FOR MORE GOOD

SOME LAW FIRMS FIND OTHER WAYS TO PROVIDE SERVICE TO SOCIETY
NEW YEAR, FRESH ADVICE

OUR YEARLONG SERIES ASKS LEADERS OF CHANGE IN LAW PRACTICE WHAT WILL WORK IN A NEW FIRM

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Embracing Innovation
Adapting to change is essential for law practitioners

THE LEGAL PROFESSION IS at a critical juncture. As the world’s pre-eminent association focused on the rule of law, the American Bar Association has a vital role to lead responses to the challenges facing today’s attorneys, including such issues as legal education, increased competition, and underemployed and unemployed lawyers. In the future, people will look to the actions we take—and fail to take—as a profound moment of opportunities embraced or opportunities missed.

Just one example of change: Many courthouses now offer a kiosk for public use. The kiosk is designed to help a nonattorney do a range of things from simple tasks all the way to filings in court. Such an innovation epitomizes the legal profession’s new reality, where online legal forms cause many to believe they don’t need an attorney since they can get “everything they need” on their smartphone.

Has our profession become less relevant? If so, what can be done about it?

CHANGE HAPPENS
The Luddites came to prominence 200 years ago in England. They famously demolished labor-saving machines. But it’s important to realize they were not opposed to all technological advances; they only destroyed those machines that threatened their jobs.

A similar attitude can be found across the legal profession today. Attorneys are concerned about the kiosks and online legal forms and the impact they have on their livelihoods. But more than that: Does technology threaten today’s legal profession? Of course, we cannot turn back the clock. The technological advances are here to stay and will continue to grow.

What happens to entities that do not adapt to change? Consider Kodak. Forty years ago, Kodak held the first patent on a digital camera. But the company’s leadership refused to pursue that innovation. In 1998, Kodak had 170,000 employees and produced 85 percent of the photographic paper in the world. By 2012, Kodak filed for bankruptcy—because the company did not adapt.

Likewise, in 2004 Blockbuster had 9,000 stores and 60,000 employees. Company leaders assumed people would continue to come to their brick-and-mortar stores to get VHS tapes and DVDs. They did not feel threatened, even as Netflix began to grow. By 2010, Blockbuster was bankrupt.

TAKING THE LEAD
But how about entities that do adapt? When you first hear the name Western Union, you probably think about one thing: telegrams. Western Union sent its last telegram more than 10 years ago. It’s now in the business of transferring money through more than 515,000 locations in over 200 countries. Western Union is thriving, and clearly not because it stayed with the telegram business.

Another organization that adapted was the National Geographic Society, which has published National Geographic magazine since 1888. By the mid-1990s, leadership realized times were changing and print magazines were not going to be as popular in the future. So the nonprofit society transformed its business model by adjusting to online versions of the magazine and creating the National Geographic channels for cable television. By so doing, they transitioned from the traditional magazine format that has seen so many business failures in recent years to a thriving, modern multiplatform model.

We are at a historical inflection point. We must embrace change, or in the future people will wonder: “Whatever happened to the American Bar Association ... and to the practice of law?”
ABA INNOVATIONS

On Sept. 1, 2016, the ABA took a big step to help the profession develop new and innovative ways to improve how legal services are delivered and accessed. Our new Center for Innovation seeks to drive technological change to improve and modernize the practice of law. The center will serve as a resource for ABA members, maintaining an inventory of the ABA’s innovation efforts and those of the domestic and international legal services community. It will also operate a program of innovation fellowships to work with other professionals, such as technologists, entrepreneurs and design professionals, to improve the justice system.

The center is off to a busy start. It is developing a nationwide “call for project proposals” competition to facilitate the development and implementation of projects that advance legal technology and improve access to justice. The center is assisting the New York State Unified Court System with a court-annexed online dispute resolution pilot project to address consumer debt cases more efficiently. It is developing a free, online legal checkup tool to help members of the public identify legal issues in specific subject areas and refer them to appropriate resources. And the center has partnered with Stanford University, CuroLegal and leading national civil rights groups to launch a new comprehensive online application to assist victims of hate crimes.

Another major technological development is Free Legal Answers (abafreelegalanswers.org), which launched in August and provides income-eligible users with the ability to pose civil legal questions to volunteer attorneys. The site helps to expand legal services for low-income individuals who must meet income eligibility guidelines in each state. More than 40 states are or have committed to participating in the website. By the end of November, pro bono lawyers had responded to nearly 1,400 questions from clients under this program.

These and other new and innovative approaches will drive the ABA and our profession forward.

I do not underestimate the sincerity of those opposed to change. But like the bands of English workers 200 years ago who destroyed machinery they believed threatened their jobs, actions we take today will have significant consequences. We cannot limit technological improvements to everything but our profession. We must modernize and adapt to continuing technological changes in the legal profession.

Innovative lawyers must work alongside innovative technologies and show the enhanced relevance of our profession. Yes, there are significant challenges facing the legal profession and our association and the public we serve. They present ideal opportunities to make needed changes. It’s time for us to embrace the challenges and overcome them smartly!
One Word: Civility

We need to heed lessons of the past and lead efforts to promote civil discourse

“Civility costs nothing, and buys everything.”

These words, written in the 18th century by poet Mary Wortley Montagu, provide a valuable reminder as we move forward in 2017.

We have become more polarized, politically, socially, geographically and economically. We have become less understanding and less tolerant of different points of view and the people who hold them.

New communication technologies have allowed us to surround ourselves with those who reinforce our beliefs and lash out anonymously at those who disagree. Civility seems to have faded from modern society, an archaic relic of a bygone era. But given all we face together, it is more necessary.

As the calendar turns to February, we would do well to remember two of our country’s most influential figures, both with birthdays we celebrate this month: George Washington and Abraham Lincoln.

Washington wrote the book on civility—literally. Actually, it was a list created by 16th century Jesuit priests that Washington copied for a penmanship exercise as a schoolboy. The list stuck with Washington. He lived by the 110 maxims published in the book “George Washington’s Rules of Civility & Decent Behavior In Company and Conversation.”

The first rule—“Every Action done in Company, ought to be with Some Sign of Respect, to those that are Present”—if followed faithfully, would go a long way toward improving the discourse in our country.

Following the last rule—“Labor to keep alive in your breast that little spark of celestial fire called conscience”—would help us do the right thing more often.

In between, there is wisdom about keeping promises, not believing rumors without facts, not bragging about yourself and not taking pleasure in the misery of others.

Lincoln, an accomplished lawyer, presided over our country’s most fractured period. On the eve of the Civil War, Lincoln continued reaching for common ground saying, “We are not enemies, but friends. Though passions may have strained, it must not break our bonds of affection.”

Near the war’s end, at his second inauguration after four years of bloody carnage, Lincoln pleaded for the nation to heal and restore civility. He told a divided America, “With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds.”

Civility allows us to deal with conflict through mutual respect without damaging relationships. It involves connecting with others, developing a sense of empathy, encouraging communication and manners.

The ABA recognizes this. In 2011, it passed a resolution affirming the principle of civility as a foundation for democracy and the rule of law. It urged lawyers to set a high standard for civil discourse as an example for others in resolving differences constructively and without disparagement of others. It encouraged political parties, government officials, advocacy groups and media to take meaningful steps toward promoting a more civil and deliberative public dialogue. The resolution can be read at bit.ly/ABARes108.

As leaders in society, lawyers must ensure that civility once again becomes a quality that defines us. We need to set the tone for constructive communication and rational decision-making. It starts with us and every individual committing to a more civil manner, insisting that civility be a part of meetings and interactions. Indeed, we need to hold ourselves and our leaders to a higher standard.

In his farewell address 220 years ago, Washington recognized that differences of opinion were a necessity to democracy and a by-product of a free society but warned us about them. He described debate as “a fire not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume.”

It is up to us to make sure we are not consumed. As lawyers, we are the perfect role models to act with civility and compromise to achieve the goals of our great nation. ■
Civil Rights Mug Shots Unearthed
Lawyer’s dogged search yields historic results

DAVID EWING IS A NASHVILLE, TENNESSEE-BASED historian and lawyer who grew up hearing stories about sit-ins at lunch counters across his hometown that helped dismantle segregation. Ewing’s mother had attended Fisk University with John Lewis, a young man who started as a civil rights activist in Nashville and became one of the icons of the movement and an influential U.S. congressman representing Georgia.

“Growing up, we heard more about John Lewis than Martin Luther King,” Ewing says.

Ewing has an abiding interest in the civil rights movement and the history of Nashville, where nine generations of his family have lived—part of that time as slaves. As a researcher and an attorney, Ewing likes to dig; and when something piques his interest, he stays on the trail. Ewing always wanted to see Lewis’ original mug shots from the Nashville sit-ins, but they were nowhere to be found.

“There are other mug shots, but this was his first,” Ewing says about the photos taken a day before Lewis’ 21st birthday (right, bottom set). “I started looking for the photos 15 years ago and was always told they didn’t exist. The police department would say the library has it; the library would say the police department has it. It was a nonstop loop.”

But Ewing didn’t give up. Finally, a law enforcement friend had an important clue: She remembered the police chief showing a copy of Lewis’ arrest record during a civil rights training. That key piece of information eventually led Ewing to a windowless, one-room municipal building where

JOHN LEWIS’ FIRST MUG SHOTS (bottom set) show him a day before his 21st birthday. Lawyer David Ewing searched for these photos of the civil rights icon for 15 years.
a clerk pulled a dusty file from a shelf with "John Lewis" scrawled across it in pencil. "I couldn't believe it because I'd been looking for so long, and I thought these might not exist," Ewing says. "And the excitement of opening these up and seeing a young Lewis, being photographed for standing up against segregation—it was inspiring. When you see something like that, you get emotional. I was glad these records were found during his lifetime and that he could see them, too."

Nashville Mayor Megan Barry surprised Lewis, who turns 77 on Feb. 21, with the photos during a speech he was giving at a local high school. The arrest records from 1961 to 1963 were for disorderly conduct, breach of the peace and resisting arrest. Lewis says he hopes the mug shots will be a "teachable moment"—to show young people that each generation must do its part to stand against injustice when they see it.

"I was deeply moved when I saw those mug shots," says Lewis. "I had never seen them before. I felt like I looked so young, so innocent. I wondered how anyone could arrest someone who was not harming anyone, who was just peacefully demanding that he be treated with dignity and respect."

After the first mug shots came dozens more—close to 50 in Lewis' estimation—as he became a leader in the nonviolent desegregation movement. Ewing notes that there were five copies of Lewis' mug shots in the folder. He suspects Lewis was on the FBI's radar, and the extra copies were on hand to send to police departments across the South to keep a lookout for the young Freedom Rider.

But Lewis never stopped advocating for justice and equality. He's as busy as ever, inspiring a new generation of young people with March, his award-winning graphic novel trilogy about the civil rights movement, and he's often seen protesting alongside a new generation of activists.

Ewing says Lewis' mug shots, which he considers the greatest finds of his lifetime, show the power of persistence and research. "Lawyers are researchers by nature," Ewing says. "I was going to ask for this until I found it." —Liana Jackson

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Lawyers Take Pride in Ancestry

Former slave's skirt tells a family's story in a national museum exhibit

Attorney Lori Anne Douglass already knew she came from a long line of strong women, starting with her great-great-grandmother Lucy Lee Shirley, who was born a slave. But Douglass, an estate law partner with Moses & Singer in New York City, learned a lot more about her ancestry when one of Shirley's skirts became part of the "Slavery and Freedom" exhibit at the recently opened Smithsonian National Museum of African American History & Culture.

Douglass says Shirley's sister made the skirt, and it had been passed down to her grandmother and donated to a museum in New York in the 1970s. From there, the skirt made its way to Washington, D.C.

By any measure, Shirley was a woman ahead of her time. Douglass says she learned from a Washington Post story that after Shirley died in 1929, she froze her abusive husband out of her will, leaving him $1 and her children $1,650, which would equate to about $23,000 today. It's an unusual bequest for a woman in those times—and especially a former slave.

"A wife's property [back then] automatically went to the husband," Douglass says. "So she intentionally only left him a dollar and provided for her children."

Douglass says it's impressive that a former slave even had a will and could leave that amount of money to her descendants. Her brother, David Douglass, a litigation partner with Sheppard Mullin in D.C., also takes pride in his great-great-grandmother's story.

"She was standing up for her own rights in a system that was unfair to women. She left her children a fair amount of money," he notes.

David Douglass says that Shirley's pretty flowered skirt, though simple, shows slaves took pride in their appearance when they could, and the same kind of pride was often reflected in other aspects of their lives, such as cooking or farming.

He's honored that his family will be part of this nation's history, and what he appreciates most about the museum is...
that it doesn’t limit the identity of African-Americans to slavery alone.

The museum celebrates many aspects of the black American story, including exhibits that pay homage to African-Americans and the law. For example, there’s a print of Charlye Farris, the first black woman admitted to the Texas bar and the first to serve as a county judge in the South since Reconstruction.

There’s also a magazine cover from February 1917 featuring Richard T. Greener, the first African-American graduate of Harvard and a dean of the Howard University Law School.

“It’s all part of telling the story of who we were independent of the condition in which we came to this country,” says Douglass, who believes he’s also a descendant of famed abolitionist Frederick Douglass.

Lori Anne Douglass says her great-great-grandmother laid a foundation for her family that has benefited them for generations. And through the National Museum of African American History & Culture, a garment once worn by a slave now represents part of the fabric of the American story. —Cristin Wilson

LUCY LEE SHIRLEY’S SKIRT, though a simple garment, helps tell a complicated story in “Slavery and Freedom,” an exhibit at the Smithsonian National Museum of African American History & Culture; Shirley’s descendants (left) include Lori Anne Douglass and David Douglass.

COLLECTION OF THE SMITHSONIAN NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY & CULTURE; PHOTOS COURTESY OF SHEPPARD MULLIN FOR DAVID DOUGLAS, MOSES & SINGER FOR LORI ANNE DOUGLASS

FEBRUARY 2017 ABA JOURNAL || 11
Caught on Tape
Is slow-motion video biasing jurors?

THE USE OF SLOW-MOTION VIDEO HAS become common in criminal cases. But a new study has found that watching crimes at slower speeds leads viewers to falsely believe perps have more time to think about their actions and act with intent, potentially skewing verdicts against defendants.

In a joint study out of the University of Chicago, University of San Francisco and University of Virginia, researchers showed participants real surveillance video of the moments leading up to a fatal armed robbery, then asked viewers to determine the defendant’s culpability. Some were shown the video in real time, some saw it in slow motion, and others saw both.

Those who saw the slow-motion video were more likely to say the defendant was guilty, according to the study, published in the Proceedings of the National Academy of Sciences. Even when viewers were reminded that the video was artificially slowed, they were more likely to vote guilty and more frequently imposed a harsher sentence, the study found.

“We found that the odds ratio of a unanimous jury for convicting for first-degree was more than four times larger than those who did not watch the slow-motion video,” says Zachary Burns, co-author of the study, and an assistant professor at USF.

These variances can be critical in a criminal case, where a determination on a defendant’s intent could mean the difference between life and death.

In an age when surveillance and smartphone videos are ubiquitous, the study calls into question the appropriate use of slow-motion video in court.

“Assuming the study can be replicated, I do think it raises a serious question,” says Robert C. Owen, a clinical professor at Northwestern University’s Pritzker School of Law.

“Any criminal defense lawyer, in the wake of this research, would want to educate the trial judge and
argue against using slow motion,” says Owen, who has defended death penalty clients. “Consider calling as a witness one of the researchers to testify about the study and results.”

Owen believes further research should examine if the possible bias could be muted or eliminated by giving express jury instruction that viewing a slow-motion tape could infer intentionality, much like jurors are asked to minimize their racial bias in court. “One can at least hope that if you can tell the viewers to be very careful when attributing intentionality when viewing slow-mo video it can help in being fair,” he says.

However, David LaBahn, president and CEO of the Association of Prosecuting Attorneys in Washington, D.C, says it’s best to play the tape at full speed first. “Then you’re going to have both sides—one side or the other—wanting to slow down a portion of it. I can hear juries grumbling about not seeing it slowed down,” he adds.

—Julianne Hill

CONGRATULATIONS to Selena Sujoldzic of Wichita, Kansas, for garnering the most online votes for her cartoon caption. Sujoldzic’s caption, far right, was among more than 100 entries submitted in the Journal’s monthly cartoon caption-writing contest.

JOIN THE FUN Send us the best caption for the legal-themed cartoon at right. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, Feb. 12, with “February Caption Contest” in the subject line.

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

“You have a big trial coming up?”
“No, just a meeting with a new client who says ‘It’s a simple divorce case.’”

—Selena Sujoldzic of Wichita, Kansas
A Novel Approach

This in-house counsel challenged herself to write a book by her birthday, launching a second career as a best-selling novelist

THE LAW PROFESSION IS CHOCK-FULL of wannabe Hemingways and half-finished novels. (Everyone who went to law school because of a love of writing, raise your hand!) Like legions of lawyers, Julie Lawson Timmer believed she had a book in her, too. Turns out, she was right. Since putting pen to paper in 2011, Ann Arbor, Michigan-based Timmer, who’s in-house counsel for a global manufacturer of automotive wheels, has published two critically acclaimed novels with a third due out this summer and a fourth in the works. (Timmer’s debut, a best-seller published by Putnam, shares an editor with The Help and A Good American.) How she got there is a page-turning tale of tragedy, challenge and dedication.

Like many lawyers, you’d always loved writing and always wanted to write a book. What happened or changed in your life to compel you to actually do it?

I’d tried a couple of times to write a novel when my kids were young, but it was never the right time, and I never felt like I had an idea that I could sustain for 300 pages. But the year I turned 45, two things happened at once: One friend died of a brain tumor, and another was diagnosed with ALS. I was so consumed with rage at what they were going through that I felt like I needed to do something to express it. I decided I could either break every dish in my house, or I could write.

That became the inspiration behind your debut novel, the best-selling Five Days Left?

Yes—the idea of how someone would want to soak up those last days. I started to think about my own life, too. I am not a bucket-list type of person—I don’t really have any place I want to see before I die, but I realized if I was facing death, I’d regret it if I never tried to write a novel. This was mid-March of 2011, and I was turning 45 at the end of May, so I decided I would have a first draft by my birthday.

And did you?

I did! We went out to dinner, and we stopped at Kinko’s on the way to print it out.

That’s amazing. How did you write a book so quickly?

Maybe because I’m a lawyer, and we know how to get things done! At the time, I had four teenagers and a demanding job, so I woke up at 3:45 every morning, seven days a week. I’d start typing at 4 a.m. with two Labs at my feet and a cup of coffee. I’d write until 6 a.m. and then get ready for work. On weekends, I could write until 10 a.m. because teens sleep in. I also did a lot of writing in the front seat of my car while the kids were at various lessons.

Did the words just flow?

Not always. But I’m not the kind of writer who has to wait for my muse or for the sunlight to be streaming in at a certain angle. I trained as a litigator, and I’m used to drafting long briefs. If I don’t have an inspiration for the beginning, I just start in the middle. That’s the gift of legal training: There’s no staring at a blinking cursor.

The protagonists in Five Days Left suffer from Huntington’s disease, a rare genetic disease that affects both the body and the mind. How did you decide to write about this disease?

It was a fluke thing. Because of my friends facing cancer and ALS, I wanted to tell the story of people facing the end of their lives. I wanted to honor their struggle, but I didn’t want to tell their stories. I literally googled “fatal diseases not cancer or ALS” and found Huntington’s disease. I thought, well, I’ll read about this disease for five minutes and just take creative license for the rest of it.

But that’s definitely not what you did.

I always swore I wouldn’t do research for a novel because I haven’t always enjoyed legal research. But I realized I could not parachute into the HD community...
and steal a few symptoms. I became obsessed with getting it right. I interviewed a ton of experts while I was drafting it and even after I’d sold it. I cried a lot.

So much for a fun, creative project, right? The process actually changed my direction as a writer, and I’ve ended up doing a ton of research for all four of my books. My second book was about foster care and adoption, and I did a lot of research there, too, to get it right.

Your work has definitely paid off. *Five Days Left* has been embraced by the HD community, and you’ve become involved with advocacy groups here and in Canada, even facilitating a panel on medically assisted dying at a national convention.

I think people inside the HD community would like the rest of the world to know what they’re going through, and it explains things in a way that makes it easy to learn about the disease without having to pick up a text book. It’s been the honor of my life to think that I wrote something that has affected people’s lives.

Would you ever leave lawyering to focus on full-time writing?

No. I never want to have to care if a book sells or not. I think it would take an artistic endeavor and a lifelong dream and turn it into a chore. I also care about my company very much, and I love that my job is different every day. If that sometimes means I have to work long hours and it cuts into my writing time, that’s life.

