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SPACE CASES
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**Your ABA/Midyear Meeting Report**

House of Delegates urges withdrawal of travel ban.

**ABA President Linda Klein says independence of the judiciary “is not up for negotiation.”**

House votes against a proposal to tighten bar-passage rate standards for accredited law schools.

**ABA groups build a rapid-response website to address new immigration order, support pro bono efforts.**

President-elect candidate Robert Carlson cites the association’s value to “Main Street lawyers.”

**Task force: Better policing will improve trust in the criminal justice system.**

An overview of the Trump administration’s possible enforcement priorities.

**Board of Governors approves a proposal for the creation of the Commission on the Future of Legal Education.**

**Precedents**

President Harry Truman seizes the steel mills.
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FACT-CHECK THAT SLOW-MO STUDY

While the main point of “Caught on Tape: Is slow-motion video biasing jurors?” February, page 12, is good and helpful, my thanks go out to the law prof from Northwestern University who commented on the study, Robert C. Owen. He twice noted the importance of replicating the study.

As John Oliver said in his excellent piece about scientific studies, “there is no reward for being the second person to discover something. ... There’s no Nobel Prize for fact-checking.” There ought to be. And hats off to Owen for including it in his comments.

John Casserly
St. Paul, Minnesota

I can’t be sure without seeing the full study, but it seems to me that the conclusion doesn’t necessarily follow from the facts.

It could be that the mock jurors shown the slow-mo were more likely to convict because the video biased their perceptions—or it could be that the mock jurors who did not see the slow-mo were less able to be or feel certain of the details of the events, and therefore more likely to have “reasonable doubt.”

In other words, it could be that the slow-motion video led to more convictions and harsher sentences because it distorted the jurors’ impressions of the timeline, or it could be merely because it did what it was supposed to do by making the action easier to follow and the details easier to distinguish.

Anthony Zarrella
Fitchburg, Massachusetts

QUESTIONABLE CLASS ACTIONS

Regarding “Foot Fight,” February, page 16: There is another side to the evanescent remedy result. I was a member of a class action to recover damages from misuse of mortgage escrow funds. I learned about it in a notice of the certification of the class. The remedy? A $1 credit to my escrow account in exchange for full release of all rights. I could discern no mishandling of the account and surmised that the suit was an attempt to “cleanse” the mortgagee from future claims, in order to sell the loans.

I suggested the case be dismissed, as it accomplished nothing positive for the class and only a negative waiver of rights for illusory gain, and the class attorneys be awarded nothing. The Subway case is different; but the whole class action scenario needs serious work to ensure genuine cases can be brought and cases in the “so what” category, like I view the Subway case, can be easily dismissed.

Thomas McGarry
Punta Gorda, Florida

CORRECTION

“Female First-Chairs,” March, page 46, should have stated that Temple University’s Beasley School of Law studied multidistrict litigation appointments and gender. The ABA Journal regrets the error.

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The Importance of Law Day

As lawyers, let’s share our passion for constitutional democracy

In 1957, during the Cold War, American Bar Association President Charles S. Rhyne had an idea. It came to him as he watched reports of the Soviet Union’s annual May Day celebration in Moscow’s Red Square, with massive displays of military might. Rhyne, a onetime counsel to President Dwight Eisenhower, suggested that what made America truly great was its fidelity to the rule of law as opposed to the rule of force.

A presidential proclamation was issued, declaring May 1 Law Day. It was codified by Congress in April 1961. Every president since Eisenhower has signed a Law Day Proclamation.

Eisenhower’s proclamation, issued May 1, 1958, declared that “guaranteed fundamental rights of individuals under the law is the heart and sinew of our Nation.” Rhyne described the rule of law as “the cement that holds our free society together.”

In the six decades since, the ABA has mobilized lawyers for Law Day to engage their communities around timely and timeless themes about America’s constitutional system. The theme of Law Day 2017 honors the principle of individual rights and the law. “The 14th Amendment: Transforming American Democracy” will explore the critical role this constitutional amendment has played in securing and protecting so many of the rights we enjoy today.

Although it is among the most litigated of the Constitution’s provisions, the public is largely unfamiliar with it. The 14th Amendment was one of three post-Civil War Reconstruction amendments. Passed by Congress on June 13, 1866, and ratified by the states on July 9, 1868, it was primarily intended to establish equal civil rights for former slaves.

But the amendment shifted how the Constitution was applied. Thanks to the 14th Amendment, individual protections under the Bill of Rights were not only enforceable against the federal government but also against individual states.

Throughout the 20th century, the 14th Amendment became the legal basis for major Supreme Court decisions, from desegregating schools (Brown v. Board of Education) to ensuring counsel for criminal defendants (Gideon v. Wainwright).

“The reason we have the 14th Amendment,” said former U.S. Solicitor General Ted Olson, “is to provide the courts with the opportunity to override the will of the people when the will of the people discriminates against a segment of our society.”

This year, we’re asking lawyers to educate the public about the 14th Amendment’s vital importance to our democracy. We’re asking you to join judges and teachers across the country to engage students, elected officials, and community leaders in Law Day discussions of the amendment’s significance.

Another goal is to have every governor issue a Law Day proclamation, something that will require your help and that of state bars. The ABA has a model Law Day proclamation you can use. That and other planning materials are available at ambar.org/lawday.

Examples of Law Day activities are plentiful. The ABA’s Young Lawyers Division is sponsoring an art contest for students that explores protections afforded by the U.S. Constitution. The Idaho State Bar is holding a student contest to create a podcast examining a key clause (citizenship, due process or equal protection) in the 14th Amendment. In Boston, lawyers will visit classrooms to talk about our legal system. The Texas and North Carolina Bars are sponsoring contests where students can submit an editorial, photo or poster to explain the importance of equal protection.

At a program on May 1 in Washington, D.C., the ABA Division for Public Education will gather legal scholars to discuss how the 14th Amendment transformed America, key cases and actors in its development, and what the future may bring.

I’ve talked to many lawyers over the past several months. They tell me that the value of civics education illustrated by Law Day is at least as important today as it was 60 years ago when America faced a rival that suppressed freedom and individual rights. We need your help and involvement this year. You can choose how to participate in educating your community. Only through an understanding and appreciation of our rights can we and our fellow citizens maintain the rule of law—the glue that binds our great nation together.
Concerned Bar Groups Step Up
Rise in hate crimes and divisive rhetoric prompts action

**PRESIDENT DONALD TRUMP’S EXECUTIVE ORDER**
seeking to restrict immigration from seven Muslim countries was part of a disturbing trend that didn’t surprise members of minority bar associations already prepping for court battles to come. Even before the “Muslim ban,” affinity bars were marshaling resources and teaming up to fight a reported increase in racism, bigotry, xenophobia, harassment and hate crimes.

Among those leading the effort is Cyndie M. Chang, president of the National Asian Pacific American Bar Association and managing partner of the Los Angeles office of Duane Morris.

Chang, an attorney who specializes in business litigation, was recently the victim of a racist taunt.

“I was standing on the steps of the U.S. Capitol, and a Caucasian man told me to go back to my own country,” says Chang, whose family has lived in the United States for five generations.

“I’m an Asian-American female, so this is not the first time it happened to me,” she says. “If you’re a person of color like me, you’ve probably had racist experiences. It’s common.”

But the upsurge in racism and bigotry has become an issue of increasing concern in the current political climate. As a result, Chang’s group and others are taking on proactive roles.
Opening Statements

“To provide our membership and the greater Asian-American community with resources to help victims of racism and hate crimes, our organization has created a toolkit of hate-crime resources for attorneys and bar associations developed over a period of months,” she says.

The toolkit contains a comprehensive definition of hate crimes, information on how to report one, sources of pro bono legal services and community education, statements from other bar associations, and additional resources.

The ABA itself has spoken out about Trump’s immigration order and his attacks on judges. (See “Taking on Trump,” page 61.)

Chang’s bar association, with a membership of about 56,000, also is working with other minority bar associations to educate as well as combat racism and hate crimes.

Those organizations include the Hispanic National Bar Association, the National Native American Bar Association, the National Bar Association (an African-American affinity bar), the National LGBT Bar Association, and the National Association of Women Lawyers.

Vichal Kumar, president of the South Asian Bar Association of North America and managing attorney for the civil defense practice of the Neighborhood Defender Service of Harlem, says his organization also has provided resources for how to report hate crimes and information on immigration rights.

“Lawyers have asked for this,” says Kumar, whose organization has 26 chapters and about 7,500 members. “We also work with other bar associations and with community organizations to protect the greater Southeast Asian community.”

SABA North America formed in the wake of the 2001 attacks on the World Trade Center, in response to an increase in anti-Muslim rhetoric and bigotry.

Kumar thinks the recent uptick in incidents might be attributable to the 2016 presidential campaign and social media. The Department of Justice reported a 67 percent increase in hate crimes committed against Muslim-Americans in 2015 (the latest figures available).

“Maybe the DOJ is doing a better job of tracking hate crimes; maybe people are just more aware of them,” Kumar says.

The Southern Poverty Law Center says at least 700 “hateful incidents of harassment around the country” against immigrants were reported during the week after the presidential election. And as the legality of Trump’s executive order on refugees winds its way through the court system, minority bar associations have pledged to continue their fight against racism, xenophobia and hate crimes.

“Because of the increase in racism and bigotry, it’s been challenging at times,” Kumar says. “But by and large, Muslims are optimistic here because of what the country offers—freedom, opportunity and hope.”

—Marc Davis

Exposing the Bail Trap

New film campaign works to inform, effect change

Educating the public and inspiring action to change the U.S. money bail system are among the goals of the Bail Trap: American Ransom film campaign. The multipart initiative is co-produced by Brave New Films and the Pretrial Justice Institute.

“We don’t run a think tank, and we don’t do research papers,” says Robert Greenwald, founder and president of Brave New Films. “We tell human stories and hope that from the human story comes a better understanding of policy.” Brave New Films recently released the first short film in the campaign, Breaking Down Bail.

Breaking Down Bail combines information about the bail system—such as the fact that about 500,000 people are in jail on any day, awaiting trial—with man-on-the-street interviews, highlighting the many misconceptions people have about the bail system. For example, some interviewees erroneously assumed bondsmen are public sector employees; one said the individuals work for themselves. The film also points out that insurers underwrite bail bondsmen.

In addition to arming the public with facts, Breaking Down Bail highlights the human lives impacted and the hardships that often accompany the money bail system. An arrestee unable to come up with the funds can be locked up for even a minor infraction.

In many cases, this puts the arrestee’s job—often a low-wage one—in jeopardy and leaves him or her unable to care for dependents.

Advocates say the system has got to change. According to Cherise Fanno Burdeen, co-chair of the ABA Criminal Justice Section’s Pretrial Justice Committee and CEO of the Pretrial Justice Institute, the goal isn’t to eliminate bail but to replace the system.

“There are 12 million arrests a year, but just 6 percent are convicted,” Burdeen says. “Jail is where mass incarceration happens, even though three-quarters of arrests are for misdemeanors.”

Many of those arrested serve more pretrial time than they would for the crime with which they’ve been charged. For example, an arrestee who can’t afford bail might spend a month in jail for a crime that carries...
Greenwald says he was inspired to tackle the bail system when he learned that the United States and the Philippines are the only countries that currently use a for-profit bail system. The film notes that some states have begun to eliminate for-profit systems, and arrestees show up for court dates at about the same rates as do those in states with money bail systems.

Maryland recently overhauled its bail policy, requiring judges to consider a defendant’s ability to pay. Other states, including Kentucky, New Jersey and New Mexico, also have moved away from money bail.

Research also has shown that locking up people because they can’t afford bail is not only costly and immoral but also ineffective—it doesn’t boost safety, Greenwald says. “It is both morally wrong [and] it’s bad policy,” he says.

The shortcomings of the money bail practice have garnered interest from across the political spectrum. Greenwald says many who’ve been part of the “lock them up and throw away the key” world are shifting their stance—often due to costs, concern about government overreach, and the lack of success with the current system.

Depending on funding, Brave New Films will complete three to five films in the series. Each will focus on personal stories and will be available for legislators and their staffers as well as voters and activists. The films initially will focus on efforts underway in California, Greenwald says. But because of its size, success in California tends to have a trickle-down effect.

Causing change at the national level will be difficult, Greenwald says. Changes will come “state by state and community by community.” —Karen M. Kroll
Check the Technique

When it comes to rap and hip-hop music, LA lawyer Julian Petty represents

AS A COLLEGE INTERN at
Def Jam Records, Julian K. Petty saw firsthand how poorly artists were represented, and he vowed that someday, he’d do something about it. Fast-forward 20 years, and Petty now is a top entertainment lawyer who represents some of the biggest names in rap and hip-hop music, including Childish Gambino, A Tribe Called Quest and the estate of the Notorious B.I.G. As head of Nixon Peabody’s entertainment law practice, the Los Angeles-based partner specializes in crafting cross-disciplinary deals that maximize ownership interests and business opportunities that can range from nontraditional record deals and reality shows to concert promotions and clothing lines.

You’re always doing exciting work, from brokering the deal for British singer Estelle to play a part in an episode of the Fox network TV show Empire to representing the Harlem Globetrotters. What are you working on right now?

There are three projects that are taking up large chunks of my day. First is the Tribe Called Quest album, their first in 18 years. I was very involved in putting that deal together, and we still have merchandising and licensing deals to finalize before they mount a tour. I’m also working with Childish Gambino, making sure his vision gets executed correctly, and he has the right partners for his music. And today we just released a single from the long-awaited Notorious B.I.G. and Faith Evans duet record.

Can you tell me more about that deal? There must have been some legal work involved since Biggie was murdered in 1997.

I’ve represented the estate and Faith for several years now, and Faith had this idea of doing a duet record with her late husband, Christopher Wallace [the Notorious B.I.G.], like Natalie and Nat King Cole. I went to the company that owns his master recordings, and they didn’t want to do anything. But I rarely take no for an answer.

How did you convince them?

At the end of the day, I am in the solutions business. I showed them how this was going to build value and would benefit everyone. The company that owns the master recordings wants to find new ways to exploit the catalog, and this is a new, fresh and authentic way to do that. It’s good business and it’s a great art piece. And that’s how we approached it.

What’s your favorite part of your practice?

I love the music and the live performances, but my favorite part is helping young people fulfill their dreams. I enjoy being part of that process, from the point when an artist comes in with an offer to when they hand their mom the keys to her own house. I just watched that happen with a client, and whenever that happens, I always get the chills.

Do you think musicians are treated better now than they used to be? I’m thinking about situations like in the movie Straight Outta Compton, where the naive ’90s rap group gets cheated by lawyers and the record companies. Is that a cautionary tale that’s become outdated?

I don’t think that story is outdated at all. Listen, the business side of music is driven by desperation. You’re talking about someone with a dream who puts their art out into the world and is trying to make a living at it. When you have opportunity dangling right in front of you, you can make bad decisions. The key is not to be desperate. If you shift the power, you shift the conversation.

You were once an aspiring rapper. Are you ever disappointed it didn’t work out for you as an artist?

Not really. But every once in a while, I’ll listen to an old demo. That was definitely my dream. I started rapping when I was 12. I used to write my own lyrics, and I worked out of the studio where [hip-hop group] EPMD recorded their first three albums. I’d go to the record companies and pitch my stuff, and I even had some label
Feather in Your Cap
Supreme Court advocates carry home traditional mementos

THE SUPREME COURT is a place of tradition. It is an institution of custom and continuity—from the seniority system that decides where the justices sit on the bench to who answers the door during their secret conferences to the handshake before they deliberate.

One unique tradition, maintained since “the earliest sessions of the court,” according to the Supreme Court’s public information office, is presenting goose-feather pens to advocates who appear for oral argument.

The practice reportedly dates back to the early 1800s, when Chief Justice John Marshall provided lawyers with quill pens and inkwells to take notes. Today, “one set of two quill pens is placed before each chair at counsel’s table at every oral argument,” according to the information office.

“The pens are a perfect memento of your trip to the Supreme Court,” says Gregory Garre, a partner and global chair at Latham & Watkins’ appellate practice and a former U.S. solicitor general—the government’s top lawyer in the court. “Sometimes they invoke very pleasant memories, and other times very painful ones.”

The keepsakes don’t just land in the hands of the lucky few who argue cases. “Typically, there are several quills on counsel’s table so that you can share them with your colleagues who have worked just as hard on the case but may not have the chance to argue,” Garre says.

The high court estimates that it distributes 650 sets of hand-cut goose quills each term. Garre got his first pen from John G. Roberts Jr. before the chief justice joined the high court.

Lisa Blatt, head of Arnold & Porter Kaye Scholer’s appellate practice, has in her glass-walled office a vase with 34 pens—one for each of her arguments. “I keep one for myself and give the rest to clients or grasp the importance of ring tones and SoundExchange [a performance rights organization for online radio and internet radio], allowing me to make sure my boss was ahead of the curve and capitalizing off those new revenue streams for our clients.

What’s exciting you right now about the music business?
I’m excited about the concept of success shifting. It used to be you sold this number of records, you got a gold or platinum plaque. In today’s marketplace, there are so many different revenue streams that you can have an extremely successful career with a very niche audience. I have a client, Vince Staples, who had a critically acclaimed album, Summertime ’06. Five or 10 years ago, you’d look at his sales for the album and say, “This guy’s not that successful.” But he’s touring all around the world and has several endorsement deals. I find this very compelling, and it’s what keeps me motivated.

Is it about more than just making music?
You definitely have to hustle more. You have to be more entrepreneurial. And that’s the challenge because you don’t want people to lose their creative space. But if you want to succeed, you’ve got to get out there.

—Jenny B. Davis

APRIL 2017 ABA JOURNAL 13
**Loving, Then and Now**

Landmark court case gains renewed significance on the big screen

The 2016 movie *Loving* depicts the story of Mildred and Richard Loving, who were arrested in the 1950s because their interracial marriage violated Virginia’s anti-miscegenation statute.

WHEN IT COMES TO CIVIL RIGHTS milestones of the mid-20th century, a trifecta stands out: the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the U.S. Supreme Court’s 1967 *Loving v. Virginia* decision. The latter dismantled one of the last vestiges of segregation—a law that crossed from the public domain into the privacy of the bedroom.

“During the ’60s, all the formal trappings of Jim Crow were gone, but there was one tower left and *Loving* brought this down,” says Peter Wallenstein, a Virginia Tech history professor who has written two books about the *Loving* decision, which invalidated state laws that banned miscegenation.

Marriage, which was not covered by the Civil Rights Act, was one of the last areas of overt discrimination, says Dennis Parker, director of the American Civil Liberties Union’s Racial Justice Project. “It was the last bastion of historical racism,” he says. As a result, *Loving* had “an extraordinary impact” and signaled a change in societal attitudes.

On the 50th anniversary of the decision, the *Loving* case has gained renewed significance, and the recently released Hollywood film by the same name has revived the story for the masses, at a time when issues that surround equality and state’s rights are dominating the political discourse.

The *Loving* movie chronicles the love affair between Richard Loving, a white man, and Mildred Loving, a black woman, who were arrested in the 1950s because their interracial marriage violated Virginia’s anti-miscegenation statute. Exiled from the state, they moved to Washington, D.C., but desired to return to Virginia. Mildred Loving wrote to then-Attorney General Robert Kennedy, seeking help. Kennedy then referred the couple to the ACLU, which took the case alongside two upstart pro bono lawyers, Philip Hirschkop and Bernard Cohen.

Eventually, in 1967, the Supreme Court unanimously decided in their favor, holding that state laws that foreclosed the opportunity to marry violated the 14th Amendment’s equal protection and due process clauses.

Although the movie is about a landmark court case, it isn’t a traditional legal drama loaded with intense courtroom scenes. For Parker, that deliberate filmmaking decision helped show that the Lovings were two regular people “who were pointedly not activists,” but who made history, he says. But at least one of the lead attorneys was unimpressed.

