, requiring them to announce every mass email and conference call 10 days in advance and open them to the public, even if they aren’t terribly relevant to government. This year, bar leaders forbade sections from paying for alcohol at functions, disrupting the plans of at least two sections.
Donna Parkinson of Sacramento, a former chair of the bar’s business law section, says some sections are so unhappy that they agreed in October to study how they’d be affected by de-unification, staying with the existing structure or a third structure. The business law and taxation sections are for separating, she says, and the business law section has even created a California Lawyers Guild in anticipation of a split.
Parker, the executive director, says the bar is being cautious about de-unification, but is “certainly looking at” splitting off certain functions.
Cantil-Sakauye has said publicly that she, like Jackson, would rather see how current governance reforms work before considering de-unification. Mangers says he believes the chief justice may think de-unification is inevitable—but, for separation of powers reasons, doesn’t want it to come from the state legislature.
Separation of powers certainly came up in negotiations over the failed bar dues bill. Jackson says it’s critical for the legislature to recognize that separation of powers constrains what it can do with the bar. But Stone says that won’t constrain the assembly in 2017.
“Our obligation as a coequal branch of government is oversight, and that’s part of the checks and balances between and among the branches,” says Stone. “And we feel the bar’s public protection obligation is not being met.” ■
Close to Home

The ABA and bar executives publish a guide to help state and local bars carry out effective lobbying campaigns

By Rhonda McMillion

Issues advocacy has become one of the most important areas of cooperation between the ABA and state and local bar associations throughout the United States. And now the ABA’s Governmental Affairs Office and the National Association of Bar Executives have collaborated to produce a guide to help bolster lobbying efforts by bars at all levels.

The “nuts and bolts” guide, which may be downloaded at no charge from the advocacy page on the ABA’s website, provides tools for state and local bars to engage in effective public policy advocacy on their home turf, including steps for achieving policy goals, mobilizing grassroots networks, and communicating through the use of social media. In addition, the publication offers tips for dealing with lobbying disclosure laws, political action committees and the nuances of lobbying at the federal and state levels.

The title of the book—All Politics Is Local: A Practical Guide to Effective Advocacy for State and Local Bars—affirms the importance of lobbying at those levels. “It is our hope that this guide offers something for everyone,” wrote ABA Governmental Affairs Director Thomas M. Susman in his introduction to the book. The title is derived from the oft-quoted mantra—made famous by the legendary Boston politician Thomas P. “Tip” O’Neill, who served as Democratic speaker of the House from 1977 to 1987—to emphasize the importance of advocating for issues that are significant to a legislator’s home constituency.

“Participation by state and local bars is indispensable to the ABA’s effective advocacy in Washington,” Susman says. “While the ABA is limited in its ability to reciprocate and engage in advocacy at the state level, this guide should help bars develop and implement local advocacy to advance their individual priorities.”

The book is an important guide both for veteran lobbyists and those just starting to engage in issues advocacy, says William K. Weisenberg, the former governmental affairs director for the Ohio State Bar Association in Columbus who now serves as special adviser to the ABA Standing Committee on Governmental Affairs. “Advocacy is a strong component to the work of the organized bar, whether on the state or national level,” he says.

Collaboration Power

As a joint product of the ABA and the Governmental Relations Section of the NABE, the new guide is the most recent example of the strong relationship between the Governmental Affairs Office and state and local bars. Since the GAO was created in 1957 as part of the ABA’s Washington, D.C., office, a primary focus has been to convey the association’s concerns and views to Congress and federal agencies on matters of importance to the legal profession. Also vital to the GAO mission is ensuring that state and local bar associations are advised of federal legislative developments and involved in the process through “alerts” calling for assistance on critical issues.

For the past 20 years, state and local bar representatives have joined with ABA leaders to participate in the annual ABA Day in Washington event held every spring. ABA Day, which has grown into a three-day effort, brings more than 300 bar leaders to Washington for face-to-face visits with legislators on Capitol Hill to advocate on behalf of issues of concern to the profession. This year, the ABA Day event will be April 25-27.