—Jenny B. Davis

**Say What?**

Dr. Seuss Enterprises filed a complaint in California federal court claiming ComicMix violated its intellectual property when seeking to crowdfund a mashup of *Star Trek* and Dr. Seuss on Kickstarter. The complaint alleges the book project—titled *Oh, the Places You’ll Boldly Go!*—was “slavish copying of the Dr. Seuss-copyrighted works” that attempted to re-create entire pages.

*Source: thehollywoodreporter.com (Nov. 14, 2016).*

**Give Me a Break**

A Florida lawyer who lost a case because of his bathroom break has won an appeal of the summary judgment granted to his opposing counsel while he was indisposed. The appeals court ruled the judge abused his discretion by refusing to allow Jeff Tomberg to argue the motion when he returned to the courtroom a few minutes late from his restroom run.

*Source: dailybusinessreview.com (Nov. 17, 2016).*

**$1.27 Million**

The amount of damages claimed in a lawsuit by Oxford grad Faiz Siddiqi, who is suing the esteemed institution for “appallingly bad” teaching that he says caused him to receive lower grades than he should have. Siddiqi claims he would be enjoying a career as a top international commercial lawyer if it hadn’t been for the mediocre grades.

*Source: thedailymail.com (Dec. 4, 2016).*

**Age-Defying**

The online entertainment resource IMDb.com has sued the state of California in an effort to block a new law that would require the website to remove actors’ ages upon request. The state argues that the law is intended to fight age discrimination in the film industry, but IMDb says the law violates not only the First Amendment but also the commerce clause of the Constitution.

*Source: theguardian.com (Nov. 11, 2016).*
As this litigation made headlines, it became the latest flashpoint in the debate about whether class action is an important tool for consumers to guard their rights or a way for lawyers to shake down corporations. Like many class action lawsuits in the news, this litigation involves fast-food restaurants.

Nine class action suits against Subway—in Arkansas, California, Illinois, New Jersey and Pennsylvania—were consolidated into one in June 2013 at the federal district court in Milwaukee, and the sides reached a settlement in February 2015. But consumers shouldn't get their hopes up about getting any money—or even a coupon. That's because it's all but impossible for people to prove that they ate a subnormal Subway sub. The plaintiff s and putative class members literally "ate the evidence," remarked Stephen DeNittis, an attorney for the plaintiff s, during a court hearing.

But customers arguably are getting a less tangible benefit: Subway's promise that its restaurants will do a better job of ensuring sandwiches are as long as they're supposed to be, whether that's 6 or 12 inches. As the result of a settlement, Subway's parent company—Doctor's Associates Inc. in Milford, Connecticut—is telling franchises to keep handy a ruler or a tape measure. Subway shops are under orders to measure a sample of at least 10 sandwiches every month.

As part of the settlement agreement, Doctor's Associates would pay $500 to the 10 named plaintiff s—plus

In January 2013, Australian teen Matt Corby posted a photo on Facebook of a Subway “foot-long” sandwich he'd bought next to a ruler that showed it was an inch short. The post went viral—and within weeks, people across the United States began to file lawsuits, claiming they'd been shorted by Subway, too. These disappointed sandwich eaters weren't simply suing to get money for themselves, however. They wanted their lawsuits certified as class actions, arguing that millions of Subway customers weren't getting what they paid for.

As this litigation made headlines, it became the latest flashpoint in the debate about whether class action is an important tool for consumers to guard their rights or a way for lawyers to shake down corporations. Like many class action lawsuits in the news, this litigation involves fast-food restaurants.

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\$200,000 in fees and expenses for the dozen attorneys who sued Subway. That didn’t sit well with lawyer Ted Frank, director of the Center for Class Action Fairness at the Competitive Enterprise Institute in Washington, D.C. He says the Subway case is “a pretty clear-cut example of lawyers abusing the system to benefit themselves.”

But Chicago attorney Thomas Zimmerman, who also represents the plaintiffs with DeNittis, says he has a more high-minded purpose. “We try to achieve a recovery for people who have been cheated, and we try to achieve changes in corporate practices,” Zimmerman says.

Frank hadn’t been involved in the early stages of the litigation at the U.S. District Court for the Eastern District of Wisconsin, but he challenged the settlement. As Frank explained to the court, he’s eaten dozens of Subway sandwiches, so he qualifies as a member of the class, giving him standing to file an appeal. He argues that the settlement is worthless to consumers, so the case shouldn’t have been certified as a class action in the first place.

“The class is getting nothing out of this,” he said during oral arguments in September at the 7th U.S. Circuit Court of Appeals at Chicago, which still is deciding on Frank’s appeal of the settlement. The judges sounded skeptical during the arguments. “A class action that seeks only worthless benefits for the class should be dismissed out of hand,” said Judge Diane Sykes. “That’s what should have happened here. ... This is a racket.”

CLASS HISTORY
When Arthur R. Miller helped write Rule 23 of the Federal Rules of Civil Procedure in 1966—the one that created the modern system of class action litigation—he never imagined it would lead to lawsuits such as this. Miller, now a professor at New York University School of Law, says civil rights were the main motivation for opening the courthouse doors to class action. “The poster-child case was a desegregation case,” he says.

The rule also was intended to help consumers fight companies regarding problems such as fraud, Miller says. One person’s lawsuit against a company might not be economically viable, but it could be if all the other people who face the same problem are aggregated into one case.

“This is an essential tool to protecting consumers,” says Maia Kats, director of litigation for the Center for Science in the Public Interest in D.C., which brings class action cases against food companies. The government doesn’t have the resources to take action on every instance of false advertising, Kats says, but class action provides a way for citizens to step into that gap. Without it, she says, “we would have just a Wild West of false advertising claims.” Or as Zimmerman puts it, class action litigation is “almost like a private attorney general.”

Pro-business groups have been fighting for years to make class action cases more difficult to win. “There’s not a significant-enough deterrent against plaintiffs lawyers bringing these cases,” says Bryan Quigley, spokesman for the Institute for Legal Reform at the U.S. Chamber of Commerce. “The lawyers run the system and use it for their own benefit.” Quigley views the system as skewed against corporations, but Miller sees the opposite. In his view, court rulings and changes in the law have hindered class actions. “Actions are stillborn because the pretrial process over the past 20 years has been littered by stop signs,” he says. “Many actions are not even instituted because the cost and delay factors have gone sky-high.”

The Chamber put the Subway case on its list of most ridiculous lawsuits in 2013. Other suits against restaurants have made headlines. In 2014, Jimmy John’s gave $1.40 vouchers to customers when it settled a class action that accused it of selling sandwiches that didn’t include the alfalfa sprouts that were advertised. In January 2016, a California man sued McDonald’s, alleging that its mozzarella sticks were misbranded, containing more water and starch than federal food labeling laws allow in mozzarella. McDonald’s denied that, and in October, a judge dismissed the case. Also last year, federal judges in Los Angeles and Chicago dismissed lawsuits that accused Starbucks of underfilling iced drinks.

MAKING BREAD
Fast-food restaurants have been facing an increasing number of high-profile class action cases. Quigley says such litigation attracts attention because restaurants have well-known brands. When lawsuits generate bad publicity, that puts pressure on businesses to settle, he says.

That happened in the Subway case, according to Jeffrey Babbin, a lawyer for Subway’s parent company. “Doctor’s Associates ... believes it very much could win this case on the merits,” Babbin said during arguments at the appeals court. “But it made a decision in the midst of a media frenzy, ... made a business decision to settle.”

During mediation, Zimmerman says, the lawyers who sued Subway realized they’d have trouble proving anyone lost out on sandwich purchases. “Because all loaves are baked from the same quantity of dough, each loaf contains the same quantity of ingredients,” wrote District Judge Lynn Adelman, who oversaw the case in Milwaukee.

So even if a sandwich were shorter than 12 inches, it likely had the same amount of bread. That’s why the plaintiffs gave up on seeking money for millions of customers and focused on getting Subway to change its practices. Frank argues that the settlement wasn’t necessary to force Subway to take action. Zimmerman acknowledges that Subway changed some practices before the settlement.

“But all the changes were brought about as a result of our litigation,” he says. Subway attorney Babbin declined to comment.
## The Docket

Although Subway’s parent company and the plaintiffs agreed to settle the case, Frank is trying to stop that settlement, arguing that it sets a bad precedent for other class action litigation. “If we can create the precedent and encourage courts to look at other cases the same way, you got to start somewhere,” he says. “It’s a systematic problem, and there are a lot of settlements like this.”

Scott Nelson, an attorney with the litigation group at Public Citizen in D.C., says Frank is making a somewhat unusual argument. “He’s basically saying the class should get nothing, and the lawyers should get nothing, too,” says Nelson, who isn’t involved in the case. “He’s a member of the class, but he will be no better off if he wins than if he loses.”

Instead of paying the lawyers $520K, should Subway distribute that money to consumers? That would be pointless, Judge Adelman wrote, estimating that each person would get 28 cents. Zimmerman says the firms are getting paid only half the typical rate for their work. “I don’t think class counsel thinks this was their greatest payday,” Nelson says. “It’s not like they’re in the business of going out and getting these kinds of settlements and laughing all the way to the bank.”

Kats says the Center for Science in the Public Interest wouldn’t file a similar lawsuit. “We are focused on cases that have real meaning to consumers who believe that they’re buying something healthy when they’re not,” she says. “Those sorts of suits do a disservice to class actions.”

A federal lawsuit filed in October in the Eastern District of New York provides an example of the legislation Kats’ group chooses to pursue. The suit accuses PepsiCo Inc. of misleading shoppers by saying its Naked juices predominantly contain high-value ingredients, such as acai berries, blueberries, kale and mango, when the main ingredient usually is cheap, nutrient-poor apple or orange juice. In a statement to the press, PepsiCo called the lawsuit “baseless.”

For his part, NYU’s Miller says complaints about frivolous litigation are overblown. “It doesn’t happen that often,” he says. “And judges are wise people who can figure out ways of terminating frivolous cases early. I mean, if you’re a contingent-fee lawyer, why the hell would you take a frivolous case?”

## Private Notes, Public Scrutiny

Public officials can’t evade public records laws through personal email accounts

**By David L. Hudson Jr.**

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<td>Although Hillary Clinton was the focus of the email-related brouhaha last year, similar controversies have been playing out in local governments across the country as other public employees use private email accounts to circumvent “sunshine laws” that mandate open meetings.</td>
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This questionable use of email to discuss government business comes as freedom of information advocates stress the continued need for transparency and accountability in government, as well as vigilant application of open records and open meetings laws. As federal appeals court Judge Damon Keith famously wrote in 2002: “Democracies die behind closed doors.”

The need for transparency is thwarted, open records advocates say, when government officials conduct public business on private email accounts and then claim public records laws don’t apply to such communications.

However, in recent months, an Illinois attorney general opinion and a federal appeals court opinion from the District of Columbia have declared that government officials cannot evade the requirements and broad purposes of freedom of information laws simply by claiming anything on private email accounts or servers is exempt from the reach of public records laws.

Illinois Attorney General Lisa Madigan, in an opinion issued in August 2016, addressed whether the Chicago Police Department responded properly to a request from CNN that concerned emails related to the shooting death of Laquan McDonald. The 17-year-old African-American youth was shot 16 times by a white Chicago police officer in October 2014.

In January 2016, a CNN reporter submitted a request under Illinois’ Freedom of Information Act that sought “all emails related to Laquan McDonald from police department email accounts and personal email accounts where business was discussed.” The department responded in July that some emails mentioned the name “Laquan McDonald” but refused to provide communications from personal email accounts of police officers. The police department asserted that personal emails were not public records within the meaning of the Illinois FOIA.

Madigan disagreed with the department in her August opinion. The attorney general reasoned that allowing government officials to avoid public records laws through the use of private emails “would be contrary to the General Assembly’s intent of ensuring public access to full and complete information regarding the affairs of government.”

The city has appealed the AG’s ruling to the Chancery Division of the Circuit Court of Cook County, where the case is in its early stages, says CNN counsel Drew Shenkman. “We were extremely satisfied with the AG opinion,” he says. “We agree with all the findings and believe that when public officials used private emails to conduct public business, those are
public records. We hope that we will be able to eventually get the emails we requested.

REASONABLE OPINION

Open government experts also applauded the opinion. “The Illinois AG opinion correctly focuses on the question whether the communication is intended to memorialize public business,” says Charles N. Davis, dean of the Henry W. Grady College of Journalism and Mass Communication at the University of Georgia. “If the opinion had come down the other way, it would send a clear signal to every public official on how to avoid public records laws. All they would have to do is get a Hotmail account and start discussing public business.”

And Madigan’s opinion is notable because of its reasonableness, says Lewisburg, Tennessee-based attorney Robert Allen Dalton, who has handled many public records cases. “Unfortunately, much of the development of the law of public records in recent years has been in favor of exceptions to and exemptions from statutes requiring disclosure,” Dalton says.

Jane Kirtley, a professor of media ethics and law at the University of Minnesota School of Journalism and Mass Communications, says the heart of the issue lies in the public nature of the content, regardless of the medium used. “If the communication concerns the public, it is part of the public’s business and subject to open records disclosure, subject to any valid exemption under the particular state law,” Kirtley says.

In her opinion, Madigan cited a July 2016 decision from the U.S. Court of Appeals for the District of Columbia Circuit, Competitive Enterprise Institute v. Office of Science and Technology Policy. The case concerned whether a federal agency could withhold emails found on a private email account of the director of the agency.

The federal agency argued that documents on a nongovernmental email server are “beyond the reach” of the federal FOIA. The federal appeals court disagreed. “If the agency head controls what would otherwise be an agency record, then it is still an agency record and still must be searched or produced,” wrote Judge David Sentelle for the appeals court panel. “The agency’s claim before us simply makes little sense.”

The appeals court also noted that to allow the agency to avoid FOIA by simply storing agency business on private emails would thwart the purpose of FOIA. “If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served.”

The court’s decision reversed a federal district court’s ruling that granted the federal agency’s motion to dismiss.

POSSIBLE REMEDIES

The use of private emails by high-level government officials is not unusual to avoid open records and open meetings laws. Chicago Mayor Rahm Emanuel, for example, was the subject of scrutiny for the alleged use of a private email account, which included communications with former Secretary of State Clinton and her former campaign chair, John Podesta, according to files hacked and released by WikiLeaks.

Davis also cites the example of former Alaska Gov. Sarah Palin, who was conducting some government business from a Yahoo account. He also recounts the case that involved former city council members from Venice, Florida, who used private emails under the code names of characters from Snow White and the Seven Dwarfs to communicate with one another.

Perhaps the most notorious recent example involves Clinton, who controversially had a private email server while in office. The organization Citizens United filed a FOIA request for certain emails. “When a Cabinet-level federal official can establish a private communication server that has the overt intention of avoiding public information requests, and the FBI openly announces that there can be no prosecution because no enforceable legal consequences for that behavior exist, then the legislative branch has quite clearly lost basic regulatory control of public records,” Tennessee attorney Dalton says.

According to University of Minnesota professor Kirtley, it’s the “cyber equivalent of city councils gathering ‘informally’ in coffee shops with a quorum present to discuss official business but insisting that their gathering is not a ‘meeting’ under the open meetings laws.”

“Although I try to give them the benefit of the doubt and say that some of them do not do this intentionally, the fact is that most states, and the federal government, provide training to records custodians and other government employees about official records retention and preservation and explain that it is the content of the communication—official, public business—that matters, not the means of the communication,” she says.

Davis says legislatures can help fix the problem. “If the laws were amended to say that all governmental business must be conducted on governmental email accounts, that would help,” he says. “These instances are clear examples of how it would be beneficial to amend the laws to say thou shalt not conduct government business off government emails.”

Another avenue is to create stiffer penalties for those public officials who violate public records laws, Dalton says. “The problem is that these laws are useless without an effective means of enforcement,” he says. “Experience at all levels of government—from the smallest towns to the largest federal bureaucracies—has taught us that government officials are extremely hesitant to prosecute other government officials. If laws concerning the disclosure of public records are to be effective, then the ability to initiate and prosecute enforcement of those laws must be vested in the public at large.”

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The case of Hernandez v. Mesa comes amid the wider debate about illegal immigration and the call to strengthen the U.S.-Mexico border, and against a background of a troubling number of cross-border shootings by U.S. agents. The case is scheduled for argument Feb. 21.

“There is a very human story here,” says Deepak Gupta, a Washington, D.C.-based lawyer for the parents of Sergio A. Hernandez Guereca. “There was a boy who was killed by a border guard. Unfortunately, there are many others like him. This case is about whether they can get a remedy in U.S. courts.”

CONFLICTING ARGUMENTS

According to the lawsuit filed by Hernandez’s parents, the boy was a soccer lover who wanted to become a police officer. On the day in question, he was playing a game with his friends, which involved daring one another to run up the U.S. side of a concrete culvert that separates Juarez and El Paso to touch a border fence before they ran back down.

While the boys were playing, a border guard on a bicycle seized one of the them, and the others fled across the culvert back to the Mexico side of the narrow stream of the Rio Grande that runs through the culvert, according to court papers.

Hernandez ran past Jesus Mesa Jr., a U.S. Border Patrol agent, toward a pillar beneath a bridge on the Mexican side. Mesa quickly drew his firearm and shot Hernandez in the head, court papers say. Mesa and other Border Patrol agents who swarmed the scene didn’t provide the boy medical aid of any kind. Instead, they got back on their bikes and left, the lawsuit says. Hernandez died on the spot.

Two very different factual scenarios surround the June 7, 2010, death of a 15-year-old Mexican boy at the border where Juarez, Mexico, meets El Paso, Texas.

But only one set of facts will be before the U.S. Supreme Court as it takes up an important case about deadly force by law enforcement and whether the Constitution’s protections reach across the border to a non-U.S. citizen.

SHOT AT THE BORDER

Court to decide whether constitutional protections apply to a Mexican boy killed by a U.S. patrol guard

By Mark Walsh

and the government—won dismissal at an early stage of the case, federal civil rules require appellate courts to accept the plaintiff’s version as true for the purpose of deciding the legal questions before them.

“The pitch here is quite modest,” Gupta says. “It is asking the court to rule that when an officer is standing on the border and using lethal force, there is at least some minimal constitutional protection to the right to life and the right to be free from an extrajudicial execution.”

In Mesa’s version of events, Hernandez threw rocks at the agent when confronted about what might have been the boy’s involvement in the smuggling of aliens into the United States.

Randolph J. Ortega, an El Paso lawyer who represents Mesa, said in a preliminary Supreme Court brief that Department of Justice records show Hernandez had been arrested twice in the United States for alien smuggling and been returned to Mexico because of his juvenile status.

“In this case, you have persons attacking a law enforcement officer on an international border with rocks—the choice of weapon for alien smugglers,” Ortega said in the brief. “When looking at the facts available to Agent Mesa at the time of his encounter with Hernandez, ... it is plain to see...
that, at the time of the shooting, it could be reasonably assumed by Agent Mesa that Hernandez was breaking the law as an alien smuggler."

**NO KNOWN REMEDY**

The main legal question in the case concerns the prohibition on unjustified lethal force by law enforcement agents as construed under the Fourth Amendment. The Hernandez family’s suit also raised Fifth Amendment protections, but their appeal in the high court relies primarily on the Fourth Amendment.

In the Hernandez family’s case, Gupta asks whether a “formalist” or “functional” analysis applies to the extraterritorial application of the Fourth Amendment right to be free of unjustified lethal force.

Gupta argues that the decision in this case by the 5th U.S. Circuit Court of Appeals at New Orleans—that a non-U.S. citizen who stands just outside the U.S. border and is shot and killed by a law enforcement agent on U.S. soil may not assert a Fourth Amendment claim—is an extreme example of the formalism that the Supreme Court rejected in its 2008 decision in *Boumediene v. Bush.*

In *Boumediene,* a case about the rights of detainees of the U.S. Naval Station at Guantanamo Bay, Cuba, the Supreme Court held in an opinion by Justice Anthony M. Kennedy that the Constitution’s extraterritorial applications “turn on objective factors and practical concerns,” not a “formal sovereignty-based test.”

Gupta argues that the 5th Circuit mistakenly applied the reasoning of a four-justice plurality in a 1990 decision, *United States v. Verdugo-Urquidez,* which embraced a functional test that required sufficient connections to the United States for extraterritorial application of a U.S. constitutional right (in that case, the Fourth Amendment’s warrant requirement).

“We’re not arguing for a global Constitution or a global Fourth Amendment,” Gupta says. “It would not be anomalous to our traditions to apply the constitutional protections in this case.”

James E. Pfander, a law professor at Northwestern University Pritzker School of Law who co-wrote an amicus brief on the Hernandez family’s side, says that as in *Boumediene,* and unlike the situation in *Verdugo-Urquidez,* there does not appear to be conflict of laws between Mexico and the United States about this case.

“In other words, applying the U.S. Constitution here would not project U.S. law into Mexico in a way that would disrupt expectations there or interfere with any Mexican regulatory interests,” Pfander says.