“I didn’t like the film, personally,” says Hirschkop, who helped argue the case. (See “Justice for All,” page 33.) “It was entertaining but flawed.” Much of what was portrayed didn’t happen, says Hirschkop, who wasn’t interviewed by the filmmakers even though he’s a character in the film. “I understand the writer’s privilege, but the inaccuracies disturb me—especially when they’re unnecessary.”

Despite Hirschkop’s review, legal scholars are unanimous on the impact the case had on history and the importance of the film’s message.

In the more recent fight for marriage equality, personal stories such as the Lovings’ played a similar role in persuading the Supreme Court justices who decided *Obergefell v. Hodges*, the 2015 landmark case that prevented states from banning same-sex marriage. Wallenstein says although early efforts to apply *Loving* to LGBT couples were rebuffed, the case still was “an important tributary in a growing river. It gave language for substantial change to take place,” even though it took decades.

—Leslie Gordon
Hearsay

More Than $81 Million

It’s not quite the cost of a Hamilton ticket, but it’s how much was raised in an alleged Ponzi scheme to defraud investors that involved the purported resale of seats to the hit Broadway show and other A-list events. The Securities and Exchange Commission filed a civil suit that accused Joseph Meli and Matthew Harriton of falsely representing to clients that they had an agreement with producers to buy 35,000 tickets to Hamilton, then diverting the money to pay for jewelry, private schools and gambling.

Source: sec.gov (Jan. 27).

137,000

How many views the live YouTube broadcast got during oral arguments over President Donald Trump’s travel ban. The 9th U.S. Circuit Court of Appeals heard from lawyers for the state of Washington and the Department of Justice. CNN, Facebook, MSNBC and other networks also live-streamed the audio to additional viewers. It was the largest audience for a 9th Circuit oral argument since the San Francisco-based court began to live-stream about two years ago.

Source: apnews.com (Feb. 7).

Did You Know?

The Harvard Law Review has elected its first African-American woman as president of the prestigious journal. ImeIme A. Umana will supervise more than 90 student editors and staff members. Last year, as part of a commitment to better reflect society, the Review elected “the most diverse class of editors in its history.”

Source: thecrimson.com (Jan. 31).

Quick Bites

Columbia Law School student Oriane Hakkila took a break from the books to appear on the Food Network TV show Cooks vs. Cons, winning the contest and taking home $15,000. On the show, amateur chefs face off against professionals in a series of culinary challenges. Hakkila’s winning dishes were shrimp scampi sauteed with common salad bar toppings and a Southern red-eye gravy with brewed coffee, over prosciutto-wrapped pork loin and coffee-roasted root vegetables.

Source: law.columbia.edu (Jan. 19).

CONGRATULATIONS to Mike Matesky of Seattle for garnering the most online votes for his cartoon caption. Matesky's caption, far right, was among more than 90 entries submitted in the Journal's monthly cartoon caption-writing contest.

JOIN THE FUN Send us the best caption for the legal-themed cartoon above. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, April 9, with “April Caption Contest” in the subject line.

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

“The terms and conditions were drafted by Pete here, but the sentiment is all mine.”

—Mike Matesky of Seattle
Speech Under Scrutiny
The Supreme Court considers 3 First Amendment cases this term

By David L. Hudson Jr.

The First Amendment—what the late, great Nat Hentoff termed “the first freedom”—takes a leading role before the U.S. Supreme Court this term. The justices will decide a trio of cases that could impact a slew of important free speech principles, including commercial speech, the government speech doctrine, online privacy, the right to receive information and ideas, speech vs. conduct and the viewpoint discrimination principle.
In *Lee v. Tam*, the court will decide whether a rock band’s effort to trademark its name violates a federal trademark law that prohibits registering marks considered disparaging, scandalous or immoral. Asian-American musician Simon Shiao Tam sought to register the mark of his band’s name, The Slants, which is also a term many Asians consider offensive. Tam says the band seeks to reclaim and take ownership of Asian stereotypes by using the name.

However, the U.S. Patent and Trademark Office denied the claim under a provision of the Lanham Act that prohibits scandalous, immoral or disparaging marks. The PTO determined the mark would be disparaging to “persons of Asian descent.”

Tam appealed to the U.S. Court of Appeals for the Federal Circuit. A three-judge panel agreed the mark was disparaging. However, a divided en banc court reversed and ruled that the government engages in impermissible viewpoint discrimination by deeming certain marks disparaging. “The government cannot refuse to register disparaging marks because it disapproves of the expressive messages conveyed by the marks,” the majority wrote. “It cannot refuse to register marks because it concludes that such marks will be disparaging to others.”

The U.S. government argues that the disparagement provision does not restrict speech but merely establishes criteria for a government program. The government also argues that the trademark registration program is a form of government speech immune from First Amendment scrutiny. Under the government speech doctrine, it can engage in speech or expression free from First Amendment scrutiny. The government relies on the Supreme Court’s decision in *Walker v. Sons of Confederate Veterans*, in which the court ruled that Texas’ specialty license-plate program was a form of government speech.

Furthermore, the government writes in its brief, “nothing in the First Amendment requires Congress to encourage the use of racial slurs in interstate commerce.”

However, Tam argues that the disparagement provision allows the government to commit blatant viewpoint discrimination by approving marks it likes and disapproving of marks it dislikes. He writes that “the First Amendment does not allow the government to impose burdens on speech to protect listeners against offense.” Tam also vigorously contests the idea that a trademark is a form of government speech, as people associate the trademark with the views of the trademark holder, not the government. Tam also contends that his band’s name is not disparaging. In his brief, he writes that he is “appropriating a slur and using it as a badge of pride.”

“The decision will be an important signal of the court’s continued skepticism about government discretion over private viewpoints,” says Washington, D.C., attorney Megan L. Brown, who authored an amicus brief for the Rutherford Institute and Consumers’ Research in support of Tam. “Recent cases have shown hostility to expanding government power, but some outliers exist. This should be a no-brainer, given how anachronistic the disparagement bar is. If it goes down, the scandalousness bar does too.”

One point that troubles free speech advocates is how fickle officials have been in approving some marks and disapproving of others. “The inconsistency with which the USPTO has enforced the disparagement clause to date is mind-boggling,” says free speech expert Clay Calvert, who directs the Marion B. Brechner First Amendment Project at the University of Florida.

For example, the board has rejected trademarks such as Stop the Islamization of America and Republicans Shouldn’t Breed, yet it allowed Take Yo Panties Off and Murder 4 Hire.

**SPEECH OR CONDUCT?**

In *Expressions Hair Design v. Schneiderman*, the court will examine New York’s “no surcharge law,” which prohibits merchants from imposing a surcharge on customers who pay with credit instead of cash. However, the law allows merchants to offer discounts to those who pay in cash.

The law also prohibits merchants from calling the price differential a surcharge but allows them to use the term *discount*.

*Expressions Hair Design* and other businesses contend the no-surchage law violates the First Amendment because it restricts merchants in how they describe transactions to consumers. However, the New York government counters that the law regulates economic conduct and does not implicate the First Amendment.

The case presents the court with an opportunity to explain when a law merely regulates conduct or restricts speech.

“A minimalist approach in *Expressions Hair Design* would simply hold that the case is only about conduct—economic regulation—and not speech, thereby ducking entirely the thorny First Amendment questions,” Calvert explains. “In contrast, an expansive approach would acknowledge speech is at issue and, in turn, recognize that the case involves not only the right of merchants to speak but also the right of consumers to receive speech.”

Calvert points to the right to receive information and ideas, a concept the high court first articulated in a Jehovah’s Witnesses case in the 1930s. “This unremunerated right to receive speech has been recognized by the Supreme Court multiple times over the years … but the court has never fully fleshed out the contours of this right. This would be a great chance to do so,” he adds.

“I think the case could be quite significant, obviously depending on how it is written,” says Erwin Chemerinsky, law dean of the University of California at Irvine and an ABA Journal columnist. “It has the potential for opening the door to First Amendment
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challenges to many other forms of commercial regulation that affect speech.”

Washington, D.C.-based attorney Robert Corn-Revere, who has argued free speech cases before the Supreme Court, agrees that the case could be quite significant. “The case asks the court to distinguish the communica-
tion of pricing information from ‘economic conduct,’ a question that will have important rami-
fications for the commercial speech doctrine.”

SEX OFFENDERS ON THE WEB

In Packingham v. North Carolina, the court examines a state law that restricts registered sex offenders from accessing commercial social networking websites that minors are known to frequent.

Lester Packingham, a register-
ed sex offender, allegedly_violated the law by maintaining a Facebook page. The North Carolina Supreme Court upheld the law, finding that it regulated conduct and only incidentally restricted speech. “The interest reflected in the statute at bar, which protects children from convicted sex offenders who could harvest information to facilitate contact with potential victims, is unrelated to the suppression of free speech,” the court wrote.

Critics of the law contend that it also restricts access to a variety of valuable websites, including Facebook, YouTube and the online New York Times. The law prohibits sex offenders from visiting any commercial social networking site that minors can access.

In its amicus brief, the Electronic Privacy Information Center writes that the law “works a constitutional violation of stag-
gering dimensions” by “walling off news, debate, sports, scholar-
ship, art and every other shred of speech published under the same domain name.” However, North Carolina views the law as a regulation of conduct with only an incidental impact on speech. This once again gives the justices an opportunity to rule on the speech-conduct dichotomy.

“Packingham should pro-
vide the easiest win—likely a unanimous one—for the First Amendment,” Calvert says. “The statute is vastly overbroad. Good intentions of protecting minors from sexual predators don’t justify a statute as expansive as North Carolina’s law.”

All three cases were argued early this year. Decisions are expected by June, if not sooner.

THE ROBERTS COURT RECORD

The trio of cases should provide much insight into the Roberts court’s free speech jurisprudence, in which the court has a mixed record. The court has expanded the reach of the government speech doctrine, significantly reduced the level of free speech protection for public employees in Garcetti v. Ceballos, and shown scant regard for prisoner rights.

On the other hand, the court has granted greater protection for commercial speech; empha-
sized the importance of exam-
ining for content or viewpoint discrimination; and refused to create new, unprotected categories of speech in cases involving funeral protesters, violent video games and images of animal cruelty.

“It generally has been very protective of speech, except when the institutional interests of the government are at stake,” Chemerinsky says.

“The Roberts court generally has been very strong on the First Amendment, although there have been some notable and disappoin-
ting exceptions,” says Corn-Revere. “It has been at its best in protecting types of speech that few people would support—which is the very point of the First Amendment.”

Too Stoned to Drive?

The question is trickier than you’d think for police and the courts to answer

By Beth Schwartzapfel

Late one February night in 2013, Massachusetts state Trooper Eric French pulled over a blue SUV with its rear lights out. When he approached the car, he saw smoke and smelled pot. The driver, Thomas Gerhardt, could count backward from 75 to 62 and recite the alphabet from D to Q. But he couldn’t stand on one leg or walk nine steps and turn—standard measures on a field sobriety test.

The trooper determined that Gerhardt was impaired, and he was arrested and charged with driving under the influence of marijuana.

Was Gerhardt even high? And if he was, was he too high to drive safely?

His lawyer argued in January before the Massachusetts Supreme Judicial Court that French proved neither that night. Massachusetts is one of eight states, plus the District of Columbia, where recre-
tional marijuana use is now legal. Twenty more states have legalized medical mari-
juana. But science and the law have not kept pace with this rapid political change.

We take for granted that not being able to walk a straight line or stand on one leg means you’re drunk, and that being drunk means it’s unacceptably dangerous to drive. But there is no clear scientific consensus when it comes to smoking pot and driving. And few of the tools police officers have long relied on to determine whether a driver is too drunk to drive, such as the Breathalyzer, exist for marijuana.

Cases like Gerhardt’s are on the front line of a new effort in courtrooms, labs and government agencies around the country to pin down how high is too high to drive—and how to reliably know when someone is that impaired.
Most (but not all) studies find that using pot impairs one’s ability to drive. However, overall, the impairment appears to be modest—akin to driving with a blood-alcohol level between 0.01 and 0.05, which is legal in all states. (The much greater risk is in combining pot with alcohol.)

The increased crash risk with pot alone “is so small you can compare it to driving in darkness compared to driving in daylight,” says Rune Elvik, a senior research officer at the Institute of Transport Economics in Oslo, Norway, who conducted several major meta-analyses evaluating the risks of drugged driving. “Nobody would consider banning people from driving in the dark. If you tried to impose some kind of consistency standard, then there is no strong case, really, for banning it.”

When it comes to alcohol, science and the courts have long established a direct line between number of drinks, blood-alcohol level and crash risk. As one goes up, so do the others. Not so for pot. Scientists can’t say with confidence how much marijuana, in what concentration, used in what period of time, will reliably make someone “high.” (This is especially difficult to gauge because most of the existing studies used pot provided by the National Institute on Drug Abuse, which tends to be a lot less potent than what smokers can buy on the street or in shops.)

Blood levels of THC—the chemical component of pot that makes you high—spike quickly after smoking and decline rapidly in the hours afterward, during the window when a smoker would feel most high. What’s more, regular smokers could have THC in their blood for days or weeks after smoking, when they are clearly no longer high.

Still, laws in 18 states tie drugged driving charges to whether drivers have THC or related compounds in their blood. Some states prohibit driving with any amount, and some specify a threshold modeled after the 0.08 limit states use for blood alcohol. But the lag time between being pulled over and being transported to a hospital for a blood draw—on average, more than two hours—can lead to false negatives, while the tolerance developed by regular users (and the tendency for THC to stick around in their bloodstream) can lead to false positives. This is why, researchers say, blood THC laws make little sense.

“If you’re stopping someone who just tried it or uses it occasionally, a little bit of THC goes a long way—they’re very impaired,” says political scientist Nicholas Lovrich, a professor emeritus at Washington State University. “But people are demonstrably able to drive at high levels of THC if they’re a frequent user.”

The more sensible strategy appears to be prohibiting driving while high, and 31 states take this approach. But proving that a driver is high turns out to be tricky terrain, too.

ROADSIDE TESTING

One of the issues Gerhardt raises in his case is whether police officers with standard training are qualified to make a judgment that a driver is high. Courts in a few states—including Montana, New Jersey and Vermont—have ruled that they are not. “Unlike alcohol intoxication,” the New Jersey high court ruled in 2006, “no ... general awareness exists as yet with regard to the signs and symptoms of the condition described as being ‘high’ on marijuana.”

Research shows that failing a standard field sobriety test correlates closely with having a blood-alcohol level above the legal limit—and officers have the Breathalyzer to confirm their findings. But “the gap between assessment, cannabis use and driving is really not completely closed,” says Thomas Marcotte, co-director of the Center for Medicinal Cannabis Research at the University of California at San Diego.

Frequent pot users may not be able to stand on one leg, for example—even when they’re not stoned—whether they’re safe to drive or not. Marcotte and his colleagues are working on validating a new field sobriety test for pot use. Their iPad-based test measures skills such as tracking an object on the screen and accurately estimating time. Although police may not yet have a validated tool, apps have begun to appear for those who want to gauge their own ability to drive after smoking by analyzing reaction time, hand-eye coordination and the like.

EVALUATION OPINIONS

Some police departments use drug recognition experts—specially trained officers dispatched to evaluate suspected drugged drivers. These officers, commonly referred to as DREs, use an hourlong, 12-step process that includes taking the suspect’s blood pressure and pulse and conducting eye exams and balance tests. They use this information to generate an opinion about whether the driver is intoxicated—and, if so, by what. Preliminary research seems to indicate their opinions are of mixed quality, and not all judges allow DREs to testify to their findings.

“They’re not EMTs. They’re not medically trained,” says Lovrich, the Washington State professor who, in a recent study of five years of DRE data in Washington and New Mexico, found a false-positive rate for pot intoxication ranging from 38 percent to 68 percent. “Everyone in the DRE business knows it’s really hard to do this.”

The gold standard would be a Breathalyzer-like device that can objectively measure whether someone has recently smoked, as well as how much. Lovrich is working on developing such a tool, using the same type of technology that security screeners use at airports to check for explosives. He says it will be at least two years before the technology is perfected, miniaturized and engineered to be durable enough to toss in the back seat of a squad car.

In the meantime, people like Gerhardt will fight it out in state courts. A ruling on his case is expected in the next few months.

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U.S. Supreme Court cases about government aid to religious institutions have revolved around tax breaks, school textbooks, transportation, private school vouchers and even computer software. But recycled tires?

A church-state case that has long been touted as one of the marquee appeals of an otherwise low-key term will go before the justices on April 19.

The case involves a Lutheran church in Missouri that operates a preschool and day care. It sought to improve its playground by applying for the state’s scrap-tire grant program, which provides money to install safe, rubberized ground coverings.

Missouri officials turned down the church’s application, which otherwise ranked high on a set of neutral criteria, based on a state constitutional provision that bars direct or indirect government financial aid to churches.

“If you could write your own facts, you couldn’t write them any better,” says David A. Cortman, senior counsel at the Alliance Defending Freedom, the Scottsdale, Arizona-based group that represents the church in Trinity Lutheran Church v. Pauley.

The Columbia church challenged the grant denial as a violation of the First Amendment’s guarantee of free exercise of religion and the 14th Amendment’s equal protection clause. As the church states in its merits brief: “A rubber playground surface accomplishes the state’s purposes whether it cushions the fall of the pious or the profane.”

GROUND FOR SUPPORT

Missouri argues in its brief that “Trinity Lutheran remains free, without any public subsidy, to worship, teach, pray and practice any other aspect of its faith however it wishes. The state merely declines to offer financial support.”

Trinity Lutheran Church has a learning center for children that it considers to be part of its ministry. The learning center’s outdoor playground has typical jungle gym-type equipment and a surface of pea gravel and grass that sometimes leaves its participants with bumps and bruises.

“The pea gravel is unforgiving if/when a child falls and thereby poses a basic safety hazard,” the church said in its 2012 application for a $20,000 grant from Missouri’s scrap-tire grant program, which is funded by a state tax on new tires and provides an environmentally friendly outlet for used tires.

The church ranked fifth out of 44 applicants for scrap-tire grants that year, based on such criteria as whether an applicant describes its proposed project in adequate detail, whether it has an
GETTING TRACTION

Trinity Lutheran sued based on its free exercise, equal protection and other claims but lost in federal district court. That court rejected the free exercise claim because the scrap-tire program involved a direct payment to a sectarian institution that would raise First Amendment establishment-of-religion concerns that were comparable to those raised by the Supreme Court in its 2004 decision in Locke v. Davey.

In that case, the justices held that the state of Washington could deny a scholarship to a student studying “devotional theology” without running afoul of the free exercise clause.

A panel of the 8th U.S. Circuit Court of Appeals at St. Louis voted 2-1 in Trinity to uphold the district court, expressing concern about the “direct grant of public funds to churches.”

Cortman, the lawyer for Trinity Lutheran, says Missouri “may not target religion for discrimination.”

Government programs that evenhandedly allocate a secular benefit for secular use do not raise establishment clause concerns just because one of the recipients is a religious institution, he says. A contrary rule would allow the government to, say, waive highway tolls for high-occupancy vehicles but not waive the tolls for church buses.

Michael W. McConnell, a former federal appeals court judge and a church-state scholar who teaches at Stanford Law School, has written an amicus brief in support of the church for the Becket Fund for Religious Liberty.

“What we’re talking about here is the government paying for shredded, discarded tires to rubberize the surface of a playground at a day care center that happens to be owned by a church,” he says. “It’s an entirely secular purpose.”

Locke did not overrule the Supreme Court’s precedents that say the Constitution prohibits the denial of an otherwise publicly available benefit to a religious institution, McConnell says.

Trinity Lutheran also argues, relatively briefly, that Missouri’s constitutional provision that bars financial aid to a religion has a “credible connection” to the so-called Blaine Amendment. That is named for the 19th-century congressman James G. Blaine, who led an unsuccessful effort to amend the U.S. Constitution to prohibit public funding of sectarian schools at a time when Roman Catholics were pressing for government funding for parochial schools. About three dozen states have similar language in their state constitutions.

