The 14th

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NATIONAL PULSE While the “sharing economy” provides inexpensive services, it also lets businesses such as Uber and Airbnb skirt civil rights laws.

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Supreme Court Report Discriminatory statements made in the privacy of jury rooms are subject to scrutiny.

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Law Practice New legal jobs make technology part of the career path.

Your ABA
Arizona Summit Law School offers a stipend for at-risk grads to put off the bar exam and prep for it.

Candidates for ABA president-elect and the Board of Governors have deep roots in the association.

As the new director of the association’s Center on Children and the Law, Prudence Beidler Carr continues its legacy of putting children first.

Precedents
Four students at Kent State University are killed by the National Guard during Vietnam War protests.
The American Bar Endowment (ABE) is the independent, not-for-profit public charity that sponsors high quality, affordable life and disability insurance exclusively for ABA members. These group insurance plans are designed to generate dividends, which our insureds can choose to donate to ABE. Their contributions help fund programs that advance the American justice system, as shown above.

This year, the ABE awarded grants of more than $7 million. Over the last 70 years, ABE has given more than $277 million to help support law-related public service, educational, and research projects. These grants are made possible thanks to the generosity of our ABE insureds. We can’t thank you enough.

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REMARKABLE RENO

Regarding “Farewell to a Friend,” March, page 66, I offer a personal memory of the late Janet Reno that captures both her humanity and her remarkable memory.

During the 1990s, Ms. Reno was the speaker at the graduation ceremonies of the Northwestern University School of Law. I happened to be standing next to her as we entered the room where the ceremonies were held. I remarked to her that we shared the experience of having been high school debaters in Dade County, Florida, remembering that she had debated for Coral Gables High School. She inquired as to what my own school was. I replied: “Miami Senior.”

Without pausing for breath, she responded: “Jessie Chamberlin.” Janet Reno had plucked the name of my debate coach at Miami Senior High School—the name of the coach of a team that opposed hers—from her memories of 40 years before.

I worked for short periods at the Miami Herald, where Ms. Reno’s father was a police reporter, and the Miami News, where her mother was an investigative reporter, so I followed her career with particular interest. Thus I particularly appreciated Martha Middleton’s piece.

Marshall S. Shapo
Evanston, Illinois

THE IMAGE OF BIAS

While I generally enjoy and learn from the ABA Journal, I was struck by the irony in the March issue. “Female First-Chairs,” page 46, discussed the continuing (implicit) bias and structural challenges for female trial lawyers in both civil and criminal cases. The 2015 report by the American Bar Foundation and the ABA Commission on Women in the Profession and the multidistrict litigation study are revealing, pointing to ongoing challenges women experience in getting first- and second-chair appointments.

Sadly, 24 pages earlier (“A Second Helping of First Words”), the Journal itself perpetuated the impression that “leading trial lawyers” are male. The six lawyers quoted in part two of the piece on effective opening arguments are all male. The imagery on page 23, with four of them plastered across the top, could not be more illuminating. Hopefully the Journal will learn to take up the baton of gender inclusivity next time.

Nora V. Demleitner
Lexington, Virginia

CORRECTION

Due to an editing error, the Bryan Garner on Words column (“Going Deep,” March, page 26) used the incorrect legal term pleading to refer to motions and briefs. The Journal regrets the error.

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OUR YEARLONG SERIES ASKS LEADERS OF CHANGE IN LAW PRACTICE WHAT WILL WORK IN A NEW FIRM
“Our liberty depends on the freedom of the press, and that cannot be limited without being lost.”
—Thomas Jefferson (1786)

Jefferson understood that a vibrant and free press is critical to sustaining the rule of law. Along with free speech, a free press is indispensable for people to be informed and to participate in a democracy. On these points, lawyers and journalists are united.

The transparency that journalism brings to events makes government work better, decreases the risk of corruption and ultimately makes our nation safer.

Lawyers often use information uncovered by journalists to prosecute wrongdoing, to hold officials accountable, and to rectify injustices.

Of course, the media robustly protects its First Amendment freedoms on its own. It is a strong institution that has served our country since its inception. But changing technology and an evolution in the way people consume news has brought challenges. Among them, fabricated news stories shared on social media sites and a tendency of readers to only consider news stories that adhere to their political ideology.

The erosion of trust in any institution, whether it be the media or the legal profession, weakens the foundation of our democratic system. In a 2016 Gallup poll on honesty and ethics by profession, only 23 percent ranked journalists very high or high, just above lawyers who came in at 18 percent.

Attacks by government officials on the institution of the press are also damaging. Calling the media “dishonest” or the “enemy of the American people” works to further destroy public trust. Trying to bully the press with threats or insults only works to weaken our democracy.

This is not a new phenomenon. The previous administration vigorously fought many Freedom of Information Act requests, prosecuted whistleblowers and journalists while criticizing news outlets it did not like. Richard Nixon railed against The Washington Post for its reporting on the Watergate scandal.

During World War I, Woodrow Wilson signed the Espionage and Sedition Acts of 1917 and 1918, which made it a crime to “utter, print, write or publish any disloyal, profane, scurrilous, or abusive language” about the federal government. Under this Act, Jacob Frohwerk was convicted and sentenced to 10 years in prison for publishing articles that claimed the United States got involved in the war to benefit Wall Street bankers. His case went to the Supreme Court, where he lost a unanimous decision. But since then, the courts have been kinder to the press.

In Near v. Minnesota, the Supreme Court in 1931 established the principle of prior restraint, saying the government cannot censor or prohibit a publication in advance. In 1964, the Court ruled in New York Times Co. v. Sullivan that the First Amendment protects the publication of even false statements about public officials unless made with malice or knowledge of falsehood.

Our country still enjoys press freedoms that many parts of the world lack. Journalists are not threatened with physical harm or death for doing their job. But still, the degree of freedom is cause for concern. The group Reporters Without Borders ranks press freedoms in 180 countries. The United States ranked 41st in 2016, right behind Slovenia. The group cited the government’s war on whistleblowers as well as surveillance activities against journalists as the main factors in its rating.

Freedom of the press is important not just to protect reporters and the news media, but to protect our rights to have access to the information we need to make decisions about our government.

The absence of a free and unfettered press has dire consequences. As U. S. Senator John McCain recently said February 20, 2017 on CNN: “If you want to preserve democracy as we know it, you have to have a free and many times adversarial press. And without it, I am afraid that we would lose so much of our individual liberties over time. That’s how dictators get started.”
It’s rare to see a recent U.S. Supreme Court decision turned into a movie. But the case of Kelo v. New London uniquely galvanized a community, spurring one filmmaker to bring it to the big screen.

In the 2005 case, the Connecticut city of New London wanted to condemn the homes of Susette Kelo and her neighbors to make room for a redevelopment project. The waterfront land, in the blue-collar neighborhood of Fort Trumbull, would be used to build a hotel, shopping and other attractions. That is, Kelo would be displaced not for a road or a school but for the benefit of private businesses. She argued that Kelo would be displaced not for a road or a school but for the benefit of private businesses. She argued that this violated the Fifth Amendment, which requires just compensation when “private property [is] taken for public use.”

She lost 5–4. But the public reaction was almost uniformly sympathetic to Kelo’s plight, with disapproval cutting across political, geographic and racial lines. (One exception: Now-President Donald Trump, who at the time said, “I happen to agree with it 100 percent.”) One poll found that more than 80 percent of Americans disapproved of the decision and at least 45 states passed eminent domain reform laws in reaction.

“It just seemed like a terrible affront to justice,” says Ted Balaker, who runs the film company Korchula Productions in Culver City, California, with his wife, Courtney.

Balaker helped cover the case for ABC News, where he worked at the time. That’s how he got to know Kelo’s attorneys at the Institute for Justice, a libertarian public interest firm. Some time after he left to go into film, the firm called to tell him the film rights to Little Pink House, a book about the case by journalist
Jeff Benedict, were available. That launched the newly formed Korchula Productions into the yearslong process of making a movie. In addition to tasks like raising the money and securing the talent, they had the challenge of finding a house just like Kelo’s. This wasn’t easy for one of the reasons Kelo didn’t want to sell in the first place: It’s rare to find a home with waterfront views that she could afford with her income as a nurse and EMT.

“Susette couldn’t just move somewhere else, because there’s no way she could have afforded to buy a similar house,” Balaker says.

They eventually found what they needed in British Columbia (though they had to paint it pink).

Another staging challenge was filming oral arguments before the Supreme Court—without access to the court. The filmmakers ultimately used an opera house, and set crews built interiors that Balaker says passed muster with several attorneys who had argued before the real court—including the attorneys who represented Kelo, who acted as legal consultants for the film. Screenwriter Courtney Balaker also used transcripts of the real trials as much as possible, Ted Balaker says—not only for authenticity but also to try to fairly represent the arguments.

“We wanted to give both sides the opportunity to lay out their best cases for why they thought they were right,” he says. “Even among our film crew when we were shooting, there was a lot of discussion.”

Little Pink House premiered in February at the Santa Barbara International Film Festival. Balaker hopes for a release in summer or fall, and Korchula Productions was still trying to find distribution at press time. For updates, check facebook.com/littlepinkhousemovie.

—Lorelei Laird

Making It Work

Making It Work is a new column in which lawyers share how they manage both life’s challenges and work’s demands.

By Joanna Horsnail

I AM FORTUNATE TO HAVE ENJOYED the last 20 years of my life practicing law. I can truly say I enjoy my work and I am proud to be a partner at Mayer Brown. This is not to say, however, that the practice of law is not without its challenges. Life brings its own challenges, as well.

I faced the toughest challenges of my life, and career, over one particularly turbulent 10-year period: My mom died; I got married; I got pregnant; I made income partner; I had a baby; my dad died; I had a second baby who was born with significant disabilities; my marriage ended; and I made equity partner. I navigated these ups and downs by keeping sight of my goals and leaning on friends, family and colleagues for support. After being a single parent for 10 years and a partner for 13 years, I feel I can offer tips for “making it work” while real life goes on around you.