The government of Mexico also filed a brief on the Hernandez family’s side, saying that it respects the right of the United States to interpret its own constitution. But the 5th Circuit’s decision in this case “effectively means the families of those killed may not obtain any remedy, no matter how unjustified the agents’ actions, if the victims happened to be on the Mexican side of the border when the agent opened fire.”

The DOJ investigated the border shooting and concluded in 2012 that there was insufficient evidence to support a criminal prosecution of Mesa. The federal government also declined Mexico’s request to extradite the agent for prosecution south of the border.

In an initial Supreme Court brief, the U.S. solicitor general’s office said that Hernandez’s death was “tragic,” and that the 5th Circuit correctly concluded that the Constitution did not protect the boy in these circumstances.

The solicitor general’s office argues that the family’s Fourth Amendment claim would fail even under the functionalist approach they urge on the court.

“Since *Boumediene,* other courts of appeals have recognized that *Verdugo-Urquidez* continues to govern the extraterritorial application of the Fourth Amendment,” the office said in its brief.

(The Department of Justice has filed criminal charges against a Border Patrol agent in another fatal cross-border shooting.)

**PROTECTION FOR THE PEOPLE**

The second question granted by the high court involves qualified immunity for Mesa. His lawyer, Ortega, argues that it is undisputed that the 15-year-old victim was a non-U.S. citizen without presence in, or substantial connection to, United States territory when he was killed.

The family “has failed to prove, at the time Agent Mesa found himself in the alleged incident, that any Fourth or Fifth Amendment rights were ‘clearly established’ to protect Hernandez,” Ortega says.

Gupta argues that Mesa learned only after the fact that Hernandez was a Mexican citizen with no connection to the United States. “Here, no reasonable officer in Mesa’s shoes would have thought it lawful to open fire on an unarmed civilian posing no threat to anyone,” Gupta says.

The final question in the case is one added by the Supreme Court when it granted review: whether the family’s claims may be asserted under *Bivens v. Six Unknown Named Agents,* the 1971 high court decision that found an implied cause of action for those who allege violations of certain constitutional rights by federal agents.

Pfander of Northwestern says that in recent years, the Supreme Court “has been quite reluctant to recognize ‘new’ rights to sue under *Bivens,* although there’s good reason to believe that Congress has offered some legislative support for more routine rights to sue” for constitutional violations under the Westfall Act of 1988.

This case comes with tragic facts; multiple, complex legal issues; and a charged backdrop against an often-tense U.S.-Mexico border.

At a minimum, Pfander says, “we may learn about the law that applies to interactions along the Mexican border. The officer here faces a challenge in arguing essentially that no law governs his actions, at least no law that might give rise to a civil action for damages. A similar argument for a law-free zone in Guantanamo Bay helped to persuade Justice Kennedy that the Constitution did indeed apply.”
The First Word
The opening statement is a good place to set yourself up to win the case—or lose it

By Allison Leotta

After months of preparation, you finally have the chance to try your case. The jurors follow you expectantly as you stand, take a deep breath and say—what?

What do you say? How should you say it? The answers to these questions are crucial to your entire case. A trial can be won or lost based on choices you make in your opening statement. It’s your first chance to frame the narrative, win the jurors’ sympathy and establish your own credibility.

Most of us know the basics: Tell a good story, weaving the evidence with themes that will resonate with the jurors’ common sense and life experience. But what’s the best way to do that? Bang on the table or shoot the breeze? Attack immediately or hold your fire? Most important, how do you connect with strangers who can’t talk back but will determine the fate of your case?

This topic is important enough to merit articles in two consecutive issues of the ABA Journal. And they follow a different format from a previous article I’ve written for the Journal about how to be an effective storyteller in court. I asked 11 of the most renowned trial lawyers in the United States to share their secrets to a great opening. Together, they provide an invaluable glimpse into the art of persuasion.

Here are their responses, in their own words, although slightly edited.

PHILIP BECK: BE A GOOD TEACHER

Philip S. Beck tries commercial cases throughout the United States. His subject matter includes product liability, audit malpractice, commercial disputes and intellectual property. His noncommercial cases include the 2000 presidential recount litigation in Florida, where he represented George W. Bush, and a wrongful imprisonment case in which he obtained a $15 million verdict for a man who served 15 years in prison for a murder he did not commit. He is at Bartlit Beck Herman Palenchar & Scott in Chicago.

Most trial lawyers agree an opening statement should tell a story that provides the jury with an emotionally satisfying framework for evaluating the evidence. But what if the jury isn’t ready to listen to your story? This happens to defense lawyers all the time. After the plaintiff’s lawyer finishes her opening, you may be looking at a jury box filled with stern faces and crossed arms.

In such a case, I structure my story to calm the jurors down and overcome their initial hostility before getting into the meat of the dispute. I do this by going into “teaching mode” early in the opening.

For example, in a pharmaceutical case, I start with the disease the drug was designed to cure—how it diminishes the quality of life. Next is how doctors have tried to treat the disease over the years. The idea is that, in medical science, each advance carries with it some risks. The most recent advance will be my client’s efforts to develop a safer and more effective treatment.

I purposely get a bit “sciencey” in this discussion. I want the jurors to feel good about themselves for understanding the medical issues and to feel good about me for helping them understand. If they view me as the teacher, they are more likely to believe my story on the more controversial aspect of the case.

Another benefit of this approach is it supplies a villain and a hero that every good story requires. The villain is the disease. The heroes are people like my client, who labored to defeat the villain. It is heartbreaking that the plaintiff is one of the few people who experienced the medicine’s warned-against side effect, but that is no reason to punish a company that has bettered all our lives.

Evan R. Chesler is chairman of Cravath, Swaine & Moore in New York City. He has broad experience in both trial and appellate courts, and has tried numerous cases in federal and state courts across the United States. He handles a wide variety of litigation, including antitrust, environmental, ERISA, general commercial, intellectual property, securities and shareholder derivative for clients across diverse industries.

The opening statement is your first opportunity to talk to the jury (other than voir dire in courts where lawyers are permitted to question prospective jurors). First impressions usually matter. You should be direct, clear and an advocate.
without over-advocating. Openings are called “statements” rather than “arguments” for a reason. To be sure, you should preview the evidence as you want the jury to see it. But you should not argue your case; there will be a time for that in your closing.

Perhaps most important, you should promise the jury what the evidence will and will not show. As my 98-year-old mother is fond of saying, “A promise made is a debt unpaid.” In this case, you had better pay your debt.

There is a virtue in creating a circle that consists of the opening, the evidence and the closing: Commit to what the evidence will show, show it and then drive home the promise you have kept.

That leads to two fundamental principles that, I believe, should be true of all opening statements. I have already addressed the first: You must deliver on your promises. The second is that you must deal effectively with the best evidence against you. That is often a difficult thing to do. It may be that less is more, and that the best course is to say nothing. But that can be very risky. It is usually better to put the evidence into the context in which you want the jury to consider and then discount it. In either event, what you say—or don’t say—about the other side’s evidence matters a lot.

Finally, openings should faithfully observe the two rules of all litigation: First, never sacrifice your credibility; and second, never violate rule No. 1.

PATRICK FITZGERALD: KNOW HOW YOU’LL CLOSE

Patrick Fitzgerald is a partner at Skadden, Arps, Slate, Meagher & Flom in Chicago. His practice focuses on internal investigations, government enforcement matters and civil litigation. He served as the U.S. attorney for the Northern District of Illinois.

To draft an opening statement that works best for a particular case, you need to first set out what you expect will be your final clinching argument to the jury. In other words, know how you will close first. Although the opening statement cannot itself take the form of an argument, the opening needs to present a narrative that sets up that final argument, while laying out a very small number of key affirmative themes and anticipating key counterarguments.

The opening needs to be simple and understandable to a person new to the case. Yet it needs to stand the test of time throughout the trial, where nothing said at the outset will later be contradicted, and everything promised will be delivered.

The hardest part of the opening statement to write is often what I call the “nose cone”—those first few sentences that frame the case for the jury. In my experience, that is the part most often rewritten. In fact, the best opening lines are often borrowed from a colleague who hears a dry run of your opening and suggests a different—and better—opening line. For this reason and many others, it is important to do dry runs of your opening statements for people not steeped in the facts of the case.

The opening statement should be structured like a newspaper story. The nose cone is the headline that sums up the story, while the rest of the opening lays out the narrative in more detail, similar to the body of a newspaper article.

Finally, never set the bar too high. The evidence rarely comes in as well as you would like. As in many aspects of life, you would much rather promise less and deliver more than the other way around.

LYNN HAALAND: BE A LIKABLE VERSION OF YOURSELF

Lynn E. Haaland—senior vice president, chief compliance and ethics officer at PepsiCo in Purchase, New York—previously served as an assistant U.S. attorney in both the District of Columbia and the Eastern District of Virginia. In the Eastern District, she was deputy chief of the National Security and International Crime Unit, whose cases included terrorism, international drug trafficking, sanctions and cybersecurity.

A coach once told me: “You can’t win a race at the start, but you can lose it.” Something similar might be said for the opening statement of a trial: You can’t win the case in your opening, but if you tell the story clearly and credibly, you can immediately get out ahead.

Tell the story of what happened with facts, not argument. While always being respectful of everyone in the courtroom, don’t be overly formal. People often advise a newer lawyer: “Be yourself.” But as you get more experienced, you realize that means you should communicate in an authentic, clear way that works for you, not that you put your whole self out there.

Try to be a straightforward, likable version of yourself. Talk to the jury as if you were speaking to a neighbor or a family member, and avoid legalese, jargon or language that is unnecessarily technical: For a prosecutor, for example,
Practice

no “police speak” such as “He exited the vehicle.”

Be careful about themes: “This is a case about greed.” While themes can be helpful, sometimes the case is just about the facts—someone hit someone or someone sold drugs—and if you force a theme or state it too many times, it will sound corny.

Finally, especially if you represent the government or the plaintiff, don’t overreach or overpromise. You will lose credibility and possibly lose the race from the start.

HALLIE LEVIN: TALK TO THE JURORS, NOT AT THEM

Hallie B. Levin is a partner in the business trial group at Wilmer Cutler Pickering Hale and Dorr in New York City. She handles a broad range of matters, including complex contractual disputes, business torts, sensitive employment matters, intellectual property and trade secrets, and internal investigations.

Here are three tips that I always bear in mind as I’m crafting (and relentlessly practicing) opening statements:

1. The opening statement is the jurors’ introduction to the facts of the case as you will be framing them and also to you as the narrator of those facts. It’s crucial, from that first moment, to convey to the jurors that you’re an honest broker, a trustworthy guide to the evidence that will be shown to them, and—most important—that you believe in what you are telling them.

2. Take the sting out of the worst evidence in your case. Do it at the start. Don’t give your adversary the opportunity to undermine your credibility with the jurors by (accurately) being able to accuse you of neglecting to tell them the most damning facts for your client.

3. Turn off the PowerPoint, step away from the podium, look each and every juror in the eye. Repeat. You will never establish a relationship of trust and connectivity with jurors if you’re talking at them, not to them.

Allison Leotta is a former federal prosecutor in Washington, D.C., and the author of five novels.

Editor’s note: A second group of trial lawyers will share their secrets about effective opening statements in the March issue of the ABA Journal.

Mandate the Update

Florida is the first state to require lawyers to include technology training in their menu of CLE courses By Victor Li

One of the most enduring legacies of the ABA Commission on Ethics 20/20 boils down to a nine-word phrase that was added to the ABA Model Rules of Professional Conduct.

The phrase was added at the recommendation of the commission, which worked from 2009 to 2013 to conduct an in-depth look at the impact of globalization and technology on the Model Rules. The House of Delegates added those words to Rule 1.1, which states: “A lawyer shall provide competent representation to a client.”

But the change was made in the comment to the black-letter rule. The comment states that, to maintain competence, a lawyer should keep abreast of changes in the law and its practice—here come the nine words—“including the benefits and risks associated with relevant technology.”

The states are embracing this change in the meaning of competence with increasing frequency, and in a few cases, are even going beyond the Model Rules. (The Model Rules are the primary basis for binding ethics rules in almost every state, although California sets forth its rules in a different format from the Model Rules.)

In late September, Florida became the 25th state to adopt the revised version of ABA Model Rule 1.1. The amendment to Rule 4-1.1 of the Rules Regulating the Florida Bar also provides that competent representation may involve a lawyer’s association with or retention of a nonlawyer adviser with established technological competence.

Florida, however, decided to go one step further and require its lawyers to take at least three hours of CLE in an approved technology program as part of the 33 total hours of CLE they must take over a three-year period. The amendments were adopted by the Florida Supreme Court.

“Once we made the observation that we needed to get lawyers educated about technology, it was not as tough a sell as we thought it would be,” says John M. Stewart, a partner at Rossway Swan Tierney Barry Lacey & Oliver in Vero Beach, Florida, who helped lead the push for mandatory technology CLE. “We got almost no pushback from the lawyer population. I think they all recognized that tech education in the legal setting is good for their practices.”

THE SEARCH FOR PROFICIENCY

Stewart is unaware of other states that require lawyers to take technology training to meet their CLE obligations. That’s too bad, says D. Casey Flaherty, founder of Legal Technology Assessment, a service for law firms that works in conjunction with the Institute on Law Practice Technology and Innovation at Suffolk University Law School in Boston.
On pre-assessment surveys, about 80 percent of people don’t think they need to or should have to go to training. But according to Flaherty, only 5 percent of users who take the assessments—which cover Microsoft Word, Microsoft Excel and Adobe Acrobat—pass the Word portion on their first attempt.

“We’ve had thousands of people go through Word. Only a fraction of that have taken the Excel and PDF modules. ... People struggle the most with Excel,” Flaherty says. “I always tell people: ‘Don’t worry about your score the first time—worry about it after you take the training.’ Everyone passes after they go through the training.”

On post-assessment surveys, more than 95 percent of people who complete the training say it was worth their time and has helped their day-to-day delivery of legal services, Flaherty says.

These stark numbers tell Flaherty that mandatory CLE is necessary if the legal industry is ever going to reach tech proficiency. “I would prefer to live in a world where there are no mandatory CLEs, but I think people need that impetus,” he says.

Bryan Sims, a member of the Standing Committee on Legal Technology at the Illinois State Bar Association, says it’s important for lawyers to take CLE that would enhance their technological knowledge. But he doesn’t think lawyers should be subject to specific requirements.

“I don’t like to see CLE requirements broken down into a number of different areas where lawyers have to get credits as if they were trying to satisfy a major in college,” says Sims, a Naperville, Illinois, attorney who is a past chair of the committee. “I would like to think we can trust lawyers to take CLEs in areas where they need their education.”

Instead, the Illinois bar focuses more on helping lawyers with their technological needs as they come up, Sims says. “Most of the time, the questions I get are from people who want to do something specific and are trying to solve that with a piece of technology they already have or are looking to acquire,” he says.

THE STRUGGLE TO CATCH UP

Katherine Suchocki, director of law practice management for the New York State Bar Association, says she is unaware of any movement within the state to make tech training a mandatory CLE requirement. Like Sims, she says she trusts lawyers to know what courses they should take and points out that New York’s law practice management CLEs often have a technology component to them.

The business side of practicing law in 2017 goes hand in hand with technology, Suchocki says. “They aren’t required, but we’ve seen more people attending these programs. Lawyers know they can’t be behind the ball anymore when it comes to technology.”

To that end, she says the New York bar focuses on helping lawyers be more efficient and works with outside companies to give them the tools they need. The bar has a partnership with Clio, which provides cloud-based law practice management software, and frequently has consultants provide tutorials on programs such as Word. “We recently introduced an estate planning document automation tool that goes beyond the HotDoc model,” Suchocki says. “It concentrates less on style and more on substance, freeing lawyers up to concentrate on lawyering.”

Michigan, on the other hand, is not a mandatory CLE state and has not yet adopted the revised Model Rule 1.1. But Janet K. Welch, executive director of the State Bar of Michigan, says the bar has been actively promoting the use of technology by emphasizing the benefits clients derive from it.

She says, for example, that the bar has worked with CloudLaw Inc. and the state bar groups in Ohio, Illinois and Indiana to create Zeekbeek, an online legal marketplace with searchable directories, verified client reviews and disciplinary history. “A lot of our members are struggling to catch up,” Welch says. “Some of them might not even be aware of how technology can help run their practice efficiently.”
Take a Swing
How lawyers can improve their litigation scores by heeding lessons from legendary golf instructor Harvey Penick  By Bryan A. Garner

Years ago when I was playing competitive golf in junior tournaments throughout Texas and Oklahoma, my coach was the great Harvey Penick of Austin, Texas. He was the gentlest imaginable coach, always saying, “Why don’t you try this?” or “Why don’t you try that?” He later became internationally famous as a golf teacher—and as the author of Harvey Penick’s Little Red Book: Lessons and Teachings from a Lifetime in Golf. I remember him fondly, especially for his gentle suggestions to try this or try that.

I often use Penick’s approach in my teaching of legal writing. To litigators who draft pleadings, I’ll say: “Why don’t you try saying coolly and calmly on the first page why you should win?” Then I’ll add: “Please omit any implication that your adversary is a duncehead or a wretch. Just use the logic of your argument.”

Let’s say, for example, that Ralph has written an appellate brief that contains a section that begins this way, with a lot of carping ad hominem attacks:

Mendez Corp. (“Mendez”) makes meritless waiver claims. It purports to claim, for example, that Pinker Systems (“Pinker”) did not disclose the rulings of the court that they lost on. However, Mendez blithely ignores the filings that deal with the appeal on the merits, where Pinker complained about mistakes below. Paraphrasing Mark Twain, Mendez’s reports of Pinker’s alleged waiver have been greatly exaggerated. For example, Mendez erroneously complains that appellants did not challenge the Statement of Decision. Mendez’s claim is so wrong on so many levels, as demonstrated below.

This is an incompetent argument—although I wouldn’t say that directly to Ralph. In the same way, if Penick saw a horrible golf swing, he wouldn’t denigrate it. He’d try to help in a considerate yet persuasive way.

Ralph’s opener has serious problems. To begin with, it’s incoherable, talking about things that assume prior knowledge. It puts off discussion of the core points of the argument (“as demonstrated below”). It has all sorts of unearned characterizations of the opposing side (“meritless,” “blithely ignores,” “erroneously complains” and “wrong on so many levels”). It assumes that the reader already agrees with the writer—almost always a fatal assumption. The Twain allusion, about which Ralph’s colleague Sarah has a different problem. In her motion for partial summary judgment, she’s peppering her opener—the most valuable turf in a brief—with meaningless verbiage. Here’s how she starts:

Defendants George Rudcliffe Whitney d/b/a Whitney and Co. and Whitney Art Restorations (hereinafter “Whitney”), file this Renewed No-Evidence and Traditional Motion for Partial Summary Judgment Regarding Plaintiff’s Claims for Tortious Interference, Conversion and Breach of Fiduciary Duty, and would respectfully show unto this Honorable Court as follows...

I ask her why she begins this way. She replies: “That’s the way I begin all my court papers. Everyone does it.”

“Do you think it’s effective?”

“It must be. That’s why people do it. You’ve got to show ‘Whitney’ is short for all the defendants and explain what the court paper is about.”

A SMOOTHER SHOT
In coaching Ralph, I encourage him to explain in the opening paragraph why his client should prevail. At first, this flusters him because he insists that he has already done so. I ask him to read the paragraph through the eyes of a neutral party. He begins to see that it doesn’t make much sense to a stranger, but he rationalizes this potential weakness on grounds that the judge will be familiar enough with the facts after he or she reads a bit more to realize that Ralph is right. I tell him he has 15 minutes to write an opener that calmly explains why he wins without disparaging the opponent in any way.

When I check back, Ralph has composed both himself and a good substitute opener:

Pinker has done everything necessary to preserve error in this appeal. Although Mendez asserts that Pinker has waived this appeal by not objecting to the proposed statement of decision and not moving for a new trial, the record belies these assertions. Pinker repeatedly objected to the statement (pages 848, 851 and 853 of the trial transcript), moved for a new trial (page 857), and even moved for a new and different judgment (page 904). The truth is easily verifiable in the record that Pinker has filed with the court.

This concrete paragraph is far more damaging to Ralph’s adversary than the earlier version is. It successfully impeaches the other side, and it does so confidently.

Ralph’s colleague Sarah has a different problem. In her motion for partial summary judgment, she’s peppering her opener—the most valuable turf in a brief—with meaningless verbiage. Here’s how she starts:

Plaintiff’s Claims for Tortious Interference, Conversion and Breach of Fiduciary Duty, and would respectfully show unto this Honorable Court as follows...

I ask her why she begins this way. She replies: “That’s the way I write all my court papers. Everyone does it.”

“Do you think it’s effective?”

“Why don’t you try explaining in your opening paragraph why you’re entitled to summary judgment on some of the claims?”

“In one paragraph?”

“Yes. Can you try that for me?”

“I’m not sure. There are so many different claims.”

“How many?”

Long pause. “I guess there are three. But how could I do that?”