Missouri’s language was adopted as “part of that anti-Catholic movement,” Cortman says. “But our argument is that it is irrelevant today because the result is the same: Those provisions are used to discriminate against churches and religious organizations.”

NOT TREADING LIGHTLY

Missouri and some of its allies argue that its constitutional provision, although adopted in 1875, was not motivated by anti-Catholic bias. “The text of Article I, Section 7 is both evenhanded ... and protective of religious freedom,” the state says in its brief. Representatives from the state attorney general’s office declined to be interviewed.

“The people of Missouri have decided, as a matter of state constitutional policy, that public funds may not be directed to churches,” the state brief says. “Forbidding the direct payment of state funds to churches advances legitimate public interests, which include ensuring that no religious denomination receives preferential treatment over another by the state, respecting taxpayers’ concerns of conscience, and protecting religious institutions from heightened government control.”

Steven K. Green, a professor of law and history at Willamette University College of Law in Salem, Oregon, helped write an amicus by legal and religious historians in support of the state. The brief argues that the nation’s commitment to a principle of no direct funding of religion arose independent of anti-religious animus, and that anti-Catholic bias was only one motivation behind the federal Blaine Amendment and its state counterparts.

“You really can’t talk about the pedigree of the no-funding principle without talking about its good history and its bad history,” Green says.

He says the Supreme Court may well have granted review with an inclination to rule for the church.

The scrap-tire grant program appears benign and “seems to be about as far removed from government money advancing a religious message as you can get,” Green says. “But there is a larger principle at stake. This is government funding of a church. This is bricks-and-mortar aid.

“We do not do direct funding of religious institutions in this country and particularly of churches,” Green says. “For the [justices] to reach out and take up a direct funding case like this suggests to me that they are thinking of doing something significant.”
Decision Dylan

Our most-cited songwriter in judicial rulings brings complex poetry to court opinions

By Philip N. Meyer

“There were a lot of better singers and better musicians around these places, but there wasn’t anybody close in nature to what I was doing. … I knew the inner substance of the thing. I could connect the pieces.”

—Bob Dylan, Chronicles, Volume 1

Before Bob Dylan won the Nobel Prize in literature, he had a profound influence upon lawyers and judges, especially mid- to late-career baby boomers like myself. Academic symposia, numerous articles and even some careers were built upon Dylan’s work and its intersections with the law.

Perhaps more important, as Adam Liptak observed in the New York Times, Dylan is, by far, the most-cited songwriter or popular artist in American judicial opinions. And these citations are not merely add-ons or throwaways providing appellate judges and Supreme Court justices with the opportunity to display stylistic flair or pop culture literacy. Indeed, just the opposite: Dylan’s lyrics are intrinsic to the judicial reasoning in appellate opinions.

That is, Dylan’s lyrics provide propositional authority and embody understandings of shared fundamental legal or cultural truths. For example, Chief Justice John G. Roberts Jr.’s conceptual notion of standing, and more specifically a lack of it, is captured in Dylan’s all-purpose aphorism: “When you ain’t got nothin’, you got nothin’ to lose” (dissenting in Sprint Communications Co. v. APCC Services Inc., 2008). And Justice Antonin Scalia, who was ever the literalist, skimmed the title off an early Dylan song without attribution, mocking the majority’s ducking an issue by rationalizing about the rapidly changing nature of technology: “The-times-they-are-a-changing is a feeble excuse for disregard of [a legal] duty” (City of Ontario v. Quon, 2010).

As professor Alex B. Long observed in a Fordham Law Review symposium in 2011 devoted to the narrative jurisprudence of Dylan, his lyrics have been lifted innumerable times in appellate court opinions, and their complex meanings and open-ended imagery have been spun in seemingly endless directions.

For example, another of Dylan’s famous aphorisms about the power of intuition to predict the obvious—“You don’t need a weatherman to know which way the wind blows”—has been recurrently cited like a judicial mantra. Dylan’s lyrics have morphed from popular culture into our text-based legal culture in a way no other contemporary popular artist ever has. So when a judge needs to breathe life into an opinion, it is often Dylan’s words that rise to the surface, drawn up from the vast trove of his lyrics, an unofficial judicial default mode of sorts.

VOICE OF REASON

Bob Dylan, the outsider-storytelling troubadour, by the metrics of judicial citations and by the substance of how his lyrics are used, is our most influential pop cultural voice. Rephrasing it idiomatically, as I pretend that Dylan might do, he is located just a little north of Shakespeare on some unofficial judicial map, and perhaps just a dab south of the Bible.

But I don’t come close to doing “justice” to Dylan in the way that Dylan alone can do. Or as he puts it, “there’s no success like failure, and that failure’s no success at all.”

Dylan’s songs adhere to our collective lawyer-imaginations in a way that so many marvelous poet-troubadours of the ’60s—including Leonard Cohen and Townes Van Zandt, Joni Mitchell and Neil Young, or even, a few years later, Bruce Springsteen—do not. Likewise, Dylan’s lyrics stick in ways that other profoundly important songsters (from Woody Guthrie to Hank Williams to the rockers of the ’50s and ’60s to, of course, the endless river of eloquent bluesmen drifting across the face of American music) don’t, can’t and never will.

Why have so many judges, academics and, yes, lawyers of my generation glommed on to Dylan’s earlier songs? Some of the reasons are obvious. Music was the dominant art form of the mid- to late-1960s when baby boomer lawyers were coming of age. And Dylan’s songs were dominant then in a different way than other songsters and pop artists. Even in our current culture of celebrity, Dylan is more of a deity than a celebrity. Although Dylan—drifter-outlaw-outsider—was offended and troubled when hung with the cross of being the voice of his generation, he was nevertheless always the messenger of the complex meanings embedded deep within the consciousness of his times. As Dave Van Ronk observed in Martin Scorseses’s documentary No Direction Home, Dylan tapped deeply into the collective unconscious of the times.

Dylan was also incredibly productive, writing songs at a superhuman clip. Where Cohen, another sometimes prophetic poet-troubadour, took months or years to
compose songs, Dylan’s work was completed in minutes. Like Robert Johnson returning from the crossroads, Dylan seemed demonically possessed. Or, as Allen Ginsberg put it, borrowing from Buddhists and other Beats, “First thought, best thought.”

Dylan’s songs and stories held our experiences and transformed our imaginations. While others wrote songs about finding and losing love, Dylan’s emotional and intellectual palette was infinitely varied. His songs provided an intersection of all the eclectic streams, rivers and tributaries of American music.

With an impossible confidence and strength, his gravelly and authoritative, yet imperfect, voice went anywhere and everywhere. There were no apparent boundaries: from journalistic story songs to aspirational folk ballads; from songs with sweetly stolen melodies to spiritual meditations and mystical religious incantations; from reconfigured endless blues to flat-out badass, yet always-lyrical rockers.

POETIC JUSTICE

And—of special relevance to aspiring lawyers—so much of Dylan’s material was ultimately about justice. About the limitations of law. About justice and injustice in society and inside of ourselves.

From the first aspirational songs of youthful hope and longing (“Blowin’ in the Wind”) to the journalistic story songs (“The Lonesome Death of Hattie Carroll,” “Hurricane”) and then on to the dreamscapes infested with dark images of American injustice (“Blind Willie McTell”), Dylan discovered a personal and idiomatic language that spoke intimately to so many of us. He knew what he was doing, too, although he was often purposely evasive whenever he spoke about the magic of his art. In Quintilian’s words, “To avoid all display of art in itself requires consummate art.” Or, as Dylan observed idiomatically, he simply “knew the inner substance of the thing and could connect the pieces.”

Lawyers love Dylan, I think, because his voice and his story songs speak so directly to parts of ourselves that are typically discounted in our professional lives—especially in lawyers’ careful, meticulous professional language, and in our text-based grammatically correct forms of written expression. He reminds us that the creative, the musical and the intuitive are not lost inside of us in our practices.

What do I mean exactly? In law, the written and especially the printed word is given primacy over oral performance and expression; it is implicitly a higher form of expression. As communications theorist Walter Ong observed, the literate eye (and the lawyer’s “I”), especially when evaluating printed text, is perhaps the singular discriminating and judging function. We direct the focus of the eye, and our analytical attention, when we read text. Lawyers are trained to focus their critical abilities upon printed words, regardless of whether the text is telling a story or presenting a legal argument. We read to command and employ texts purposefully; we seldom if ever sacrifice our disbelief to narrative or poetry. We adjust reading speeds, jump over what is unimportant or irrelevant, make implicit and unstated critical assessments about what is and what is not on the page.

SOUND POWER

Sounds speak directly to us in ways that the written word can never do. We cannot close our ears. We are drawn into songs by their melodies and rhythms. Songs sung by sirens seduce us. Songs sung by storytelling troubadours call up associational experiences and emotions. It is the musical soundtrack of the movie that tells us how to feel about the images on screen, suggesting how to connect the stories into story.

Dylan provides his own soundtrack to the imagery and idiom of his own complex movies; both his voice and the voices of the instruments tell us how to feel about the images he projects onto the screen of our imaginations. But Dylan’s poetic genius goes beyond this. Listen to Patti Smith’s performance of “A Hard Rain’s a-Gonna Fall” at Dylan’s Nobel Prize ceremony (on YouTube)—a prophetic warning now recast in our own times. Recall Percy Shelley’s famous dictum: Poets are not merely authors of language and composers of music; they are institutes of laws and “the unacknowledged legislators of the world.”

Through poetry and song, Dylan reopens parts of ourselves, legislating the world in ways that are often discounted because of the focused analytical and strategic judgmental work that most lawyers are typically trained and paid to do.

Thank you, Bob, for reminding us that other parts of our soul are central to our work as well.

Philip N. Meyer, a professor at Vermont Law School, is the author of Storytelling for Lawyers.
Lawyers who seek to withdraw in civil cases for client nonpayment of funds should take precautions to ensure that they do not violate the duty of confidentiality, according to ABA Formal Opinion 476.

ABA Model Rule 1.16(b)(5) allows attorneys to withdraw when a client “substantially fails to fulfill an obligation to the lawyer.” Comment 8 to Rule 1.16 elucidates: “A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs.” Rule 1.16(b)(6) says a lawyer can withdraw where “the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.”

Courts may allow lawyers to withdraw after they give reasonable warning to clients about what could happen if they continue to shirk financial obligations.

However, Model Rule 1.6 speaks to one of the hallmark principles of American legal ethics: the duty of confidentiality. This must be considered when a lawyer moves for withdrawal. The opinion explains that when lawyers file a motion to withdraw, they “must consider how the duty of confidentiality under Rule 1.6 may limit the information that can be disclosed in the moving papers.”

The opinion notes that “when in doubt, a lawyer should err on the side of nondisclosure.” This means that ordinarily a lawyer should file a motion to withdraw based on “professional considerations.” Such a motion would not reveal confidential client information.

PROFESSIONALISM FIRST

Many motions—particularly when substitute counsel has been identified or is otherwise readily available—are granted without the professional-considerations language, says Phoenix-based ethics expert Keith Swisher. “That said, including the professional-considerations language is permissible, as the opinion notes, and it should be attempted first before any confidential information is revealed,” he says.

However, a court may require more information, as trial courts have broad discretion when ruling on motions to withdraw. The opinion cites Comment 3 to Rule 1.16, which states: “The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rule 1.6 and 3.3.”

The ethics opinion explains that “to accommodate the individual facts of any particular case, the scope of information that may be deemed pertinent to a particular withdrawal motion is necessarily one that is left to the trial judge’s discretion under applicable law.”

The opinion also cites a series of judicial opinions in which judges required more information before they decided whether to grant an attorney’s motion to withdraw because of a client’s failure to abide by financial obligations to the attorney.

Ellen Murphy, who teaches professional responsibility at Wake Forest University School of Law, says judges should be able to read between the lines when lawyers seek permission to withdraw and recognize that there could be rule compliance issues, such as conflict of interest or repugnant action by the client. However, “I can imagine facts when a judge would want, and reasonably need, more information,” Murphy says.

A judge could ask the lawyer whether the motion is brought in good faith and without a dilatory purpose. The opinion explains that a “judge should not require the disclosure of confidential client information without considering whether such information is necessary to reach a sound decision on the motion.”

If the judge needs more information to rule on the motion to withdraw, the attorney should try to persuade the court to rule on the motion without the attorney revealing confidential client information. If that does not work, the attorney should “submit only such information as is reasonably necessary to satisfy the needs of the court and preferably by whatever restricted means of submission, such as in camera review...”
under seal or such other procedures designated to minimize disclosure, as the court determines is appropriate."

"When some additional information is necessary, the judge should require only that which is necessary to resolve the issue and should usually receive the information under seal and in camera," Swisher says. In certain situations, including conflicts about strategy, a jurist other than the trial judge should hear the sensitive information and make the ruling, so that the trial judge is not exposed to the information, he adds.

This process might require extra time and expense for lawyers who already might not have been paid by clients. "Our profession increasingly wrestles with the tension between law as a profession vs. law as a business and the cost, broadly defined, of increased regulation," Murphy says. "In solely business terms, the added resources, and therefore cost, to the lawyer in having to show cause why withdrawal should be permitted is especially high because the lawyer already has suffered the cost of nonpayment. Essentially, the lawyer has a receivable at this point. And having to show cause further decreases the value of this receivable."

**COOPERATION IS KEY**

Lawyers are in a different position than many other people in business. They often have to keep working even though they know they are not getting paid. "Business people value certainty," Murphy says. "If a buyer repudiates a contract, the seller can cancel without judicial approval. A lawyer cannot do so, necessarily, when a client repudiates a contract by failing to pay. This reality existed before this opinion; the opinion does not change things. But it is notable that the structure of the process found in this opinion increases uncertainty for the lawyer and therefore the costs of doing business. A lawyer can't be a professional unless she can get paid."

The opinion emphasizes that the process of filing for and considering a motion to withdraw requires cooperation between lawyers and judges. "Cooperation is essential," Murphy says. "Without it, lawyers are at risk."

Swisher agrees. "Lawyers, of course, need to mind their confidentiality and other obligations to the client and remind judges of these obligations. And judges—who have the raw power to order disclosure—should be careful not to abuse their power and unnecessarily coerce confidential or privileged information from clients," he says.

The opinion also notes that it does not cover motions to withdraw in criminal cases, which have "additional and unique issues."

Swisher says two points could be stated more strongly in the opinion. "Judges should grant deference to attorneys when those attorneys invoke professional considerations, absent of course other facts suggesting that the attorney cries wolf or that granting the motion will significantly prejudice the case," he says. "And in the event that the professional-considerations language is insufficient for the court, attorneys must—not just should—take appropriate measures to protect the information from reaching the other side or third parties."
May I make a motion for deep issues?

By Bryan A. Garner

Last month, we saw the power of the "deep issue"—a question presented in 75 or fewer words. The question should be worded so that anyone can understand it. (If people can't understand it, that's your fault: Remember that good writing makes people feel smart, while bad writing makes people feel stupid.) We focused on how deep issues work with briefs.

But with motion practice, litigators aren't accustomed to issues or questions presented. Instead, the common practice is to do one of two things:

1. Use the filibustering boilerplate that amounts to congestive throat-clearing—"Now comes so-and-so, by and through such-and-such law firm, and files this motion with the cumbersome name given above, which I'll now repeat for its full repulsive effect to fill up the bottom-third of this first page under the caption."

2. Or resort to overheated, emotion-laden invective because it is thought to be the heart and soul of "persuasion."

Either way, the writer is engaging in time-wasting guff. A more effective opener involves stating the problem to be solved. After all, what is a motion? It's a request to the court to resolve a specific problem by entering a specific order. Let's see how Type 1 and Type 2 openers in motions can be rewritten with deep issues to improve their power and cogency.

TYPE 1: FILIBUSTERING BOILERPLATE

It's extraordinary how wedded lawyers are to their old forms, which typically get off to a slow-motion start. Consider this beauty:

TO THE HONORABLE UNITED STATES DISTRICT COURT:

NOW COME EAU CLAIRE INDEPENDENT SCHOOL DISTRICT (the "District") and SGT. WILLIAM "BULL" BALLARD ("Ballard"), Defendants in the above-entitled and numbered case, by and through their attorneys of record, KARR & STILTON, 3300 First City Centre, Suite 1700, Real City, Real State, Real ZIP with Four Extra Digits, and files this the DEFENDANT EAU CLAIRE INDEPENDENT SCHOOL DISTRICT'S AND SGT. WILLIAM "BULL" BALLARD'S MOTION TO DISMISS, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, together with their memorandum in support thereof, and would respectfully show unto the Court the following...

What follows is two pages of "background" beginning with "Defendants would show unto the Court that ... ." In the first 100 words, how much have you learned about this case?

Imagine, though, the deep-issue-type opener to replace that one. It gets us off to a fast start. It has taken me an hour to write this, by the way, by studying all 15 pages in the original motion:

Defendants' Motion to Dismiss

This motion to dismiss presents the Court with two straightforward issues:

1. Qualified Immunity. Under state law, a law enforcement official loses qualified immunity only if there was "no arguable basis for probable cause to arrest." Here, the crime-lab report conclusively determined that Bianca Trevino signed a forged high school grade-change request that is the basis of the complaint. Relying on that report, Officer Ballard issued an arrest warrant, and she has sued him for malicious prosecution and alleged Section 1983 violations. Is Ballard entitled to qualified immunity?

2. Vicarious Liability. Under state and federal law, municipal liability under Section 1983 requires proof of (1) a policymaker, (2) an official policy and (3) a violation of constitutional right whose moving force is that policy. Here, Trevino has alleged no such policy or policymaker. Given that she has now twice been granted leave to amend after the deadline for repleading passed, should this court dismiss her Section 1983 claims against the school district?

The first deep issue there is 75 words; the second is 68. The word limit, remember, is the magic number 75.

Can you see how much more effectively we're now using this invaluable real estate—the bottom of page 1? It's the most valuable space you have. Why would you want to waste it on regurgitations of meaningless form-book verbiage? Yet countless lawyers do it. I move that you not be one of them.

TYPE 2: THE VITUPERATIVE AGITATOR

While teaching an in-house CLE seminar recently, I asked the participants to count the derogatory characterizations of the opponent on the first 1½ pages of one of the firm's motions. The thing was a record-setter: 33 serious blasts in fewer than two pages. "But isn't that the essence of persuasion?" someone asked.

"No," I said. "You're asking the judge to become empathetically aligned with your position, to walk with you. If you're excoriating the other side with emotional billingsgate (yes, I'm afraid I used that word), you're making it hard for the judge to adopt your position. You want to win with cool, hard logic."

It's a hard lesson to learn—that a coolly written opener is far more likely to carry the day than a heated one. Let's...
see a case in point, from the opening words to an appellant’s reply brief on appeal. Notice how distasteful it is to pick up and read this sort of thing:

**Introduction**

Seeking once again to dupe this Court and to waste the time and money of OpusTV, thereby merit[ing] the imposition of pretrial sanctions by this Honorable Court, Rembrandt has submitted woefully deficient infringement contentions to OpusTV. Rembrandt’s current violations, outrageous as they are, follow closely on the heels of its previous violations of the Joint Discovery Plan.

The rhetoric there spoils what was probably a good point. With the second and third words, one senses where it’s headed; the fifth removes all doubt.

By contrast, note how well it reads if we eliminate all the foaming at the mouth and use the deep-issue technique:

**Introduction**

This motion for sanctions, filed regretfully but unremorsefully, presents a single issue:

Last month, finding that Rembrandt had violated the Court’s joint discovery plan 12 times, this Court sanctioned Rembrandt. Last Friday, Rembrandt submitted 10 deficient infringement contentions to OpusTV in direct violation of this Court’s discovery orders.

of last month. Should the Court impose Rule 37 sanctions yet again, for each of the 10 fresh violations?