1. Don’t leave before you ask for what you need. This is the corollary to Sheryl Sandberg’s “don’t leave before you leave.” You may be surprised by the accommodations your employer is willing to make in order to retain you. And you may be surprised that even some simple fixes can make what’s on your plate seem manageable. Before I went on maternity leave with my first son, I made it clear to my management that I hoped to be put up for income partner but that I also wanted to return to work on a 70 percent schedule. Friends told me I was crazy for disclosing that I wanted to reduce my hours before I got the promotion. But a career is built on trust and relationships, and I felt I had to be honest and ask for what I needed at that time. I got the promotion and the modified schedule, and I proceeded to have an alternative work schedule for the next 10 years as I was promoted to equity partner and given a number of leadership positions. Now I am back to a full-time commitment as my kids are older, and I am loyal to the firm for this flexibility. Ask for what you need to make your career succeed before you give up.

2. Don’t let the perfect be the enemy of the good. Most lawyers have a “high need for achievement” personality type, and it can be paralyzing when we don’t feel we are doing everything perfectly. But “having it all” is such a strange thing to strive for—no one is perfect at everything every day. You can’t be a perfect lawyer, perfect significant other, perfect parent, perfect child and perfect friend all the time. Triage, prioritize and drop things that aren’t critically important to you. Practice saying no to things that you don’t have to or want to do, and say yes to the things that bring you the most satisfaction.

3. You can’t clone yourself—ask for help. Even when we are not striving to be perfect, we encounter times when we are expected to be in two or three places at once. I used to hate asking for help, but I have
learned that there are times when I simply cannot be in multiple places and I must ask others to step in. Now, I initiate the requests for soccer carpools, I pay my nanny for some extra hours for grocery shopping and other errands, and I ask grandparents and friends to pitch in with my kids when work travel is demanding. And I ask for help at work. There have been times when my son has been hospitalized and I have had to ask a colleague to handle negotiations on a deal on a moment’s notice. I find if you are a good colleague and you support others when they need help, they will do the same for you. I have been touched to learn that many people truly enjoy helping.

4. Strive to keep perspective—life really is a marathon and not a sprint. Don’t blow challenges out of proportion and assume they will last forever. I have been surprised to learn that I can change more than I ever thought, and that circumstances around me also change in the blink of an eye. Time brings perspective and changes how you prioritize your goals. So don’t be impetuous about making life- or career-changing decisions. I certainly had points in my career when I wanted to throw my hands up and quit, but those were the times when I had a particularly challenging client and a new baby and a bad cold. I also have days when I’m on the beach on vacation with my kids and I can’t believe my great fortune. If you are faced with a hurdle that seems insurmountable, ask yourself how it may seem different in a week, a month, a year. Sleep on it—for a while.

5. When you make it work for you, you make it work for others. When we push the boundaries in the workplace, we change the possibilities for future generations of lawyers—women and men. The more you reach for what you want, despite your hurdles, the more you are a role model for others that it is possible. I talk openly about my challenges and my coping strategies in the hope that it may inspire others. Volunteer your time to talk to colleagues who need support in making it work, and advocate for what others need when you are in a position to do so. And try not to judge others for making different choices than you. We all make it work in different ways, and that is the beauty of this sometimes crazy life. It’s yours to live as you choose.

Joanna Horsnail is a partner in the Chicago office of Mayer Brown with a focus on complex design-and-construction transactions. She received the firm’s 2015 Diversity Champion Award and serves on the boards of the Anister Center, Cabrini Green Legal Aid and the PURA Syndrome Foundation. Horsnail gave a TEDx Talk in 2016 about her journey with her younger son.

Trump and the Constitution
Law course explores the limits of executive power

FOR THIRD-YEAR LAW STUDENT KELLY HOLLER, simply reading the headlines wasn’t enough. She wanted more insight and perspective on the limits of the law under a Donald Trump presidency. That’s why she signed up for a new course at the University of Washington: “Executive Power and its Limits.” Holler is one of 40 students enrolled in the class, which seeks to provide students with the tools—and critical thinking skills—needed to analyze the Constitution and the presidency.

“In the wake of the presidential election, I felt a sense of urgency to understand how I, as a future attorney, can act to preserve the integrity of our constitutional system and hold elected officials accountable to the rule of law,” Holler says. “Lawyers have privileged access to the tools of justice, and I want to be ready to advocate for government accountability.”

Kathryn Watts is one of two professors teaching the course.

(Continues on page 12)
She says administrators responded to student demand when they created the class, and it filled quickly upon being announced.

“Our law students feel they should have a good grasp of the law that defines presidential powers and defines the limits of presidential powers,” Watts says.

One example she gives deals with the president’s promise to build a wall on the border of Mexico to deter illegal immigration. Is President Trump within his rights to do so? Does he need the approval of Congress beforehand?

Watts says it’s these sorts of issues the class is able to dissect and discuss in real time.

Kevin Eggers, another 3L, is also in the class. He says it’s fascinating to watch history unfold.

“We get to take current stories coming from the news cycle, compare them to similar historical circumstances, and use this analysis as a means of understanding the powers and limits of the Office of the President,” Eggers says. “Perhaps most interesting is the fact that at the end of our analysis, we often conclude that the contours of a specific power of the president are not as well-defined as we might have presumed before taking the class.”

The class meets twice a week for a total of three hours. Students look at case studies and hear from different experts in the field.
“We just wanted to give students a class that was more specialized and dive into current events,” says Sanne Knudsen, who teaches the course with Watts.

Both professors say there has been an outpouring of interest. Professors at UW have asked whether they could sit in, and other schools have requested the course information and syllabus. Meanwhile, those in the community have expressed interest in the material as well, prompting Knudson and Watts to provide reading resources through the law library. —Cristin Wilson

show like Project Runway? I would totally tune in to watch a lawyer-mediator who could also design.

I had the opportunity to audition for it, but I decided I didn’t want the drama to be associated with my brand. If the focus were truly on skill and artistic value, I’d do it; but the behind-the-scenes cattiness is not me. Oftentimes you leave the season remembering the drama and not the talent.

You probably see enough drama in divorce court. How did you get into fashion design?

My mom was a plus-size woman, and for many years, she would go out on shopping trips and come back empty-handed and with tears in her eyes. I thought: Why aren’t there designers out there creating garments for curvy women? This was 20 years ago, and back then, it was just about covering the body. There was no style or sense of design. So I purchased a sewing machine, and I taught myself to sew so I could make clothes for my mom. As she started looking better, she started taking better care of herself. When you look good, you feel good. One thing led to another, and I started designing for other women.

How many people work for Mark Roscoe Couture?

At the moment, just my loving family that donates their time and energies. My sister, Valerie, and cousin, Ginger, are my extra hands and motivators that keep me focused. My secretary, Juanita, maintains my schedule and appearances, and Chef William keeps us all well-nourished during sewing marathons!

And you have a great in-house counsel!

That’s the benefit of being a lawyer! I handle the entire business end on my own.

You’re building a fashion brand from small-town Indiana. Is that a challenge?

I do maintain a satellite studio in Chicago. That’s where I conducted the fittings with Keegan-Michael Key when I dressed him for the Emmy awards. But if I need to meet a client in Los Angeles or Las Vegas or New York, I just fly out there. You don’t have to be physically located in the city where the work is performed, so long as you get your brand out there. It’s been really nice to have those opportunities from little old Valparaiso.

Do you have any goals or dreams for your practice and your atelier?

Fortunately, I have been living my dreams. I try to stay in the moment and realize the full benefit of each experience without looking too far ahead. There is still so much to learn in my law practice and as a designer. Every lesson learned is important in my personal evolution and in creating that final picture. It’s interesting: When you give yourself emotional permission to do something, things just seem to happen. When your heart and your mind are in the right place, and your motivation is to help and to heal, opportunity flows. —Jenny B. Davis

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May 2017 ABA Journal | 13
ACHIEVING DIVERSITY IN BIGLAW has proved an uphill battle for advocates of inclusion. But many general counsel—who are uniquely positioned to influence the dynamic of legal teams—have chosen to direct their business to firms that show a commitment to diversity.

Kim Rivera, chief legal officer and general counsel at HP, says new tactics are in order. “Despite decades of sustained effort, we’re not demonstrating any kind of sustained practice for diverse lawyers,” Rivera says. “We’re past the point of continuing to talk about it and are doing more bold things, pushing boundaries, pushing the envelope to come up with better ideas.”

For Rivera and her team, this meant implementing a groundbreaking program that leverages the power of the purse. HP’s “diversity holdback mandate” allows the company to withhold up to 10 percent of billed invoices from law firms that don’t meet or exceed minimum requirements for diverse staffing.

“For people like me—I’ve been working on diversity and inclusion in one fashion or another for over 20 years,” she says. “Now I have this rare, wonderful platform of support ... to tell law firms we work with: This is important to us. It’s so important to drive performance and innovation that it’s going to be mandatory.”

HP’s initiative builds on the work of general counsel who’ve maintained pressure on outside counsel to create more opportunities for female and minority lawyers. Former Wal-Mart GC Tom Mars and Roderick A. Palmore, formerly general counsel at Sara Lee and General Mills, are just two of many who worked within, and outside of, their organizations to promote change. Mars terminated Wal-Mart’s relationship with firms that didn’t meet diversity targets, and in a 2004 “Call to Action” letter, Palmore urged his peers to commit to ending or limiting relationships with firms that lacked a “meaningful interest in being diverse.”

Last September, the ABA House of Delegates passed Resolution 113, calling on corporate legal departments to use their purchasing power to increase economic opportunities for diverse attorneys. Two dozen in-house counsel from top U.S. companies, including McDonald’s, CBS and Verizon, signed a letter pledging to uphold the resolution and urged other GCs to utilize the ABA’s model diversity survey to accurately measure the effectiveness of diversity and inclusion in the legal teams they engage.