“Figure out what the elements are for each of those claims and then point out the elements, for each claim, on which the plaintiff falls short.”

“That sounds impossible to do in one paragraph.”
“I’d like you to try. I’ll be back in 15 minutes. By the way, the plaintiff has a name. What is it?”
“Bergdorf.”
“Please use that, but don’t disparage Bergdorf in any way. Just say coolly why you win.”

WIN ON PAGE 1
Sarah is really frustrated. She wants to throw up her hands. So I tell her we’ll write the paragraph together. I ask her to list the elements for each claim—tortious interference with a contract, conversion and breach of fiduciary duty.

In 15 minutes, she has her list, and we start writing. We give the motion a new and shorter title: “The Whitney Defendants’ Renewed Motion for Partial Summary Judgment on Tortious Interference, Conversion and Breach of Fiduciary Duty.” Not beautiful but businesslike. We don’t repeat it in the opening, which goes like this:

Bergdorf has no defense for refusing to pay Whitney for its services. (“Whitney” here refers to all three defendants, whose interests are aligned.) Each of the three claims addressed in this motion falls short of the required elements. With the tortious-interference claim, Bergdorf cannot marshal any evidence on three of the four elements. With the breach-of-fiduciary-duty claim, Bergdorf cannot show that he and Whitney had any kind of fiduciary relationship. And the conversion claim fails for two reasons: (1) There is no evidence that Bergdorf had any proprietary interest in tangible or intangible property. (2) There is no evidence that any allegedly proprietary information was merged into a document that was converted by Whitney.

Sarah asks, “Why is the tortious-interference point written so abstractly, without listing the elements?”
“Only because it would bog down the opening paragraph. You want to keep things moving. Besides, the judge will now be curious to see all four elements and to scrutinize the three that you’re saying haven’t been met.”
“That’s good.”
“But we can’t do that all the way through the opener. You’ll need concreteness to be credible. We can be more concrete on the second and third claims while keeping the prose moving at a clip.”
“I like it.”
“Try it every time you write a court paper. Try winning on page 1. The middle then becomes your proof—almost like a geometric proof. And you’re far more believable when you don’t vilify your opponent.”

It only recently occurred to me how much Penick’s methods had influenced me in my teaching. My last lesson with him was 40 years ago, about the time I was deciding not to pursue a career in golf.

His books with Bud Shrake brim with wisdom, and they’re a gift to the world. They’re said to be the best-selling sports books ever published. His second book, And If You Play Golf, You’re My Friend, was published in 1993. Three of his lessons in this book bear on Ralph’s and Sarah’s writing, and probably yours:
“Try and talk plain.”
“Practically all of the awkwardness and odd ways people have are an outgrowth of misunderstanding some of the few simple fundamentals.”
“Be brave if you lose and meek if you win.”
And Penick said something else, too: “I never know so much that I can’t learn more.”
The highest-performing law firms of the 21st century will distinguish themselves along two dimensions. The first is the client-facing dimension: Leading law firms will focus on delivering effortless experiences that reduce the amount of friction involved in accessing legal services.

The second dimension is inward-facing, where best-in-class firms will continuously monitor and benchmark key performance indicators against industry standards and optimize internal processes to achieve operational excellence.

**TOP LAW FIRMS WILL PROVIDE EFFORTLESS EXPERIENCE AND KEY IN ON PERFORMANCE DATA**

BY JACK NEWTON
From the client perspective, these firms will deliver a superior, technology-enabled experience that is a significant competitive differentiator. Internally, these firms are well-oiled machines that leverage data insights to continuously improve their processes.

**EXPERIENCING THE EFFORT**

In 2010, CEB Inc., a global technology company that analyzes and applies business practices for corporate clients, delivered a bombshell: In a study of more than 75,000 consumers, it found a very weak correlation between customer satisfaction and long-term loyalty.

In particular, it found that there were rapidly diminishing returns in long-term loyalty once a threshold of meeting expectations had been reached. The incremental increase in loyalty because of exceeding expectations proved to be vanishingly small.

The CEB findings contradicted deep-seated conventional wisdom that delivering exceptional customer experiences correlated with increased loyalty. If we can’t increase loyalty by under-promising and over-delivering, what drives it?

CEB found that modern consumers are not seeking exceptional customer experiences. Instead, they prefer effortless experiences.

For examples of a smooth experience, we can look to innovators of the 21st century. These companies have disrupted deep-pocketed incumbents by delivering truly effortless experiences.

Uber has disrupted a long-established industry by simply leveraging on-demand labor to make itself “everyone’s private driver” and optimized every step of the purchasing process to be as effortless as possible.

CEB also has found that consumers are increasingly demanding that their service delivery be shifted from traditional platforms, such as telephone, to the web, with more than 50 percent of respondents ages 21 to 50 indicating they prefer web-based interactions to telephone-based interactions.

For law firms, these findings deliver a clear message: The clients of our shared future will not place a premium on a high-end, marble-lined office lobby. They don’t care about the fancy holiday gift basket. They will want to obtain legal advice as seamlessly as possible through channels that involve as little friction as possible. Clients prefer legal services delivered through cloud storage—via Dropbox or Google Drive, for example—instead of those delivered in brick-and-mortar offices and FedEx packages.

To win in the 21st century, take lessons from Uber and Amazon: Deliver an effortless experience.

**WINNING WITH DATA**

Externally, the winning law firms of the 21st century will prevail by delivering effortless client experiences. Internally, however, these firms will have to achieve operational excellence by monitoring and optimizing a set of key performance indicators that will drive profitability. In addition, the emerging set of benchmark data sources, including the 2016 Clio Legal Trends Report, will allow law firms to compare themselves against national and regional standards.

Traditional benchmark programs are based on self-reported data, which can be unreliable. Furthermore, their surveys may be based on relatively small sample sizes, which further limit the capability to generalize the survey findings.

Survey results, like those from Clio and Wolters Kluwer’s TyMetrix Legal Analytics, are based on the real-world billing behavior of legal professionals—40,000 of them were surveyed for the Clio report. The Legal Trends Report surfaces a number of devastating conclusions that relate to the typical law firm’s productivity:

**The law firm funnel**—Many businesses use the idea of a funnel to represent effectiveness, in which a number of inputs at the top of the funnel generate a commensurate amount of value at the bottom, according to the report.

Take a retailer: The top of the funnel may be the number of visitors (foot traffic) to the retailer’s store in a day. The bottom of the funnel is the dollar value of goods sold in a day. To improve its business, the retailer will consider ways to increase volume at the top (increasing foot traffic) and maximize output at the bottom (for example, using a sale or special offer to increase the number of visitors who convert to customers).

Lawyers who bill on an hourly basis, however, have a fixed top-of-funnel: the number of hours in a day. Whether you’re working a sane eight-hour workday or an 18-hour marathoner, you can’t find more than 24 hours in a day.

The lawyer’s funnel is likewise unforgiving: We can convert a given number of workday hours to billable time (utilization rate). Only a subset of those hours convert to actual billed time after discounting and write-offs (realization rate). An even smaller
number become collected revenue when factoring in bad debts (collection rate).

Understanding the funnel, and where it can be optimized will unlock growth for the leading 21st-century law firms.

**Utilization rate**—The utilization rate answers a question: “Of your available workday hours, how many are billable?” Nonbillable work typically includes all administrative, overhead and marketing-related activities, according to the report.

*Legal Trends Report* data shows that the average utilization rate in 2015 was 28 percent. Put another way, out of a typical eight-hour workday, lawyers only bill 2.2 hours to clients.

If we look at utilization rates across firms of different sizes, we find several interesting data insights. First of all, solos have the lowest utilization rate (22 percent), while midsize firms of 12 lawyers have a utilization rate more than twice as high (50 percent). Utilization rates plateau for firms with four to nine lawyers, in which the rates hover between 35 and 40 percent.

**Realization rate**—The realization rate represents the number of hours billed to clients minus discounting. The average realization rate for lawyers in 2015 was 81 percent.

**Collection rate**—The final stage of the lawyer’s funnel is the collection stage, which represents the total amount of collected revenue compared to the number of billed hours.

The collection rate shows the amount of revenue collected after factoring in bad debt and other sources of lost revenue. The average 2015 collection rate was 86 percent.

**Credit card payments**—In assessing collection rates, the *Legal Trends Report* also evaluated the impact of collecting credit card payments and observed a 35 percent reduction in average payment times compared to check-based payments.

### FIGHTING THE FUNNEL

The *Legal Trends Report* data paints a bleak picture: Out of an eight-hour workday, the average firm collects payment on only 1.5 hours of billable time. These unit economics would be devastating to almost any industry, and they help explain why—despite charging an average of $232 per billable hour—the average small-to-midsized firm struggles to make ends meet.

This data might seem depressing on the surface, but it holds the key for law firms that hope to break apart from the pack.

By closely monitoring and improving key performance indicators such as the utilization rate, realization rate and collection rate, the leading law firms will realize a massive increase in productivity against their peer set.

For example, take the average utilization rate. If a firm implements a set of efficiency and scale improvements to take the utilization rate from 28 to 40 percent, it will have increased its overall revenue by 43 percent. This kind of efficiency gain might be derived by increasing the ratio of support staff to lawyers in the firm.

Combined with other efforts, such as reducing write-downs and increasing collections by accepting credit cards, the typical firm might be able to increase revenue by another 20 to 40 percent. These kinds of iterative improvements compound on one another. Although each gain might seem incremental, in totality, they can transform a law firm from a money loser to a winner.

The winning law firms of the future will take a page from the disruptor’s playbook: Deliver truly effortless customer experiences while advancing a ruthlessly data-driven culture of continuous improvement internally. Combined, these two forces will reshape the face of legal services.

Jack Newton is the founder and CEO of Clio, the legal cloud computing firm. His business, founded in 2008, is part of the new ABA Blueprint program, which provides products and services to solo and small law firms.
Before he became a trial lawyer (and an advocate on behalf of the wrongfully convicted), Sean MacDonald in Toronto worked as a private investigator. His experiences on both sides of the coin taught him all too well how time-consuming and expensive it could be to locate eyewitnesses months or years after the fact.

Then he saw a demo of LifeRaft, a cloud-based program that uses geolocation technology and data mining to monitor social media. It can re-create a scene based on public posts on social media. LifeRaft was marketed primarily toward law enforcement officials to maintain public safety and monitor potential threats. But MacDonald saw other uses. “When I first saw it, it struck me like a bolt of lightning,” says MacDonald, a solo practitioner who sits on the board of directors at Innocence Canada. “I knew this would be unbelievably useful for lawyers preparing for trial.”

Social media contains a potential treasure trove of information. It seems people’s first instinct nowadays is to reach for the smartphone while they witness a fight, traffic crash or crime, then log on to spill the details. The problem was trying to comb through all the selfies, pet portraits and other irrelevant information in a quick, cost-effective way.

**TIME MACHINE**

With TrialDrone, which launched in late February 2016, MacDonald thinks lawyers now have the ability to go back in time and see who witnessed an event and what he or she said about it. TrialDrone, a sibling company to LifeRaft that uses the same software, claims to be able to re-create an event by identifying everyone who posts publicly to social media at a given time and location.

If an attorney wants to see how many people within a mile of the Boston Marathon bombing site posted to social media immediately before, during and after the event, the lawyer can search for that in TrialDrone.

TrialDrone can help lawyers prepare for trial in other ways, too. MacDonald says users can run a report on a specific witness to see what the witness posted and determine whether the posts are consistent with evidence provided at trial. Users even can run a link analysis on a particular witness to see his or her open-source social media contacts and who they’re connected with and speaking to. “There are literally tens—if not hundreds—of billions of open social media posts out there,” MacDonald says.

MacDonald is charging $325 to $625 per report—a fraction of what investigators usually charge, he says.

For one litigator, TrialDrone already is making a difference. Jonathan Halperin, an attorney at the Halperin Law Center in Glen Allen, Virginia, has handled numerous high-profile matters and used TrialDrone in several cases.

He used to handle Washington, D.C., Metro cases—"train derailments, fires inside the train and things like that," Halperin says. “This technology is vital for those kinds of cases because you’ll have a bunch of people seeing it happen in real time and taking pictures and tweeting about it.”

Halperin says before he used TrialDrone, the process of social media intelligence was extremely time-consuming and not comprehensive. “We’d have to ask people for their social media posts, and the only way you get that is through discovery,” he says. “We had to chase everything down piece by piece.”

Meanwhile, MacDonald, who says he’s talking to several big firms about adopting TrialDrone, isn’t concerned that publicizing it will cause people to stop posting publicly. According to statistics website Statista, Twitter alone had about 317 million users by the third quarter of 2016. “I don’t think we’re in any way going to stop that tide,” he says.

Law Scribbler Online: Victor Li shares his reporter’s notebook at ABAJournal.com/lawbythenumbers and on Twitter at @LawScribbler.
Mixed martial arts is a sport in a class of its own. The excitement during matches, the crowd’s energy and the athletes’ fierceness grabbed Erik Magraken’s attention. The Canadian attorney’s love for the sport led him to get as close to the ring as possible by becoming an MMA judge.

“There is something both gritty and pure” about MMA bouts, says Magraken, who practices combative sports regulation and personal injury law at MacIsaac & Co. in Victoria, British Columbia. “These sports do resonate with many people.”

MMA is one of the fastest-growing niche sports in North America. In July 2016, the Ultimate Fighting Championship, the association that owns and promotes MMA, announced its sale to a collection of private equity groups for $4 billion. The sale marks a new chapter in MMA fighting and opens the door for lawyers to enter the ring of combat sports law.

Magraken, a 2002 graduate of the Peter A. Allard School of Law at the University of British Columbia, noticed about five years ago that changes were being made to the province’s criminal code to legalize combat sports.

“I’ve enjoyed combative sports most of my life,” Magraken says. “I decided to become fluent in the areas of combative sports regulation to assist stakeholders as legal issues arose.”

He used his previous knowledge of combat sports and involvement in MMA to stand out from the crowd. He started his Combat Sports Law blog in 2012 and became an MMA judge in 2014.

“It is a good idea to become involved with the sports themselves,” he says. “Having a background in the regulatory landscape helps. Having hands-on experience and gaining an understanding of how these sports operate, how they are regulated and the nuts and bolts of how promoters put on shows are valuable tools.”

IN PURSUIT OF BETTER CONDITIONS

Combat sports law involves contract negotiation and regulatory law. Magraken’s blog covers recent health issues, particularly the risks of brain injuries and the legal issues related to contested fights.

“The world of combative sports has a diverse regulatory framework with laws changing from state to state, province to province and, in some cases, city to city,” Magraken says. “The projects I’ve enjoyed working on most are contractual negotiations and delving into various, often poorly worded or inconsistently applied rules and regulations.”

The biggest legal issue that MMA faces is the push to improve conditions for the fighters. Phoenix personal injury lawyer Rob Maysey is leading the movement through his

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**LEVERAGE STILL RULES**

**THERE’S ONE DIFFERENCE BETWEEN LAW FIRM “HAVES” AND “HAVE-NOTS”**

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**GROWTH FASTER THAN 2.7%**

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**THOMSON REUTERS PEER MONITOR**, in its 2016 Law Firm Leaders Forum Special Report, used compound annual growth-rate statistics to divide large law firms into “haves”—showing 10 percent or more CAGR growth between 2013 and 2015, and “have-nots,” which showed 0 percent or less. CAGR is a measure of growth over multiple time periods.

**ONE GROWTH FACTOR WAS SURPRISING:** Large firms with lower fee increases, averaging around 2.4 percent, grew revenue faster than 2.7 percent, while those with higher fee increases, averaging around 3.2 percent, grew slower. And one truth remains true—firms with fewer equity partners than associates were haves, while those with more partners than associates were among the have-nots.

**SOURCE:** 2016 LAW FIRM LEADERS FORUM SPECIAL REPORT. MORE INFORMATION AT LEGALEXECUTIVEINSTITUTE.COM.
creation of the Mixed Martial Arts Fighters Association.
Maysey has been an advocate for MMA fighters for more than 10 years, and he is a supporter of extending the Muhammad Ali Boxing Reform Act, a 1999 federal statute that protects the rights of boxers, to cover MMA fighters.

Maysey, a partner at Warner Angle Hallam Jackson & Formanek, says a bill to extend the Ali Act still is pending in Congress. “We’re hoping for progress,” he says. “We’re also working with MMAFA members to push for weight classes, so that fighters can be protected.”

THEY’RE NOT TROPHIES
Another group is endeavoring to rival the MMAFA. The Professional Fighters Association, founded last year after the $4 billion UFC sale, aims to unionize fighters to bargain for more health coverage and profit sharing.

“Anytime that fighters want to come together, we support them,” says Mike Mazzulli, president of the Association of Boxing Commissioners, an organization that also handles MMA fighting. “We understand the need to protect the fighters’ safety.

“There’s a very short window for fighters to go out there and support their family,” Mazzulli says. “It’s great to have managers and promoters in the business, but it’s the fighters who put their life on the line in the ring.”

Although it’s unclear whether MMA will follow the path of other professional sports leagues, Magraken says he will continue in his passion for combat sports in his legal practice and close to the ring.

“Being passionate and involved are key,” he says. “From there, knowledge builds over time. Sitting ringside is an opportunity I am privileged to be able to enjoy.”

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**DOES YOUR CASE MANAGEMENT SOFTWARE HAVE...**

- **Legendary, US-based Support?**
  - No ➔ Yes

- **Sophisticated Report Generation?**
  - Yes ➔ No

- **Case Checklists Tailored to Match Your Workflow?**
  - No ➔ Yes

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FOR MORE GOOD

SOME LAW FIRMS FIND OTHER WAYS TO PROVIDE SERVICE TO SOCIETY

BY JULIANNE HILL
a beautiful Saturday morning last May, a group of women spent the day with students planting and repairing yellow and red container gardens in a lot shared by Public School 7-Samuel Stern School and Global Technology Preparatory School in East Harlem. Some of them filled the 2,000 square feet of planters with vegetable seedlings. Others painted a bright and cheery mural on the garden wall, while others built a grape arbor.

The work at 120th Street and Lexington Avenue, an area with limited access to fresh produce, supports Edible Schoolyard NYC, a nonprofit organization that aims to teach public school kids how to grow, cook and eat nutritious foods by integrating gardening and kitchen classes throughout the school day.

The women, attorneys from Morrison & Foerster and Morgan Stanley, are giving back—but not in the traditional sense of pro bono legal work.

“It was a wonderful day, a charity day, a community service day,” says Jamie A. Levitt, chair of the MoFo Foundation, which celebrated its 30th anniversary last year. “But it was also funded with a donation to Edible Schoolyard by our firm’s foundation.”

This program—a combination of financial donations, hands-on community volunteerism and coordinating good works with clients—is emblematic of a shift in how lawyers are thinking about working for good.

Evolving Ways of Giving Back

Pro bono translates as “for good.” The American Bar Association suggests that lawyers contribute 50 hours of unpaid legal services per year as a professional responsibility to give back. Traditionally, that work was conducted on a one-on-one basis, with lawyers looking for people and causes they could help with legal work.

But how lawyers work for good now manifests in many ways, including financial donations through firm
foundations, engaging employees in nonlegal service work and organizing opportunities with in-house counsel. And in some cases, working for good enhances the "double bottom line" of firms by working with altruistic businesses and organizations but charging for their services. These charitable programs are not meant to replace pro bono service but often direct law firm donations to specific needs.

"The ABA has a definition of pro bono, and it's legal work," says Mary K. Ryan, an adviser and former chair of the ABA Standing Committee on Pro Bono and Public Service. "I've been practicing law for 35 years, and I have been hearing more about community service efforts lately—but it is not pro bono in the sense of Rule 6.1."

Still, these "not pro bono, but for good" efforts by law firms are growing. "Not all these ways of doing good are happening at all firms, but a combination of them is happening at an increasing number of firms," says Scott M. Curran, founder of Beyond Advisers, which advises law firms, altruistic businesses and nonprofits.

As technology makes the world increasingly interconnected, awareness of the world's social ills grows. "With a touch of your phone, you can see all the crises around the world and all the people in need," Curran says. The need for donations of time and resources has grown. In recent years, many nonprofits have shut down or merged, says Marc J. Lane, president of the Law Offices of Marc J. Lane in Chicago.

"Philanthropy is overtaxed, chased by too many nonprofits," says Lane, who teaches social enterprise at Northwestern University Pritzker School of Law. "The 50 million people living below the poverty line in the U.S. can't count on government support. Government grants and contracts are unreliable and slow paying. Philanthropy is changing and morphing, and the law is trying to catch up and doing things in different ways."

FIRM FOUNDATIONS
Some law firms put their money where their hearts are by setting up their own foundations that financially contribute to their altruistic missions. Greenberg Traurig
topped Law360’s list of the top 10 charitable law firms during 2014, donating more than $7 million. Sidley Austin ranked second with $6.5 million, and MoFo was third with $4.4 million in giving.