The tone is that of sorrow not anger (always the right tone with a motion for sanctions). It’s much more concrete than the other one. That is, it gives the reader much more useful information, and it makes effective use of chronology. Most importantly, it has just the right tone.

**LEAD-IN TO A DEEP ISSUE**

You might have thought just now: What? “Regretfully but unremorsefully”? What’s that all about? Don’t worry, that’s just me. I try to do something eye-catching right at the outset of any court paper—something to make the judge or law clerk sit up and take notice. You can do that in negative, buffoonish ways, of course; or you can do it in positive, smart ways.

The idea is to do anything you can to avoid looking like a form-book lawyer. While all your competitors at the bar are mimicking one another like silly lemmings, you do something to stand out from the crowd. For every motion, you should tailor—make page 1. Your client does want bespoke motions, right? Not ill-fitting, off-the-rack motions.

Some of the lead-ins I’ve used in recent years under the heading “Introduction” include these (preceding up to three 75-word issue statements):

• In ruling on this motion, the Court need address only the following issues:
• This motion presents the Court with the following issues:
• This motion presents the Court with the following issues—all else being peripheral:
• Although Stevenson’s motion for summary judgment states four issues for this Court to resolve, the Court need consider only a single overriding point:

You get the idea. Then each issue statement is a matter of capsulizing within 75 words the major premise, the minor premise and the conclusion expressed as a question.

Oh, yes: Do end with a question mark.

It’s more persuasive that way. You’ll find a lot of lawyers who want to put their prayer on page 1: “This Court should order ... .” Why in the world lawyers would think it’s useful to hector a judge at the outset is beyond me.

State the problem to be resolved. Carry through in the middle. Then put your prayer at the end. That’s where it belongs.

Besides, if you’re moving for something and your court paper is called “Motion for X,” the judge will have a pretty good idea that you want X. It hardly helps to begin by saying that the court should order X before you give it any reason.

There’s real power in a question mark—especially if it follows a syllogism.

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Bryan A. Garner (@BryanAGarner) is the president of LawProse Inc. and a distinguished research professor of law at Southern Methodist University. His most recent book, The Law of Judicial Precedent, is co-authored with Judge Neil Gorsuch and 11 other appellate judges. His other new book, Garner’s Modern English Usage, is available from iTunes as an app.
If you're wondering whether to start a paperless firm, I have a surprise: You already have. Remember when you bought a computer to create pleadings and memos? It started then. And when you began doing legal research online? You picked up momentum. When you started using email, you picked up more momentum.

The question isn't about when to start; it's about how to leverage the momentum you've already built up.
MYTH-BUSTING

Becoming paperless is perhaps not what you believe. Many lawyers think a paperless practice means getting rid of every piece of paper. That’s impossible—and ridiculous.

No one aspires to get rid of paper. That’s not your burning desire. But you certainly want your practice to run smoother and be less stressful, right?

OK, then you want a paperless practice. The less paper you have to keep track of, the easier it is to manage your firm. When your day-to-day workflows are mostly digital, you’ll save time, improve productivity and ultimately make more money. Even a sole practitioner with no staff can save at least $500 a year.

In firms that rely too much on paper, files are easily disorganized or strewn about. This increases stress levels. When important information is hard to find or gets lost, your practice also becomes more difficult to manage.

Now, imagine locating key documents you need instantly, simply by performing a search on your computer. Envision pulling up a client file using your smartphone while you’re aboard a plane cruising at 30,000 feet. Imagine easily sharing files with anyone—inside or outside your office—with a few clicks of a mouse.

Lawyers who have transitioned to a paperless practice don’t have to imagine this; it’s a reality. There is no reason why you can’t make this a reality in your practice as well. Yes, you’ll have to put in some effort. And yes, you’ll have to get used to doing some things in a new way.

But we’re not talking about something difficult. Quite the opposite: It’s actually fairly easy to do—if you go about it in the right way.

Remember, you’ve already built up momentum. You have a computer, and you have a basic filing system for digital documents, such as word processing files and email, right?

OK, then you’re halfway there. Now, you just need to learn how to scan paper and work better with the digital documents you’ll be scanning.

You’ll want to develop a document management system that allows you to access digital files from anywhere, via the internet (aka the cloud). When you can easily share digital files, you can collaborate more easily, and then your practice will become exponentially easier to manage.

Now, let’s talk about how you can gain momentum.

SCANNER SPECS

To convert paper into digital files, you’ll need a scanner. There are lots of scanners to pick from, but there’s only one you should use as your main office scanner.

The scanner you pick will be crucial. If you don’t get the right one, you’re just shifting the location of your bottleneck from the paper stacks in your office to a new machine—i.e., the scanner.

The scanner you pick needs to be easy to set up, reliable, robust enough for law office work, and flexible enough to handle both letter- and legal-size paper.

Your scanner should have an automatic document feeder so you can plop in a stack of paper and scan each page without having to insert one page at a time. The scanner should be able to scan both the front and back sides of paper in one pass. This feature is called “duplexing.”

The scanner should produce a straight image, even if the paper goes through the scanner crookedly. This feature is called “deskewing,” and it’s performed by the scanner’s software. Important point: The scanner you purchase will come with software, and that software is as important as the physical machine.

As I mentioned, there are many scanners on the market. The worst options are multifunction devices because they are less reliable, less robust and come with mediocre software. Avoid those machines like the plague.

The best option, hands down, for small law firms is the Fujitsu Scansnap iX500, which costs about $420. It has all the features I mentioned, plus more.

You should get one of these machines for everyone in your law office who receives paper documents. That is, if they get paper that’s supposed to go in the firm’s filing system, then they get a scanner.

Resist the temptation to get by with only one scanner. With just one machine located in a central place, human nature will conspire against you. What do I mean by that? When scanning is inconvenient—even temporarily—people will postpone doing it, which will mean that crucial information might not get into your highly efficient digital system as fast as necessary. Or worse: The paper will get lost before it can be scanned.

Remember, human nature can also be a bottleneck to efficiency. Putting scanners on the desks of more people will eliminate more bottlenecks. If you can’t afford to do this immediately, strive to do it as quickly as possible.

DESTROYING PAPER

As you’re getting ready to implement your scanning system, you’ll naturally wonder: “What do I do with the paper after it’s been scanned?” The answer: It depends.

If you trust your backup system … wait, you do have a backup system for your digital files, right? OK. Step one in creating a paperless filing system is making sure you have a reliable backup system for all of your digital information.

Assuming you have reliable backup systems in place, then you should shred or otherwise destroy paper after you scan it. Otherwise, you’ll be managing the same information in two different systems. This can lead to chaos and confusion, which in turn leads to increased stress.

Your long-term goal should be to steadily convert most of your paper documents into digital files, and then learn to manage most of your workflows using your computer. This
part of the transition requires patience and thoughtfulness. You can analogize most of your paper-based workflows and create digital equivalents. But in some cases, you will achieve greater efficiency and flexibility if you adjust some processes to leverage new possibilities that digital file management will provide.

The more people who have to learn to collaborate in this new way, the more time it will take. And the more systematic you’ll have to be. You might benefit from hiring a technology consultant who specializes in helping law firms transition to a paperless operation.

WHAT TO KEEP

While you’ll soon get to a point where you are routinely shredding most of the papers you scan, some you’ll have to keep. For example: original wills, promissory notes, birth certificates and affidavits. In most jurisdictions, you’ll have to keep those types of papers.

Sometimes, you’ll want to keep the original, even though the law doesn’t require you to do so. The commonsense guideline is this: Keep any kind of paper if you have a reasonable concern that you’ll have an easier time proving something, or navigating a procedural process, with the paper original.

Maybe in your practice area it’s possible to submit a scanned affidavit as self-authenticating proof. But if the judge handling your case is uncomfortable dealing with digitized affidavits, your life will be easier if you keep the original.

The key is to make reasonable assessments. Don’t keep every piece of paper out of some vague sense of impending doom. You’ll wind up managing two document systems, which leads to—remember?—confusion, chaos and stress.

Here’s a pro tip: Revise your current engagement letter to add a provision informing clients that your filing system is digital, and that you don’t plan to keep copies of nonessential paper that has been scanned. If the clients want the paper originals, give them a reasonable time to ask for them to be returned. They won’t ask, trust me.

PDF PREFERENCE

You will scan paper to a PDF, or portable document format. Why? Because you want a single format for all the paper you scan. Having scanned documents in more than
one format leads to, yes, complexity, confusion and chaos. Federal courts require you to file pleadings in PDF, and states that have switched to e-filing all use PDFs. The states that have not yet adopted e-filing will undoubtedly opt for these as the canonical format.

Think of PDF files as digital paper. If you ever want to print out a PDF that you’ve scanned, you’ll be relieved to know that it will look exactly like the paper that got scanned in. If the paper was letter-size, it will print out as an 8½-by-11 document. If it was legal-size, it will come out as 8½-by-14. If the paper contained color, then you can print it out as a color document, assuming your scanner was set up properly.

While PDFs look and act exactly like the paper from which they were created, they have much greater utility than paper. For example, if you needed to find every piece of paper that had the word HVAC in it, you would have to flip through every sheet of paper, scanning for that word using your feeble eyesight.

If you make your PDFs text-searchable, using optical character recognition, then you’ll be able to analyze one or many files at one time and jump right to the page and line where your search term is located.

Working with PDFs is much easier than working with paper. It takes time to get comfortable, but it’s not hard. If you need to work from paper, you can easily print the file.

In other words, PDFs give you all the options of paper and more. No one transitions to a paperless practice overnight, nor would that be desirable, even if you could. Be patient, and remember that the ultimate goal is to make your practice easier to manage.

Start learning to scan your papers and develop a reliable system that’s comfortable for everyone in your office. Get better at working with PDF files. Start slow, and keep improving steadily. Soon you’ll discover that you’ve made the transition, and your life will be easier.

If you want to learn more about shifting to a paperless practice, check out my website, PaperlessChase.com. Or sign up for a free 10-part email course on developing a paperless law firm by visiting this link: bit.ly/Paperless10Part.

Ernie Svenson, a 2009 ABA Journal Legal Rebel, is a New Orleans attorney who has been blogging as Ernie the Attorney since 2002. In 2006, after Hurricane Katrina struck, he moved to a solo, paperless practice and has become one of the best-known advocates for digital law practice.

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VALUE PROPOSITION
FIRMS USE DATA TO JUDGE LATERALS’ POTENTIAL SUCCESS

When it comes to lateral partner hiring, it’s clear that an arms race is going on. Lateral hiring has been booming over the last several years, according to The American Lawyer, and 2015 saw the largest partner migration since the Great Recession. Moreover, virtually all law firm leaders think increased lateral hiring is here to stay, and they would pursue laterals as a means to grow their firms, according to law firm consultancy Altman Weil. But does the weaponry all work? ALM, an information and intelligence company, released a 2016 study that found that most lateral partner hires don’t meet expectations, and a majority bring in less business than they promised.

“All firms will fail at lateral hiring at some point,” says report author Steve Kovalan, a senior industry analyst in ALM’s intelligence division, in a statement. “Unfortunately, these are extremely costly failures, impacting firm finances, cultural stability, brand and client relationships.”

Yet firms will continue to hire lateral partners. As a result, many are turning to statistics and performance analytics to help them determine which of their laterals are delivering and which are not.

One of the more widely used business intelligence tools comes from legal software company Aderant. According to Derek Schutz, product manager of business intelligence at Aderant, more than 100 law firm clients use the company’s analytics programs—not just to evaluate lateral partners but to analyze the entire firm. Aderant’s program allows firms to track a range of metrics, including profitability, revenue, expenses, hours and billings. Using a firm’s data, Aderant can determine how many hours certain types of cases and clients are worth, who did the work and how long it all took.

“Probably the most important aspect is that firms can see what they do well and what they don’t,” Schutz says. “That gives firms an idea of what they need to focus on for future matters.”

BETTER GRASP
That keen sense of understanding is what many firms lack, Schutz says, and having a better grasp of it could help with the lateral recruitment process. “Most laterals don’t meet their short-term goals, and it’s more an issue of expectations than anything else,” Schutz says. “A lot of firms don’t know what their goals are, what they do well and where they want to go. There should be a reason for bringing in someone from outside, like ‘We want to grow this area,’ or ‘They have work we want.’”

Employment and labor law firm Littler Mendelson decided to go in a different direction and create its own software. When it comes to lateral partners, Littler’s Big Data Initiative tracks data from many different sources to predict the firm’s likely return on investment and whether laterals will remain with the firm or leave for other opportunities.

“The goal for all the work we do is to identify data sources that we can use to help improve decision-making with the use of prediction modeling,” says Zev Eigen, a data scientist with a PhD from the Massachusetts Institute of Technology and Littler’s global director of data analytics.

Eigen notes that it can be difficult to apply blanket rules to lateral hiring because many unique factors are at play. He points out that data science can’t quite predict how much business a partner will come in with. Nevertheless, firms can set up a model in which they assume the best- and worst-case scenarios and determine the lowest number that a partner can walk in with and still be profitable for the firm.

Eigen is especially interested in looking at relational data as a means to predict how likely an attorney is to fit in with Littler’s culture. “ONA [organizational network analysis] and SNA [social network analysis] are good ways to figure out whether someone will work well with others within a firm,” Eigen says.

Ultimately, Eigen says, firms will be able to use this data to weed through the vast pool of potential laterals and focus on the ones more likely to integrate successfully into the firm.

But legal recruiter Karen Kaplowitz, president of the New Ellis Group, a business development consulting firm, worries that firms might rely too much on the numbers and forget that it often takes a while for laterals to ramp up and become profitable.

“My impression is most of the big law firms look very carefully at metrics to evaluate all their lawyers,” Kaplowitz says. “For laterals, the information can be much more damaging because they are on a much shorter leash.”

She says most firms have an 18- to 24-month contract with lateral partners that gives the firm the right to cut ties if the partner doesn’t perform to certain standards. If a partner is back on the market within two years of a prior move, there’s a good chance that the firm chose to part ways with the partner. “It can become a downward spiral,” she says.

Instead, Kaplowitz argues that law firms should focus more on successful integration. She says very often it simply comes down to better communication.

“There might be a business plan in place where the firm promises to introduce the lateral to existing clients as a means of growing the lateral’s business,” Kaplowitz says. “Very often that doesn’t happen, and the firm doesn’t follow up to make sure it happens.”
IN 1963, PHILIP HIRSCHKOP WAS walking toward the Georgetown University Law Center when he ran into his constitutional law professor. The chance encounter led to a meeting with the attorneys who’d met with President John F. Kennedy earlier that day in the aftermath of the bombing that killed four black girls at the 16th Street Baptist Church in Birmingham, Alabama.

The meeting ignited Hirschkop’s passion for social justice. “I had a lot of social drive in terms of equality,” he says. No exaggeration is in that statement, as Hirschkop’s passions have taken him from civil rights cases to his current position as outside general counsel for the animal rights group People for the Ethical Treatment of Animals.

Ingrid Newkirk, PETA president and co-founder, has high praise for Hirschkop. “As our in-house general counsel says, ‘He has forgotten more than I’ve ever known about the law.’ I can trust that Phil will think of—and dare to do—something that no one else might, including asking judges to recuse themselves or bringing sanctions against the opposing counsel.”

CIVIL RIGHTS SUPPORT

When he learned that many civil rights lawyers in the South were African-Americans in solo practice with no support staff, Hirschkop co-founded the Law Students Civil Rights Research Council. By summer 1964, Hirschkop was supervising about 100 law students, clerks and paralegals who provided support on civil rights cases.

He has since argued such landmark cases as Loving v. Virginia, which delivered a death knell to anti-miscegenation laws; Kirstein v. University of Virginia, which allowed women to enroll at Virginia universities; and Johnson v. Branch, one of the earliest decisions that protected teachers’ rights to protest. Surprisingly, Hirschkop’s first legal position was as a patent examiner in the U.S. Patent and Trademark Office. “It was really not stimulating to me,” he says. But the position allowed him to use his mechanical engineering degree from Columbia University while he earned a law degree from Georgetown, which he received in 1964.

While Hirschkop continued to take on civil rights cases, many on a pro bono basis, he also had to earn a living. He moved to Capitol Hill, and his boss was Richard Ichord Jr., a Democratic representative from Missouri and chair of the House Un-American Activities Committee. Hirschkop lasted a few months there and later became a vice chair of the National Committee to Abolish the House Un-American Activities Committee, which later became the National Committee Against Repressive Legislation and now is the Defending Dissent Foundation.

By the late 1960s, Hirschkop turned his focus to the war in Vietnam. He argued cases that defended the rights of individuals and groups, including veterans, to protest against the war. That Hirschkop would take on these cases might seem to be a jarring contrast to his service as a Green Beret in the U.S. Army Special Forces. “It was a wonderful experience, and I’m glad I did it,” he says. “I also believe in this country. I believe in what Winston Churchill said, that [democracy is] the best system we have.”

At the same time, the war in Vietnam made no sense, Hirschkop says. “I honestly believed we were trying to impose our system of government on other people who didn’t want it. I didn’t think it was a justifiable war.” Just as important, he thought the protesters had a right to speak out.

That conviction informs Hirschkop’s work with PETA, where he has been outside general counsel since 1980. PETA’s legal department was named after Hirschkop in November. His defense of PETA president Newkirk against a charge of

Continues on page 71
Ad

CALL ME!

PHOTO ILLUSTRATION BY DON LEVEY
PHOTO INSERT: DANNY DURAN
Morris Bart remembers a time when he was awkward, stiff and nervous on camera. It was 1980, and the Tennessee native turned New Orleans resident was building up his personal injury law practice.

It had been three years since the U.S. Supreme Court held in Bates v. State Bar of Arizona that the traditional ban on lawyer advertising was unconstitutional. States were starting to carve out their own ethical rules that covered how attorneys could (and could not) market their services to the general public.

Bart was thinking of ways to drum up business when he came across a story about a lawyer in Colorado who started to run television ads.

“A lot of people told me not to waste my money, that it would never work and that it would sully my reputation,” says Bart, whose eponymous firm now consists of more than 90 lawyers in 14 offices in Alabama, Arkansas, Louisiana and Mississippi. “I called [the Colorado lawyer] up, and he said that the ad had worked and that his phone was ringing off the hook.”

Bart decided to take the plunge. But he readily admits that he wasn’t quite ready for his close-up.

“I was sitting in my office chair behind my desk, pretending to talk on the phone,” Bart says. “I had to look at the camera, point the phone at it and say two words: ‘Call me.’ I felt so uncomfortable doing it that it took something like 15 takes to get it right.”

Practice makes perfect. Bart’s ads are on television constantly.

40 years after Bates, legal advertising blows past $1 billion and goes viral

By Victor Li
Billboards with his face, phone number and website are displayed prominently on highways throughout Louisiana and the other markets he’s entered. He has a website that features a 24-hour hotline and live chat options for clients to reach an attorney at any hour of any day. He has a YouTube channel and a Facebook page that contain numerous web-exclusive videos and testimonials. He even has a catchphrase (“One call, that’s all!”) that he’s been able to adjust seamlessly for the web (“One click, that’s it!”).

And he has a cult following. The Advocate newspaper, based in Louisiana, reported in 2015 that a mother in Prairieville threw a Bart-themed birthday party for her 2-year-old son complete with an image of Bart emblazoned on his birthday cake, a Bart cardboard cutout, a T-shirt and an autographed picture.

Bart, who spends about $1 million per month on TV spots, was able to parlay this story into tons of free advertising for him and his firm. The story got picked up by major outlets such as the Wall Street Journal, BuzzFeed and People magazine. TV host Jimmy Kimmel surprised the mother and child with a visit from Bart at their home.

“That was a joyful experience that came out of nowhere,” says Bart, whose 2015 Kimmel spot had racked up more than 186,000 views on YouTube at press time. “All of a sudden, it goes viral, and I’m getting emails from all over the world.”