As businesses cater their sales strategies to a growing diverse demographic, they are seeking contractors who reflect the community at large. A wealth of research has demonstrated that diversity benefits the bottom line. One study published by the market research house Acritas found that law firms offering “very diverse teams” tend to receive a 25 percent greater share of legal spending than nondiverse teams.

But research supporting the business case for diversity has had minimal impact on law firm hiring and retention practices, although general counsel have been steadily employing the carrot—and the stick.

“I think GCs need to keep up the pressure in any way they can,” says Arin Reeves, a former lawyer and the founder and president of Nextions, a research and consulting firm in Chicago. “It’s the structures in firms that don’t support this. The structures in firms are too heavily weighted toward people’s comfort zones. As long as you’ve got systems of retention and advancement—especially promotion, and promotion into leadership in firms—that are incredibly subjective, comfort-zone-based systems, everything else is going to nibble around the edges.”

Rivera says she’s seen an immediate effect from HP’s initiative, with the teams coming to pitch business “more diverse than ever before.” But it’s only the first step—Rivera is collaborating with other GCs and looking at ways to expand the program.

“How can we help smaller and medium-sized practitioners? How can we help firms rethink the traditional economic structures that have been a barrier to diversity? But I want to walk before we run. I want to build something that’s sustainable, and then we can build upon it as we go.” —Liane Jackson
Hearsay
GRE vs. LSAT
Harvard Law School is putting its imprimatur on the GRE as an alternative to the LSAT for law school applicants. The school announced it will accept the Graduate Record Examination beginning this fall, with the goal of expanding access to law school, particularly for international students. In February 2016, the University of Arizona’s James E. Rogers College of Law became the first ABA-accredited law school to accept either the LSAT or the GRE for admission.
Source: today.law.harvard.edu/gre (March 8).

Free Prep
In other LSAT news, the Law School Admission Council has teamed up with Khan Academy, a nonprofit, online provider of free educational services, to offer LSAT test prep beginning next year. Khan Academy also offers free SAT test prep in partnership with the College Board. The website’s goal is to offer supplemental learning and tutoring to further the accessibility of education.
Source: lsac.org (Feb. 28).

Did You Know?
Finally! The dispute over whether the Snuggie is a blanket or a garment is over. The U.S. Court of International Trade has ruled that Customs and Border Protection improperly categorized the Snuggie as a garment, making it subject to a 14.9% percent tariff vs. 8.5 percent for blankets. In its determination, the court noted that the addition of sleeves alone does not transform the blanket into clothing, despite government arguments that the Snuggie was akin to priestly vestments or scholastic robes.
Source: bna.com (Feb. 10).

Top 10
Because a legal education shouldn’t just be about lectures, studying and whatnot, a new report has compiled the top 10 “lifestyle law schools,” based on a mashup of location, social life and national ranking. Rounding out the top five are the law schools at the University of Colorado, University of Florida, University of Virginia, University of Alabama and Northwestern University.
Source: law.com (Jan. 26).

Finally! The dispute over whether the Snuggie is a blanket or a garment is over. The U.S. Court of International Trade has ruled that Customs and Border Protection improperly categorized the Snuggie as a garment, making it subject to a 14.9% percent tariff vs. 8.5 percent for blankets. In its determination, the court noted that the addition of sleeves alone does not transform the blanket into clothing, despite government arguments that the Snuggie was akin to priestly vestments or scholastic robes.
Source: bna.com (Feb. 10).

Cartoon Caption Contest
CONGRATULATIONS to Kevin K. Peek of St. Louis for garnering the most online votes for his cartoon caption. Peek’s caption, right, was among more than 150 entries submitted in the Journal’s monthly cartoon caption-writing contest.

JOIN THE FUN
Send us the best caption for the legal-themed cartoon at right. Email entries to captions@abajournal.com by 11:59 p.m. CT on Sunday, May 14, with “May Caption Contest” in the subject line.
For complete rules, links to past contests and more details, visit ABAJournal.com/contests.

“How did the meeting with your attorney go?”
“He said these balloons had a better chance of getting me out than he did.”
—Kevin K. Peek of St. Louis
When Sharing Isn’t Caring

While the ‘sharing economy’ provides inexpensive services, it also allows small businesses to skirt civil rights laws

By Lorelei Laird

Jamey Gump just wanted to get home. Gump and his friend Manveen Chahal had met for drinks at a bar in the Bay Area suburb of Menlo Park, California, in May 2014. It was late and Gump was planning to travel the next day, so he decided to call a car through the ride-booking app Uber. But he and Chahal are blind and use service dogs, and when they tried to get into the car, the driver yelled “No dogs!”
Gump tried to explain that the dogs were allowed under the Americans with Disabilities Act, but the driver yelled insults and profanity. Then he drove away, hitting Chahal with an open passenger door and narrowly missing Gump’s dog. They filed a police report after the incident.

That story, and several more like it, made it into a legal complaint about two years later. National Federation of the Blind v. Uber Technologies alleged that Uber was violating the ADA by failing to ensure equal access to blind riders.

Against a traditional taxi company, the case could have been easy. Taxis are considered to be in the “travel service” category, the suit says, which includes on-demand transportation. That might apply to Uber, as well. But the ADA doesn’t define travel services, according to the suit. And Uber insists it’s not a transportation company at all—it’s a technology company that brings parties together for a transaction.

No court has tested that issue squarely yet; the NFB case ultimately settled. And the federation later settled a similar claim against Uber competitor Lyft without litigation. But if courts agree, users in the “sharing economy”—businesses that use technology to connect people who sell goods or services with customers—would have little recourse against discrimination.

But that hasn’t stopped the complaints. A black man sued travel accommodations company Airbnb last year, alleging racial discrimination by a host. In Chicago, a disability rights group sued Uber for refusing to add wheelchair-accessible vehicles to its fleet. Twitter users have been sharing their discrimination stories under the hashtag #AirbnbWhileBlack. And academic studies have found racial discrimination involving Airbnb, Lyft, Uber and peer-to-peer lending site Prosper.

“It doesn’t take a science degree to understand that [Airbnb has] a platform that allows for someone to directly discriminate,” says Ikechukwu Emejuru of Emejuru & Nyombi, the Silver Spring, Maryland, law firm that represents the Airbnb plaintiff. “There are a lot of people out there who are being harmed.”

**TERMS OF SERVICE**

It’s illegal to discriminate in “public accommodations”—generally, businesses open to the public—on the basis of disability, race, color, religion or national origin under the ADA and the Civil Rights Act of 1964. Some states have laws that cover even more classes of people.

But in a law review article published last year, “The New Public Accommodations,” University of Denver law professor Nancy Leong and law clerk Aaron Belzer argue that those laws might not be enough to fight discrimination encountered by clients of sharing-economy businesses. The authors think they can be used against such businesses. But the businesses disagree, and the question hasn’t really been tested in court.

“There’s basically no case law on sharing-economy platforms as public accommodations,” says Leong, who teaches constitutional law, civil rights and criminal procedure at the Denver school’s Sturm College of Law.

One reason for this is the companies are fairly young; another is early settlements. But a big reason, lawyers say, is that sharing-economy businesses often invoke arbitration clauses when they’re sued. Users automatically agree to those arbitration clauses by signing up for accounts.

That’s what happened in Emejuru’s case that alleged racial discrimination by Airbnb. His client, Gregory Selden of Washington, D.C., was told by an Airbnb host that a room he’d requested was unavailable. But when Selden found the same place listed as available shortly afterward, he got suspicious and created two more accounts, using pictures of white men. When he inquired as white customers, the accommodations were suddenly available.

Selden complained to the host, who said Selden was “simply victimizing [himself].” When Selden brought the matter to Airbnb, he claims, it never responded. That’s when he sued. But the matter never got aired in district court because Airbnb invoked its arbitration clause. Selden is appealing the arbitration order.

The situation is slightly better under the ADA because that law confines standing on people who are deterred from using a service because of known disability discrimination. That’s one reason the NFB case was able to avoid being sent to arbitration, says Disability Rights Advocates staff attorney Julia Marks, who’s based in Oakland, California, and was part of the case.

“But it is something that we always have to think of when we get phone calls from people complaining of discrimination [from] some of these companies,” she says.

As a result, the majority of discrimination lawsuits against sharing-economy businesses have ended before they got to the question of platform versus accommodation. NFB might have gotten the furthest, but it still didn’t address the question squarely. A judge found that the issue should be developed further and declined to dismiss the case.

Leong thinks the best way to show that anti-discrimination laws apply is to cite the design of the apps through which users of sharing-economy businesses reach sellers.

“They design the entire platform that makes the transaction possible, which means they determine what the parties to the transaction know about one another, when they know it, how that information is presented to the parties, and the norms of the platform,” Leong says.

It’s not clear whether anyone has made that argument. Selden’s complaint uses a different strategy suggested by Leong and Belzer, seeking to hold Airbnb vicariously liable for the actions of its “employee”—the host who rejected his requests.

Perhaps more similar is Access Living of Metropolitan Chicago v. Uber, filed last October. Users of motorized wheelchairs require specially fitted vehicles with ramps and tie-downs—and Access Living alleges that no such vehicles are
The Docket

available through Uber in Chicago. Uber employees told Access Living it had no intention of providing equivalent service for wheelchair users, says Charles Petrof, Access Living senior staff attorney.

Petrof says he thinks Uber is clearly subject to the ADA (although he sees several categories it could fit into) because it has substantial control over its drivers’ operations—pricing, dispatch, driver qualifications and other aspects of the experience. Much of that control explains why consumers might choose Uber, he says.

“The consumer is in no way negotiating with an individual driver in the process,” he says. “This is all accepting a proposal that Uber is making to the consumer.”

When contacted for this article, Uber said that its drivers are required to comply with the ADA, and that it’s piloting different ways to add drivers with wheelchair-accessible vehicles. Petrof says wheelchair users in Chicago are typically directed to UberTaxi, which connects them to a traditional taxi dispatch service. Asked what Uber would have to do to add wheelchair-accessible vehicles to its core business, spokeswoman Sophie Schmidt maintains that Uber doesn’t operate passenger vehicles but provides its software to “driver-partners.”