Funding for the MoFo Foundation comes from mandatory donations from partners plus voluntary contributions by associates and staff. As one of the first law-firm-affiliated charities, the foundation has donated about $48 million since its inception. Contributions range from $14 to $322,000.

“The whole mission of the foundation is to enable the people at MoFo to focus their charitable giving,” Levitt adds. “Maybe they are already connected to an organization and volunteering there.”

Every year, each office is given a portion of the collected funds, prorated by the size of that partnership, Levitt says. That office’s staff suggests meaningful local charities: The Los Angeles office donates to the Children’s Burn Foundation in Sherman Oaks, California, while the U.K. office gives to the Richard House Children’s Hospice in London.

Proposed grantees are vetted to ensure they are 501(c)(3) charities, do not have discriminatory practices and fall in line with the MoFo mission. “As long as it fits, it is funded,” says Levitt, who also co-chairs the firm’s commercial litigation and trial group.

Grant recipients often focus on work to help children and youths, which received $1.6 million of the foundation’s 2015 donations. A similar amount was awarded in 2016.

When a natural disaster strikes, such as Hurricane Katrina or the Fukushima tsunami in Japan, the foundation’s board matches employee donations.

“We will pick the most useful organizations that can best use the funds,” Levitt says. In 2015, the foundation matched more than $100,000 in gifts.

**MORALE BOOSTER**

Every few years, the foundation gives special project grants to support or help create new nonprofits geared toward disadvantaged children. In 2012, the foundation gave $250,000 to iMentor in New York City to help launch its College Ready Initiative, which encourages high school kids from low-income communities to become first-generation college students.

Greenberg Traurig has two separate philanthropic
foundations funded by shareholder and attorney donations. In 2015, the firm hosted meetings with partners in every U.S. office and discussed increasing donations.

"And that's paid off," says Brian L. Duffy, the firm's Denver-based CEO. "Part of our core values is giving back to the community with our time and treasure. ... It improves the morale of our employees and the quality of our communities."

Many lawyers in larger firms spend their days working on financially driven clients, Duffy says. "But we want to feel good about what we're doing when we get up in the morning," he says.

Legal aid and education are common focal points for money and manpower. "We think pro bono hours and philanthropic financial support work great together," Duffy says.

The Greenberg Traurig Holly Skolnick Fellowship Foundation is dedicated to funding two-year fellowships for young lawyers via Equal Justice Works, a nonprofit that supports aspiring public interest lawyers.

"If you take a good associate who is working 100 hours a year on a pro bono project, you can make an impact—somewhat," Duffy says. "But if you take a full-time lawyer working 2,000 hours on a single subject, they will have a more significant impact."

Each year, potential fellows submit proposals in a very competitive process, says Mia Sussman, Equal Justice Works fellowship director.

Sponsors such as the Skolnick foundation, Sidley Austin and Morrison & Foerster pick fellows to fund. Greenberg Traurig has sponsored the most fellows of any firm, supporting 142 since 1999.

Current fellow Kwame Akosah, a 2015 Fordham University School of Law graduate working through the Brennan Center for Justice in New York City, aims to ease restrictions on restoring voting rights for those who have left prison.

"I can barely describe how important this fellowship is to me," says Akosah, whose internships at the American Civil Liberties Union and the New York Mayor's Office also focused on voting rights. "I often idolized the Brennan Center and their clout and importance, and I hoped one day I would find my way here. Little did I realize I'd be here so quickly after law school."

Equal Justice Works strives to ensure that a pipeline of talented and trained lawyers are involved in public service. "There is a crisis for funding for civil legal aid, and there are no funds for entry-level staff attorneys," Sussman says. "One of the only ways they can go into those careers is through one of these fellowship programs."

With his fellowship funded by Greenberg Traurig and the Ottinger Foundation, Akosah now sees how his pro-social work can continue. "Now I have an opportunity to pursue voting rights work as a career," he says.

GLOBAL GIFTS

New Perimeter, a nonprofit established by global law firm DLA Piper, acts not as a foundation but as an organization to manage multiyear projects that use staff and clients from around the world.

"Our mission is to offer long-term pro bono legal assistance to give access to justice and develop sound legal institutions," says Lisa Dewey, pro bono partner and director of the nonprofit. "A lot of those projects have been in developing or post-conflict countries that are underserved places."

As of November, over 800 DLA Piper lawyers from more than 60 global offices have devoted at least 120,000 hours to New Perimeter projects in 33 countries, including helping the United Nations draft laws to create the court and prosecutorial systems in Kosovo in Southeast Europe.

New Perimeter frequently supports law schools in developing countries. At the University of Zambia School of Law, DLA Piper and in-house counsel from one of its clients, German pharmaceutical company Boehringer Ingelheim, conducted a weeklong writing workshop last June to help students pass the bar exam. BI lawyers from three countries helped teach more than 100 Zambian law students.

"The lawyers from BI and DLA broke down the formula and helped us understand it. I saw an improvement in my grades," says student Suwema Banda from Zambia's capital of Lusaka in Southern Africa.

"What touches me is how motivated and hardworking and talented students are," says Sara K. Andrews, New Perimeter senior
international pro bono counsel and assistant director. "Many are from extremely humble backgrounds. A number of students come from places where their entire village pitches in for the student to go to university."

Pro bono is not part of the culture in India, so Kruti Shah was eager to soak up the teaching experience. "This was the best experience I could ever have," says Shah, legal counsel at Boehringer Ingelheim in Mumbai, India. "They were looking for help with legal language but also things like grammar. I am also from a developing country, and they wanted to know everything about India—food, spices. The conversation moved way beyond law."

The experience continues beyond the five-day program. "I have received 30 emails from students there to tell me how special these five days were," Shah says. "Many have wanted to do an internship in India. I've had seven requests."

**ORGANIZING LOCALLY**

In the United States, more firms are employing pro bono coordinators. Anne Geraghty Helms, DLA Piper's director and counsel of U.S. pro bono programs, organizes lawyers at the firm and in-house corporate counsel to help out on good works.

"For a few years now, pro bono resources have been shrinking," Helms says. "We have a responsibility, a real call to action to work together."

The Woodlawn Legal Clinic in Chicago provides free legal services and referrals for issues that include eviction, divorce, child support and expungement of criminal records. Helms has brought in her firm's lawyers and in-house counsel from clients such as Discover Financial Services.

"More and more what I've seen from the leadership of corporate clients and in the firm world is this recognition that we are all lawyers and in it together," Helms says.

On Wednesday afternoons a few times per year, Kelly McNamara Corley, executive vice president, general counsel and secretary at Discover Financial Services, makes the hourlong drive from her office in Chicago’s northern suburbs to the Woodlawn clinic. "Every time I go down there I really feel I help someone," she says. "You carry that feeling around and go back to help more people, and then go back again. It is gratifying."

One evening, an elderly man with a series of respiratory health problems came to Corley in search of help with his landlord. "He brought in pictures, and from every angle..."
of the room, there were rats—six rats on the kitchen counter, in holes in the wall, everywhere. It was horrific,” says Riverwoods, Illinois-based Corley.

“We made some suggestions, like how to sharpen communications to make sure his landlord understood he knew his legal rights. We suggested some resources, like temporary housing with other social service groups.”

DLA Piper provides training for volunteers, including an overview of the most common legal issues—such as housing, family law and benefits—seen at the clinic.

“It refreshes points I learned in law school that I haven’t used in a while,” Corley says.

“Without the partnership with DLA Piper, I might not have felt comfortable going to provide this type of aid.”

Although neither DLA Piper nor Discover Financial Services has a foundation, they do supply financial support for pro-social causes. DLA Piper helps fund legal aid organizations, while Discover funds fellowships for young lawyers interested in public law.

The financial service agency is building its own pro bono projects, with 92 percent of its legal team now participating in efforts that include helping first responders set up their wills.

“In the corporate world, you have to make sure you have the time, that it’s OK with your employer,” Corley says. “Folks here, our people, will do this work on Saturday, or we’ll take a day and the department will go help out. And that’s quite a thing.”

**PROFIT FOR GOOD**

Socially conscious business models have been popping up to replace traditional nonprofit and philanthropic entities that have been suffering from financial stress and uncertainty.

Although altruistic business models have existed for decades, lines between a traditional charity and for-profit companies that work for social good are increasingly blurring. As a result, the private sector is evolving as more companies create innovative ways to make profits while being socially conscious, Beyond Advisers founder Curran says.

An example includes Toms Shoes, which donates a pair of footwear to someone in need for every pair sold.

“They are trying to solve a social problem through business, but make no mistake—they are a business,” Curran says.

These for-profit social enterprise entities are much more visible, says Gene Takagi, managing attorney of Neo Law Group in San Francisco. Facebook mega-couple Mark Zuckerberg and Priscilla Chan’s company for investment and philanthropy, the Chan Zuckerberg Initiative, “is money going from one pocket to the other. It’s not going directly to a charity, but it is pledged for the public goods,” Takagi says.

There can be a business motive:
Millennials often base purchases on a company’s pro-social works.

“This generation doesn’t see contradictions between doing good and doing well,” says Kyle Westaway, managing partner of the Brooklyn law firm Westaway. “The idea of you have to be a martyr or you have to work for ‘the Man’ doesn’t fly for them.

“The traditional bifurcation of ‘You make money here, and do good there’ is a model that doesn’t allow us to think as creatively about solving some of the most pressing social issues,” he says.

The shift toward being paid for pro-social work emerged as new legal forms evolved, Takagi says. For example, the benefit corporation—also known as a B Corp.—must have as its purpose the creation of a direct public benefit.

And the low-profit limited liability company, or L3C, must have an explicit primary charitable mission, and the production of profit or appreciation of capital cannot be a significant purpose.

But unlike a charity, the L3C is free to distribute the profits to its owners.

“Social good or work other than financial motive is part of these organizations’ DNA,” Takagi says.

**PRO BONO BUT PAID**

Some firms—typically smaller shops—see their mission as helping society by doing paid work for socially conscious clients, including nonprofits, philanthropies and social entrepreneurs. Takagi worked as a lawyer on the change in ownership structure for the Burning Man Project, in which the company that housed the event was transferred to its public charity. The law firm was paid for its work.

“The idea of Burning Man was a social enterprise to further the social community, the environment and the artistic message,” Takagi says. “It was a chance for us to help the founders and directors understand what it meant as a charity.”

Often, boutique firms such as Neo Law Group help altruistic startups determine the best structure as they launch, then operate as in-house counsel once things are up and running.

To stay accessible to smaller clients, these firms develop different pricing structures. Neo Law Group has a tiered format.

“We have a discount rate for our charitable clients,” Takagi says. “Private foundations might be paying more than a small public charity.” And the firm has no billable hour requirement. “We want to be accessible to the general public. We don’t have a minimum number of hours clients must use us,” he says.

At law firm Westaway, the structure is different from traditional firms. It operates on a hub-and-spoke model, with its founder and director of operations working as the hub.

“We build teams around projects, and no one is on the full-time payroll,” managing partner Westaway says. “What we’ve learned is clients want a good value, but they really want cost certainty. They need to eliminate question marks. We have simple, clear billing and talk about it up front.”

Wilkinson Mazzeo, a San Diego law firm, keeps its overhead low by working in a collaborative office space with about 20 other businesses. It also uses a flat-fee system, with rates for some nonprofits lower than rates for for-profit clients.

The firm does not charge for routine communications with clients, and it gives a discount to female entrepreneurs' initial project with the firm, such as forming a limited liability company.

“We like to think we are affordable, approachable and we educate our clients,” says Sam Mazzeo, a partner at the firm. “The value they get is pretty good.”

At ABA standing committee member Ryan’s firm, Nutter McClennen & Fish in Boston, they will consider working for reduced rates for a nonprofit. “ABA Rule 6.1 does provide for working at substantially reduced rates as pro bono,” she says.

Mazzeo says it’s a win-win to have paying clients engaged in socially rewarding work. For example, his firm has worked with jewelry company the Giving Keys in Los Angeles, which hires formerly homeless people and those transitioning out of homelessness.

“When we meet the people and see them working, it feels great,” Mazzeo says. “It’s been a gut check for us. We are working for nonprofits and creative people, but they are paying. And it feels good.”

Mazzeo likes the notion that his firm’s work is supporting people’s efforts for change. “We’re behind the scenes, helping them make decisions,” he says. “I’d like to think some of the social impact they have can be attributed to us in some small way.”

Julianne Hill is a freelance writer based in Chicago.
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To Kill a Mockingbird, Anatomy of a Murder, Presumed Innocent, The Firm. Most legal fiction top 10 lists include one or more of these recognizable titles. But what about more recent fare? After all, it’s been more than 55 years since Harper Lee introduced us to Atticus, and more than 25 years since the name “Grisham” became synonymous with the legal thriller.

To compile a more recent collection, I enlisted the help of some fellow lawyer-authors—10 of the best in the business—to identify their favorite law novels published in the past 10 years. Their top 10 includes some interesting picks—stories of law and justice, family and loss, morality and greed. You’ll find crime and murder novels, a historical novel and even one with a Marvel superhero. And, of course, you’ll find John Grisham.

by Anthony Franze

Photos courtesy of the authors
ALAFAIR BURKE
*Defending Jacob*
by William Landay

Law professor by day, crime writer by night, Alafair Burke is the best-selling author of 11 novels (plus three co-authored with Mary Higgins Clark). The former prosecutor, now criminal law professor at the Maurice A. Deane School of Law at Hofstra University, chose a story of a father who has to leave his job as a prosecutor to defend his troubled teenage son accused of murdering a classmate.

“I love books that bend genre. *Defending Jacob* has all the legal heft and realism of a novel written by a former prosecutor, as Landay is. But, like Scott Turow’s remarkable *Presumed Innocent*, the book tells a lawyer’s story from an intensely personal perspective. It’s as much about family, loyalty and community as it is about the American legal system. It’s also a darn good thriller.”

MARCIA CLARK
*Compulsion* by Meyer Levin

Most lawyers know Marcia Clark as the lead prosecutor in the O.J. Simpson murder trial, but she also has an impressive literary career. After publishing a *New York Times* best-selling account of the “trial of the century,” Clark turned to crime fiction, including her popular Samantha Brinkman series. Although Clark’s pick for the Journal’s list was first published in 1956, she found a loophole for my past-10-year limitation: *Compulsion* was re-released in April 2015.

“Based on the Leopold-Loeb case, in which two college students born to fabulously wealthy families murdered a 14-year-old boy, Levin debunks the popular theory that the murder was a ‘thrill killing,’ with an insightful analysis that draws heavily on the psychiatric reports and testimony in the case. What elevates this book above all others is the manner in which Levin explores how the social mores and biases of the time impacted the trial, and in doing so reveals the flaws that still affect our system of justice—and perhaps always will.”
ROBERT DUGONI
An Innocent Client
by Scott Pratt

After 13 years as a civil litigator practicing in San Francisco, Robert Dugoni woke up one morning in 1999 and decided to quit law to pursue his dream of becoming a writer. Soon enough, he was on the New York Times best-seller list, where he remains to this day with his Tracy Crosswhite series.

“Pratt blends real courtroom drama with intense scenes that keep this book moving at a quick pace. Joe Dillard is a Tennessee criminal defense lawyer who wants to defend one innocent client before he walks away from the practice. He finds himself defending a stripper accused of killing a preacher who visited her strip club the night before. Rich plot? The dialogue is real, the courtroom scenes riveting and the outcome anything but certain.”

LINDA FAIRSTEIN
The Theodore Boone series by John Grisham

More than 20 years as chief of the sex crimes unit of the Manhattan district attorney’s office provided Linda Fairstein with plenty of grist for her series that featured prosecutor Alexandra Cooper.

“I chose the Theodore Boone series” about a 13-year-old aspiring lawyer who uses his legal knowledge to solve mysteries and crimes.

Fairstein admires how Grisham brings his page-turning talents to an audience who desperately needs someone to inspire them to read. “Grisham brought fun, intelligent stories to a space where kids don’t always read, especially boys.” Fairstein says she discovered the series through the second book and has been a fan ever since. “I like the authenticity he brings to the main character and how the books educate young people about justice, access to justice and how the system works.” The Boone series inspired Fairstein to try her hand at getting young people to read—she’s written a series for middle-graders featuring a modern-day Nancy Drew, 12-year-old Devlin Quick.
JOHN HART  
_Sycamore Row_  
by John Grisham  
Former Salisbury, North Carolina, criminal lawyer John Hart is known for his smooth Southern style that's landed him a pile of literary awards. All his books also are on the _New York Times_ best-seller list.

"I chose _Sycamore Row_, the sequel to _A Time to Kill_, which was John's first book, and arguably the best of his early novels. Writing a sequel to such a marquee achievement is a bold step for any writer. The expectations are immense, as is the potential for disappointment. John stepped up after two decades and knocked it out of the park. I love that kind of grit."

WILLIAM LANDAY  
_Bring Up the Bodies_ by Hilary Mantel  
The author of the blockbuster _Defending Jacob_ (see Alafair Burke's pick on page 45), William Landay says, "It is almost impossible, so late in the life of the genre, to write a legal novel that is truly fresh and unpredictable, to 'make it new,' as Ezra Pound commands us—believe me; I've tried." But Landay found that elusive, fresh and unpredictable work in Mantel's historical novel.

Landay says the 2012 Man Booker Prize-winning novel "manages to make it new by retelling a very old story: the dispatching of Anne Boleyn, the second wife of Henry VIII, by Henry's chief minister, Thomas Cromwell. This Cromwell accomplishes with a trumped-up charge of adultery, using the travesty of a legal system in a police state. The investigation is swift and ruthless: a series of interrogations in which confessions are extorted in various ways, a show trial, an unforgettable execution. To a lawyer, it is macabre to read. To a novelist like me, it is all utterly masterful."
The Children Act

Ian McEwan

Harvard Law School grad Allison Leotta spent 12 years as a Washington, D.C., sex crimes prosecutor, an experience that influenced her best-selling series with prosecutor Anna Curtis. Leotta says McEwan's novel "haunted me long after I'd finished."

"This story is about a female judge considering whether to force a boy to undergo a life-saving medical procedure despite his religious objections. It confronts deep moral dilemmas, explores the personal toll the law takes on its practitioners, and will make you think about what are the best interests in anyone's life, including your own."

BRAD MELTZER

She-Hulk: Law and Disorder by Charles Soule (author), Javier Pulido and Ron Wimberly (illustrators)

Brad Meltzer wrote his breakout novel, The Tenth Justice, while in law school. By the time he graduated, he was a New York Times best-selling author. Over the next 20 years, Meltzer never practiced law but became the only author to ever have best-sellers in fiction, nonfiction, advice, children's books and comic books.

"Yes, she's green. Yes, she's a Hulk—the Hulk's cousin actually—but for me, this was the best law-related reading I've had in a long time. Writer Charles Soule is a lawyer himself—and, best of all, knows exactly which tropes to embrace and which to leave behind. If you like superheroes and the law, look no further. Jennifer Walters is a strong female hero who's never played as a joke. She's also surrounded by some of the best minor characters anywhere. Go. Buy. Smash."
PHILIP MARGOLIN

*Personal Injuries* by Scott Turow

When he was a criminal lawyer in Oregon, Phillip Margolin defended at least 30 homicide cases and even argued before the U.S. Supreme Court. He left the practice in 1996 to write full time and today is the best-selling author of more than 20 novels, including the acclaimed Amanda Jaffe series.

“When I reviewed the book for the *Oregonian*, I started by saying that it was a shame that Scott Turow had been pigeonholed as a writer of legal thrillers because that meant that *Personal Injuries* would never be considered for a serious literary prize like the Pulitzer. I think this character study of a crooked lawyer who is forced to wear a wire for the FBI is a gem. Robbie Feaver is a character one reviewer called Faulknerian and another called a character of almost Shakespearean contradictions. Brilliantly written and complex, Turow succeeds in capturing his audience without a single murder or car chase.”

LISA SCOTTOLINE

*The Lincoln Lawyer* by Michael Connelly

Lisa Scottoline worked as a law clerk in the 3rd U.S. Circuit Court of Appeals at Philadelphia until she left the law to write full time. She now has 28 best-sellers and says Connelly's novel is one of her “all-time favorite legal novels.”

“Connelly isn’t a lawyer, but he’s done all his homework in this superb novel, which contributes a great character to the world of legal thrillers, namely Mickey Haller, a savvy criminal defense lawyer whose office is on wheels, namely his Lincoln Continental.

“Mickey is a classic rogue, but he has a heart of gold without any sentimentality and he fights for justice without any pretense. *The Lincoln Lawyer* may show the less savory aspects of legal practice, but it never loses sight of our goal as a profession.”

Anthony Franze is a Washington, D.C., lawyer in the appellate and Supreme Court practice of Arnold & Porter Kaye Scholer and a critically acclaimed thriller writer with novels set in the nation’s highest court, including his upcoming book, *The Outsider*. 
Fueled by new research and bipartisan interest in criminal justice reform, states are raising the age for adult prosecution back to 18.