**IT’S AN AD WORLD**

Whether it inspires envy, parody, anger, litigation or teeth-clenched admiration, legal advertising is here to stay. Bart’s experience shows how some lawyers are relying on multiple ad streams to compete in today’s multiscreen media landscape.

Jayne Reardon, chair of the ABA’s Standing Committee on Professionalism, says the rise of social media and the prevalence of the internet have created an incentive for some lawyers to move away from the traditional ads that Bart and others pioneered.

“I started practicing in the ‘80s, so I’ve lived with lawyer advertising throughout my entire legal career,” says Reardon, the executive director of the Illinois Supreme Court Commission on Professionalism. “Over the years, the tone has changed. Ads have become more sensationalized, and it’s been accelerated because there are so many different ways to get your message out there.”

All that has led to lawyers opening up their checkbooks and spending big bucks to be on TV and in print, and to maintain an active web and social media presence. According to Oct. 31, 2016, figures from Kantar Media’s Campaign Media Analysis Group, lawyers, law firms and legal-service providers spent $770,598,900 on television ads in 2016. The CMAG also predicted that $924 million would be spent by the end of the year based on the current monthly average.

For paid Google keyword search terms—which advertisers buy to have ads appear after the terms are plugged into a Google search—a 2015 study by the CMAG and the U.S. Chamber of Commerce Institute for Legal Reform found nine out of the top 10 and 23 of the top 25 were legal terms. The most expensive terms were “San Antonio car wreck attorney” at $670, “accident attorney Riverside CA” at $626, and “personal injury attorney Colorado” at $553.

Although the ad-buy rush is being fueled by personal injury and mass tort lawyers, Kantar Media found that other lawyers and legal-service providers have contributed to the boom, ranking Avvo and LegalZoom among the top 10 biggest spenders on TV advertising in 2015.

“Legal advertising not only appears to be recession-proof but also politics-proof,” the report states.

**‘JUSTICE, PURE AND UNSULLIED’**

Historically, the idea that a lawyer would market his or her practice to the general public was seen as unseemly and unprofessional.

It also was unethical. In 1908, the ABA adopted as part of its Canons of Professional Ethics a blanket prohibition against advertising and solicitation. Some limited exceptions existed—lawyers could have listings in telephone directories, and could communicate with friends, family and clients. The canon tolerated business cards but held open the possibility that they could be scrutinized by local bar officials by calling them “not per se improper.” Lawyers weren’t allowed to solicit business through fliers or ads, and the prohibition even extended to indirect forms of advertising, such as commenting on newspaper articles.

“In America, where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration,” the canon stated. “The future of the republic, to a great extent, depends upon our maintenance of justice, pure and unsullied.”
Everything changed in 1977 when the Supreme Court handed down its decision in *Bates*. The court found that prohibitions on lawyer advertising violated the First Amendment. Moreover, the court simply saw such bans as anachronistic and unnecessary to maintain the integrity of the bar.

“The assertion that advertising will diminish the attorney’s reputation in the community is open to question,” wrote Justice Harry Blackmun for the majority. “Bankers and engineers advertise, and yet these professions are not regarded as undignified.”

Blackmun found that the absence of lawyer ads hurt the legal profession, holding that “the absence of advertising may be seen to reflect the profession's failure to reach out and serve the community,” and that many people in need of legal services do not contact an attorney because they worry about pricing or finding a competent lawyer.

Almost immediately after that ruling, lawyers started to make up for lost time. Advertising company Group Matrix signed up its first law client one day later. Others followed, and Group Matrix made so much money off the legal industry that it discontinued its work in other industries to focus on attorneys.

According to its website, Group Matrix produces more than 400 lawyer commercials for television each year and boasts that more than 35 million people see its attorney ads per day. Bart was one of Group Matrix’s early clients.

“What *Bates* did was change the whole complexity of professional service,” says Group Matrix CEO Richard Sackett. “The basic issue with any case is who owns it. Lawyers like to say ‘my case,’ but the case always belongs to the client. The *Bates* decision reaffirms that.”

‘CALL US NOW!’

Overseeing an ad campaign can be a full-time job that doesn’t leave much time for lawyering. So some law firms have become, first and foremost, marketers.

Take Sokolove Law in Chestnut Hill, Massachusetts, for example. Attorney Jim Sokolove founded the firm out of the ashes of his previous firm, which split up after accumulating massive debts.

It was 1982, and Sokolove needed a way to make some money and raise his profile in Boston. He was intrigued by television. According to a 2009 article in *Boston* magazine, Sokolove spoke with Bates & O’Steen, the Phoenix firm that had brought the original *Bates* lawsuit, and Jacoby & Meyers in Los Angeles, which had run the first nationally televised legal ad.

Sokolove decided to get in on the act and filmed a slow-motion car crash that he personally staged on a quiet road in Weston, Massachusetts. He then put himself on camera (he had wanted to cast

Morris Bart says he used to be awkward and nervous on camera. “It took something like 15 takes to get it right.”
Perry Mason star Raymond Burr, but his local bar association put the kibosh on that because of ethical issues) and uttered the words that have become a cliché for many of his fellow attorneys: “If you are injured in an accident, call us immediately.”

According to the 2009 story, Sokolove received some pushback for his ad from the legal community (one prominent Boston litigator called lawyer advertising “degrading” and criticized Sokolove for lowering himself). But he also received a lot a business. Pretty soon, Sokolove Law had so many phone calls that they couldn’t handle all the cases. He started to send them to other attorneys in exchange for 10 percent of all fees. As the story pointed out, Sokolove hadn’t tried a case in about three decades.

Sokolove retired in 2013, but his law firm continues to spend big on advertising. According to CEO Michael Skoler, the practice spends about $30 million to $40 million per year on advertising.

The Kantar Media study ranked the firm fifth in terms of projected TV spending in 2015, behind AkinMears, Morgan & Morgan, Pulaski & Middleman and LegalZoom. But Skoler is quick to point out that less than half its total spending goes to TV. The spending is about 45 percent on TV, 45 percent on internet and 10 percent on other outlets such as social media or print.

CATCHING CLIENTS

Skoler joined the firm 15 years ago to help Sokolove Law go national. “You don’t want to be in the buggy-whip business,” he says. “If you look at how the legal marketing landscape has changed over the last 14 years, there’s a ton of money being spent chasing customers in a flat market. It’s all about acquisition cost and the efficiency of one’s marketing dollars.”

Sokolove Law has an analytics group that determines which ads are working and how many phone calls become clients. “Every commercial we run has a unique

Bryan Wilson utilizes his alter ego, the Texas Law Hawk, to attract new business.
phone number,” Skoler says. “We want to know exactly what works and what doesn’t, so we can buy-manage to determine what ads are getting the best results.

Conversion rates are everything, Skoler says, and the firm is ultimately looking at “cost per fee-generating case.”

“That takes a long time and a tremendous amount of analytics,” Skoler says. “It also forces us to make decisions at every step of the process based on what the data says.”

Still, Skoler thinks his firm has it down to a science, so much so that it has chosen to export its advertising capabilities. In 2011, the firm spun off its own in-house ad agency to create d50 Media.

“We figured why not do this work for everyone?” Skoler says. “Sokolove is the anchor client, but d50 does work for other industries in the lead generation and direct marketing business.”

Although Skoler says marketing is Sokolove Law’s core business, he objects to the notion that the firm functions as a referral service. He says the firm maintains a co-counsel relationship on all its cases, and that it continues to work with clients and get information from them while the case is ongoing.

“In the mass tort business, client acquisition is the more critical part,” Skoler says. “Litigation is also critically important, but that’s a different type of work over a longer time period. It’s not like the initial rush where you’re trying to acquire as many clients as possible.”

(One firm has transitioned from legal work to marketing. See “How One Lawyer Makes Millions Providing Ads for Other Firms” on ABAJournal.com.)

THE LAW HAWK

On the one hand, it might be hard to tell where Fort Worth, Texas, criminal defense lawyer Bryan E. Wilson ends and his alter ego, the Texas Law Hawk, begins.

Wilson plays the role with confidence, yelling out his name and moniker with relish as he rides his motorcycle while surrounded by enough U.S. flags to make Evel Knievel blush. His series of viral videos depicts him riding into crime scenes, where he informs the accused of their rights and stops overzealous police officers from abusing their authority.

He screams “Bryan Wilson, the Texas Law Hawk!” and you can hear eagles screeching—a lot.

“It was my nickname in law school,” Wilson explains. “It was mock trial week, and we were all exhausted. We were trying to come up with a team name, and I got fired up when I said ‘law hawks!’ That’s what people started calling me.”

On the other hand, he always draws a clear distinction between his marketing persona and his professional abilities. At the end of each video, he speaks into the camera in a serious tone and encourages viewers to call him if they’ve been arrested.

When Wilson started his law firm, he decided to center his marketing campaign around the nickname. Without access to a large budget, he called his friends to help him brainstorm and film his admittedly outlandish videos.

An ad released last June also was his most expensive, with a budget of $4,000 to $5,000. Well, riding a personal watercraft off a ramp usually will inflate anyone’s budget.

“I really don’t rely on conventional advertising,” Wilson says. “I have a website, and I do the videos. Other than that, I just ask people to share my videos if they think they’re funny.” One of his ads has topped more than 1.8 million views on YouTube and helped Wilson land a local Super Bowl commercial in which he endorsed Taco Bell in 2016.

“During my last trial, I brought up my ads during jury selection for the very first time,” he says. “I felt like I needed to tell people about them and say, ‘If you’re going to hold it against me, don’t hold it against my client.’”

The foreman spoke up, Wilson says, and said the ads were hilarious. The best part for Wilson? The jury acquitted his client on a DWI case.

THE WOMAN CARD

In another unconventional ad campaign, several female lawyers have embraced the slogan “Ever Argued with a Woman?” as a means to demonstrate their zealosity and effectiveness as advocates.

“One day, we were brainstorming at the office and going through various ideas,” says Melissa A. Wilson (unrelated to Bryan Wilson), a Bartow, Florida-based divorce lawyer and founder of the Advocate Law Firm. The “argue with a woman” theme “seemed fitting for the message we were trying to get out there,” Wilson says. “It can be taken in more than one way. You can take it with a grain of salt and a laugh, but you can also take it seriously and realize that we’re here to fight for you.”

Wilson says she hasn’t received much negative feedback from the ad campaign, which mainly consisted of billboards and social media, and claims it has been a boon for business. However, during a November 2014 episode of @Midnight, which airs on Comedy Central, several comedians made fun of the ad. “I didn’t know women could also be sexist towards women,” show host Chris Hardwick quipped.

Meanwhile, the phrase proved to be successful enough for others to use it in their ad campaigns (unlawfully, Wilson claims—she trademarked the phrase and currently is considering her legal options against others who have used it).

Reardon of the ABA professionalism committee sees these unconventional ads aimed at attracting regular people rather than landing sophisticated clients.

“Many people say these types of ads undermine the integrity of our profession, and I get that,” Reardon says. However, she says it’s not really up to her and others in her position to judge ads based on their personal tastes.

“In terms of what is important for taste or dignity for lawyer advertisements, I think we, as a profession, could and probably should issue some guidelines,” Reardon says. “I’m not so sure that violation of those guidelines should subject someone to be disciplined, however.”

To that end, she thinks the June 2015 proposal from
the Association of Professional Responsibility Lawyers to simplify and streamline the ABA Model Rules of Professional Conduct as they relate to lawyers who advertise is a good starting point.

The proposal deletes several rules, including provisions that relate to font size and letterheads, while emphasizing that the standard for advertisements is that they should not be false or misleading. It received a mixed response at a forum during the ABA Midyear Meeting in February. Written comments were accepted through March 1.

ANTI-ADS

Perhaps the most difficult way to advertise is the route Bill Marler has taken. Marler, managing partner at Marler Clark in Seattle, spends almost no money on TV or web ads. He’s put out some ads on local public radio, but he considers that to be his donation to the arts. The Marler Blog is one of his primary marketing tools, but it’s not his main form for advertising.

Instead, Marler has adhered to the philosophy that many in the legal industry have long held: A track record of success is the best form of advertising.

Since 1993, when an E. coli outbreak at Jack in the Box restaurants infected more than 700 customers in four states (the outbreak led to 171 hospitalizations and four deaths), news coverage helped Marler establish himself as the foremost food-safety lawyer in the country.

“I just happened to get one of the first calls and filed one of the first cases,” Marler recalls. “I became the face of the lawyers representing the victims.”

But it wasn’t just dumb luck. Marler stepped up and offered to do most of the work for his fellow plaintiffs lawyers. “I learned in college that if you offer to do the report for your group, they’ll let you do it,” he says. “I told my co-counsel that I’ll organize everything, I’ll handle the discovery and the documents. I became the de facto lawyer in America who knew more about E. coli than anyone.”

He says lawyers in Seattle weren’t really advertising then, so the free publicity from the Jack in the Box cases caused his caseload to expand from one client to several hundred very quickly. Once those cases wrapped up, another one popped up, and Marler realized that he could make a practice out of food-safety law.

Nowadays, Marler says, it’s common for him to handle the vast majority of cases in any given class action lawsuit relating to a food-poisoning outbreak. In 2011, for example, Marler handled 51 out of approximately 60 claims that dealt with a listeria outbreak from certain brands of cantaloupes.

Marler says that about half his work comes from referrals. “They usually come from people reading about us in a newspaper or magazine, or seeing us on TV,” he says. The blog helps reaffirm Marler’s credentials while providing important information to the public.

“Look at what he’s been able to do,” says Kevin O’Keefe, CEO and publisher of LexBlog, who helped build and design Marler’s blog. “He’s quoted by every paper whenever there’s an outbreak, and he’s the first lawyer to know if someone in your family gets sick from a foodborne illness. He’s proven you can make a good living without spending a lot on advertising.”

LOSING LIMITS

When it comes to lawyer advertising, Group Matrix CEO Sackett figures he’s seen it all. After all, he was there from the beginning, helping usher in the “age of
advertising” to a profession that, until Bates, regarded marketing as dishonorable.

He still sees some remnants of that anachronistic attitude. Like all legal advertising, Group Matrix’s ads must be cleared by the local bar association for each particular market where they will run. Sackett notes that Bates classified lawyer advertising as commercial free speech, and that such speech can be restricted but not censored.

“I've found that some states have very strict restrictions that were really just veiled attempts at eliminating or censoring legal advertising,” Sackett says. Among the things he's seen shot down over the years are a talking dog ad—rejected because the dog didn't identify himself as a nonlawyer—and an ad that takes place in outer space because it wasn't realistic.

To Sackett, those types of restrictions should become less onerous over time. But there's a flip side. Sackett says lawyers and law firms have started to attack one another directly, using their ads to talk about how much better their services are compared to their competitors.

The Fieger Law Firm, a personal injury practice based in Southfield, Michigan, made waves last February when it released an ad that distinguished the firm's lead attorney, Geoffrey Fieger, from his competitors in Detroit, mentioning some by name.

“You think you know them, or do you?” the ad's narrator asks ominously, as if he were reading an attack ad against a political candidate. “Because only one has 165 separate million-dollar settlements and verdicts. ... Only one has stood up and taken on big business and the government. And only one is one of the most famous trial lawyers in America. There is only one Geoffrey Fieger!”

Fieger stands behind his ads and says he's been doing them for years. Perhaps it's the politician in him—he won the 1998 Democratic nomination for Michigan governor but lost to the incumbent, John Engler.

“I don't do cloying advertisements where I just look at the camera and go ‘We do right by you,' ” Fieger says. “I do what feels right to me. If you look at 99.9 percent of lawyer advertising, it's embarrassing, dumb, stupid and ridiculous.”

Fieger says he gets blowback all the time for his ads but also claims that none of it has come from the state bar. “Free speech is free speech,” he says. “What are they going to say? 'Your ads are too good, so you can't use them?' ”

To Sackett, these types of ads soon will become more commonplace. He calls this phenomenon “the Trump effect,” explaining that, similar to how President Donald J. Trump has lowered the level of public discourse by making crude language and personal attacks permissible, lawyers soon will follow suit.

“At some point, within the next three to five years, we'll see substantially negative advertising about one competitor over another,” Sackett says. “One law firm will do an ad like this, and then there will be retaliation because lawyers are trained to fight back.”

Kantar Media's CMAG agrees with Sackett, estimating a 300 percent jump from 2015 to 2016 in so-called negative ads about a lawyer's or a law firm’s competitors. “Bar associations have rules against making comparisons in advertisements,” he says. “But if it's factual, then they can't stop it.”

Ultimately, Sackett thinks that legislatures might have to step in—especially if bar regulators cannot maintain the dignity of the profession.

“Everyone wants the practice of law to remain dignified,” Sackett says. “But the public doesn't always respond to dignified ads.”
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OUTER SPACE is nothing like the movies. Contrary to popular imagination, there are no space armadas, Death Stars or laser battles above Earth. Only a handful of humans have ever been to outer space ...
THE OUTER SPACE TREATY TURNS 50. CAN IT SURVIVE A NEW SPACE RACE?

BY JASON KRAUSE
... almost all of them trained astronauts, cosmonauts and scientists.

The reality of space travel is thanks in large part to the Outer Space Treaty, which turns 50 this year. In 1967, a time when only the United States and Soviet Union were even capable of launching vehicles into space, the treaty declared space a demilitarized zone and made the moon and other celestial bodies "the province of all mankind."

But every so often, something shocking happens that threatens to shatter the soundless peace of outer space. Several years ago, hackers from China cracked into the U.S. weather satellite network and forced a temporary shutdown of the system. More recently, private companies have begun testing commercial rockets designed to take tourists into space—resulting in several explosive failures and one death.

U.S. Rep. Jim Bridenstine, R-Okla., points to these and other incidents as the reasons why comprehensive space law reform is necessary. "Fifty years ago there were two nations in space ... and our main concern was nuclear proliferation," he says. "Now, almost every nation on Earth has some sort of presence in space, and we have to be concerned with threats like jamming, dazzling [shining disruptive light down from space], spoofing and hacking satellite constellations.”

**BILLIONAIRES IN SPACE**

The treaty (formally the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies) is a product of the Cold War and primarily addresses concerns of that era, including nuclear war. So for 50 years, the treaty has prevented belligerent nations from putting weapons of mass destruction into space.

But space is becoming big business, and commercial interests are putting new pressures on the law of outer space.

According to *The Space Report 2016*, published by the Space Foundation, a nonprofit advocate for space-related endeavors, at least 19 countries have, are developing or are planning to host spaceports for orbital and suborbital launches. The report counts 86 orbital launches attempted around the world in 2015, and it says "the global space industry
grew in 2015,” totaling $323 billion. This economic activity is still largely driven by national space agencies, but private interests are increasingly reaching for the stars. Nearly 50 years after the U.S. beat the USSR to land the first humans on the moon, a new space race is underway.

This time, billionaires—including Elon Musk of SpaceX, Jeff Bezos of Blue Origin, Richard Branson of Virgin Galactic and Microsoft co-founder Paul Allen—are racing to launch commercial rockets that could take tourists to space. Last year, Blue Origin’s launch vehicle landed after a suborbital flight and subsequently flew to space and back on two occasions. SpaceX returned the first stage of its Falcon 9 vehicle after an orbital launch. And in January, it resumed launching satellites after a rocket explosion in September.

The financiers and entrepreneurs behind these operations want assurances that regulations are in place that will not stifle the nascent industry. “What the space industry wants is regulatory certainty without regulatory burdens that are going to strangle innovation,” says Bridenstine. “That’s a delicate balancing act.”

As these 21st-century challenges arise, the foundation of space law is still rooted in a series of 20th-century international conventions, beginning with the Outer Space Treaty. (See “Laws in Space,” page 48.) The treaty is supplemented by...
There are five international treaties that deal with issues such as the nonappropriation of outer space by any one country, arms control, freedom of exploration, liability for damage caused by space objects, safety and rescue of spacecraft and astronauts, prevention of harmful interference with space activities, and the environment. Notification and registration of space activities, scientific investigation and exploitation of natural resources in outer space, and settlement of disputes.