Airbnb has addressed discrimination more actively. Spokesman Nick Papas said that last year it hired Laura Murphy, former director of the American Civil Liberties Union’s Washington legislative office, to study discrimination at Airbnb.

Murphy’s September report suggested several changes Airbnb already has adopted: anti-bias training, more instantaneous bookings that don’t let hosts see the profile, and a requirement that users accept an anti-discrimination commitment. The company also hired former U.S. Attorney General Eric Holder to create its anti-discrimination policy and aired a Super Bowl commercial criticizing the company’s anti-discrimination policy.

The Consumer

According to Robinson, the police spent 90 minutes searching his apartment and electronic devices. They also interrogated him and his partner in separate police vans parked in front of their building in the Queen Anne neighborhood.

The Seattle Police Department was working off a tip from the National Center for Missing & Exploited Children that an IP address, the unique identifier produced by every computer or computer network, was tied to Robinson’s name and physical address and was used in the upload and transfer of child pornography.

After finding no evidence of child pornography, the police left without making an arrest. The incident left Robinson feeling “afraid” and “furious.” Seattle police declined to comment for this story.

Damaged Protections

Over the past 20 years, the internet has altered every aspect of society, including the challenges of obtaining a warrant. While police departments work to keep abreast of a technological landscape in flux, advocates worry that technology is outstripping procedure—and damaging the warrant process and its protections.

Tor is software that legally allows people to privately surf the internet by being randomly routed through various computers around the world. (Its name comes from the Tor Project’s original name, “The Onion Router.”)

Tor is promoted by the Department of State to help dissidents get access to the internet in repressive societies, such as China, Egypt and Russia. It’s also used by privacy advocates to browse the internet without corporate or government tracking and can be used to disseminate illegal material, such as child pornography.

In Robinson’s case, someone transferring child pornography was randomly routed through his IP address, similar to an illicit package through a random post office. The exit node, which Robinson says he set up as a service to people online who want to browse privately, allows a person being routed through Tor to connect to the internet.

The advent of Tor, along with proxy servers and mobile access to the internet, has made IP addresses less reliable for law enforcement investigating online crimes. “It’s gotten more challenging,” says Chuck Cohen, a captain with the Indiana State Police. He served his first subpoena for IP logs, the list of users who visit a website, in 1995. He was investigating the online sale of knockoff sunglasses.

“Back then it was easy,” Cohen says. He says an IP address

Net Search and Seizure

Inaccurate leads from IP addresses prompt police to serve warrants on innocent people

By Jason Tashea

On the morning of March 30, 2016, David Robinson and his partner, Jan Bultmann, were starting their day when six Seattle police officers knocked on their door with a search warrant. The police thought Robinson was trafficking child pornography. Still in bed when police arrived at 6:15 a.m., Robinson got dressed as an officer stood in the bedroom.

According to Robinson, the police spent 90 minutes searching his apartment and electronic devices. They also interrogated him and his partner in separate police vans parked in front of their building in the Queen Anne neighborhood.

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“Back then it was easy,” Cohen says. He says an IP address
would lead him to the internet provider who would then release data about the customer tied to the address. This worked in the ’90s because IP addresses were primarily static. Today, however, due largely to mobile access of the internet, Cohen says, IP logs are less useful.

CAUGHT UP IN THE SCENE
The combination of old tactics alongside new technology had led to innocent bystanders being caught up in criminal investigations. For more than a decade, MaxMind, an IP addressing company based in Waltham, Massachusetts, had been incorrectly and repeatedly leading law enforcement to a farm in Kansas in search of identity thieves, suicidal veterans and runaway children.

This happened because the farm’s physical address was MaxMind’s U.S. default location, a catchall for when the company knew an IP address was from the United States but could not get more specific. The family who moved to the farm in 2011 dealt with the IP addressing havoc for five years and filed a complaint last year.

This example informed the Electronic Frontier Foundation’s September report that calls attention to the challenges that IP addresses create in criminal investigations.

“It’s not just an education problem; it’s also a constitutional problem,” says Aaron Mackey, a legal fellow at the EFF and co-author of the paper. The education problem is that courts and law enforcement have to understand how IP addresses have changed, Mackey says. It is a constitutional issue because an IP address alone is often insufficient for a probable cause warrant, he says.

Both issues coalesce for Mackey in what he says is the incorrect use of certain analogies. He says it’s misleading when police seek a warrant and try to equate IP addresses with physical locators, such as a street address or a vehicle license plate.

Mackey argues that an IP address is more analogous to an anonymous informant. “Anonymous tips can be right, but they can also be wrong,” Mackey says. “In the same way, an IP address can sometimes identify an individual, but in a lot of circumstances they don’t.” Drawing out his preferred analogy, he says anonymous informants provide tips that require further police work to secure a warrant, and IP addresses should be no different.

The prevalence of this problem is hard to ascertain. For his research, Mackey says he examined several instances nationwide in which an IP address was used incorrectly to obtain a search warrant. However, he thinks this issue will become more prevalent, as police are investigating more crimes online.

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Aaron Mackey, Electronic Frontier Foundation

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The inability to quantify this problem is a result of decentralized criminal justice data collection. Also, using an IP address to get a warrant is the exception rather than the rule, according to Cohen.

“On step one, we are going to see if [the IP address] is a Tor exit node,” Cohen says. To help police differentiate between criminals and privacy activists such as Robinson, the Tor Project created the ExoneraTor service, which allows anyone to see whether an IP address was used as a Tor relay on the day in question. According to Robinson, the Seattle police knew he operated an exit relay.

Cohen says that if an IP address is shown to be a Tor exit node, then “that lead becomes a dead end” in the investigation.

He makes clear, however, “with 800,000 police officers [nationwide], it’s not realistic for them to have that technical background.” But, he says, this process and others are “widely known” among officers whom departments rely on to undertake these types of investigations.

‘LUCKY’ CRIMINALS
Offering a lawyer’s perspective is Matthew Esworthy, a criminal defense and civil commercial litigator in Baltimore. Esworthy says he has seen Tor cases that involve child pornography in which criminals used computers to accomplish their crimes. But “that seems to be the exception to the rule,” he says.

Also the co-chair of the ABA’s cybercrime committee, Esworthy thinks online crime is so prolific that “law enforcement doesn’t want to waste their time going after locations that aren’t going to bear fruit.”

From police officer Cohen’s point of view, the challenge in using IP addresses to help obtain a warrant is about whether the address is collected at all. “There is no federal law on retention of IP records,” he says.

Federal lawmakers failed to create a standard for retention in 1999 and 2009. By comparison, the European Union passed the Data Retention Directive in 2006, requiring data to be kept for a minimum of six months and a maximum of two years.

Domestically, service providers can retain IP address information for as long as they want, if at all. One major internet provider, for example, keeps its records for 72 hours before it erases them. To this end, Cohen says that if you are a “lucky” criminal with a provider that does not retain IP information, then “you don’t get caught.”
Bias Behind Closed Doors

Racially discriminating statements made in the privacy of jury rooms are subject to scrutiny

By Mark Walsh

A case about racial bias in the jury room would seem to have all the makings of a provocative and headline-grabbing decision. However, *Peña-Rodriguez v. Colorado*, a case containing just such bias, hovered a bit below the radar, even during this relatively low-key U.S. Supreme Court term.

Justice Anthony M. Kennedy appeared to be doing what he could then, in his March 6 majority opinion in the case, to offer some soaring rhetoric in explaining why a longtime rule against calling jury deliberations into question after a verdict must give way to concerns about a single juror relying on racial animus to convict a criminal defendant.

“The jury, over the centuries, has been an inspired, trusted and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases,” Kennedy said.

But “the nation must continue to make strides to overcome race-based discrimination,” Kennedy said. “Blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule.”

That rule, meaning jurors may not impeach their verdicts with later testimony about what went on in the jury room, is one aspect of the jury system that is itself centuries old, in Britain and the United States. The rule is meant to give finality to verdicts and ensure jurors that what they said during deliberations will usually not be called into question later.

In the 5-3 decision in *Peña-Rodriguez*, the court held that when a juror makes a clear statement indicating that he or she relied on racial stereotypes in voting to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way to allow the trial court to consider the evidence of the juror's statement.

Kennedy’s “language was even more potent and uplifting than many would have expected,” says John Paul Schnapper-Casteras, the special counsel for Supreme Court and appellate advocacy at the NAACP Legal Defense and Educational Fund, which filed an amicus brief in support of the defendant. “We thought it was powerfully written.”

A JUROR’S VIEWS ON MEXICANS

The egregious facts are these: Miguel Angel Peña-Rodriguez was charged with sex crimes in relation to alleged contact with two teenage girls in a barn at a Colorado racetrack. The teens were the daughters of a jockey, while Peña-Rodriguez was a newly hired horsekeeper at the track.

The trial court followed standard voir dire procedures, and no one who ended up on the jury acknowledged any ethnic or racial bias. After a three-day trial, the jury found Peña-Rodriguez guilty of unlawful sexual contact and harassment, but it failed to reach a verdict on a charge of attempted sexual assault.

After the discharge of the jury, the defendant’s lawyer entered the jury room to discuss the case. Two jurors informed the lawyer that during deliberations, one of their fellow jurors had expressed anti-Hispanic bias against the defendant and his alibi witness.

The two jurors gave affidavits in which they said a juror identified...
as “H.C.” had told the other jurors that he believed the defendant was guilty because, in his experience as a former law enforcement officer, Mexican men had a bravado that caused them to believe they could have their way with women.

The jurors said H.C. had declared that in his experience, “nine times out of 10, Mexican men were guilty of being aggressive toward women and young girls.” And the jurors recounted that H.C. said that he did not find Peña-Rodriguez’s alibi witness credible because, among other things, the witness was “an illegal”—even though the alibi witness had testified that he was a legal U.S. resident.