Every fall, state and local bar representatives who work on legislative matters meet at the NABE Governmental Relations Workshop to network and share ideas. As part of the workshop, GAO staff brief them on state and federal legislative trends on issues of concern to the legal profession.

“It is important for the ABA and state and local bars to be there for each other,” says Kenneth J. Goldsmith, the GAO legislative counsel and director of state legislation. “To be successful in serving our members, we need to ensure that the assistance that state and local bars provide to us to support our mission is returned in ways that strengthen them as well.”

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.
A Woman Wins the Right to be Homeless

Before New York City health officials arrested her on Oct. 28, 1987—and not long before she lectured at Harvard Law School—Joyce Patricia Brown lived a fierce, solitary existence over an air grate on the city’s Upper East Side. Known by her street name, “Billie Boggs,” she muttered incessantly and cursed angrily. Money given by passers-by was burned in mock ritual. Clothing was tossed onto Second Avenue. Routinely, she relieved herself on the curb. Although Brown was African-American, she hurled racial epithets—and occasionally feces—at black men who offended her, whether or not they existed.

In a 1975 ruling, *O’Connor v. Donaldson*, the U.S. Supreme Court established strict standards for involuntary detention of the mentally ill. In the next decade, a resulting depopulation of mental institutions generated an eruption of homelessness, particularly in major cities. Those cities, often under pressure from local businesses, looked desperately for ways to diminish their presence.

Mayor Ed Koch responded with the reorganization of a city program to identify and assist the street-bound mentally ill in 1987. But where detention under *O’Connor* required a diagnosis of mental illness and a specific threat to self or others, a defiant Koch empowered Project Help to interpret “self-neglect” as a threat to self that could justify involuntary hospitalization. At his suggestion, Brown became the program’s first case.

Before her life on the street, Brown was a secretary in New Jersey. But when persistent bouts with drugs and alcohol pushed her family to have her committed, she fled to Manhattan to hide in plain sight and was jailed and released at least five times. In the custody of Project Help, she was confined to a ward in Bellevue Hospital Center and injected with Haldol and Ativan, drug treatments psychiatrists ordered to address a diagnosis of “schizophrenia, paranoid type.”

Although stabilized, Brown sought help from the New York Civil Liberties Union, which took to court the argument that her street behavior, however unconventional, did not meet the *O’Connor* standard. In November 1987, Brown testified with considerable coherence that she had become a street life “professional”—that she changed her name to avoid her sisters, destroyed money because she feared being mugged, relieved herself on the sidewalk because public restrooms were unavailable to her, and that the muttering was her singing to herself. Impressed by her composure—and the support of several new psychiatrists—a state judge ordered her released on Jan. 19, 1988.

Health officials got the court order reversed, but Brown’s case had provoked national debate on the moral and ethical boundaries of dealing with homelessness and mental illness: Was the object to help the mentally ill or to clear affluent neighborhoods of human nuisance? Do narrow legal definitions of “sane” and “insane” adequately account for the variety and nuance of mental affliction? Did Brown’s reasoned resistance to custody, as Koch argued, represent living proof of the value of forced treatment? Although pessimistic about her prospects, beleaguered Bellevue officials released Brown after about 12 weeks of forced treatment.

Upon release, Brown was greeted as a news-cycle celebrity. She gave interviews, pondered book offers, bought clothes on Fifth Avenue with donations from sympathizers, and lectured at Harvard Law School. At the May 1988 Moscow Summit, President Ronald Reagan invoked her case as he scolded Mikhail Gorbachev on the Soviet Union practice of jailing political dissidents under the color of mental health treatment.

By then, however, Brown had returned to the streets. She was spotted, incoherent, at the Port Authority bus terminal and later arrested with a small amount of heroin and hypodermic needles in September 1988. She appeared in court with attorney Barry Scheck, who helped gain her release conditioned on continued psychiatric treatment. Free from jail and from public fascination, Brown spent the rest of her life struggling anonymously with her afflictions. She died in November 2005 at age 58.
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