The treaties, commonly referred to as the “five United Nations treaties on outer space,” are the following:

**OUTER SPACE TREATY** The foundation of international space law, it forbids weapons of mass destruction in space and reserves the moon and other bodies for peaceful purposes. It opened for signature in January 1967 and entered into force on Oct. 10, 1967.

**RESCUE AGREEMENT** It outlines the obligations for any state party that becomes aware that the personnel of a spacecraft are in danger. The Rescue Agreement went into force in December 1968.

**LIABILITY CONVENTION** Coming into force in 1972, it established liability rules for space. The Soviet Union was penalized under this convention when one of its nuclear-powered satellites crashed in Canada in 1978.

**REGISTRATION CONVENTION** In 1976, it created a system to identify and register space objects.

**MOON AGREEMENT** It was opened for signatures in 1979 but did not enter into force until 1984. The agreement reaffirmed and elaborated on the Outer Space Treaty as it relates to the moon and other celestial bodies, which should be used exclusively for peaceful purposes, their environments should not be disrupted, and the United Nations should be informed about any stations built on those bodies.

**MOON AGREEMENT** created a system to identify and register space objects. Informed about any stations built on those bodies.

**SPACE TREATY** In 1976, it established liability rules for space. The Soviet Union was penalized under this convention when one of its nuclear-powered satellites crashed in Canada in 1978.

**MOON AGREEMENT** In 1979, the agreement reaffirmed and elaborated on the Outer Space Treaty as it relates to the moon and other celestial bodies, which should be used exclusively for peaceful purposes, their environments should not be disrupted, and the United Nations should be informed about any stations built on those bodies.

Thus, it was established that the rules governing spacecraft would differ from those for aircraft.

But in 2015, the Spurring Private Aerospace Competitiveness and Entrepreneurship Act was passed. The Space Act allows companies to mine inorganic resources from space. "Congress wants to allow these interests to go into space and keep the fruits of their labor," says Michael Dodge, a law professor in the Department of Space Studies at the University of North Dakota. "But property rights in space are a complicated bundle of laws, and they want to promote commercial actions. It's not clear if it is legal from an international law perspective."

**DOES E.T. SPEAK LEGALESE?**

The Outer Space Treaty is not an anomalous or unusual area of law. It is very similar to maritime law, which guarantees peaceful passage through navigable waters by ships of all nations. But in application, the treaty is more similar to the Antarctic Treaty System, a series of international agreements that call for cooperative management of Antarctica as a non-militarized environment, and put off claims of sovereignty for an indefinite period.

One of the things that makes space law and the Outer Space Treaty problematic is direct attribution. That is, the treaty makes every nation directly responsible for any activities its citizens engage in above Earth. In particular, Article VI is the foundation on which any laws or regulations regarding commercial space activity are erected. This section makes states responsible for the activities of nongovernmental entities,

International custom and general principles of law recognized by space-going nations, as well as bilateral agreements among nations. And increasingly, nations are enacting legislation and regulations for commercial space activity.

“Space law is at the jagged edge between legislative and executive power,” says Joanne Gabrynowicz, professor emerita at the University of Mississippi School of Law and editor-in-chief emerita of the Journal of Space Law. “Before the commercialization of space can truly take off, Congress must define the legal framework they will be operating under.”

How big is the gap in the law? In the U.S., there is no federal agency with jurisdiction of on-orbit activity. The Federal Aviation Administration licenses vehicles going up and returning, but no agency actually regulates activity in orbit or on another celestial body. For the most part, Congress had opted to regulate the industry only loosely, granting an extended “learning period” that would allow companies to grow and practice space travel.

In fact, because man entered outer space before law did, what might have created a military confrontation—spying by satellite—became accepted, if not officially legal. When Sputnik 1 circled the globe on Oct. 4, 1957, the Soviet satellite violated international air law that extends a nation’s sovereignty vertically to the airspace over its territory. But because President Dwight D. Eisenhower knew the U.S. would want to send its own satellites over the Soviet Union, he tacitly accepted its right to operate a satellite in orbit over U.S. territory.

When Sputnik 1 circled the globe on Oct. 4, 1957, the Soviet satellite violated international air law that extends a nation's sovereignty vertically to the airspace over its territory. But because President Dwight D. Eisenhower knew the U.S. would want to send its own satellites over the Soviet Union, he tacitly accepted its right to operate a satellite in orbit over U.S. territory.
requiring “authorization and continuing supervision” of space activities by commercial enterprises.

“Direct attribution is a unique feature of space law,” says Chris Johnson, space law adviser for the Secure World Foundation, an organization that promotes “peaceful uses of outer space contributing to global stability and benefits on Earth.” He says that “in other areas of international law, responsibility is more indirect, but in space, citizens are considered to be acting on behalf of their home nation.”

Direct attribution exists because the treaty was very much written to address military, scientific and political questions—not with commercial interests in mind. As a result, there is no framework for regulating or managing commercial actors in space. The document mentions ‘nongovernmental agencies’ only once,” Gabrynowicz says. “And because of that oversight, there is no U.S. agency with jurisdiction of on-orbit activity. That’s a big gap in the law.”

Another big gap is that there have been virtually no judicial decisions on a question of space law by an international court. Even more problematic, it’s not clear which international court would be called on to settle a dispute in space. In order to fully address these and other concerns, the U.N. would need to amend existing treaties or draft new ones. That would likely be the only way to create binding legal opinions in space law, but in the current political climate, there is little political will or interest in new treaties.

Unfortunately, there are a number of key treaty phrases that remain opaque. For example, Article I says the use of the moon and space resources shall be “the province of all mankind,” while Article V designates astronauts as “envoys of mankind.” Other ill-defined terms at the heart of the treaty include “interests of all other states parties,” “space object,” “harmful interference” and “peaceful purposes.”

“Who exactly is an envoy of mankind? What is the province of mankind?” Johnson asks. “The treaty really doesn’t tell us, and no one has ever had to figure it out.” These are more than just semantic questions. The vagaries of the treaty and related convention have made it difficult to get more signatories to join the treaty regime. For example, the “Moon Agreement,” the last of the five U.N. treaties relating to space, has been ratified by only 13 nations. Johnson believes this is in large part because commercial interests have been lukewarm to treaty language that reserves lunar resources for “the common interest of all mankind.”

The Outer Space Treaty has faced challenges before. Just over a decade ago, there was an effort to amend or even replace it. At the U.N. Conference on Disarmament in Geneva, bureaucrats considered
expanding the categories of prohibited weapons and placing further limits on the military, but the U.S. declined to open new arms control discussions, effectively ending the talks. At the same time, others suggested revisiting the treaty in order to make it conducive to commercial space activities.

“It would be impossible to get a new treaty or amend the existing treaty,” Gabrynowicz says. “It looks like [national] legislation and regulation is the only plausible avenue for modernizing the legal framework in outer space right now. The only question is if Congress can keep up with the space industry.”

THE TREATY WILL ABIDE

Rather than amend the treaty, space-faring nations like the U.S. will likely pass legislation to authorize and supervise space activities. To help shape these efforts, the U.N. released a resolution adopted by the General Assembly in 2013 outlining how national legislation can comport with the treaty. The document contains a set of recommendations on national legislation relevant to the peaceful exploration and use of outer space, emphasizing “sustainable use” of outer space resources and reminding states of their responsibility for supervising space activity originating from their territories.

Bridenstine has proposed the American Space Renaissance Act, which would bring about significant changes in the nation’s commercial space policy, starting with a much larger role for the Department of Transportation and the Commerce Department. These agencies’ budgets would be increased significantly to keep up with growth in the commercial space industry. New initiatives include a loan guarantee program, tax credits for the domestic launch industry and funding for a variety of prizes.

Bridenstine does not expect ASRA to pass as a whole. Instead, provisions would be incorporated into other legislative measures as events warrant. Among his concerns is that existing treaty language would allow foreign powers to interfere with or thwart economic activity unless U.S. law is amended to give legal protections to space activity.

“Imagine a new company is about to attempt a rendezvous and proximity maneuver, like refueling a satellite,” he says. “There is a real concern another nation could declare this was a provocative act and all of a sudden a multimillion-dollar project is stopped. Companies need confidence and regulatory certainty that they can proceed with new ventures.”

The SPACE Act was the first major update to U.S. space law explicitly allowing “U.S. citizens to engage in commercial exploration for and commercial recovery of space resources free from harmful interference.” Because the Outer Space Treaty has no clear prohibition against the taking of resources, the law assumes that the use of space resources is permitted.

The primary motivation behind the U.S. law was to help private interests begin the exploitation of space resources. In 2016, the FAA announced that it had cleared a company called Moon Express to launch an unmanned mission as early as this year—the first private moon landing. While the Outer Space Treaty clearly bars countries from making a territorial claim, SPACE assumes that broad commercial exploration and use of celestial objects such as asteroids or the moon is legal, something that is not a universal view.

In fact, SPACE is just one possible interpretation of the treaty; whether and to what extent this interpretation is shared by other nations remains to be seen. For now, the law regulates a hypothetical practice until commercial projects, space tourism and mining operations begin. “The fact is that the treaty considers celestial bodies ‘common heritage,’ and no nation has the right to unilaterally declare these resources private property,” says Timothy G. Nelson, a Skadden Arps Slate Meagher & Flom partner in New York City who specializes in international law.

Meanwhile, Spaceport America in the New Mexico desert is the first commercial spaceport in America, giving Virgin Galactic and others a launching pad for putting tourists into space. And Deep Space Industries plans to begin mining resources from asteroids within three years. Congress will have to act to prevent the regulatory regime from becoming a serious impediment.

A launching pad for Virgin Galactic and others, Spaceport America in the New Mexico desert is the first commercial spaceport in the U.S.
In my experience, motivated offices will find a way to make something happen or to find an excuse why they cannot allow something in space. It all depends on political will,” says Ann Liebschutz, executive director of the United States Israel Science & Technology Foundation.

“If the commercial interests can motivate the government to act, the space race can continue.”

But in addition to nascent commercial concerns, fear is a powerful motivating force behind proposed new legislation. New threats to existing space assets have emerged that are not addressed by the treaty. One example: Nuclear weapons are not allowed in space, but hacking is a provocative act—and potentially a cause for war. The treaty was conceived before these threats existed, and holding parties accountable for interference in space activities is difficult.

“We need to make our space-based assets more resilient,” says Bridenstine. “If someone attacks us in space, we reserve the right to respond terrestrially.”

But even if American legislators want to create penalties or sanctions for space-based treachery, holding nations responsible for activities in space has been an impossible task. In January 2007, the Chinese used a projectile from a ballistic missile to destroy one of their own aging weather satellites. The blast left a trail of space flotsam that, according to NASA, now accounts for 42 percent of all satellite breakup debris, a large component of the orbiting man-made detritus known as space junk. This provocative act was widely condemned, but no legal action was pursued.

BE A SPACE LAWYER
Space law is an obscure but important field. Its complex mixture of international and domestic laws includes administrative, intellectual property, arms control, insurance, environmental, criminal and commercial law, as well as international treaties and domestic legislation written specifically for space.

But as the prospects for commercial ventures in space increase, it will be necessary to address the issue of who will be allowed to profit from the fruits of those ventures. This will demand lawyers with a rare blend of talents.

The profile of a space lawyer is changing. In the past, space law was the domain of aerospace and defense industry attorneys. Now a company or organization may need lawyers to help get a new service into the air. The challenge will be to reconcile the last-century treaty with this-century challenges. “The thing we academics have to explain is the Cold War thinking that influenced the treaty,” says Dodge from the University of North Dakota. “We live in a very different time, but the treaty language has to apply to today’s realities.”

Still, despite its shortcomings, the Outer Space Treaty has endured for 50 years. Supporters say that, just like the U.S. Constitution, the treaty’s basic values are fundamental and applicable in any age.

“When the framers of the Constitution wrote the Fourth Amendment, they knew that the government could not be allowed to conduct unreasonable search of a person,” Gabrynowicz says. “Fast-forward 225 years, when GPS satellites in space are used to track persons, but the Fourth Amendment still applies.

“The Outer Space Treaty proposed that space should only be used for peaceful purposes,” she says. “That’s the principle. It’s no less ambiguous than due process or other fundamental principles.”

Jason Krause is a freelance writer based in Madison, Wisconsin.
Neglect and political interference have created a growing backlog in immigration courts of 540,000-plus cases

BY LORELEI LAIRD

THE GOVERNMENT STARTED TRYING TO DEPORT OCTAVIO, A MEXICAN IMMIGRANT, in 2007. He’s still waiting for his case to be resolved, and he will likely continue to wait until at least 2018.

Octavio (the Journal is withholding his last name because of his uncertain immigration status) was subject to removal—immigration law’s term for deportation—because he’d been convicted of having false identification papers. He’d already been living in the United States for more than 10 years, had a wife with a heart condition and three stepchildren when the proceeding began in Denver.

There was a backlog of cases, so Octavio couldn’t get a final hearing scheduled until early 2013—six years later. When he returned, the judge ordered him removed but said he’d reopen the case if Octavio could find evidence showing his crime did not merit removal. Having navigated the earlier hearings without counsel, Octavio hired attorney Camila Palmer to reopen his
case. The judge scheduled the reopened hearing for the summer of 2013.

But that judge retired. The next judge sent the case from Denver to New York City, reasoning that Octavio lived part of the year in Buffalo, where he works in construction. Months later, the New York judge sent the case to Buffalo. The Buffalo judge sent the case back to Denver, where it’s been lingering for years. Octavio hasn’t been able to leave the United States to visit family, work toward citizenship or pay back the $10,000 bond a friend fronted him in 2007. Another hearing was held Nov. 1, 2016. In the interim, his family has welcomed nine grandchildren and a 13-year-old ward, whom Octavio and his wife took in after the child’s own father was deported.

The delays in cases such as Octavio’s are partly due to the immigration courts’ enormous backlog—more than 540,000 pending cases—and partly because his case was not a priority. After the 2014 surge of young people and families fleeing gang violence in Central America, the immigration courts prioritized those cases, pushing people like Octavio to the back of the line. Syracuse University’s Transactional Records Access Clearinghouse, which tracks immigration court data, says 94,662 surge cases of unaccompanied minors or families were pending at the end of November. Octavio’s final hearing was held this January.

But Octavio won’t find out the results, Palmer says, for a year or two. There’s only a limited number of green cards for people in his situation, and the outcome of the case isn’t disclosed until one is available.

“Thankfully, my client is not going to abscond, and eventually, [the lender] will get his money back,” says Palmer of Elkind Alterman Harston in Denver. “But it will probably be close to 12 years after he paid the bond that it’s going to be released.”

This situation is not unusual—at least not in immigration court, where the Sixth Amendment right to a speedy trial does not apply. Immigration Judge Dana Leigh Marks, president of the National Association of Immigration Judges and a sitting judge in San Francisco, told the ABA Journal that, in the fall of 2016, some judges were setting hearing dates as late as 2022. A backlog of pending cases has been growing in the immigration courts for more than a decade-reaching more than half a million cases last year—and a second surge of Central American families in 2016 has only worsened it. (U.S. Customs and Border Protection says there were 59,692 unaccompanied minors and 77,674 family units apprehended in fiscal 2016.)

WAVE OF REPERCUSSIONS

That backlog creates serious problems. People who aren’t in priority groups can wait years for their days in court—while evidence gets lost and memories fade. Immigrants who left families overseas may not see them for years, thanks to legal or practical travel restrictions, and they may not be able to help them escape dangerous conditions until their status is adjusted. Those who are detained can lose their jobs in just a few days; those trying to adjust their status to legal can end up working under the table for years, for low pay and in tough conditions.

The situation could be exacerbated under the new administration. Five days after his inauguration, President Donald Trump issued an executive order expanding the definition of a “criminal” for deportation purposes to include not only those with convictions but also those with pending charges, those accused of fraud or misrepresentation against a government agency, and anyone who an immigration officer believes has done something that could be considered a crime. Those criteria are so broad that every one of the 11 million people living or working in the United States without authorization could be deported.

“It’s going to crash the immigration courts,” says Paul Wickham Schmidt, a retired immigration judge and former chief of the Board of Immigration Appeals, which hears appeals from immigration courts. “No matter how you cut it, his broadened immigration priorities are going to mean hundreds of thousands of additional cases, on top of the more than half a million cases that are already there.”

The U.S. Department of Homeland Security released memos in February implementing that order, in which it expressly acknowledged the immigration courts’ record-high backlog as a hindrance to quick deportations.

But rather than address the courts’ problems, DHS proposed to greatly expand the use of “expedited removals,” in which foreign nationals are deported without any hearing at all in immigration court. (ABA President Linda A. Klein released a statement in January condemning the practice as a violation of due process.) This was previously limited to people arrested within two weeks of entering within 100 miles of the border; it will now apply to anyone, anywhere, who arrived within the past two years. Nothing was said about more funding for immigration courts.

Meanwhile, the immigration courts themselves were in the middle of a hiring spree that got started under President Barack Obama. The DOJ agency that houses the immigration courts, the Executive Office for Immigration Review, was authorized to fill up to 374 judgeships and had requested authorization for 25 more as of February. But that effort may be too late. As of the end of January, Syracuse University’s TRAC said the backlog stood at 542,411 pending cases. Start to finish, cases were taking an average of 590 days to complete.

This upsets people on all sides of immigration politics.

“You get to keep living here, maybe get married, maybe have a kid, and every day here makes it less...
likely you’ll leave,” says Mark Krikorian, executive director of the Center for Immigration Studies, which advocates for stricter controls on immigration. “Because they’ve been here so long, judges will let them stay, or they develop equities that make it difficult if not impossible to throw them out.”

“It’s not appropriate for cases that can very well result in somebody being returned to their home country and dying,” says Christina Fiflis, an immigration attorney in Boulder, Colorado, and a former chair of the ABA Commission on Immigration. “There are all sorts of consequences that flow from these failures, and there’s no necessity for them.”

In the early 2000s, when the Brazilian economy faltered, Brazilians began coming to the United States in waves. Many ended up in Boston, with relatives in the area’s large Brazilian community.

Retired immigration judge Eliza Klein, who sat in Boston at the time, says her court had no control over when and how those cases were docketed. Rather, Customs and Border Protection—the agency that polices America’s borders—scheduled court dates directly onto her docket, based on where the immigrants said they were going. But the Brazilians often didn’t have clear information about where their relatives lived, and CBP didn’t have Portuguese-speaking interpreters. The results were bad, Klein says.

“I’d go into a master calendar—you should have like 25 new cases—and there’d be nobody there,” recalls Klein, now retired from the bench and practicing law in Chicago. “And at the same time, there were a lot of people who had been placed into removal proceedings who we couldn’t schedule for hearings because all of our hearing time had been used up by these Brazilian cases. ... They completely usurped our court schedule.”

And that, immigration court advocates say, shows why those courts have such a big backlog: They’re not given the independence or funding of trial courts. Immigration lawyers and former judges say policy is set by bureaucrats at the Department of Justice, which took over control of the immigration courts from the Immigration and Naturalization Service in 1983. At DOJ, there’s occasional interference from higher up. And until recently, immigration court budgets were an afterthought.

OUT OF PACE
A major factor in the backlog is that immigration enforcement grew rapidly over the 2000s—but immigration court funding didn’t keep up. According to the Migration Policy Institute, that increase in funding was tied directly to concerns about national security after Sept. 11; indeed, immigration enforcement agencies were moved to the newly created Department of Homeland Security right as the spike in funding began. More judges were needed to handle all those new cases—but the money simply wasn’t there, says Marks, who emphasizes that she’s not speaking for DOJ, but as president of the National Association of Immigration Judges.