The trial court reviewed the affidavits and acknowledged juror H.C.’s apparent bias. But the court rejected Peña-Rodriguez’s motion for a new trial, noting that juror deliberations are shielded from inquiry under Colorado’s rules of evidence. The Colorado Supreme Court affirmed the conviction, citing two U.S. Supreme Court decisions that had rejected challenges to the similar no-impeachment rule under the federal rules of evidence with respect to juror misconduct or bias.

Those cases are Tanner v. United States, a 1987 decision in which the court rejected a Sixth Amendment challenge to evidence that some jurors were under the influence of drugs and alcohol during the defendant’s trial, and Warger v. Shauers, a 2014 ruling in which the justices rejected a challenge in a civil case where the losing party alleged that the jury forewoman had failed to disclose pro-defendant bias during jury selection.

HARKENING BACK

Justice Kennedy, in an opinion joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan, reached back to English common law in 1785, when Lord Mansfield rejected juror testimony that a jury had decided a case with a game of chance.

“The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations,” Kennedy said.

American courts adopted the Mansfield rule, though there were less rigid variations in some states, including one called the “Iowa rule.” In 1975, Congress adopted federal rules of evidence that included a broad no-impeachment rule.

Justice Kennedy balanced the no-impeachment rule with the court’s long line of cases seeking to eliminate racial bias from the jury system. “Time and again, this court has been called upon to enforce the Constitution’s guarantee against state-sponsored racial discrimination in the jury system,” he wrote.

“The court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee,” Kennedy said.

Not every offhand comment indicating racial bias will trump the no-impeachment rule, he said. For a post-trial inquiry to proceed, “there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.”

In the case before the court, the alleged biased comments were egregious, according to Kennedy.

“Not only did juror H.C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis,” Kennedy said.

“What Justice Kennedy recognizes in his opinion is that the ordinary safeguards don’t work to ferret out the kind of racism present here,” says Lisa Kern Griffin, a law professor at Duke University who helped write an amicus brief for a group of law professors in support of Peña-Rodriguez. “He talks about the way racial bias performs an infective function. It corrupts.”

PRYING OPEN THE DOOR

Justice Samuel A. Alito Jr., in a dissent joined by Chief Justice John G. Roberts Jr. and Justice Clarence Thomas, emphasized that jurors are “ordinary people” who, once in the jury room, “are expected to speak, debate, argue and make decisions the way ordinary people do in their daily lives.”

“To protect the jury trial right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded,” Alito said, but the majority “pries open the door.”

Alito was dubious of Kennedy’s view that the Constitution is less tolerant of racial bias than other forms of juror misconduct, saying the Sixth Amendment gives every defendant the right to be judged impartially.

“Today’s decision—especially if it is expanded in the ways that seem likely—will invite the harms that no-impeachment rules were designed to prevent,” Alito said.

Thomas, in a separate dissent for himself, wrote that “our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the 14th Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct.”

Michael B. Rappaport, a professor at the University of San Diego School of Law and the director of its Center for the Study of Constitutional Originalism, says he is not convinced that Thomas is correct about that common-law history. But Kennedy, he says, has “a methodology of chicken soup: a little bit of this, a little bit of that.”

“Justice Kennedy is not big on imposing limits on himself,” Rappaport says, “and his style of deciding cases leaves him free to do whatever he wants.”
Sex with clients is forbidden under the rules of professional conduct in most states. The rules exist to ensure that the lawyer’s independent professional judgment is not clouded or conflicted by the emotions encircling intimate relationships. The rules also exist to protect clients from lawyers, as often there is an unequal balance of power between the people in those roles.

California is in the process of likely changing its existing rule to expand the bar against such relationships. The State Bar of California’s board of trustees approved a new rule on March 9, while considering 33 other proposals on attorney conduct standards. The measure now goes to the California Supreme Court.

“The court, of course, can take as much time as it needs and will either adopt or reject our suggested rule,” says Dan Eaton, part of the four-member drafting team that created the proposal and a shareholder at the San Diego firm of Seltzer Caplan McMahon Vitek.

The current rule does not prohibit lawyer-client sexual relations wholesale, but it forbids them when there is a quid pro quo, coercion or undue influence, or if the relationship will cause the attorney to not live up to the duty of competency.

“I believe the greatest dangers are abuses of power by the lawyer, particularly when clients are vulnerable, as many are,” says Wake Forest University law professor Ellen Murphy. “Arguably, California’s rule as it stands today covers such situations. Absent abuses of power or coercion, the real concern should be whether the relationship in any way impairs the lawyer’s ability to provide competent representation or otherwise satisfy the fiduciary duties owed.”

The current California rule provides that an attorney shall not:
1. Require or demand sexual relations with a client incident to or as a condition of any professional relationship.
2. Employ coercion, intimidation or undue influence in entering into sexual relations with a client.
3. Or continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently.

California adopted its current rule in 1992, a few years after the state legislature passed a measure that required the California bar, with approval of the California Supreme Court, to adopt a rule of professional conduct governing sexual relations between lawyers and clients.

“Regulating lawyer-client sexual relationships involves balancing professionalism with privacy concerns,” Murphy says. “California’s current rule covers the types of lawyer-client sexual relations that are most concerning to me: those involving abuses of power by the lawyer.”

But California’s rule may change soon. The new proposal adopts a bright-line position that attorney sex with clients is not allowed unless there was a consensual sexual relationship before the formation of the attorney-client relationship.

**ENFORCEMENT AND EXPECTATIONS**

The proposal reads: “A lawyer shall not engage in sexual relations with a current client who is not the lawyer’s spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.”

The proposed rule is very similar to Rule 1.8(j) of the ABA Model Rules of Professional Conduct, which reads: “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.”

“One of the problems with the current rule is that it really wasn’t working that well from an enforcement standpoint,” says Eaton. “Moving much more to a black-letter rule would be more in line with client expectations and would be much easier for lawyers to follow. This new proposed rule serves an important public protection purpose.”

“One of our charges was to make the rule more easily enforceable and clearer. That is what we did. We also
wanted to bring our rule more in line with national standards, unless there was a specific reason to keep our state variation.”

“It is obvious that the ABA approach is much better, no question,” says John Cary Sims, who teaches ethics at the University of the Pacific McGeorge School of Law. “Inherently, a sexual relationship between an attorney and client is likely to cause trouble. A flat prohibition on initiating a sexual relationship with a client, such as that in Model Rule 1.8(j), is also good for lawyers, since it heads off inappropriate relationships.”

The proposal drafting team was not unanimous in its opinion that the current rule should be changed. James Ham, the lead drafter, dissented.

“There is no empirical or even reliable anecdotal evidence that a complete ban on sexual relations is needed to protect the public or regulate the legal professional effectively,” wrote Ham, who is a bar discipline defense attorney with the South Pasadena firm of Pansky Markle Ham. “A complete ban would infringe personal rights in circumstances where there is no undue burden, coercion or risk to competent representation.”

ETHICAL DILEMMAS

Last year, lawyers faced sanctions for violating state rules regulating sex with clients:

• The Iowa Supreme Court imposed a 30-day suspension on a lawyer who had an intimate, personal relationship with a client whom she first represented when the client was incarcerated. Iowa Supreme Court Attorney Disciplinary Board v. Johnson.

• The Alaska Supreme Court suspended an attorney for three years for his sexual misconduct with an appointed client, including sexting photos of his penis to the client. In re Stanton.

• The Supreme Court of Ohio imposed a six-month suspension, stayed upon conditions, on an attorney who solicited his client on several occasions. Cleveland Metropolitan Bar Association v. Paris.

“Lawyers are human,” Sims says. “People tend to be more open to sexual relationships in intense interactions, and these relationships sometimes occur when there is a great disparity of power.”

Murphy identifies a concern over the definition of “sexual relations” in many state rules. The new California proposal forbids sexual relations “with a current client” and defines the term as “sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification or abuse.”

Murphy warns that the definition may not cover all the situations that involve abuse of power or coercion. She cites a 2007 decision from the Supreme Court of Wisconsin, In re Inglimo, where the court found that an attorney did not violate the lawyer-client sex rule when he participated in a three-way sexual encounter with his client and the client’s girlfriend. The court determined that because the lawyer did not touch the client during the threesome—only the girlfriend—there was no violation, according to the plain language of the rule.

“This hardly seems in the spirit of the rule or a sufficient distinction to alleviate the dangers of such relationships,” Murphy notes.
In Conclusion ...

The power of finishing strong

By Bryan A. Garner

If, in persuasive writing, your opening words must arouse your reader’s attention, your closing words must somehow prompt your reader to act. The bane of so-called persuasive legal writing is that openers are typically slow and muddled (as we’ve seen over the past two columns), and closers are rote and perfunctory.

One way of describing the problem is that most briefs and motions consist almost entirely of undifferentiated “middle”—lacking any proper opener or closer. If the opener says anything at all, it’s likely to be “for all the following reasons.” And the closer is likely to say “for all the foregoing reasons.” At many law schools, in fact, it’s dogmatically taught in moot-court programs that a conclusion must contain nothing but a one-sentence prayer: “For the reasons hereinabove stated, Jones requests that the judgment be affirmed.”

This benighted doctrine contradicts everything that professional writers and rhetoricians have ever said—from the time of Aristotle to the present day. Only with an extremely short brief, say of two pages, might a cursory closer be justified.

The point is to find some way of making your points a little differently at the end. Rack your brain to think well in the body of the brief. It’s a tough mission: You’re trying (as at all points) to keep your reader’s interest high, to capsulize your points freshly, to lead the reader to conclude that what you’re asking for is best, and to spur your reader to do what you’re asking.

Repeating sentences that you’ve already written is sure to bore; going on too long will diffuse your points; sounding unreasonable will make the reader unlikely to side with you; and tedium induces only sleep. These things are all your enemies.

Burdening your reader is also unwise. You do that by saying, essentially: “Go back and reread the whole brief again. Or, if you skipped straight to this conclusion, go back and do your job! I’m not giving you an easy way out.” So the generic conclusion is a poor strategy as well.