Age Appropriate

By Lorelei Laird
Miguel Moll, who served time in adult prison as a teenager, co-founded Hyped About HYPE (Helping Young People Excel), an organization that speaks to kids in the juvenile justice system about making better choices.
Miguel Moll had a choice: Would he be a beast or a victim?

Moll was 17 when he was taken into custody on suspicion of joyriding. He’d been a passenger in a stolen car. It was exactly the kind of dumb thing teenagers do; but under Texas law, 17-year-olds are automatically prosecuted as adults. He was booked into Harris County Jail in Houston with adult offenders.

Moll, who remembers weighing about 120 pounds and standing about 5 feet 9 inches at the time, was being taken to a holding cell, when a big man ran up to the bars and yelled, “I got this one!” That’s when he made his choice.

“I became a beast just like them, in order to keep the other beasts off of me,” Moll, now 45, testified to the Texas state legislature in 2015. “What choices did I have? I either submit, bow down or fight back. And at 17 years old, these things stick with you.”

It stuck with Moll so well that he left jail with that “beast mentality”—and was quickly rearrested. This time, he ended up serving 19 years of a 20-year sentence for robbery in an adult prison. Testifying before the Texas legislature’s Juvenile Justice & Family Issues Committee, he said that because the adult system had no rehabilitation services—unlike juvenile detention, where those services are standard—he had to choose to reform himself.

Recalling it now, Moll says he realized less than halfway through his sentence that his tendency to fight with prison authorities, even when they were clearly abusing their power, could add time to his sentence. Rather than fighting with corrections officers, he says, he started fighting to change the culture of violence he saw.

“I was in there all those years, and I saw guys that were stuck in the same place where they [were when they] came in,” he says. “So I knew that if I wanted to avoid the revolving door, then I had to do something.”

Moll now works for Safe Hands Family and Children Programs, a Dallas-area nonprofit serving low-income families, and he is raising a son and working on a sociology degree. He also co-founded Hyped About HYPE (Helping Young People Excel), an organization that speaks to kids in the juvenile justice system about making better choices. He was speaking to the legislature on behalf of that group, along with three other men, in support of a bill intended to raise the age of adult jurisdiction in Texas to 18.

That bill—sponsored by Rep. Ruth Jones McClendon, D-San Antonio—failed, as did two similar bills. But increasingly, that makes Texas an outlier. Since 2009, seven states have raised the age of adult prosecution to 18, and five more tried during their 2015-2016 legislative sessions. In 2017, advocates are expecting “raise the age” bills in at least five states—more if you count proposals to increase the age to 21.

These aren’t bleeding-heart liberal states; one of the early adopters was reliably conservative Mississippi. In fact, the juvenile justice reform movement is now bipartisan, with right-leaning organizations working with children’s rights advocates. They’re responding to studies showing that adult penalties lead to more teen recidivism, new science showing teenage brains really do mature later, and increasing political and financial pressure to address high incarceration rates.

Though not everyone is on board—law and order concerns and financial worries have stalled reform in some statehouses—advocates for juveniles say it’s definitely a trend.

“We’re at a critical time right now,” says Marcy Mistrett, CEO of the Campaign for Youth Justice, a Washington, D.C.-based national initiative focused on ending adult prosecution for juveniles. “We now have the fewest states left in history—seven—that define
second chances

While Moll was learning the dubious lessons of adult prison, Charleston White was learning some very different things in Texas juvenile detention. White wasn't an obvious candidate for rehabilitation. At 14, he joined a group of teens who tried to rob a Foot Locker and ended up killing a man. Though White wasn't the one who pulled the trigger, he was convicted of murder for his involvement. Testifying to the state legislature, he said he became a gang leader in juvenile detention. The state had the option to send him to adult prison when he turned 18, and he wanted to go. Growing up, he'd seen so many men from his community go to prison that he “literally believed that going to prison is what made you a man,” he said.

But four adult “house parents”—corrections officers who White says acted like parents to him—saw through White's tough facade. He says they drove more than three hours to Fort Worth to tell a judge that White should stay in the juvenile system, risking their jobs in doing so.

Reflecting on it now, White says his attitude changed instantly. “I wanted to go back and be accepted by my friends, because I feared their rejection, but I also now have something inside of me that's pulling me in a different direction,” says White, who co-founded Hyped About HYPE with Moll. “Because I don’t want to disappoint these people. ... Now somebody finally believed in me other than my mother.”

This kind of second chance was the original goal of juvenile justice. The first juvenile court was established in 1899 in Chicago by Progressive Era reformers who objected to the practice of putting kids in adult jails next to hardened criminals. They believed young people, if put through a system with more benign influences, could be rehabilitated.

Those juvenile systems had their ups and downs, but they met a serious challenge in the 1990s when crime rates rose and public concern grew about minors breaking the law. Over that decade, 45 states passed some kind of law that made it easier to try juveniles as adults, according to research from the John D. and Catherine T. MacArthur Foundation.

“It was a period of heightened moral panic,” says Laurie Garduque, director of justice reform at the foundation, which is wrapping up a 20-year program supporting juvenile justice research and reforms. “There was a sense that the juvenile justice system was not able to deal with these ‘more serious offenders’ [or] ‘superpredators,’ as they were labeled.”

But 20 years later, states are starting to rethink that. An important reason for that, child advocates say, is that the U.S. Supreme Court has led the way with a series of important decisions on juvenile justice. Beginning in 2005 and continuing up to the 2015-2016 term, the Supreme Court has held that it’s unconstitutional to execute people for crimes they committed as juveniles; outlawed automatic life without parole for nonhomicide crimes committed by juveniles; extended that ruling to homicide crimes; and, in 2016, made the ban on life sentences retroactive.

Marsha Levick, deputy director and chief counsel of the Juvenile Law Center in Philadelphia, says that helped start a conversation about how “kids are different.” And that conversation, she says, is partly because advances in behavioral and brain science show that adolescent brains really are different.

As Dr. Judith Edersheim, co-director of the Center for Law, Brain and Behavior at the Massachusetts General Hospital, explains it, there are three widely agreed-upon differences between adult brains and adolescent brains. One is that during adolescence, kids actually lose “gray matter,” the brain cells that do all of the brain’s computation. This “pruning” of gray matter is especially concentrated in the frontal lobes, which are responsible for self-control, planning, decision-making and other executive functions.

At the same time, Edersheim says, teenagers get more “white matter,” the cells that pass messages between parts of the brain, which increases processing speed. Scientists think these two changes make the brain
more efficient, even though it also loses some computational ability. This process of brain maturation continues after the body matures; some scientists think it ends as late as age 25.

But perhaps the most conspicuous difference, Edersheim says, is that adolescent brains have more circulating dopamine—a neurotransmitter that scientists believe governs rewards and learning—and more receptors in their brains to pick it up. Dopamine is released when a person receives many kinds of rewards, including new experiences, as well as things such as food and sex. This predisposes teenagers to seek out rewards and novelty.

The thinking, Edersheim says, is that this helps push adolescents out of the nest and into the world. And what kids learn during this process, she says, helps determine what parts of the gray matter get pruned. That means a kid’s environment matters a lot, and adult prison isn’t the best environment.

“If you don’t provide an adolescent with an opportunity to develop a social competency or self-esteem, if you don’t put them in contact with pro-social peers, then you’re setting trajectories which actually might persist through adulthood,” Edersheim says. “Adolescents are really these neurologic sponges for their environment.”

That’s the science that’s helping fuel the “kids are different” conversation Levick mentions. But at the same time, Levick says, that conversation is being driven by another discussion the country is having about justice reform generally. And that’s very much a bipartisan conversation.

“Conservatives were the ones who stepped forward most recently and said, ‘This is becoming fiscally irresponsible, to take what are now increasingly limited public resources and ... lock up a population that doesn’t really pose a safety risk,’” says Levick, who co-founded the Juvenile Law Center in 1975. “And I think once conservatives began putting that message out there, liberals and progressives were more than happy to join in.”

Dianna Muldrow, a policy analyst at the conservative policy organization Right on Crime, says it’s about more than money—it’s about creating better outcomes, for society as well as for teenagers. Three decades of research have consistently shown higher recidivism rates for teenagers sent to adult prison. For example, a 2007 review of studies by the Centers for Disease Control and Prevention found that the kids who served time in adult prison were 34 percent more likely to commit new crimes than similar kids who went to juvenile detention.

Outcomes for the kids themselves are also bad. According to the Campaign for Youth Justice, which used Department of Justice and CDC numbers, teens under 18 being held in adult jails are 19 times more likely to commit suicide than teens generally, and 36 times more likely than those held in juvenile facilities. The Bureau of Justice Statistics says youths under 18 were 21 percent of those sexually assaulted in adult jails in 2005, despite being only 1 percent of jail inmates that year.

Muldrow also notes that when teens are treated as adults, there’s no requirement for the police to notify the parents. Treating kids as kids helps keep their parents involved.

In some facilities, sexual assault is addressed by putting the youngest inmates in solitary confinement—a practice that quickly and catastrophically hurts their mental health, driving up suicide rates.

In 2016, President Barack Obama banned solitary confinement for juveniles in federal prison, saying it’s overused and can have devastating, lifelong consequences. And these are kids who often already have problems. Kids who get in legal trouble have disproportionately suffered abuse, neglect or another trauma. A DOJ study found that 50 to 70 percent have
behavioral health diagnoses.
And kids of color make up a disproportionate number of those treated as adults, reflecting a racial disparity trend in other parts of the criminal justice system. The Campaign for Youth Justice says black adolescents are nine times more likely to be sentenced as adults compared to their white contemporaries; Latino juveniles are 40 percent more likely; and American Indian youths are nearly twice as likely. A federally funded 2007 study of juvenile justice in three cities said that while some of this can be explained by nonracial risk factors—such as family income, the age of the mother at the time of her first birth and education problems—that didn’t entirely eliminate the disproportionate numbers.
Garduque says much of the behavioral research was already available in the 1990s, when states were passing laws that treated teenagers more like adults. But nobody had set out the legal implications of that research, she says, which was part of why the MacArthur Foundation spent two decades funding that kind of work. And the Supreme Court rulings, which relied in part on MacArthur-funded research, set the precedent. “This idea that children are different for the purposes of criminal punishment has now become a powerful constitutional principle,” Garduque says.

‘IS YOUR SON’S LIFE WORTH IT?’
In 2005, a tragedy spurred Connecticut to become one of the first states to put that principle into practice. That was the year David Burgos, 17, committed suicide in an adult prison.
Burgos’ mother, Diana Gonzalez, was initially pleased when her son went back to prison. At least he’d be off the streets, she reasoned. Burgos had been homeless off and on, and she worried about his safety.
Being homeless was just the beginning of the story for the teenager, who had been in and out of Connecticut state institutions since he was 10. Abused as a child and diagnosed with bipolar disorder, he had so many episodes of violence, toward himself and others, that Gonzalez asked the state for help. But when Burgos was placed in group homes or shelters, he frequently ran away, occasionally showing up at relatives’ houses for showers and meals. When he got into a physical fight with his older brother, he was convicted on a weapons charge.

One condition of Burgos’ probation on that charge was that he accept child welfare services. But he refused—so he was sent back to prison. And because Connecticut automatically prosecuted 16- and 17-year-olds as adults then, he went to a facility run by the adult corrections system to await trial. That’s where, in the summer of 2005, he hanged himself with a bed sheet.

The suicide jump-started a conversation about age for juvenile jurisdiction. A raise-the-age bill had just failed in the state legislature, and Abby Anderson, executive director of the Connecticut Juvenile Justice Alliance, says she had met with the Campaign for Youth Justice about launching an effort. Days after the death, four state corrections officers were particularly concerned about the practical implications of Delegates adopted that resolution, saying shackling states a majority for the first time.

Advocates say shackling—putting kids in chains in court—is too often used automatically, rather than after a judge decides the juvenile is a safety threat or a flight risk. That’s a problem because the vast majority of juveniles who get into legal trouble are accused of nonviolent offenses, according to Justice Department statistics.

And shackling creates new problems, according to the National Juvenile Defender Center, a nonprofit focused on the legal defense of minors. The center’s view is that shackling harms a kid’s right to a fair trial by creating an appearance of guilt and impeding communications with the defense lawyer, humiliates the juvenile, and harms the rehabilitation mission of the juvenile courts.

The ABA’s Criminal Justice Section cited all of those problems in 2015, when it proposed a resolution calling on jurisdictions to adopt a presumption against restraints on juveniles in court. The House of Delegates adopted that resolution, saying shackling should be used only when needed and after an in-person hearing.

States may be listening. According to the NJDC, Delaware became the 27th state to end automatic juvenile shackling in September, giving limited-shackling states a majority for the first time.
Laurie Garduque has worked to limit shackling for years as director of juvenile justice reform at the MacArthur Foundation. She says that shackling bans, like other recent juvenile justice reforms, have been influenced by new findings on adolescent development.

“This does not happen in adult criminal court, where the Supreme Court outlawed shackling, saying it undermines the presumption of innocence,” Garduque says. “It’s done automatically, regardless of age, regardless of charges, regardless of the risk they pose.”
of treating teenagers as juveniles instead of adults, such as the added time required for parental notification when an arrest is made. Some said they’d need entirely new facilities to house arrested teens separately from adults.

Others objected that raising the age would hurt public safety by letting dangerous delinquents loose on the streets. But Connecticut, like most states, had a separate provision permitting juveniles to be tried in adult court for certain serious crimes. (Some states also permit this at the discretion of a judge or prosecutor.) Anderson says once people learned that, their resistance to Raise the Age often disappeared.

But a bigger concern was the financial cost. Anderson says it genuinely costs more to put people through the juvenile justice system than adult prison because kids in the juvenile system are getting education, therapy and other rehabilitation services. Those are pricey, but they’re also the reason recidivism for juvenile detainees is lower, Anderson notes. To proponents, raising the age was a priority worth the money.

That argument got a powerful boost from Gonzalez, the mother of David Burgos, when she testified before the state legislature in 2006. “She was like, ‘Basically, what you’re saying is my son’s life isn’t worth it. Is your son’s life worth it?’” recalls Anderson. “And that was a real crucial turning point in the effort, because it became very hard after that for a legislator to say publicly [that] this is just about the money.”

The bill passed—and survived the recession of 2007-2009, which Anderson says made the cost concerns “a lot more real.” Under pressure from opponents, who kept introducing legislation to repeal it entirely, Raise the Age proponents agreed to split implementation across two budget cycles. Connecticut’s 16-year-olds would begin to be prosecuted as juveniles on the original implementation date, Jan. 1, 2010. For 17-year-olds, implementation would be pushed back to July 1, 2012. Even with that, Anderson says, “it was a nail-biter to the very end.”

But when January of 2010 rolled around, a funny thing happened: nothing. The size of the juvenile justice system didn’t double, as some had predicted. It actually shrank a bit, Anderson says, partly because crime was down and partly because of companion bills to Raise the Age provided alternatives to detention. When it was time to include the 17-year-olds, Anderson says there wasn’t much discussion.

And for Connecticut, the results of Raise the Age have been good. Juvenile crime is still trending down, and spending on juvenile justice in 2011-2012 was slightly lower than it had been 10 years earlier. The Connecticut Judicial Branch says 16- and 17-year-olds are actually less likely than younger juveniles to be rearrested during probation. There are far fewer juveniles in adult prison (where they can still go if a judge permits it). And the Connecticut Office of Policy and Management says the number of young adults 18-20 in adult prison is also down, which it says indicates the success of rehabilitation in the juvenile system.

Similar arguments are likely to play out in at least five states during the 2017 legislative session: Missouri, New York, North Carolina, Texas and Wisconsin. Advocates say public safety concerns have killed reform in at least two of those states—New York and North Carolina—in recent years.

But in other states, the primary impediment is the cost. That includes Texas, where cost was the killer in the last legislative session, according to Elizabeth Henneke, a policy attorney focusing on juvenile justice at the Texas Criminal Justice Coalition.

“Even last session, there was a wide acceptance that raising the age was
the best thing for Texas children,” says Henneke. “The question has just been the financial piece. And really, the pushback then has not even been on whether or not to fund it; it’s just a question of how to fund it and what that looks like.”

**AN ARBITRARY LINE**

When Vincent Schiraldi became commissioner of probation for New York City, he had an office inside a Brooklyn courthouse. There, he got to see teenagers parading in and out of court all day.

“They kind of fall asleep with their earbuds in until somebody barks their name at them,” says Schiraldi, now a senior research fellow directing the Program in Criminal Justice Policy and Management at the Harvard Kennedy School. “They go up, they get yelled at by the prosecutor, they get lectured by the judge, their defense attorney says something incomprehensible to them, and for the most part they go home no better off and a little more alienated from us adults than when they came in.

“But not to worry, because they’re going to be back pretty soon.”

Schiraldi should know—he’s one of the nation’s most prominent advocates for reforming juvenile justice. Off the top of his head, he can tell you that young adults have a 78 percent rearrest rate over three years, and he can tell you about the brain science that helps explain why. The same neuroimaging studies that show important structural differences between adolescent and adult brains show that those differences don’t disappear until well into people’s 20s. That is, brain maturation lags behind body maturation—and well behind the age of adult prosecution in many states.

When he arrived as commissioner of probation, directly after he headed the Washington, D.C., juvenile justice agency, Schiraldi began thinking about these factors. The agency supervised young adults up to age 21. In New York, kids as young as 13 were on his adult probation caseload, waived into adult court for serious offenses. “It became pretty apparent, the arbitrary nature of the dividing line between adults and juveniles,” he says.

During his time in New York—first as probation commissioner and then as a senior adviser to Mayor Bill de Blasio’s Office of Criminal Justice, Schiraldi made friends with Jeff Butts, a professor in the criminal justice department at the John Jay College of Criminal Justice, who convinced him that maturation is a process. Kids don’t wake up fully mature on their 18th birthdays, Schiraldi recalls Butts saying, and the justice system should reflect that.

As Schiraldi got deeper into the subject—speaking, researching and even becoming part of a delegation that observed a juvenile prison in the German countryside—he started to believe that the legal system should reflect the more gradual maturation people really undergo.

That’s how Schiraldi became a proponent of prosecuting young adults as juveniles up until at least age 21, or otherwise treating them as a different class of defendants—a radical idea in a country where 17-year-olds are routinely prosecuted as adults. In September of 2015, he laid out a case for that idea in a paper published with two Kennedy School colleagues, Bruce Western and Kendra Bradner.

To support their argument, the authors invoke some of the same research used by proponents of raising the age to 18. But they also argue that today’s young adults are much more like adolescents, sociologically, than they were a few generations ago.

Take marriage, Schiraldi says. In 1960, according to the Pew Research Center, 45 percent of people ages 18 to 24 were married. In 2010, that rate was 9 percent.

The same is true of work, Schiraldi says. As an example, he offers his own childhood neighborhood: the Greenpoint section of Brooklyn.

When he finished high school there in the 1970s, graduates could easily get a factory job or an entry-level finance job without a college degree. With that salary, they could soon buy or rent a home and start raising a family.

None of that is true today, and criminologists have found that steady work and marriage are two important predictors of whether someone will obey the law. Without that stability, young adults, who are already disproportionately risk-takers, are even more likely to get in trouble. Unfortunately, the criminal justice system doesn’t take that into account.

And that’s why Schiraldi believes raising the age past 18 should be on the table, along with other developmentally appropriate options.

**BEYOND LEGISLATION**

Thus far, three states have considered the idea. In the 2016 legislative session, bills to raise the age to 21 failed in both Connecticut and Illinois; Vermont also considered one, but decided to study the idea first.

Schiraldi thinks it’s still a live issue in those jurisdictions. It’s been a priority for Connecticut Gov. Dannel Malloy.

There are other options for addressing the needs of young adults, Schiraldi says; the cities of New York and San Francisco have added some protections for young adults on a piecemeal basis, he notes.

“Whatever the solution might be—changing the adult system, creating a third system or including young adults in the juvenile system—we need to fix that,” he says. “Because it’s resulting in some very, very bad outcomes. For the kids and for us.”

Hyped about HYPE co-founder White might agree with that. He draws an analogy to the fighting dogs that were kept by NFL quarterback Michael Vick, almost all of which were eventually rehabilitated and adopted by families into caring homes.

“We nurtured and we loved those dogs back into their original state of nature,” White says. “And those dogs are no longer fighting and killing other dogs. If we can do that for animals, why can’t we do that for our children?”
A Father’s Mission

40 years after 4 children were abducted and murdered in suburban Detroit, a victim’s father is demanding authorities explain why the cases remain unsolved

By Kevin Davis
Photography by Wayne Slezak
Barry King, an attorney and father of four, went on television on the evening of March 18, 1977, with a message to his 11-year-old son, Timothy, who had been missing for two days. King was hopeful that his son was OK, but he feared the worst: Three children had already been snatched from the streets of his suburban Detroit community and murdered during the last 13 months.