Seven years of budgets reflect that. Between 2003 and 2009, the combined budgets for CBP and Immigration and Customs Enforcement—both established in 2003—nearly doubled, from $9.2 billion to $17.8 billion. In the same period, the budget for the Executive Office for Immigration Review, the DOJ agency that houses the immigration courts, went up by 40 percent, from $191.7 million to $267.6 million. A 2009 DOJ budget request notes: “For
years, EOIR’s top funding priority has been to attain the ability to adjudicate the record numbers of cases already received as a result of DHS enforcement increases.”

The funding problem was compounded by a three-year Justice Department hiring freeze enacted in 2011, Klein says. When judges retired, the courts didn’t replace them, even as enforcement agencies kept filing cases. Immigration court funding has since reached parity with enforcement funding, largely thanks to big jumps between fiscal 2014 and 2016. Those jumps coincide with the 2014 influx of unaccompanied Central American minors, which attracted media attention to the backlog.

Even if funding stays parallel under Trump, Marks says immigration courts would still be hobbled by their lack of independence. EOIR is one department in a very large Department of Justice; it received just 1.46 percent of DOJ’s $28.7 billion budget for fiscal 2016. And it’s not part of the department’s core mission of law enforcement. That’s not the best place to house judges, Marks says. For example, DOJ has asked employees to telecommute in order to reduce its carbon footprint. That doesn’t make sense for court employees whose job it is to meet with the public, Marks says.

“The attitude within the Department of Justice is ... ‘To us, you’re nothing but trial attorneys,’” says Bruce Solow, a retired immigration judge and former NAIJ president now in private practice in Miami. “There is an internal built-in disrespect.”

As a result, immigration judges and attorneys say, immigration courts lack many of the features that trial courts take for granted, including adequate numbers of clerks and e-filing. Immigration courts don’t use court reporters; they use recordings, which are time-consuming to refer to when it’s time to write an opinion, and often hard to understand because of the foreign accents routinely heard in immigration court. “To reduce the need for in-person judges in remote areas or inside detention centers, EOIR has also relied on videoconferencing—but the technology is not up to par,” Klein says. The system frequently shuts down or pixelates, she says, derailing hearings and making it tough to evaluate the speaker’s credibility.

David Bier, an immigration policy analyst at the libertarian think tank the Cato Institute, believes another factor is likely a dearth of attorneys in immigration court. Immigration law expressly says there’s no right to appointed counsel, so immigrants who can’t afford lawyers and can’t find a pro bono attorney are on their own. Dealing with pro se respondents takes time, Marks says—and Bier’s analysis suggests a lot of immigration judges prolong cases to permit respondents to find attorneys.

Bier also believes the backlog was fed by controversial federal programs that called on local police to tell ICE when they’re holding a noncitizen charged with a crime. Because immigration law can be vague about which crimes make a person removable, these cases can be time-consuming. Meanwhile, he says, enforcement agencies have reduced reliance on stipulated removals, in which immigrants voluntarily waive their right to a trial, after immigrant advocates won court cases arguing that the practice is coercive.

And Bier agrees that being housed in DOJ hasn’t been helpful. Independence would give the immigration courts a stronger voice at budget time, he says, and end the possibility of political interference from above.

A MATTER OF PRIORITIES

Marks and some of her retired colleagues strongly agree. They say because EOIR answers to the politically appointed attorney general, who answers to the president, it’s vulnerable to politically motivated orders in a way that the independently run federal courts are not.

In 2016, the most glaring example of political interference was the 2014 order to prioritize surge cases of unaccompanied minors and parents traveling with children. That order rearranged dockets to the detriment of everyone involved, judges and attorneys say. For the families and minors who were prioritized, the cases were being scheduled so quickly that they couldn’t find lawyers. Cases that were ready to try were sent to the back of the line. In fact, thousands of those cases were scheduled for a placeholder date: the day after Thanksgiving of 2019. Advocates say this was never intended as a real hearing date—nor could it have been, with thousands of cases assigned per judge. The idea, Schmidt says, was to artificially clear the dockets “because if you started setting cases for 2028 or

“The attitude within the Depart...
As of October, Fiffis says, judges in Denver were rescheduling those cases for 2018. But the rescheduling means that even those that were ready to try when the dockets were reshuffled have to start the process over from the beginning—adding years to the delay. “Can you imagine trying to explain that to your client?” says Palmer. “All people wanted to do was to have their day in court, and they weren’t able to get it.”

This has messed up dockets still further, says Schmidt, who sat in Arlington, Virginia, until June of 2016. “If you look, the receipts have actually fallen over the last few years [and] there’s a few more judges on,” he says. “But the backlog has mushroomed because the cases are so poorly arranged on the docket.”

And this, Schmidt says, was intended not to benefit the courts but to “send a message” to Central Americans. He is referring to DHS policy under Obama, often repeated during the “surge,” intended to discourage would-be migrants by showing them they’d be deported quickly. This is an inappropriate use of a court system that’s supposed to provide due process, Schmidt says.

Schmidt, who was chief of the Board of Immigration Appeals from 1996 to 2001, can offer a more personal example of politicization. A few months into the George W. Bush administration, he says, he was asked to step down as chair, which his supervisor expressly said was because his opinions were too friendly to immigrants.

Not long after, he says, Attorney General John Ashcroft decided the board would work better with fewer members—and let go of the judges considered immigrant-friendly. The stated rationale was that fewer members would make the BIA more efficient, but Schmidt says it actually left the BIA with too few judges for its workload, forcing it to draft staff attorneys as temporary judges.

“Politics played no role in anything John Ashcroft did at the Justice Department,” says Mark Corallo, who was Ashcroft’s director of public affairs at the time.

Regardless, the NAIJ and others say independence would address any potential or actual political interference in the immigration courts. The NAIJ has repeatedly called for the immigration courts to be Article I courts created by Congress, like the U.S. Tax Court or the Court of Federal Claims.

“It is my honest opinion that the only way to fix this is to provide a real court that’s independent of all of these agencies,” says Solow, the retired judge in Miami.

**Justice Deferred**

All of this has real effects on the people who appear in immigration court. Just ask immigration lawyer Hedi Framm-Anton, who had a client literally collapse in her office.

Carmen, the client, was claiming asylum from 2029, everybody would go berserk.”

For the federal appeals courts, which hear appeals from the BIA—and the appellate judges were not pleased. A 2005 article from the Los Angeles Times says appellate judges were describing BIA rulings as “incoherent” and “sloppy adjudication” that “contravened considerable precedent.” There were so many appeals, Schmidt says, that the DOJ drafted staff lawyers with no immigration expertise to defend them.

Two of Schmidt’s former colleagues—both of whom were also let go—agree that the downsizing was politically motivated, as do sources quoted in a November Law360 article. A 2008 report from the DOJ’s Office of the Inspector General didn’t address this issue, but did find that only attorneys endorsed by Republican elected officials or appointees were hired as immigration or BIA judges from 2004 onward. (This exacerbated the backlog, the report said, because getting political approval slowed the hiring process considerably.)

The OIG found that three people, none of them Ashcroft, had broken federal law with these practices.

A spokesman for Ashcroft calls the allegation ridiculous. He cited a 2002 press release announcing the reforms as an attempt to address a backlog at the BIA by “streamlining.”

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“It is my honest opinion that the only way to fix this is to provide a real court that’s independent of all of these agencies,” says Solow, the retired judge in Miami.
ABA Commission Had Warned of Backlog

SEVEN YEARS AGO, AN ABA COMMISSION ISSUED a series of recommendations to address the immense backlog in immigration cases, yet few of those proposals have come to pass.

A 2010 report from the ABA Commission on Immigration cited many of the same concerns that exist today about a system incapable of handling increased enforcement of immigration laws.

The report, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases, also noted a sevenfold increase over five years in cases going to the U.S. Court of Appeals, in part because the Board of Immigration Appeals directly below had stopped supporting its decisions with extensive written opinions.

"In 2010, there was hope that comprehensive immigration reform would be a possibility in coming years," explains Karen Grisez, who chaired the commission at the time and now serves as a special adviser to it. "So it was intended to give recommendations for improving the system across the board."

Just as modern observers have noted, the report’s authors (all pro bono attorneys from Arnold & Porter) found that the backlog was largely created by increases in immigration enforcement not matched by increases in resources for the immigration courts. It also found too much enforcement against immigrants convicted of minor offenses; delays and insufficient time to make decisions in immigration courts and actual or perceived politicization of the courts.

The commission proposed restructuring immigration courts by removing the court system from the Department of Justice to obviate concerns about their independence from political interference. The immigration courts and the BIA would instead be Article I (congressionally created) courts, with a leadership appointed by the president and confirmed by the Senate. Judges would have fixed terms, set qualifications and obligations to a code of conduct.

That’s long been on the wish list of the National Association of Immigration Judges. Dana Leigh Marks, speaking as president of the union and a sitting judge in San Francisco’s immigration court, believes this would help the system secure adequate funding, rather than having to compete with much larger units of the Department of Justice. It would also insulate the immigration courts from perceived or actual political interference.

The report also recommends smaller steps, including narrowing the definitions of "crime" in certain statutes to lessen eligibility for deportation; increasing the use of prosecutorial discretion to end minor cases; establishing a right to legal representation in removal cases, particularly for vulnerable populations like unaccompanied minors; and decreasing the use of detention. Many of these recommendations clash with President Donald Trump’s early executive orders. For example, one order construes "crime" broadly, to include actions that an immigration officer believes would "constitute a chargeable criminal offense."

Grisez, who also works on immigration issues in her role as public service counsel for the Washington, D.C., office of Fried, Frank, Harris, Shriver & Jacobson, says advocates are concerned about how Trump’s moves will affect immigrants across the system.

Nonetheless, Grisez notes, there’s been movement on some of the report’s priorities, including improvements in the length and clarity of the BIA’s opinions, which has reduced appeals to the federal appeals courts and given more guidance to immigration courts. There are also several new programs providing counsel to unaccompanied minors, another recommendation.

One key recommendation was to hire more immigration judges, which came to pass near the end of the Obama administration. As of March, the Executive Office for Immigration Review said it had 301 judges and was authorized to hire up to 374. Recent reports state that the Trump hiring freeze will not include immigration judges. Still, Grisez says advocates are concerned that Attorney General Jeff Sessions might slow the process by rejecting new hires.

But with more enforcement coming, Grisez says, continuing the hiring will be essential: “Unless there are a large number of judges added, it’s obvious that more new cases in the system without more judges is going to lead to increased backlogs.”

both rampant gang violence and domestic violence at home in El Salvador. (Her last name is being withheld for her protection.) Like many Salvadoran nationals, she had paid a smuggler to take her and her son north, arrived at the border in 2015 and spent a few months in the government’s immigrant detention center in Dilley, Texas. Carmen’s case was prioritized along with other surge cases, and Framm-Anton requested an expedited hearing—which in immigration court means within six months.

The speed helped resolve Carmen’s case sooner, but it also condensed the process of drawing out Carmen’s story. That was tough, Framm-Anton says, because Carmen was an educated woman, ashamed that she’d tolerated the abuse. That kind of reluctance is common with Framm-Anton’s clients, many of whom were traumatized by events at home. “It’s a delicate balance of... what’s going to happen to this person if I force her to keep telling her story,” says Framm-Anton, who runs a small law office in San Francisco.

To prepare the case, Framm-Anton had to grill Carmen weekly. Meanwhile, Carmen was working two jobs and leaving her 14-year-old son alone all weekend. The state was threatening to take him away. During that time, Framm-Anton says, Carmen stood up to leave the office one day—and passed out. EMTs said it was the stress.

Carmen won her case. But prioritizing cases like hers has created problems for both the prioritized immigrants and those sent to the back of the line, immigration lawyers say.

For priority cases—unaccompanied minors and families traveling with children—the problem is speed. Framm-Anton, who represents a lot of unaccompanied minors and families, says those cases are supposed to be finished within a year. Because nobody in immigration court gets...
The backlog can help clients who have weak cases but has had a case linger so long that new case law of the case, or federal policies can change. If courts can pass new law during the pendency of the line. His case may have been extreme, but across the board, people with nonpriority cases can expect to wait years—with dates from 2018 to 2023, lawyers and judges say—to have their cases heard. Palmer says one of her clients has been waiting so long that his wife, who’s still living in Arlington would keep continuing cases until the respondents got lawyers, but other courts simply deported unrepresented people.

Harder to address has been the opposite problem: sending people like Palmer’s client, Octavio, who had the parade of judge changes, to the back of the line. His case may have been extreme, but across the board, people with nonpriority cases might benefit from a change in the law. Such clients, and their lawyers, might welcome a three-year delay.

Krikorian of the Center for Immigration Studies strongly agrees. He adds that the backlog is also a problem for enforcement agencies. “Either [immigrants] don’t show up [to court], or they do show up and are turned down, but there’s no consequence to that,” he says. “It’s difficult to find them if you don’t have them in custody.”

Meanwhile, says Framm-Anton, the reshuffled docket is also hard on advocates. “I’m trying to get a coherent story that matches up with a credible fear interview ... to have testimony that’s coherent, get the person together enough psychologically so they can testify, all within six months—are you kidding me?” she says. “I mean, I could be living here 24/7.”

It’s not great for business either, says Ben Johnson, executive director of the American Immigration Lawyers Association. “Just the logistics—of trying to stay on top of all of those things and how those changes in the political scene and the changes in the client’s environment, all the changes that can happen in that three- and four-year period of time—is a real nightmare for immigration practitioners,” he says.

HELP WANTED

In the fall of 2016, the Executive Office for Immigration Review was busy addressing these problems by hiring aggressively, spokeswoman Kathryn Mattingly said.

As of March, she said the agency had 301 seated judges and had requested authorization for a total of 399 judgeships. Those new judges are welcomed by legal and immigration groups—including the ABA, which called for more immigration judges with 2010’s Resolution 114B.

But that effort may be overwhelmed by changes under the Trump administration. Trump’s actions since taking office emphasize enforcement; his executive orders call for 10,000 more ICE agents and 5,000 more CBP officers, and they substantially reduce use of prosecutorial discretion. In his first months in office, there were several high-profile deportations of immigrants who had previously benefited from prosecutorial discretion and had little or no criminal record.

Although the DOJ eventually said immigration judges weren’t subject to the hiring freeze, it’s unclear whether immigration courts will be funded enough to handle all the additional cases. If not, Schmidt says, wait times will only worsen.

“If they really put a lot more people in proceedings, then it seems to me the backlog’s going to continue to grow,” he says. “How are they going to take on more work with the number of cases that are already there?”
The ABA House of Delegates urged President Donald Trump to withdraw his executive order issued Jan. 27, titled “Protecting the Nation from Foreign Terrorist Entry into the United States.” The House also pressed him to ensure full, prompt and uniform compliance with court orders concerning the order for as long as it remains in effect.

Further, Resolution 10C—passed during the ABA Midyear Meeting in Miami in February—urges that the executive branch ensure that any executive orders on border security, immigration enforcement and terrorism be within the bounds of laws, treaties and other agreements, and facilitate a just system for adjudicating various requests for entry into the country, as well as guaranteeing protections for refugees.

A companion measure—Resolution 10B—also passed, reaffirming the ABA’s support for laws, policies and practices to allow access to legal protections for refugees, asylum seekers, torture victims and others similarly deserving of humanitarian refuge. It urges Congress to make new laws and provide adequate funding for refugee applications, and legislatively create timely, individualized assessment of their cases without banning otherwise eligible individuals on the basis of national origin or religion.

The resolutions were filed after lawyers from around the country spent hundreds of pro bono hours working on them. The measures passed by resounding voice vote.

A UNITED FRONT
ABA President Linda A. Klein spoke to the association’s policymaking body about the Trump administration, immigration and the judiciary, exhorting all lawyers to join in efforts to uphold the rule of law.

“We are very proud of lawyers around the nation who flocked to airports where immigrants were detained,” she said. “It is important that lawyers represent their clients’ interests—even unpopular interests—without fear of retaliation or persecution.”

No one sought privilege to speak in opposition to the resolutions. Among those who spoke favorably, a recurring theme existed in more than one statement: The world is watching.

The executive order and other related actions grabbed the world’s attention, said Glenn P. Hendrix, an Atlanta lawyer and House delegate from the ABA Section of International Law, a co-sponsor of the resolution. He said it raised the questions: “What does this country really stand for? What principles do we stand for?”

While the executive order didn’t specify Muslims in the ban on entry into the United States, the “lead-up” to the order “indicates that it is aimed at Muslims,” Hendrix said.

Kevin Curtin, a Boston lawyer representing the ABA Criminal Justice Section, reiterated that the “entire world is watching” and noted that “this is something we can rejoice in and love the fact that we live in a country like this, where we can speak out; a country of liberty where we’re not going to be intimidated and where we’re not going to be bullied into silence.”

The resolution concerning the executive order was co-sponsored by the New York City Bar Association; the ABA sections of International Law, Criminal Justice, and Civil Rights and Social Justice; the ABA’s Center for Human Rights, Commission on Immigration, and Standing Committee on International Trade in Legal Services; and the Massachusetts Bar Association.

The companion resolution urging legislation and policies and practices to ensure justice...
KLEIN: JUDICIAL INDEPENDENCE ‘NOT UP FOR NEGOTIATION’

ABA President Linda A. Klein, speaking to the association’s House of Delegates, issued a call to arms for lawyers to defend the rule of law in response to a spate of attacks on law in general and the judiciary in particular by the Trump administration, though the name went unmentioned.

“Make no mistake: Personal attacks on judges are attacks on our Constitution,” Klein said during the ABA Midyear Meeting in Miami. “Let us be clear. The independence of the judiciary is not up for negotiation.”

Klein, an Atlanta lawyer and senior managing shareholder of Baker Donelson, noted that there has been a lot of talk about protecting borders, and she confirmed that every country has a right to do so. But the United States has due process protections, even for noncitizens. Klein said lawyers need to take the lead in what is “our defining season.”

In response to President Donald Trump’s January executive order on refugees and immigrants, Klein said that those swept up in immigration enforcement should be given hearings before impartial immigration judges.

She also pointed out what she considers to be another vital border: “It’s our Constitution and the rule of law it embodies. And we as lawyers are called upon to protect it. As Winston Churchill put it: ‘Never give in. Never, never, never, never!’

Klein’s speech preceded resolutions, filed after the midyear meeting was underway, concerning alleged breaches of law and other problems with President Trump’s executive order on immigration. Those resolutions were passed on voice votes.

Klein said the association is concerned about significant portions of recent executive orders that “jeopardize fundamental principles of justice, due process and the rule of law.”

“It is vital that our judiciary remains independent and free from political pressure—indeed from party politics, independent from Congress and independent from the president of the United States himself,” Klein said. “There are no ‘so-called judges’ in America. There are simply judges—fair and impartial. And we must keep it that way.”

Klein also spoke of the need for Congress to fill vacant seats in the federal judiciary with qualified, vetted candidates; the need for adequate funding for the Legal Services Corp.; and the need for bipartisan criminal justice reform.

The full text of Klein’s remarks is on the ABA News website, americanbar.org/news, in the “Key Issues” section under “Stories, Releases and Statements.”

—T.C.
The ABA House of Delegates voted against a proposal to tighten bar-passage rate standards for accredited law schools. Under ABA rules, the House can send the rule proposed as Resolution 110B back to the council of the Section of Legal Education and Admissions to the Bar twice for review with or without recommendations, but the council has the final decision on Standard 316 and other matters related to law school accreditation.

A storm of criticism has surrounded Standard 316’s proposed revision, which would have required that to meet accreditation standards, 75 percent of a law school’s graduates must pass a bar exam within a two-year period. At a notice and comment hearing the section held in August, various groups, including the National Black Law Students Association, testified that the proposal failed to address racial inequities in the law school admissions process and legal education.

According to data submitted for the hearing by William Patton, a professor emeritus at Whittier Law School, 33.4 percent of black students in California and 29.8 percent of the state’s Hispanic law students attend the five ABA-accredited law schools that would be most at risk of violating the proposed revision.