What I recommend is a pithy summary that contains at least two catchy (but not catchpenny) words that you haven’t used anywhere else in your brief or motion. Keep it understated. But know that this is the place, if there is one, to begin injecting a little emotion. (Avoid that on page one, which should be coolly logical.) This is also the place to make a policy argument that might not have fit well in the body of the brief.

The power of rewriting

Having taught this method recently at a law firm in Los Angeles, I gave a homework assignment to the lawyers: They had two hours to find a humdrum closer and to write instead a powerful one that might rivet the judge’s mind in a short paragraph or two. Participants were to introduce at least two new words into the conclusion to be sure that their final words would resonate.

One example was a simple motion for calendar preference, together with a request for an expedited oral argument. The original conclusion, on page 8 of the original motion, stated in full: “Ms. Johnson respectfully requests that the court grant her motion for calendar preference and schedule oral argument to take place within 60 days after briefing is complete.”

Here’s how Jason Kim rewrote that closer: “The safety of Ms. Johnson’s infant daughter is at risk because the trial court awarded custody to a proven domestic abuser. The science establishes that her daughter may suffer irreversible emotional and physical harm if Mr. Findlay…"
is allowed continued custody. This court has the sound discretion to expedite appeals involving a child’s safety. We urge the court to use that discretion and to protect Ms. Johnson's daughter from the very real threat of future harm."

In explaining his revision, Jason said that the biggest challenge was finding two words he hadn’t used elsewhere in the brief. He settled on the words science and irreversible—the first because it conveyed the idea that the threat to the child’s safety wasn’t up for discussion (the authorities had been marshaled and cited), the second because the studies Jason cited in the brief showed the harm to be long-term and life-threatening.

Another example also began as a mere pro forma statement, appearing on page 19 of an emergency motion for conditional release: “Mr. Lopez respectfully requests that this court order his immediate release on bail pending the resolution of his habeas petition.”

Sam Eisenberg rewrote the closer so that it wouldn’t be just boilerplate. He wanted to land some punches without making the tone inflammatory. Here’s what he wrote—and, by the way, this didn’t resemble any passage anywhere else in the motion: “In the 12 days since Lopez’s arrest, the government has failed to provide this court with a fact-based, constitutional reason for either his arrest or his continued detention. Lopez has presented evidence rebutting each rationale the government has offered. The record shows that Lopez’s arrest violated the Fourth Amendment. The government’s threat to terminate his employment authorization based on mere innuendo also violates due process. The government’s arguments here, which belie its repeated public statements that the benefits and protections of the DACA program remain in place, have engendered fear among the over 860,000 government-vetted DACA recipients who are in the same position as Lopez. This court has the power to conditionally release Lopez pending the resolution of his habeas petition. It should do so to protect his constitutional rights and his personal safety.”

Sam told me that it was challenging to summarize the many arguments and standards at issue in that case while still keeping the closer short. Initially, he thought it would be impossible. (That’s a normal reaction to any rhetorical challenge: At first, the material seems intractable; then you have a breakthrough.) In the end, just the short time he spent focusing on the conclusion helped him determine what points had and hadn’t been made in the brief, decide which points were the strongest, and ensure that he’d told a complete story.

FIND THE THREAD

Although the two examples I’ve given are pretty dramatic, the principle holds as well with drier matters such as commercial litigation. Remember: At first, it’ll seem unattainable, and then (if you persist) you’ll find an approach that works. Naturally, you’ll want to test it on others before filing. Don’t be afraid of a colleague’s criticism. It’ll help you refine your work.

Coming full circle with this particular column is no mean feat. Let me try by prompting you to act. Try this experiment. Pick up a major newsmagazine and select three meaty articles—at random. Scrutinize just the openers and closers. I’ll bet you’ll find that, more often than not, a unifying thread from the opener gets woven into the closer in a way that’s intellectually satisfying. There’s a real lesson there.

Bryan A. Garner (@BryanAGarner), the president of LawProse Inc. of Dallas, is the author, most recently, of The Law of Judicial Precedent (with 12 appellate judge co-authors) and Garner’s Modern English Usage (available as a phone and tablet app also). He has been editor-in-chief of Black’s Law Dictionary for the past four unabridged editions.
WORKING WITH
BUILDING A BETTER LAW FIRM TAKES COLLABORATORS

BY PATRICK LAMB AND NICOLE NEHAMA AUERBACH

Technology is evolving at a staggering pace—much faster than most law firms can accomplish or pay to accomplish. It used to be that a firm faced with a large quantity of documents to review could hire the necessary contract lawyers and accomplish the job. Eventually, clients pushed back against the expense, and the e-discovery vendor world was born.
In the past, law firms tried to woo clients with technology. The problem was that a client would have to access its matters through separate portals at all the law firms it was using. Flash-forward to document management and document creation.

And now some firms are developing workflow software, plus project management software and client-specific dashboards that sometimes integrate work and billing.

There are more examples, but these illustrate the point: Technology is becoming a bigger and bigger part of law practice. But much of this technology is costly; and even if it could be acquired, mastering it takes training, time and commitment. Not to mention the cost of staying current as technology rapidly evolves.

**FASTER SOONER!**

But wait: There’s more. The pace of change, especially in the technology area, is accelerating. Things like Moore’s law—processor power will double every two years, the creation of data—4.4 zettabytes (1 zettabyte is a trillion gigabytes) in 2013 to 44ZB in 2020 to 180ZB in 2025), and so on. Consider the following view on the pace of change.

Futurist Ray Kurzweil posited in 2001 that we will experience something akin to 20,000 years of change—at the pace of 2001—in the 21st century. Many others have agreed that more change will occur faster than ever before.

If these futurists are remotely accurate, what will firms have to do? What should firms do now? The conundrum is particularly daunting for smaller firms that lack the resources to match BigLaw’s ability to invest in-house technology. But even for BigLaw, using limited resources for more and more technology—which limits the so-important profits per equity partner number—poses significant management challenges.

In the face of the significant pool of tech talent, we must consider the topic of disaggregation. The book *Alternative Fees for Litigators and Their Clients* (by Patrick Lamb) discusses the importance of disaggregation of legal services.

“For every task, someone must decide who will perform it, and there are usually several different choices. ... I believe each selection should be driven by the answers to these questions:

1. Who can perform the task at an acceptable level of quality?
2. Of those identified in No. 1, who can perform the task most cheaply?
3. If more than one option emerges from No. 2, who can perform the task most quickly?”

More and more often, the answers are that entities that are not law firms can perform tasks at a higher level of quality, at a significantly lower price and faster than any law firm.

Better. Cheaper. Faster. Is there something not to like?

**TO THE CLIENT**

Some collaborative technologies are “client-facing,” or primarily helpful to the client. Law firms—at least firms of a certain size—resist these changes because they make money from marginal quality of work slowly performed. Lots of money. And clients finally started to realize they had better alternatives for such work, and they began insisting their law firms collaborate with these “non-law-providers.”

It has been a modest success to date because many firms see these tech providers as competitors. A friend of ours in the document review business provides a world-class tech and process solution that costs a fraction of what law firms have charged and would charge for the same document review. Law firms hate the loss of the easy money, but the review by the tech provider is qualitatively and quantitatively superior.

Let us share one of the keys to the success of Valorem Law Group: We embraced Novus Law early in our existence. When we started the law firm, the founders agreed that we did not want to carry the number of associates needed to do document review on larger cases. We had an early contingency case where we hired and tried to supervise contract lawyers to do the needed document review. While the effort worked out, it was apparent that it was not the preferred way to go.

Fortuitously, we met the founders of Novus Law. We found that their deep expertise in document review—one that combined technology, human assets and extraordinary processes—provided precisely what we needed to be able to bolt on this capability when we needed to present ourselves to clients as having it, and we had a partner we worked with so seamlessly.

This example illustrates a competitive opportunity worth exploring further, since it represents the future. When law firms partner with a tech provider to offer cheaper, faster and better document review as part of the representation, the firms can show they have bandwidth to match or exceed bigger firms and therefore create a much greater chance of being engaged.

Look at the list of client-facing internet technologies on page 28—and a hat tip to Richard Granat, CEO of DirectLaw Inc., for providing us this list. And there are many more examples. In the March/April 2017 issue of *Law Practice*, Robert Ambrogi writes about “a golden age of legal tech startups,” highlighting 12 winning startups picked for slots at this year’s ABA Techshow from a much larger pool of companies.
The pool of startups may number in the thousands of companies, but it certainly is in the hundreds. The vastness of the pool may itself be a problem to be addressed in a different article, and we invite readers to share their favorite technologies in comments to this article. Our goal is not to provide a complete list of technologies for law firm use but highlight that effective use of technology will be a core component of success in the 21st century.

TO THE LAW FIRM

There are huge numbers of “inward-facing”—primarily helpful to the law firm—technologies available. Every day, we make use of older technologies, including Microsoft Word, PowerPoint and Excel, or accounting software such as QuickBooks.

While software allows firms to better operate, it does not replace, for example, accounting professionals. But now you can engage companies to do your billing, bookkeeping, payroll and CFO analytics. Two examples are the 4700 Group and 4L Law Firm Services, both of which can provide virtual accounting services.

Outside of billing and finance, companies such as ThinkSmart (using a workflow platform to automate processes) and web-based presentation design companies (SlideGenius, for example) are available at a moment’s notice. There is virtually no part of a lawyer’s business or practice for which back-office help is not available via web-based companies that specialize in servicing the legal market.

DEALING WITH RAPID CHANGE

What we have described is a significant change from the status quo of most lawyers. As such, active and passive resistance to the change is to be expected. Former U.S. Army Chief of Staff Gen. Eric Shinseki once told soldiers under his command: “If you dislike change, you’re going to dislike irrelevance even more.” Lawyers should consider this a word of caution aimed directly at our profession.

So it is appropriate to devote a few paragraphs to the topic of change.