“We’re with you, buddy,” King said as he stood outside the Birmingham, Michigan, police station. “We love you. God bless you. Stay tough.”

King also had a message for the person who may have abducted Tim. “I don’t know if you have a child or want to have children, but please treat Tim as you would your own kid.”

For the past 48 hours, police had been searching block by block for the sixth-grader in and around Birmingham. Tim was last seen at a pharmacy three blocks from home, where he’d gone on his skateboard to buy candy.

Six days after Tim disappeared, the King family was home watching Johnny Carson when a news bulletin appeared: A boy’s body was found in the nearby town of Livonia. A few hours later, the police chief and a priest came to the house bearing the news: It was Tim.

The Oakland County Child Killings, as they became known, left deep scars on the King family, on the families of the other victims and among those who lived through it during the late 1970s. The events forever changed a community where kids once played outdoors freely and without worry. Instead, parents instructed their children to come right home after school, play in their own yards and never talk to strangers.

The murders sparked one of the largest investigations in the U.S. and included a task force of 200 local, county and state police, as well as the FBI. Investigators sifted through some 20,000 leads and interviewed thousands of people. They consulted with psychologists, criminologists—even a hypnotist. King thought the police were doing an extraordinary job, and he was confident that the killer would be brought to justice.

Forty years later, the murders remain unsolved, and King’s view of the investigation eventually changed. He believes that police made many mistakes and squandered opportunities to solve the case. Now 85 years old, King has been on a campaign to find the truth and hold authorities accountable.

In his effort to shed light on the investigation, King has filed freedom of information lawsuits seeking case files. He’s also hounded authorities to explain why some suspects were cleared, particularly a man he believes was the most promising: the now-dead son of a former General Motors executive who had been questioned and released just before Tim’s murder.

“The legal system,” King says, “has failed us.”

TERROR IN OAKLAND COUNTY

Oakland County is about 28 miles northwest of Detroit. It’s a mostly upper-middle class collection of suburbs, including Birmingham, where the King family lived along with other white-collar professionals. Barry King practiced general law at a small firm, doing mostly civil litigation. He lived on Yorkshire Road with his wife, Marion, and children Tim, Mark, Chris and Cathy.

Tim was an active kid who loved to play baseball and hockey and zoom around on his skateboard. “His world was the neighborhood, his school, paper route and the parks where he played sports,” King recalls. “He was everybody’s friend.”

The days of carefree play ended in Oakland County on Feb. 15, 1976, when Mark Stebbins, 12, was abducted from the town of Ferndale. His body was found four days later in nearby Southfield. Ten months later, on Dec. 22, Jill Robinson, also 12, was taken from Royal Oak. Her body was found in Troy, about 5 miles from her home, on Dec. 26. On Jan. 2, 1977, Kristine Mihelich, the youngest of the victims at age 10, was taken in Berkley and found dead 19 days later in Franklin.

Two months later, passers-by found Tim’s body, still warm, in a roadside ditch in the town of Livonia, just over the border in Wayne County. He had been sexually abused and suffocated, his wrists and ankles bruised by rope marks. The killer had cleaned Tim’s body and washed his clothes before placing him on the side of the road with his skateboard. The other victims also had been found washed and in clean clothes.

When the King family arrived at the funeral service, they saw undercover police taking surveillance photos of people in the parking lot and walking into the church. Tim was dressed in a blue warmup suit, his coffin covered in a floral rendition of a baseball and bat.

The police task force continued its investigation, headquartered in an abandoned school building. Investigators worked up a psychological profile of the suspect—a white man with above-average intelligence, obsessed with cleanliness,
possessing an air of authority and appearing trustworthy to children, and living in or around the community. In one of the most publicized leads of the case, investigators said a witness reported seeing a boy with a skateboard in the pharmacy parking lot talking to a man possibly driving a blue AMC Gremlin with a white stripe. Police drew a composite sketch of a man with shaggy hair and bushy sideburns.

Barry King went back to work a few days after his son’s funeral, doing his best to get on with life. He trusted that police would bring the killer to justice. He never talked about it much after that. “I was always more concerned about tomorrow than yesterday,” King says.

His wife, Marion, however, found it hard to cope, and the children would suffer their own psychological wounds in the months and years to come. No one really talked about it at home, as if the subject were taboo, as if it would hurt too much. “His mother was never the same,” King says of Marion.

In December 1978, after spending its $2 million budget, the police task force disbanded, and the Michigan State Police took over the case. The killings had stopped with Tim, and some theorized that the murderer might have moved away, got arrested for other crimes or possibly died.

During the next 30 years, Cathy became a lawyer, got married, had children and moved to Idaho. Mark became a businessman, eventually moving to Texas, and Chris an editor and tech writer in Michigan. Barry King continued to practice law.

“We just couldn’t talk. My mom was so broken by this,” recalls Cathy, now Catherine King Broad. “I felt I could never bring it up.”

Marion died in 2004—never seeing her son’s killer brought to justice.

**A SECRET REVEALED**

Throughout the years, police zeroed in on several suspects, some of whom were convicted child molesters and purveyors of child pornography. They even exhumed the body of one suspect, but that lead hit a dead end—like so many others.

But in 2005, Michigan State Police Detective Sgt. Garry Gray announced the department was reviving the task force on a smaller scale, explaining that advanced forensic techniques and the availability of new computer databases would allow them to re-analyze old evidence. Once again, the King family went about their lives, assuming the police were doing their best.

That assumption changed after Chris King and his sister, Broad, got a call in 2006 from a childhood friend, Patrick Coffey, who had explosive news. Coffey had become a polygraph examiner and was living near San Francisco. He said he had just met another polygraph examiner at a conference in Las Vegas who confided that he conducted a polygraph on a man who admitted killing one of the Oakland County children.

The examiner was Lawrence Wasser, who heard Coffey speak at the conference and invited him to speak in Michigan. Coffey mentioned he once lived in Michigan and explained he became a polygrapher, in part, because of Tim’s murder. He asked Wasser whether he had heard about the Oakland County Child Killings.

Coffey says Wasser suddenly appeared shaken and then revealed that he tested a man 30 years ago who was suspected in the killings. Though the suspect confessed to killing one of the children, he was cleared by police. Wasser said the suspect had since died, as did his attorney. He declined to name either one, which Wasser considered a breach of professional ethics. Coffey hoped that Wasser might be willing to share the information with police. He later reached out to Wasser but never heard back.

Meanwhile, in December of 2006, members of the police task force announced the arrests of two men on child molestation charges who were being questioned in the murders: Theodore Lamborgine, 65, and Richard Lawson, 60. The pair were accused of sexually molesting children during the 1970s and 1980s. But neither was ever charged in the Oakland County killings.

One of the lead detectives...
investigating Lamborgine and Lawson was Cory Williams from the police department in Livonia, the town where Tim’s body was found. Williams had met Barry and Chris King along with other members of the Michigan State Police task force to discuss the arrests, and the Kings took a liking to him.

Broad felt it was time to do something with the information she got from Coffey about Wasser’s polygraph claim. But she feared the task force would ignore her tip. She had become cynical after reading stories and blogs about people who claimed that many of their tips to police were dismissed. Broad also reviewed old news articles and concluded that the investigation had been mired in problems.

“Up to that point, I drank the Kool-Aid that the police did their best,” she says.

Broad decided to call Detective Williams, who had left the state task force after some disagreements, and tell him about Wasser. Broad asked Williams not to share her tip with state police. So instead, Williams contacted the Wayne County Prosecutor’s Office, which had jurisdiction where Tim’s body was found.

The prosecutor’s office issued an investigative subpoena compelling Wasser to identify the person he polygraphed. Wasser subsequently helped police by hinting which file folder among several splayed on a desk contained the right name. By doing this, Wasser could preserve his reputation and ethical standing by not technically giving up the name.

His name was Christopher Busch.

The name wasn’t familiar to Broad, but genealogical research led to a death certificate for a Christopher Busch who lived in nearby Bloomfield Township. He had committed suicide in 1978 at age 27.

The Kings learned that Busch was a convicted pedophile, though he never served time in prison. His father was the late Harold Lee Busch, an executive financial director for General Motors. And it turned out that police had questioned Busch three weeks before Tim was abducted. He’d been polygraphed and cleared.

Wasser later denied ever talking to Coffey about polygraphing a suspect in the case, calling his story “bogus” and suggesting that Coffey sought recognition and wanted to write a book. Coffey responded by filing a libel suit, which he later dropped after Wasser agreed to withdraw his allegations. Wasser did not respond to ABA Journal requests by phone and email to discuss the case.

The Kings believed Busch should have been a strong suspect, but the police would not reveal much more about what evidence they collected or the progress of the investigation into Busch.

The Kings did learn that Busch had been arrested in Flint, along with a man named Gregory Greene, in 1977 on charges of molesting and photographing boys. The men were also questioned about the death of Mark Stebbins and passed polygraph exams, according to police accounts. The Traverse City Record-Eagle published stories linking Busch to a child pornography operation on North Fox Island, where a group of men were accused of using a religious mission as a front for their activities.

The Kings filed a freedom of information request with the Bloomfield Township Police Department for the Busch autopsy report. The department said the file had been destroyed. Yet a local reporter later got the file, which deepened the King family’s distrust of the police. The report listed the cause of death as a self-inflicted gunshot wound from a rifle. While investigating, police found a drawing pinned to Busch’s bedroom wall of a screaming boy wearing a hooded jacket, and it resembled Mark. They also found rope on a closet floor stained dark red.

Broad and Chris King were upset to learn the police had never told them about Busch. “At this point they were just keeping us in the dark,” Chris says. Broad finally decided to tell her dad about the call from Coffey and the Busch lead. The family requested to meet with the Michigan State Police to learn more about the investigation. Meetings were set up and then canceled. Finally, in October 2009, King—along with son Chris and Erica McAvoy, the sister of Kristine Mihelich—met with the task force, but King says no one answered their questions and they left frustrated.

**SUING FOR INFORMATION**

King learned from the former Birmingham police chief that in 2010 the task force had stopped following the Busch lead. King tried to get someone at the Michigan State Police or the Oakland County Prosecutor’s Office to explain why, but no one would. He enlisted the help of family friend Lisa Milton to file a lawsuit in 2010 against the state police for investigative files.

“When he started asking questions was when they started being resistant,” Milton says.

King won the suit, and police turned over 3,411 pages of evidence, which King says cost nearly $12,000 in fees and copying costs. He pored through the files, which confirmed much of what he already knew about Busch and, in his mind, underscored that he should remain a prime suspect. “There was nothing exonerating Busch,” King says. “That’s what I was looking for—something to indicate...
that he wasn't involved. I haven't seen anything that excludes him.”

The files also contained information that matching white hairs, likely from a dog, were found on the clothing of all four victims. In addition, DNA evidence was retrieved from a human hair found on Kristine’s body. The sample was poor and would only allow police to make what’s known as a mitochondrial DNA match, meaning that the DNA profile could be matched not just to one person but also to that person’s mother, all her children, her siblings, her mother or other maternal relatives. Police said the profile matched a suspect named James Gunnels, who had an arrest record for property crimes but was never charged in the murders. A local television station, WDIV, reported that Gunnels, who was 16 at the time of the murders, had been molested by Busch and may have been involved in a plot to lure children to him.

King, disturbed that investigators had never shared this information, demanded a meeting with Oakland County Prosecutor Jessica Cooper, who took office in 2009. He also filed more FOIA requests to no avail. He argued that the Michigan Constitution entitled him to the files as a victim, and that he had the right to confer with the prosecutor. “All I’ve asked from anyone is the reason they stopped treating Busch as a suspect,” King says. “If they have a good reason for doing these things, tell me.”

Cooper says she’s been put in the difficult position of having to deny the many requests of a grieving father. In an interview with the Journal, Cooper says that she did, in fact, meet with King, and that the chief assistant prosecutor, Paul Walton, also met with King at his home to discuss the case. “It’s very frustrating for him,” Cooper says. “I feel great compassion for someone who has lost a child. But I don’t have unlimited time and resources. Nobody is going to rest, and I don’t know if there will ever be an answer.”

The relentless push by the Kings, along with stories in newspapers and on television, prompted Cooper to post a report on the Oakland County prosecutor’s webpage to separate fact from myth about the case. Cooper’s office points out that in the 40 years since the murders, dozens of police chiefs have led thousands of officers on the case and that four different prosecutors have served in office. They waded through conspiracy theories, false leads and dead ends. Information was not digitized as it is today, so it was difficult to exchange or cross-reference. “The right hand didn’t know what the left hand was doing,” Cooper says. “DNA evidence was unheard of then.”

Cooper says investigators have since scanned and digitized thousands of pages of document85s, and have combed through them all again. “We are still pursuing new leads and still doing what we can.” But her office still cannot share information with the Kings or anyone else because, she explains, it’s an ongoing investigation and contains attorney work product. “He wants a declaration that I can’t give him,” Cooper says.

The Michigan State Police won’t say much either. Lt. Michael Shaw says, simply, that the case remains under investigation. “It’s the same thing year after year,” says McAvoy, Kristine’s sister. “The state police and task force are so uncertain.”

In the fall of 2012, former suspect Gunnels contacted Barry King and requested a meeting in Kalamazoo to clear the air about his suspected involvement in the murders. King and his son Chris visited Gunnels in October at the home of his Alcoholics Anonymous sponsor. Gunnels told the Kings he had been molested by Busch, but knew nothing of the killings and could not link him to them.

There were other suspects in later years, but none panned out. In his continuing effort to draw attention to the case, King produced a DVD in 2013 in which he and his family recount the story and discuss the investigation. The proceeds benefit a fund set up in Tim’s name to help abused children and support youth activities.

**PARENTAL INVOLVEMENT**

King’s efforts on behalf of his son, as well as his criticisms of the police and prosecutor, are much like those of another grieving—and very famous—father: John Walsh, the victims’ advocate and television personality whose 6-year-old son, Adam, was murdered in 1981. Adam went missing from a mall in Hollywood, Florida. His severed head was found two weeks later, but the rest of his body was never found. The investigation yielded no arrests for more than 25 years as Walsh became an advocate for the missing. That’s why King says he will keep trying until someone remembers something. “Here’s a guy who’s 85 and he’s going to keep plowing ahead in hopes that this might help someone remember something.” —Chris King
for missing and exploited children and host of America’s Most Wanted.

In 2008, police announced a break: They had concluded that a drifter and convicted serial killer named Ottis Toole murdered Adam. Toole, an associate of the serial killer Henry Lee Lucas, had confessed to killing Adam, but he recanted before dying in prison in 1996. Detectives believed Toole was the killer based on an accumulation of evidence over the years.

Walsh, writing in his 1997 book Tears of Rage, asserted that the case was completely botched. While Walsh had been opposed to police releasing investigative files to the public, he said the files revealed that the investigation had been “a disaster” from the beginning. Among his criticisms was poor coordination among police agencies and inexperience in handling homicide cases. “Everything seemed so chaotic and disorganized,” Walsh wrote.

Also in Florida, the parents of Tiffany Sessions, 20, who disappeared from the campus of the University of Florida at Gainesville in 1989, worked for decades to keep the investigation alive. Patrick Sessions, a Miami real estate developer, used his own money and connections to keep the case in the media. His ex-wife, Hilary, who also was deeply involved, helped create a missing person’s act in Tiffany’s name and became a nationally recognized victims’ advocate.

In February 2014, there was a break in the Tiffany Sessions case. The Alachua County sheriff announced that investigators identified a convicted rapist and murderer as the all but certain killer of Tiffany, whose remains were never found. He was Paul Eugene Rowles, a serial killer who had left diary entries that contained notes about his killings and what seemed like a reference to the abduction and murder of Tiffany. Rowles, however, had died a year earlier.

Kevin Allen, the cold case detective from the sheriff’s office who led the investigation, says the family’s unrelenting commitment to solving the case made a big difference. “In most cold case investigations, if the family doesn’t push, there is very little done at the investigative level,” he says.

Hilary and Patrick Sessions knew the value of using the media to keep the story, and the investigation, from slipping into obscurity. “Anything you can do to create a hook to get the media to come out and law enforcement to come out is valuable,” Hilary Sessions says. And though her daughter’s remains have yet to be found, she has found some comfort and relief in knowing that police have identified the killer, even though he’s dead.

A FATHER’S BLOG

Barry King still lives in the same home on Yorkshire Road with his second wife, Janice, who had been a friend of Marion’s. Photos of Tim are displayed in the living room, along with a painting of the boy in a hockey uniform.

King writes a blog to bring yet more attention to the case. His posts include photos and documents he obtained through his lawsuit, along with correspondence with police and the prosecutor’s office. “I’ve enjoyed it because in a way, it’s given me an opportunity to vent,” King says.

“Here’s a guy who’s 85 and he’s going to keep plowing ahead in hopes that this might help someone remember something,” King’s son Chris says. “He’s a man on a mission and he’s going to keep at it.”

Despite the family’s campaign to keep the case in the public eye, it’s been a difficult journey. “There’s no upside. It has re-traumatized us,” Chris King says. “It’s such an open wound within the community. If there can just be some kind of closure in the case, that would be helpful.”

Broad says police owe the families an explanation. “They should reveal what went wrong with the investigation and say this is why we couldn’t put together the case,” she says. “At some point they have to stop hiding behind the active investigation. Tell the public what went wrong. Innocence is damaged in Oakland County forever. I think they owe it to those four kids to come clean and explain why they have no answers.”

Detective Williams believes Barry King’s work has been extraordinary. “I’m proud of Barry, as a father, how far he’s carried the torch for his son and never gave up,” Williams says.

Perhaps the most poignant reminder of Tim is a gift he gave his dad, a piece of wood on which Tim painted “Happy birthday, dear Dad. Best wishes, Tim.” Tim told his dad that the piece of wood was the best he could do because he had no money.

“I told my family,” King explains, “that when I go to the crematorium, I want this to go in with me because I want to take Tim with me.”

FEBRUARY 2017 ABA JOURNAL || 63
Amanda Jones is a well-traveled writer and photographer who doesn’t shock easily. But a trip to the Democratic Republic of Congo in 2013 left a deep impression on her when she witnessed firsthand the horrific effects of sexual violence against women that have plagued the conflict-ridden country for about two decades.

Jones was visiting Congo with a group of female philanthropists, there to mark One Billion Rising, playwright Eve Ensler’s worldwide project to end violence against women. But any celebratory tone to the trip was undercut when Jones met 8-year-old Cynthia, a child of rape whose mother had been held captive and sexually violated daily over a two-year period. In desperation, her mother tried to kill the girl five times during her first six years of life. “It amazed me that this child could be so resilient and still so loving,” Jones says. “It was hard not to fall completely in love with her.”

Coming home “still feeling shattered” by the terrible stories of violence she heard and the evidence of brutality she witnessed, Jones was “determined to help in whatever small way I could. Cynthia gave me hope that the DRC had a future, one where women and girls who had experienced the worst things one can imagine could pick themselves up and move on,” she says.

Jones was soon talking to Jennifer Chapin, her longtime friend and fellow activist in the San Francisco Bay Area, about her experience. “It was Cynthia who made us realize we had to do something,” says Chapin, a business and social entrepreneur.
They began hatching a plan on a flight to New Orleans, where they were gathering with a group of friends to celebrate Chapin’s birthday by volunteering to rebuild houses by day in neighborhoods still ravaged by Hurricane Katrina. They continued the celebration by going out to music clubs at night. “Jen asked me: ‘What program did you see there that needs the most help?’” says Jones, who was ready with an answer. She said they should marshal support for the Legal Scholarship Fund for Congolese Women sponsored by the ABA Rule of Law Initiative, a project initiated in 2011 by a private donor. Jones first saw ABA ROLI’s work in Congo and learned about the scholarship program when representatives from Human Rights Watch took the visiting philanthropists to meet ABA ROLI staff members and some female law students who traveled for two days to meet them. “They were so grateful and so gracious that it moved me to tears,” Jones says.

ABA ROLI has 52 professional staff and 10 support personnel who work in Congo. All of these personnel are Congolese nationals, except for the country director, who’s from Cameroon, and the finance manager, who’s from Ivory Coast.

TO CHANGE A NATION

Thinking about where she and Chapin could best apply their efforts, Jones says, it seemed to be that the ABA ROLI scholarship program “was the only program I had seen that was not funding triage. It had the potential to change a nation, merely by getting more women lawyers into school.” When they returned from New Orleans, they invited some friends to Chapin’s house and gave a little talk, Jones says. “We raised around $30,000 that night, and we were on our way.”

The project was given the name Cynthia’s Sisters, and its sole focus is to raise money to fund law school scholarships for young women in Congo in partnership with the ABA ROLI Legal Scholarship Fund for Congolese Women. Only 13 percent of lawyers in Congo are women, says Elizabeth Andersen, director of ROLI and an associate executive director of the ABA. Many people who work in the field think empowering women as lawyers and leaders will support their proactive efforts in helping stop the violence against women and give them hope that justice will be done to those who commit the crimes.