And in January, the Deans Steering Committee of the Association of American Law Schools wrote the council to ask it to withdraw the proposal, based on concerns about different state bar scoring standards, failing bar-passage rates and a lack of diversity in the profession.

MEETING THE STANDARD

No accredited law school has ever been out of compliance with Standard 316, and there are various ways to meet its current requirements. One is that at least 75 percent of graduates from the five most recent calendar years have passed a bar exam, or there’s a 75 percent pass rate for at least three of those five years.

Also, a school can be in compliance if just 70 percent of its graduates pass the bar at a rate within 15 percentage points of the average first-time bar-pass rate for ABA-approved law school graduates in the same jurisdiction for three out of the five most recently completed calendar years.

The House heard statements by 10 speakers—five each for those favoring and opposing the proposed amendment to the current standard. The push and pull between the two sides concerned the impact of the economic downturn beginning in 2007, which hurt the market for legal services. At the same time, tuition at some law schools rose significantly and some schools lowered entry standards to keep enrollment up.

Justice Christine Durham of the Utah Supreme Court, a delegate from the Section of Legal Education and Admissions to the Bar, introduced the amendment and spoke in favor of its passage. She detailed problems such as onerous student debt placed on graduates who fail to be admitted to the bar and schools admitting students who are unequipped to pass the bar or practice law.

The result, Durham said, is “the bottom of the class financing people at the top of the class.” She added, “You cannot diversify the legal profession if these candidates cannot acquire a license to practice.”

Opposing the amendment, Judge Peter M. Reyes Jr., a former president of the Hispanic National Bar Association, noted that similar measures had come up before in the House of Delegates and were not passed. Reyes, a Minnesota appeals court judge, said there still is a lack of data and studies on the impact that rules like this would have on diversity “so all of us can make an informed decision.”

The section will give the matter further consideration, according to a statement released by Barry Currier, the ABA’s managing director of accreditation and conformity.
legal education, after the vote. 

“There is no set timeline in the standards or rules for this process, although given its great importance, I would expect the council will promptly review this matter,” he said.

A proposed revision to Standard 501, which addresses law school admissions, was approved by the House of Delegates. Resolution 110A states that law schools should “adopt, publish and adhere” to admissions policies and practices consistent with the standards, and only admit applicants who appear capable of finishing law school and passing the bar.

Also, it adds language that being in compliance with Standard 316 is not alone sufficient to meet the Standard 501 requirements, and it makes an additional requirement that law schools with non-transfer attrition rates higher than 20 percent must demonstrate that they’re in compliance with 501.

Kyle McEntee, executive director of the reform group Law School Transparency, thought the vote to approve revisions to Standard 501 was promising.

“The revisions to Standard 501 are an enormous win that will make it more difficult for law schools to exploit students for tuition,” he said. “While the Standard 316 battle was lost this time, the war is not over. The law schools that do more harm than good will be held accountable for terrible bar-passage rates.”

Terry Carter contributed to this article.

ABA GROUPS BUILD RAPID-RESPONSE WEBSITE FOR IMMIGRATION ORDER

In February, the members of the ABA Law Practice Division’s Futures Initiative sat down to discuss an agenda they had planned for three months.

But they abandoned that agenda entirely after member Reid Trautz, the practice management adviser for the American Immigration Lawyers Association, mentioned that AILA has had trouble coordinating a flood of pro bono offers since the Trump administration’s executive order banning entry to citizens of seven Muslim-majority countries for 90 days and halting the U.S. refugee program. AILA wanted to make a website for this purpose, he said, but he had been stymied by the process of creating it.

“The committee said collectively, ‘Man, we could help you with that,’ ” said Ed Walters, CEO of online legal research company Fastcase, a member of the initiative and a member of the advisory board for the ABA Center for Innovation. “We basically threw away the agenda for that meeting and said, ‘Let’s do it immediately.’ ”

Later, the Futures Initiative and the Center for Innovation created ImmigrationJustice.us, a portal for attorneys and others responding to the executive order.

People interested in volunteering their legal or language expertise can sign up there to work on behalf of affected immigrants. Attorneys and members of the public can also find information on the travel ban and other immigration-related issues, such as habeas corpus and detention. The site also provides resources for attorneys working on those issues and more.

Because this conversation took place at the midyear meeting, much of the work was done from a hotel conference room, said Chad Burton, chair of the Futures Initiative, a member of the governing council of the Center for Innovation and CEO of CuroLegal. Walters says there was a design session formed with the idea of creating a “minimally viable product”—something that will work until AILA can flesh it out.

Burton and Walters both lead legal technology companies—and the team included people from Avvo and Lawyerist—but Walters stressed that no software developers were involved; the team was “a handful of lawyers.” And the cost of the website—including purchasing the domain, hosting and images—was less than the cost of lunch, he says.

The ABA Fund for Justice and Education is setting up a fund collecting financial donations for the legal response to the executive order.

The Futures Initiative team documented its work in a “Guide to Rapid Website Deployment,” which is on the Center for Innovation website in the how-to part of its resources section. The goal is to help organizations respond quickly to future emergencies.

Walters believed this kind of fast work is “the new ABA,” using technology to amplify and accelerate legal work.

“We documented the process so that the next time … someone will have spelled out the steps in a couple of hours,” Walters said. It’s a “very software-development way of thinking about how to solve the problem.”

—Lorelei Laird
NEW PRESIDENT-ELECT TOUTS ABA’S VALUE TO ‘MAIN STREET LAWYERS’

BY LORELEI LAIRD AND TERRY CARTER

The ABA’s policy and lobbying arms can get a lot of attention, especially after public statements on contentious issues. But ABA president-elect candidate Robert Carlson says the ABA also offers unmatched value to “Main Street lawyers”: practical help with their everyday work, opportunities to keep abreast of top legal news and advocacy for causes important to the profession.

“I sought the nomination for president-elect because I believe in what the association does,” says Carlson, who chaired the ABA House of Delegates from 2012 to 2014. “The ABA has a great story to tell—a long and proven track record of making a difference for practicing lawyers.”

Carlson was formally nominated as president-elect at the ABA Midyear Meeting in Miami in February. He will stand for election at the August annual meeting in New York City, where he is expected to face no opposition. If elected, he would become president in August 2018.

Carlson knows a bit about Main Street lawyering: He’s practiced law in his hometown of Butte, Montana, for 35 years, all with the same eight-lawyer firm, Corette Black Carlson & Mickelson. His roots in Montana include serving as president of the State Bar of Montana from 1993 to 1994.

Carlson has also been active in the ABA for years. In addition to chairing the House, he’s been in the House since 1999; chaired its Drafting Committee from 2010 to 2012; served on the Rules and Calendar Committee from 2004 to 2006; served on the Select Committee of the House from 2006 to 2008; and served on the Board of Governors from 2001 to 2004.

Carlson’s presidency would mark a break from recent trends toward female presidents—he would succeed three women in a row—and presidents who come from large law firms.

At the Nominating Committee’s meeting shortly before retiring to vote, members heard from the unopposed candidates for president-elect nominee and for chair of the House of Delegates. Judy Perry Martinez of New Orleans was selected to be the president-elect nominee who would be in line to become ABA president in August 2019.

Asked about the ABA’s role in the national dialogue when issues arise concerning the rule of law, Martinez praised ABA President Linda A. Klein’s approach in choosing the right time and the right tone to respond as the association’s spokeswoman.

“Our role has always been, and must be now, to speak the truth, to speak about the rule of law,” Martinez said in a packed conference room at the Hyatt Regency Miami, adding that she and Klein had spoken about this recently and agreed on the need to be thoughtful and strategic, rather than “responding to every tweet, to every article.”

William Bay of St. Louis was selected as the nominee for chair of the House of Delegates from 2018 to 2020. Asked whether the House should meet once a year rather than twice, he noted that attendance has trended up for midyear meetings and down some for annuals, but said he’s reluctant to cut back to once a year.

There are “issues that come up that we’re going to need to deal with more quickly than once a year,” Bay said, though he added that it’s the right time for input on the matter.

The other attorneys selected by the Nominating Committee are 12 candidates for the Board of Governors, all of whom are expected to be unopposed in August. They are:

Fritz Langrock of Vermont (District 1)
W. Anthony Jenkins of Michigan (District 2)
Allen C. Goolsby of Virginia (District 4)
Lee DeHihns III of Georgia (District 6)
Randall D. Noel of Tennessee (District 12)
David L. Brown of Iowa (District 10)
Lynne B. Barr of Massachusetts (Section of Business Law member-at-large)
Michael H. Byowitz of New York (Section of International Law member-at-large)
C. Edward Rawl Jr. of South Carolina (Young Lawyers Division member-at-large)
Tom Bolt of the Virgin Islands (Law Practice Division member-at-large)
Judge Eileen A. Kato of Washington (Goal III woman member-at-large)
Myles V. Lynk of Arizona (Goal III minority member-at-large).
The legal profession can help build trust in the American criminal justice system in part by encouraging best practices by police departments, according to an ABA task force report.

The 15-member ABA Task Force on Building Public Trust in the American Justice System looked at how police departments can help repair frayed relationships between police and communities of color. Besides encouraging best practices, the ABA and other bar groups can also build consensus about needed reforms and can educate the public about how the criminal justice system works, the report said. The ABA Board of Governors accepted the report and the three recommendations when it met during the midyear meeting in Miami.

The ABA task force report identified several policies and practices by police departments that have created distrust among communities of color. Those areas include:

- Disparities in the rate at which whites and blacks are subjected to police investigative stops: “Ensuring that investigative stops are initiated for good and valid reasons promotes respect for those conducting the stops,” the report says.
- Confrontational police interactions: “Interacting with communities in a professional and courteous way presents an opportunity to improve perceptions on all sides of the encounter,” the report says.
- The arrests of minorities for minor offenses at higher rates than whites.
- Excessive use of force: “Police officers perform dangerous work that can require the use of lethal and nonlethal force,” the report says. “But when force is exercised without justification or restraint, it undermines confidence in law enforcement.”
- Harsher treatment of minorities at multiple stages of the criminal justice system, including bail, plea bargaining and sentencing.
- Inadequate law enforcement training and oversight: “There is also a role for external oversight,” the report says. “The perception that police departments constitute law unto themselves undermines public trust.”

The report cautions that it should not be construed “as a sweeping denunciation of police methods and motives.”

“A productive discussion about how to narrow the rift between communities of color and law enforcement requires all participants to approach each other with open minds and without hostility,” the task force says in the report, “and to base decisions on evidence rather than preconceived ideas, particularly because this is a context where emotions can run high.”

The ABA task force was chaired by Theodore Wells Jr. of Paul, Weiss, Rifkind, Wharton & Garrison. Monique Dixon of the NAACP Legal Defense and Educational Fund was the task force reporter. Task force members included representatives from law enforcement, prosecutors’ offices, the judiciary, state and federal government, law firms and nonprofits.

The ABA Board of Governors has created a five-member working group to collaborate with the appropriate entities for consideration and implementation of the report.

—Debra Cassens Weiss
President Donald Trump’s administration is expected to bring significant change to enforcing laws. Despite the president’s at times unpredictable approaches to governance, a panel of experts provided some possibilities for enforcement priorities at the ABA Midyear Meeting in Miami.

Although prognostication is no more than a wild guess in many areas of the law at this early stage of the Trump administration, the panelists provided some thoughts and guidance on likely enforcement priorities concerning the topics of immigration and antitrust, and regarding the Foreign Corrupt Practices Act and street crime. The program was sponsored by the ABA Criminal Justice Section.

Despite the campaign meme about whether to take Trump literally or seriously, Jon A. Sale, a former federal prosecutor and co-chair of the white-collar defense and compliance department at Broad and Cassel in Miami, does both. No one has inside information, Sale said. But there already has been a signal through the press that “what he said, what he campaigned on, he means it. It’s what he’s going to do.”

Sale said that during conversations with a senior official on Trump’s transition team looking at justice issues, “emphasizing criminal immigration enforcement” likely will be stressed. Sale also noted that, despite expectations that the president will be business-friendly, that might not apply in some antitrust matters. “This administration has a strong belief in competitiveness, and some megamergers might be looked at closely,” Sale said.

The Foreign Corrupt Practices Act, which prohibits paying bribes or other rewards to foreign officials to further a business interest, might be in play during the Trump administration, some panelists said. The Securities and Exchange Commission plays a prominent role in FCPA enforcement, and many investigations have ended in settlements with deferred prosecution agreements or nonprosecutions outside the judicial process, said panelist Jane Serene Raskin of Raskin & Raskin in Miami. Raskin is a former federal prosecutor and counsel to the assistant attorney general of the criminal division in the Department of Justice. One result, Raskin said, is that the statute has been interpreted with “very little judicial weighing-in.”

Raskin said “this administration might shake things up a little bit” and look more carefully at the anticompetitive influence on our global competitiveness.

Moderator Marcos Daniel Jiménez, a partner in the Miami office of McDermott Will & Emery and former U.S. attorney for the Southern District of Florida, noted that in 2012, Trump commented on CNBC that the United States was crazy to prosecute the FCPA in places such as Mexico and China. But the act is a huge moneymaker, bringing in tens of billions of dollars in settlements. There’s third-party pressure through the news media concerning Trump and the Constitution’s emoluments clause and his worldwide business holdings.

“I can see where cutting back would look like going easy on himself,” said panelist Reginald J. Brown, who worked in the White House counsel’s office, chairs Wilmer Cutler Pickering Hale and Dorr’s financial institutions group in Washington, D.C., and leads its congressional investigations practice. —T.C.
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Midyear Meeting
Continued from page 68

BOARD APPROVES COMMISSION ON LEGAL EDUCATION’S FUTURE

The ABA Board of Governors has approved a proposal submitted by President-elect Hilarie Bass to create a Commission on the Future of Legal Education.

Bass is aiming to restructure the ABA’s Section of Legal Education and Admissions to the Bar with a new, “forward-thinking” entity handling all nonaccreditation-related activities.

“The creation of the commission is an important step forward in recognizing the ABA’s critical role in speaking out on behalf of the legal profession in connection with the future of legal education,” Bass said in a statement. The Board of Governors approved the commission on Feb. 3.

The proposal calls for a 10-person commission, the members of which will be appointed by the president and serve staggered three-year terms. The commission will become operational in August 2017. Details of how the commission will work were to be determined during the section’s council meeting in March.

In the earlier proposal, Bass envisions that the Commission on the Future of Legal Education would take over conferences, programs, publications and nonaccreditation-focused legal education section committees.

Besides accreditation work, the section would keep deans workshops and assistant deans workshops, which tend to deal with accreditation issues. If approved, nonaccreditation activity funds would shift to the commission in September. Commission members would be appointed.

Gregory G. Murphy, chair of the Section of Legal Education and Admissions to the Bar, sent a letter to the Board of Governors on Jan. 30 that expressed various concerns and asked that Bass’ proposal be given “thoughtful consideration.” His concerns included existing relationships the section has with other legal education groups and how section dues would be split.

Also, Murphy asked that the U.S. Department of Education be notified of the proposal before it is finalized and be asked for an assessment of how it might change the ABA’s recognition as the national accrediting agency for law schools.

The Deans Steering Committee of the Association of American Law Schools had asked the Board of Governors to table discussion of the proposal so members can be more involved.

“We learned of these proposals only yesterday, and we have serious concerns about them,” Daniel B. Rodriguez, chair of the steering committee, wrote in a Feb. 1 letter.

—S.F.W.
soliciting led to a not guilty verdict and an agreement from the Fairfax County Park Authority to stop hosting rodeos. Newkirk was handing out pamphlets at a rodeo and was arrested at Frying Pan Farm Park in Herndon, Virginia.

“He can find arguments within arguments,” Newkirk says. “He knows how to dig deep, and he has a beautifully developed brain along with a memory that never seems to quit.”

A TROUBLING TOLL
Hirschkop has received death threats, especially when he handled civil rights cases. But his work on Koehl v. Resor, which centered on the right of a leader of the American Nazi Party to be buried in a national cemetery as a U.S. veteran, came at a more personal cost.

When the American Civil Liberties Union asked him to take on the case, Hirschkop declined. His friends in the ACLU challenged him, arguing that the essence of the suit centered on free speech. Hirschkop took the case.

Although he tried to explain the principles he was fighting for to his parents, they refused to talk to him for two years. “I did the right thing,” Hirschkop says. “It was a terrible, terrible experience.”

Hirschkop considers the opportunities he’s had to argue before the U.S. Supreme Court an honor but says his skills shine in trial court. “A good trial lawyer is a bit of a private eye,” trying to determine what really happened, he says.

“I feel good about the work I’ve done,” he says. “I’m more than amply paid, just internally, when I look at my pop’s and mom’s picture and say, ‘You know, I did good for you.’”

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Truman Seizes Steel Mills

Shortly after 6 p.m. on April 26, 1944, a platoon of 30 soldiers from nearby Camp Skokie marched into the Chicago headquarters of Montgomery Ward & Co. Armed with rifles and an executive order signed by President Franklin D. Roosevelt, the soldiers were there to enforce a federal takeover of operations at the mail-order company. Its management had ignored an order by the National War Labor Board to recognize a department store union whose 12,000 members were on strike.

The first half of the 20th century was marked by two world wars and the Great Depression, and such government seizures of private companies—even whole industries—were not uncommon. Broadly tolerated and sometimes specifically authorized by Congress, takeovers were regarded as a matter of public necessity in a time of war. Most involved labor disputes that might affect the production of military goods or the processing of vital energy resources. And while their legal authority remained vague, successive administrations seized electric plants, water supplies, dams, coal mines and munitions factories.

But Montgomery Ward was none of these. The company sold sewing machines and refrigerators—not war materiel. Moreover, Roosevelt’s executive order cited no conclusive legal authority; and after his death one year later, President Harry S. Truman quietly ceded company operations back to management.

When the wars ended, a crippling string of labor strikes provoked a change in political climate and a Republican takeover of Congress. Over Truman’s veto, Congress passed the Taft–Hartley Act of 1947, resetting the limits of labor disputes and redefining the government’s capability to respond. Truman regarded the law as a challenge to presidential authority. In 1952, the threat of a strike by steelworkers provoked an overdue clash about the limits of executive power.

In November 1951, as the Korean War raged, steelworkers sought government approval for steep price increases, ostensibly to pay for new labor costs. When the Office of Price Stabilization pared back its demands as opportunistic, labor talks stalled. On April 8, 1952, hours before a strike was to begin, Truman issued Executive Order 10340, directing Secretary of Commerce Charles Sawyer to seize control of the nation’s steel production, including the Youngstown Sheet & Tube Co. and other steel mills.

The companies sought a restraining order, arguing a government-imposed wage scale would cause irreparable economic harm. Instead of answering their charge, the government pressed the issue of constitutional authority. Before an astonished federal judge, lawyers argued that a president has unlimited power in a national crisis and the power to define that crisis. That executive authority had been ratified, they said, by decades of judicial silence on the matter.

Judge David A. Pine’s ruling was blunt: “Apparently, according to [the government’s] theory, several repetitive, unchallenged, illegal acts sanctify those committed thereafter. I disagree.”

Both sides sought review by the U.S. Supreme Court. Recognizing the urgency, the court issued a 6-3 ruling against the Truman administration in Youngstown Sheet & Tube Co. v. Sawyer three weeks after the oral argument. Justice Hugo Black wrote for the majority, but it was Justice Robert H. Jackson—a former attorney general—who defined the undulations of presidential authority.

Jackson was a close legal adviser to Roosevelt and knew firsthand about the power of the office in the hands of a charismatic leader. His concurrence described a presidential power that waxes and wanes in deference to a Congress willing to assert itself, and he expressed respect for constitutional limits placed by the founders.

“They knew what emergencies were, knew the pressures they engendered for authoritative action, knew too how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies,” Jackson wrote.
DOES NEUROSCIENCE BELONG IN THE COURTROOM?

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