‘CLIENT-FACING’ INTERNET TECHNOLOGIES

SECURE CLIENT PORTALS
clio.com, directlaw.com, mycase.com, rocketmatter.com

WEB-ENABLED DOCUMENT AUTOMATION
hotdocs.com, exari.com, directlaw.com/rapidocs.asp

AUTOMATED LEGAL ADVICE
neotalogic.com

AUTOMATED CLIENT INTAKE FORMS
lexicata.com

CONVERSATIONAL BOTS
aux.ai

INTERACTIVE WEBSITE GUIDES
guideclearly.com

CLIENT DOCUMENT SHARING
box.com, hightail.com, egnyte.com

CLIENT COLLABORATION
sharepoint.com, huddle.com

CLIENT FACING CALENDARS
acuitiescheduling.com, appointy.com

Source:
Courtesy of Richard Granat, CEO of DirectLaw.
There is a difference between “going for a walk” and “walking to the corner of State Street and Wacker Drive.” One is an activity and the other is a destination. Change is the latter, not the former, and so it must begin with a vision—the destination—clearly in mind.

The vision cannot be insignificant; if your change is too minor, you fall victim to inertia. If it is significant and you have not properly planned for it, you can easily convince yourself that achieving it is impossible. People who successfully climb Mount Everest report the first thing they focus on is the base camp. They eventually move to thinking about the next few steps. And only at the end do they think about the summit.

Our colleague Jeff Carr has identified the successful process of change as broken into stretch, step and leap phases. Stretch is the first motion away from the status quo in the direction of the change vision. It’s something, but not a lot. The next move is bigger—a full step that separates you from the prior status quo but is not quite all the way to the vision. And the leap traverses the remaining space to reach the vision. It is a pattern of change successfully applied in many environments.

In the context of our discussion of building a better firm through collaboration, a firm might pick an area —e-discovery, due diligence, contract drafting or some other—and identify a company with which they share a productivity vision. A productivity vision is how the parties can work together seamlessly to benefit the client.

**LATHER, RINSE, REPEAT**

Even though we are lawyers, none of us is perfect. That’s a hard thing for many in our profession to admit. But because it is true, no one will get the most out of a collaboration the first time you do it.

It behooves all of us to get better at collaborating, and the quickest way to improve is to learn from each experience. We suggest your efforts to collaborate and change include a vigorous after-action assessment program as part of the process.

Only the largest law firms can be everything to every client. Firms that fail to recognize this truth tend to find themselves economically vulnerable, since trying to be everything is expensive.

Firms that recognize the truth learn they sometimes need to be more than they are, even if for a short time. The opportunities to collaborate with other firms and service providers allow firms to be more than they are when the “more” is needed, but avoid the cost of trying to be more permanently.

This is akin to manufacturers adopting a just-in-time approach to inventory, instead of just-in-case. The pressure to utilize this collaborate-when-needed approach is growing, and embracing it is a key to the successful practice of law in the 21st century. ■

*Patrick Lamb, a 2009 ABA Journal Legal Rebel, and Nicole Nehama Auerbach are the founders of Valorem Law Group, a commercial litigation firm in Chicago.*
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1 STEP BEYOND
TBD LAW’S 2ND CONFERENCE AGAIN SKIPS PAST THE BASICS

As someone who has been to a lot of legal conferences, I can safely say that TBD Law is nothing like the others I’ve attended or covered. The invitation-only conference, which took place Feb. 26-28 at the Filament conference center in St. Louis, resembled more of a retreat and team-building enterprise than the usual “panels full of pundits” approach. Instead, the 50 or so attendees representing solo practices, small firms, legal service providers, technology companies and businesses were identified as tech-savvy innovators who had long since moved beyond the initial dilemma of whether to challenge the legal profession’s status quo.

With a certain level of sophistication and expertise assumed, attendees instead focused on sharing parts of themselves and their professions for the common goal of improving the legal industry. There were breakout sessions, free exchanges of advice and even mental exercises.

One involved “remembering the future.” Participants were asked to pretend it was 2027 and reveal the steps they took to prepare for the big changes that happened in the legal industry during the previous decade.

“We’re not going to focus on whether this is a profession or business,” said Sam Glover, editor-in-chief of the website Lawyerist. “Let’s just assume, for the sake of this conference, that it’s both.”

Glover is a co-founder of the conference with Lawyerist CEO Aaron Street and Matt Homann, founder of Filament.

Homann echoed Glover’s sentiments. “Let’s get better at business because everything else flows from that,” Homann said. “If we don’t make enough money to keep the lights on, then we can’t help anyone. If we make more money, we can serve more clients.”

FIRST COME, FIRST SERVED

The focus on business and service dominated one of the main sessions of TBD Law. During the hackathon and live design event, attendees were given free rein to come up with projects that would serve the public, increase access to justice or improve the legal profession.

Two projects came about in anticipation of President Donald Trump’s modified executive order banning travel to the United States from certain Muslim-majority countries. One of them—Justice in a Box—was created to provide volunteers with the information and resources necessary to help immigrants inside detention centers. Street from Lawyerist; Fastcase CEO Ed Walters; Jeffrey Asjes, a research and reference attorney at Fastcase; and Dan Lear, director of industry relations at Avvo, headed the project.

“There are many long-term efforts to help immigrants on the path to citizenship. This is a proactive, short-term effort to help AILA [the American Immigration Lawyers Association] and others take action ahead,” Walters said. “The only way to help detainees is for lawyers to show up in person to help—and many of them won’t be immigration lawyers. So we decided to put together materials for them to use.”

Justice in a Box includes forms and questionnaires that can be used to generate documents for clients subject to summary removal proceedings or orders of removal.

Several conference attendees also came up with a tool to help detainees fill out forms and generate documents so that their U.S. citizen children would be taken care of.

That team included Damien Riehl, a lawyer and technologist in Minneapolis; Inti Martinez-Alemán, a civil and business lawyer at the Ceiba Forte Law Firm in St. Paul, Minnesota; Jennifer Reynolds, a family lawyer at the Fresh Legal firm in Ottawa, Ontario; Greg Siskind, an immigration lawyer at Siskind Susser in Memphis, Tennessee; and Steven Weigler, a founding partner of patent and startup firm EmergeCounsel in Denver.

Another project included a web-based TV series with three of the conference attendees in a Hell’s Kitchen-style reality show. Mary Juetten of Evolve Law and Traklight, Alma Asay of Allegory Law and Allen Rodriguez of One400 went to a law office and pointed out the ways they could use technology to improve the practice.

Llamazon, an online marketplace (complete with a logo featuring a llama) proposed to collect all the “freemium” legal services available from lawyers or law firms.

“Consumers want a one-stop shop,” said Patrick Palace, owner of Palace Law in University Place, Washington, just outside Tacoma. “Lawyers would be able to direct people to their websites” from the marketplace. Palace created Llamazon with Chad Burton, CEO at CuroLegal, and solo practitioners Jacob Levine and Mindy Yocum, both from Columbus, Ohio.

The challenge with events such as TBD Law is to see how much follow-up there is on the proposed projects (which were all completed within a few hours during dinner and cocktails), Homann addressed this in his closing remarks.

“Too many conferences don’t have a built-in community,” Homann said. “For us, we have a bunch of co-conspirators in this room. I’d love for you all to think about how to keep these conversations going as you look for ways to continue improving your communities.”
Business of Law

Law Architects

New legal jobs make technology part of the career path  By Jason Tashea

In a previous life, Jason Dirkx was a software developer. But that skill set’s purpose was unclear to him as he got to Chicago-Kent College of Law. “I didn’t really know how I’d parlay the tech background into a legal practice.” Dirkx says. “Everybody tried to push me toward intellectual property, which I tried, but didn’t particularly care for.”

It wasn’t until he started to work with the Center for Access to Justice and Technology at Chicago-Kent and Illinois Legal Aid Online that he began to see his potential career path. He witnessed how his technology background could be part of a legal career. Now, as knowledge management counsel, a nonpracticing position with the service solutions division at Littler Mendelson in Chicago, Dirkx designs scalable legal services with a technology component.

Although Dirkx’s role might be new to many in the legal field, his path is becoming more common thanks to BigLaw’s increasing acceptance of solution architecture, a tech-infused approach that tackles a client’s needs beyond providing a legal answer. Firms such as Littler, as well as Foley & Lardner and Davis Wright Tremaine, have embraced this trend.

Betsy Braham, CEO of technology company Neota Logic says solutions architects will become part of “mainstream business interests. … Organizations will have people who know how to build applications.”

This core group of 10 people provide a diverse skill set. In the words of managing director Lawton Penn: “Traditional law firm approaches are increasingly less satisfying [to clients]. … Just talking to lawyers isn’t going to solve the problem.”

In looking for talent, Rechtschaffen finds potential employees from Chicago-Kent and the Iron Tech Lawyer program at Georgetown University Law Center. While both schools are producing tech-savvy law graduates, they often are not software developers.

“I don’t necessarily want people that can code,” Rechtschaffen says. “I don’t want lawyers coding any more than I want coders doing ERISA litigation.”

At Neota, Braham says her solutions architects can come from a plethora of backgrounds that include business, law and engineering. But “the degree isn’t as important as the attributes to be logical, analytical and grasp complex topics and have a technical ability,” she says.

Of the jurists hired by Neota, Littler and De Novo, there is a mix of recent graduates, attorneys who have not practiced and practicing lawyers making a lateral move.

The solutions architects at De Novo and Littler tend to make less money than associate attorneys at the same firm. De Novo’s Penn thinks this is because “the profession doesn’t know how to appreciate [their value] because it’s so new.”

Penn and Rechtschaffen agree that the inability to bill out a solutions architect’s time like an associate’s time is one reason for the smaller paycheck. Braham says her solutions architects are making parity with associates who have similar career experience. And Amani Smathers, a legal solutions architect at De Novo, says no billing requirement is the corollary to a slightly smaller paycheck.

Beyond pay, Rechtschaffen says, the firm is committed to these new positions as a career path. At Littler, they have principals, which are management positions for people who work in nonpracticing areas of the firm.

As for aspiring solutions architects, Dirkx recommends conversing with everyone you can. “The industry is changing so rapidly,” which means that firms are experimenting with new roles, requiring different capacities. “Do your own due diligence,” he says. “Find that role that works for you.”