The total cost for an individual legal education in Congo is $7,000, and all the money raised by Cynthia’s Sisters, which comes from individual donors and foundations, goes directly to the scholarship fund, Andersen says. The scholarships cover four years of the five-year program that leads to a law degree, including tuition, course materials, laptops, library fees, admission to the local bar and externship stipends. The young women are selected based on academic performance and on their commitment to fight for women’s rights and empowerment in Congo, she emphasizes.

To date, the scholarship program has raised $330,000 and is allowing 50 young women to attend law school. With support from Cynthia’s Sisters in the past few years, “we have tripled the number of law students receiving ABA ROLI scholarships,” Andersen says.

Nevertheless, the project faces a daunting challenge. Although Congo has vast natural resources, it is one of the poorest countries in the world, largely because various militias, rebel groups, businessmen and even the army compete for control of that mineral wealth, according to many experts who also describe Congo as one of the most dangerous places in the world for women. Exact figures for the numbers of rapes and other violent acts against women are hard to tally. But Michael Maya, the former deputy director of ABA ROLI, wrote in a 2011 article that the scale of Congo’s epidemic of rape, which he said is used as “a weapon of war,” is “arguably without rival in modern history.”

The article, which can be accessed on the ABA ROLI website, also notes that the United Nations has estimated that about 500,000 victims have been raped or subjected to sexual violence in Congo, especially in its eastern area, since 1996. A 2010 article in the American Journal of Public Health presented more chilling figures, reporting that 1.65 million to 1.8 million Congolese women reported having been raped in their lifetimes.

The scholarship program is one part of the ABA’s extensive rule of law programs in Congo, where staff members work with judges, prosecutors and civil society organizations on a wide range of reform efforts, Andersen says. “But this scholarship program fills us with particular pride and hope, as it is making a lasting investment in change agents of the future,” she says.

‘PASSION PROJECT’

ABA President Linda A. Klein of Atlanta applauds the Congolese scholarship program “for planting the seeds for a better future for the country.” She notes that, as similar ABA ROLI programs to promote justice, economic opportunity and human dignity are taking place in about 100 countries, the scholarship program in Congo reaches “a corner of the world where empowering and supporting female lawyers can help curb violence and bring about peaceful communities.”

The Schmidt Family Foundation’s 11th Hour Project supports the administrative costs associated with running the scholarship program in Congo. The ABA ROLI team in Congo “plays an incredibly important role in ensuring that each and every scholarship winner gets the most out of her experience,” says Maria Koulouris, program director of the 11th Hour Project. “They are uniquely positioned not only to mentor these talented young women during their studies but also to help them navigate the opportunities they have to use their higher education for the betterment of society.”

A new benefit to the scholarship program—also sponsored by the foundation—is postgraduate fellowship opportunities in which new lawyers are placed in jobs in local civil organizations, such as legal aid clinics, to develop their lawyering skills.

And recently, Cynthia’s Sisters announced that it is beginning a new Lawyer-to-Lawyer Program, challenging U.S. law firms to underwrite the cost of just one student. Chapin says. As for the future of Cynthia’s Sisters, it hopes to help ABA ROLI spread the program to other countries.

Chapin and Jones say it is rewarding to see the fruits of their labor. Two scholarship recipients, Rita Salama Rubaiy and Kelly Buhendwa Shukrani, traveled from Congo to the 2016 ABA Annual Meeting in San Francisco, where they attended a reception for Cynthia’s Sisters and thanked their supporters. Andersen says the women talked about what a difference the program has made in their lives and their communities, speaking “in personal terms about the very real limitations in their families and their communities to pursue their ambitions.” The women also discussed the scourge of sexual violence in their country, Andersen says, which motivates them to develop the legal tools to help reduce it.

Cynthia’s Sisters is a “passion project,” says Chapin, and Jones agrees. “I have two daughters, and the luck that they were born into is something I wanted them to grow up appreciating,” Jones says. “I truly believe that the next step for the world is to have more women in positions of power.”
In 2014, George Annas was one of the speakers on a panel at the ABA Annual Meeting. The program had nothing to do with informed consent for medical patients, but that didn’t stop Annas, a professor and director of the Center for Health Law, Ethics & Human Rights at Boston University’s School of Public Health, from broaching the topic. And when he did, he didn’t pull any punches.

He contended that informed consent, a long-standing legal and ethical bedrock of the doctor-patient relationship, was “under attack.” Annas reached his conclusion from studying informed consent up close during years in the field of bioethics and the law. It was not just the fact that physicians in some specialties were encouraged to perform procedures even if they did not obtain patient consent, he said, but it was the broader concern that even when doctors obtained consent, they were making the process a matter of efficiency rather than ensuring that patient rights were protected.

It’s an issue that continues to concern Annas. He cites the controversial study known as Support (short for Surfactant, Positive Pressure and Oxygenation Randomized Trial). Conducted between 2004 and 2009 with funding from the National Institutes of Health, the study sought to find ways to improve treatment of babies born prematurely. In one part of the study, extremely premature newborns were given different levels of oxygen after...
being placed in one of two random groups. While informed consent was obtained from the parents of the babies who participated in the study, Annas says, they were not informed of the risks of death or blindness, a conclusion reached in 2013 by the federal Office for Human Research Protections. “It’s a question of what you value,” says Annas, a co-chair of the Health Rights and Bioethics Committee in the ABA Section of Civil Rights and Social Justice.

Annas’ comments at the annual meeting program in 2014 caught the attention of the ABA Special Committee on Bioethics and the Law, which decided to embark on what its webpage calls “an intensive study of the issue of informed consent.”

A WORK IN PROGRESS

Starting in October 2014, the special committee held a series of town hall meetings across the United States to garner comments about informed consent from bioethicists, clinicians, dentists, hospital administrators, nurses, occupational and physical speech therapists, pharmacists, researchers and academics, social workers, surgeons, and, of course, lawyers.

The special committee intentionally did not seek out patients or representatives of professional associations for the town hall meetings, but it does intend to reach out to them during its next phase of work, says Valerie Gutmann Koch, its chair. The strength of the town hall conversations was that the professionals who spoke also brought their experiences as patients and health care consumers to the table, says Koch. She is director of law and ethics at the MacLean Center for Clinical Medical Ethics at the University of Chicago and a visiting fellow at DePaul University College of Law.

What the committee ultimately will do with its voluminous accumulated information has not been finally determined, Koch says, but much of it will be published as a full symposium of articles in the spring issue of The Journal of Law, Medicine & Ethics. Meanwhile, the project continues to be a work in progress. Eventually, she says, the committee may produce policy recommendations for consideration by the ABA House of Delegates, a list of practice considerations or a white paper that discusses the issue in detail but does not make formal recommendations.

While all 50 states mandate informed consent for both treatment and research, the bioethics and law committee concentrated on the treatment arena, in part because federal regulations govern informed consent for research and the fiduciary obligations are much different. According to the American Medical Association, informed consent in treatment means the doctor should follow several steps: The patient is provided with the diagnosis, if known; the nature and purpose of a proposed treatment or procedure; the risks and benefits of proposed treatment or procedures; alternatives (regardless of costs or extent covered by insurance); the risks and benefits of alternatives; and the risks and benefits of not receiving treatments or undergoing procedures.

While that’s the ideal process, today’s managed care environments with tightened budgets and financial incentives to reduce costs have created numerous impediments, the committee found, with informed consent often coming down to just making sure the patient has signed essential forms. “It should be an ongoing process, something other than the piece of paper,” says Nanette Elster, a bioethics professor at Loyola University Chicago’s Stritch School of Medicine and the immediate-past chair of the ABA’s bioethics and law committee. Informed consent was intended as a way to begin a dialogue between patients and doctors, she says, but the process lost the informed part along the way. “We need to rethink how the law works and what its purposes are,” says Elster, who also is vice president of the Lincolnshire, Illinois, law firm of Spence & Elster.

Medical institutions seeking to protect themselves and their providers from liability have brought more lawyers into the process, especially in recent years. At least one town hall participant, Elster recounted, said that once lawyers got involved something dramatic shifted, and “that informed consent went from a process to really a verb.” Indeed, many in the medical community say that “Did you consent the patient?” has become a common question before a procedure or treatment is to take place.

Such developments have meant the informed consent process can take on the characteristics of a contractual relationship, with participants negotiating at arm’s length and often in adversarial tones, Elster says. “Again, it’s the reduction to the signed piece of paper: a contract.”

Many experts believe medical providers should do away with forms altogether and encourage doctors and patients to talk to each other. Dr. Theodore Christou, a staff physician at Mercy Hospital & Medical Center in Chicago, agrees that informed consent sometimes becomes “another item on a checklist. The conversation is being avoided. If you obtain informed consent without talking to the patient, what use is it?”

The Special Committee on Bioethics and the Law held its most recent town hall in August during the annual meeting in San Francisco, where speakers added the question of how to deal with informed consent when a patient’s capacity is compromised. The topic came up frequently during earlier town halls, Elster says, as participants discussed the varying levels of brain disorders from birth through childhood and adulthood, the country’s aging population and how best to convey information to individuals with diminished or no capacity. Most states have default surrogate consent statutes that go into effect when a doctor decides the patient cannot provide his or her own consent, Elster says, but “there’s often confusion between capacity and competence,” with the latter frequently more problematic to assess.

And when surrogate measures are employed, those decision-makers still may not know what the patients’ goals and decisions are. Annas would like to see everyone name a health care agent in advance. Then, when patients are found to be incapacitated and need their surrogates to make treatment decisions, he says, “they will be the decisions you’ve selected.”

AN EXTREME APPROACH

One proposal to change the overall process of informed consent, considered among the most radical, is to eliminate liability altogether, according to the committee. Currently, plaintiffs generally attach a claim of failure to obtain informed consent, a tort, to other causes of action in medical-malpractice actions, legal experts say. Doctors and hospitals are held liable, and patients can collect damages, even when they have given consent but claim that a doctor failed to disclose certain or all risks, benefits and alternatives to a treatment or procedure and injuries resulted.

But with no liability, the process could become merely informational, preventive and nonpunitive, perhaps with dedicated informed-consent navigators to take all the information presented and try to collate it so the patient understands it. “We need to find a way to educate patients better, not just in informed consent per se,” says Elster. “They need to recognize what they don’t know, how to get answers to their questions, what to expect from their researchers, from their care providers. One size doesn’t fit all.”
Miami is just 228 miles away from Havana. When the most tropical city on the U.S. mainland hosts the 2017 ABA Midyear Meeting, scheduled for Feb. 1-7, there will be plenty of buzz about the implications of Fidel Castro’s death and Donald Trump’s rise to the presidency on relations between the United States and Cuba—particularly for American business.

The midyear meeting schedule includes two panel presentations on doing business with and in Cuba and another analyzing the impact of the Hispanic vote on November’s election, in which Trump won enough Electoral College votes to become president.

“The context is now very different after Fidel Castro’s death,” says Carolina Blanco, who will moderate a Cuba program being sponsored by the ABA Commission on Hispanic Legal Rights & Responsibilities. “There are a lot of panel discussions about ways to do business in Cuba, but the reality is they’re encountering big obstacles on the Cuba side,” says Blanco, an associate at Hill Ward Henderson in Tampa, Florida, who is a member of the commission. The Cuban government insists on the U.S. economic embargo being lifted entirely, she says, though “it is tempered by their self-interest if a proposal is appealing to them.”

But the midyear meeting also will feature scores of programs on various substantive issues in the law.

Prompted by the refusal of Republicans in Congress to give active consideration to former President Barack Obama’s nomination of Merrick Garland, a judge on the U.S. Court of Appeals for the District of Columbia Circuit, to fill the seat on the Supreme Court vacated by the death of Justice Antonin Scalia, a high-powered panel of experts will discuss the issue. The Feb. 3 program titled “The Presidential Nomination Process and the Steps to Confirmation—a View from Different Perspectives” will also include questions from the audience.

Republicans generally argued that Obama’s lame-duck status negated the need to consider his nominee, while the president and other Democrats maintained that Congress should be obligated to fill the vacancy on the Supreme Court.

THE HOUSE GETS DOWN TO BUSINESS

On Feb. 6, the ABA’s policymaking House of Delegates will consider a variety of recommendations, including a proposal to accredit a program that would certify a qualified lawyer as a “privacy law specialist.” Another proposal asks the House to approve a model statute adopted by the Uniform Law Commission Committee for online privacy protections for social media presence by employees and students.

A proposal to require that 75 percent of the graduates at a law school accredited by the council of the ABA Section of Legal Education and Admissions to the Bar pass a bar examination within two years of graduation likely will be the most controversial issue coming before the House. Accordingly, that particular matter will be considered separately from several other proposals from the section to amend the ABA Standards and Rules of Procedure for Approval of Law Schools, including self-study, and curriculum and admissions.

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.

On Feb. 4, two ABA entities will sponsor their annual awards luncheons. The Commission on Racial and Ethnic Diversity in the Profession will present the Spirit of Excellence Awards, recognizing the efforts of four recipients to promote a more racially and ethnically diverse legal profession.

Meanwhile, the Commission on Sexual Orientation and Gender Identity will present its Stonewall Awards to three recipients in recognition of their efforts to advance lesbian, gay, bisexual and transgender lawyers in the profession or to address legal issues affecting the LGBT community.
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Getting Ready

The ABA takes a close look at Trump administration positions

By Rhonda McMillion

The ABA Governmental Affairs Office has been closely monitoring positions taken by President Donald J. Trump to determine their impact on issues of concern to the association. “The Governmental Affairs Office has been an effective advocate for advancing ABA policies in Washington, regardless of the political party in power,” says Thomas M. Susman, the GAO director. “Nonetheless, we do not underestimate the headwinds we face as we press forward in the 115th Congress on many issues of importance to the bar and the legal profession.”

“Nor do we take lightly the need for strong and vigilant defensive efforts to protect against rollbacks on a number of our priority issues.”

IMMIGRATION

One area of specific concern to the ABA is immigration. The administration announced plans to immediately start building a wall on the nation’s southern border with Mexico and to initially focus on deporting illegal immigrants who have committed crimes. Other steps described on the Trump campaign website include vetting applicants to “ensure they support America’s values, institutions and people,” and temporarily suspending immigration from “regions that export terrorism and where safe vetting cannot presently be ensured.”

Trump also indicated that he would repeal numerous executive orders issued by former President Barack Obama, including ones establishing two programs supported by the ABA that address the status of undocumented people who have significant ties to the United States: Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans and Lawful Permanent Residents.

Approximately 750,000 people are participating in the DACA program, which provides temporary protected status to allow individuals brought to this country as children to go to school and work after meeting certain criteria. The DAPA program is currently blocked by an appeals court decision that the U.S. Supreme Court affirmed on a 4-4 vote.

The ABA supports enhanced border security, strongly advocates for comprehensive immigration reform that promotes legal immigration based on family reunification and employment skills, and provides new legal channels for future workers and a path to legal status for much of the undocumented population. The association also has spoken out against legislative proposals or policies that would delay or halt U.S. resettlement of Syrian, Iraqi or Muslim refugees.

CRIMINAL JUSTICE

Another ABA priority is criminal justice reform. Trump ran on a “tough on crime” agenda and said he would create a new violent-crime task force and increase spending for law enforcement and federal prosecutors. Although he has said some laws regarding nonviolent crime need to be reassessed, he has not indicated a position on bipartisan sentencing and corrections reform legislation supported by the ABA that was considered by the 114th Congress.

The legislation would have narrowed the scope of mandatory sentences to focus on the most serious drug offenders and violent criminals, allowed judicial discretion in sentencing lower-level violent offenders and expanded recidivism-reducing prison programs. Trump’s pick for attorney general, Sen. Jeff Sessions, R-Ala., has strongly opposed most of these measures.

TORT REFORM

A Republican president working with a Republican-led House and Senate also will likely initiate an aggressive revival of tort reform proposals opposed by the ABA.

During the last Congress, the House passed legislation to amend federal court rules regarding class actions and the filing of frivolous lawsuits. The ABA opposes these measures as unnecessary and unfair to victims in these cases. The association also opposes any attempt to revive legislation that would preempt state medical liability laws to place caps on pain and suffering awards in such cases.

Meanwhile, there will definitely be quick action to submit a Supreme Court nominee and to fill the more than 90 vacancies in the federal district and appellate courts. The ABA Standing Committee on the Federal Judiciary evaluates the professional qualifications of potential nominees for the lower federal courts before their nomination, and evaluates nominees for the Supreme Court after their nomination. It is unclear what the committee’s role will be in the Trump administration.

This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillion is editor of ABA Washington Letter, a Governmental Affairs Office publication.
RESULTS OF THE 2017 UNCONTESTED STATE DELEGATE ELECTIONS
On Dec. 8, 2016, the Board of Elections certified the results of the 2017 State Delegate Elections. For a complete list of the State Delegates elected for the (2017-2020) term, go to ambar.org/stateelection and click State Delegate under Elections.

2017 ‘CONTESTED’ STATE DELEGATE ELECTION
The following persons accredited to the state of Washington have filed petitions for nomination for the office of State Delegate. The term is for three years commencing at the adjournment of the 2017 Annual Meeting. The name of each contested nominee and the names of 25 signers of his/her petition are published below in accordance with section 6.3(b) of the Association’s Constitution.


GOAL III MEMBERS-AT-LARGE ON THE NOMINATING COMMITTEE
The ABA President will appoint one Goal III minority member-at-large and one Goal III woman member-at-large to the Nominating Committee for the term 2017-2020. Nominations for these appointments will be broadly solicited from the diversity commissions, sections, divisions and forums, state and local bar associations, and the membership at large. If you are interested in submitting a nomination or have questions, contact Leticia Spencer (Leticia.Spencer@americanbar.org) c/o Office of the Secretary, by Wednesday, April 12.

AMENDMENTS TO THE ABA CONSTITUTION AND BYLAWS
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. March 10 is the deadline for any ABA member to submit proposals, which will be published in the July ABA Journal. For details, visit ABAJournal.com/magazine, Your ABA, ABA Announcements.

Mary T. Torres
ABA Secretary

ABA Notices
Justices Hear a Challenge to ‘English-Only’ Laws

On a May afternoon in 1920, a county prosecutor showed up at a one-room parochial school in rural Nebraska to watch a 10-year-old boy take part in a crime. He watched as young Raymond Parpart read aloud an Old Testament Bible story about Jacob’s ladder. The crime evolved from the fact that the boy was reading in German. Parpart’s teacher, Robert Meyer, was later charged with violating Nebraska’s Siman Act, for which he could face jail time and a fine.

During decades of upheaval in Europe, heartland America had absorbed unprecedented levels of European immigration. Even the armistice ending the Great War brought no end to lingering fears that this tide of immigrants would bring European chaos to Middle America.

In response, Nebraska legislators passed the Siman Act in 1919, forbidding foreign language instruction through eighth grade in all schools. Like the post-war “English-only” laws in many other states, the act appeared to have solid federal support. An omnibus education initiative, the Smith-Towner Bill of 1918, included a requirement for the “Americanization of immigrants” through mandatory English instruction. State legislatures were offended by federal interference in education but convinced by virulent xenophobic organizations like the American Protective League that the unfamiliar spoken word—particularly German—was disloyal and dangerous to American cultural norms. One legislator noted: “If these people are Americans, let them speak our language. If they don’t know it, let them learn it. If they don’t like it, let them move.”

The brunt of this vitriol was aimed at a growing population of Catholics and Lutherans, many Italian or German by birth or by culture. It was no coincidence that Meyer taught at a school operated by the Zion Evangelical Congregation, one of the nation’s most influential Lutheran ministries. Moreover, the Bible reading was a carefully staged act of civil disobedience designed to place before the courts a challenge to the Siman Act and other such laws.

Meyer was tried and convicted, but he refused to pay the $25 fine. On appeal, the Nebraska Supreme Court ruled that enforcement of the Siman Act, like any mandatory education, was a legitimate exercise of state police power—this one directed at a potential public threat. But his lawyer Arthur Mullen—a naturalized citizen born in Canada and a former Nebraska attorney general—took a different approach before the U.S. Supreme Court. Instead of grounding his argument in a First Amendment right of religious expression, Mullen attacked the law as a violation of Meyer’s right to pursue his teaching profession, an abridgment of due process under the 14th Amendment.

By the time the nation’s highest court was to consider Meyer’s criminal case, Nebraska legislators had adopted a newer, harsher version of the act. And in February 1923, the court heard arguments that included the Siman Act, the newer Nebraska legislation and English-only cases from Iowa and Ohio.

But it was Meyer v. Nebraska that dealt the blow. In a blistering 7-2 decision delivered in June, Justice James C. McReynolds derided the laws as an affront to not only the rights of teachers but also parents who desired to have their children educated as they see fit. McReynolds also directed specific attention to the disproportionate, irrational treatment of German immigrants.

“Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable,” McReynolds wrote. “The protection of the Constitution extends to all—to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.”
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