LOGIC-TREE LAW

One project, a joint venture with Neota Logic, is ComplianceHR. Rechtschaffen says “it’s a TurboTax type of approach” to employment law issues. By creating a reliable logic tree of questions, the tool is able to filter out answers regarding independent contracts and overtime rules, for example.

Davis Wright Tremaine’s De Novo, a legal solutions design team headquartered in Seattle, started in 2012.
ABA Treasurer’s Report

Fiscal year ended August 31, 2016

I will share with you our year-end results, including our financial position (balance sheet) for the Association’s fiscal year ending August 31, 2016.

Year-End Audit and FY16 Final Results

The year-end financial statement audit, including the Uniform Guidance Single Audit on government grants (formerly A-133) was successful. We received a clean (unqualified) opinion from our auditor, Grant Thornton. The results were approved by the Board of Governors (BOG) at the Midyear meeting and can be reviewed at the following URL: http://www.americanbar.org/content/dam/aba/administrative/treasurers-office/aba-fy2016-audited-financials.pdf. On a consolidated basis, the ABA reports revenue under four segments: 1) General Operations; 2) Sections, Divisions and Forums; 3) Grants; and 4) Gifts. Prior to FY16, Grants and Gifts were reported together as one segment. This further breakout provides additional insights, clarity and valuable analytics on our operations. Additionally for FY16, other than the General and Administrative (G&A) indirect credit in expenses allocation (reduction of General Operations expenses) and G&A general funding to grants (expense in General Operations) reported in General Operations, all grant revenues and expenses are reported under the Grants segment.

Through fiscal year ending August 31, 2016, on a consolidated basis, Net Operating Revenue under Expenses resulted in an $8.7 million deficit. This deficit by segment consists of a $5.3 million deficit from Sections, a $3.6 million deficit from General Operations and a $0.4 million deficit from Gifts, offset by a $0.6 million surplus in Grants. Recall that some Sections intentionally budget a deficit that by default is funded from Section Net Assets (reserves). The reasons for these deficits across the Sections vary but may include: no investment income budgeted, use of reserves allowed by policy for special projects that invest in the future such as membership outreach, new member benefits and diversity programs, and one-time expenditures for initiatives, and budgeting based on expected reductions in revenue from dues, books and the like. So, now let’s look at the two components of our consolidated net operating results; operating revenue and operating expense.

On a consolidated basis revenue is $6.7 million below budget but $7.0 million favorable to the prior year. While operating expenses were favorable to budget, the revenue shortfall was the key contributor to our deficit. Consolidated operating revenue through August 31, 2016 was $207.7 million, which was $6.7 million below budget. Revenue budget variances are primarily due to unfavorability in Sections of $6.2 million and General Operations of $4.4 million. The main drivers to General Operations revenue shortfall included:

- **ABA Journal** ($1.6) million
- **Dues revenue** ($1.5) million
- **Publications** ($0.8) million
- **Meeting fees** ($0.8) million
- **ABA Leisure** ($0.6) million

Two key General Operations revenue items offsetting the above were royalties (which were $0.5 million favorable) and an additional $0.5 million of investment reserves transferred to operations to offset the Code & Theory web development that covered the expense incurred in FY 2016, as approved by the BOG.

On a consolidated basis, operating revenue is $7.0 million favorable to prior year. If you recall, due to the grant

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reporting change as mentioned above, certain grant revenue and expenses previously recorded in General Operations have moved to the Grants segment, which is driving our unfavorable General Operations variance (and most of our Grants favorability). The segment reporting change does not change the consolidated results. The consolidated $7.0 million favorable increase is mainly driven by increased grant activity of $4.6 million and increased investment income and reserve funding for operations of $5.4 million. This $7.0 million operating revenue favorability with prior year is partially offset by decreases in Membership Dues, Meeting Fees and Advertising.

Through the same period, consolidated operating expense of $216.4 million was $5.0 million favorable to (under) budget, and $1.0 million unfavorable to (higher than) the prior year. Favorable budget variances are mainly driven by Sections of $6.7 million and General Operations of $0.8 million. The $0.8 million favorable General Operations variance reflects a favorable pension expense, offset by $1.9 million of BOG approved unbudgeted expense for ABA Insurance Program costs (USI startup fees and related legal costs related to the member benefit insurance initiative totaling $1.4 million) and the Code & Theory web development costs of $0.5 million. Adjusted for these unbudgeted expense items, General Operations expense would reflect $2.7 million favorable to budget variance. All in all the Association has very good expense discipline.

We also had a net change in pension liability of $13.3 million and a non-operating unrestricted investment gain of $2.7 million. Including the above items in non-operating consolidated results, the ABAs unrestricted deficit for the fiscal year is $19.4 million. This deficit, along with the change in restricted net assets, results in a total reduction in net assets of $19.6 million.

Statement of Financial Position (Balance Sheet)

It is key to understand the components of our Association’s balance sheet. Total assets as of August 31, 2016 were $342.2 million and Net Assets were $155.0 million.

While we have significant assets, we also have significant liabilities totaling $187.4 million. The bad news is that our assets fell and our liabilities increased, which resulted in a $19.6 million decline in Net Assets. Our Long-Term investment balance fell by $12.9 million as we liquidated investments to support operations. This will impact operations into the future by reducing funding to operations from our Long-Term Investments portfolio pursuant to our reserve funding policy. Simply put, we spend more than we take in and use our Net Assets to make up the difference. We have been doing this too much for too long.

Our existing operations funding policy provides for the ability to transfer 5.5% of our Long-Term investments to fund operations annually. While the policy called for 5.5%, we have in fact transferred a much higher percentage to operations in recent years. The Investment Committee asked our investment advisor, Russell Investments, to review and comment on our funding policy. Russell’s conclusion is that given the expected lower investment return rates for the foreseeable future and the need for the long-term investment balance to grow with inflation to maintain its purchasing power, the current annual 5.5% spending policy is too high and should be reduced to no more than 3.5%. At the BOG meeting in February 2017, the operations funding policy was reduced to 3.5%. This will impact our FY18 budget by reducing funds for operations by an estimated $5 to $6 million annually which represents approximately five to six percent of the FY17 General Revenue budget.

The other big item of concern is our pension liability and related debt (collectively referred to as “pension liabilities”) which increased by $10.3 million. Our pension liabilities should have declined by $6 million because of payments we made to service the related debt. However, the pension liabilities increased by more than $10 million because interest rates fell significantly in FY16, driving up

### Consolidated Operating Revenue By Segment ($ in millions)

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### Consolidated Operating Expense By Segment ($ in millions)

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the pension liabilities. The pension liabilities are very sensitive to interest rates and a one percentage-point change in interest rates will change the liability by over $20 million.

While we did lose ground in FY16, we are fortunate to still have a very sound balance sheet with $342.4 million of high quality total assets and $155.0 million in total Net Assets. However we must reduce our reliance on our Long-Term Investments to fund our operations. As a result of BOG action taken at the February meeting, we will reduce that reliance in FY18.

The ABA’s Future

The BOG continues to discuss the tough times our Association is facing. We have been too heavily reliant on our investment portfolio to fund operations. We cannot afford to do all the things we are currently doing in the manner in which we have been doing them. The BOG has taken action and tasked Jack Rives, our Executive Director, to reduce spending for FY18. Between FY16 and FY17, the General Operations budget was reduced by over $4 million. Taking into account inflationary trends and revenue softness, the Board’s directive is to reduce our net operating General Operations budget for FY18 by $8.7 million (revenue less expenses), which will require very tough decisions. The net $8.7 million in cuts are needed to maintain the viability of the Association. I ask all our members to support and assist our BOG, Executive Director and staff as they make the changes that will be controversial. We all have a responsibility to make the changes necessary to ensure our Association is vital and effective for the next 100 years, as it has been for the last 100 years. I am very grateful for your support in implementing the Association’s priorities within our financial means.

Thank you for the privilege of serving as your Treasurer.

Nick Casey
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

—John Bingham
John A. Bingham wasn’t the most prominent Republican politician during the Civil War period; he probably wasn’t even among the top 10.

Elected to the U.S. House of Representatives in 1854, he was forced into premature retirement eight years later after losing re-election. There were plenty of external factors for his loss: His Ohio district had been redrawn, and Bingham had been forced to run in unfamiliar territory; also, it was the first full year of the Civil War, and the Union soldiers who lived in his new district (most of whom were Republican-leaning) were off fighting the Confederates.

Yet Bingham managed to cultivate a pretty warm friendship with the guy who was the most prominent Republican at the time: President Abraham Lincoln. Lincoln kept Bingham employed with various jobs following the latter’s electoral defeat. One of them was as a military prosecutor—a job that allowed Bingham to prosecute John Wilkes Booth’s co-conspirators in Lincoln’s assassination.

And one more role Bingham garnered provides his most lasting legacy: He is the father of the 14th Amendment. As a leading member of the Joint Committee on Reconstruction, Bingham was the main author of the amendment, adopted by Congress on June 13, 1866, and ratified on July 9, 1868.
The longest amendment in the U.S. Constitution, the 14th is also the most complex, resulting in a raft of litigation over its meaning and reach that continues to this day.

It is also arguably the most important amendment in this nation’s history. It enshrined the notion of equality under the law, protected the rights of the newly freed slaves and guaranteed due process to all people.

The 14th Amendment, as well as the other Reconstruction amendments, sets the stage for what some scholars refer to as the country’s “second founding.” It brought to life Lincoln’s promise for a “new birth of freedom” made on the battlefield at Gettysburg, and it re-affirmed the lofty ideals of the Declaration of Independence.

“We rightly revere Washington, Jefferson, Adams and Hamilton—all of the original Founding Fathers,” says Tom Donnelly, senior fellow for constitutional studies at the National Constitution Center. “The 14th Amendment, more than any other provision, suggests how unfinished their work was. For many years, we underplayed the accomplishments of the people who saw Lincoln’s work through. People like Thaddeus Stevens, Charles Sumner and, of course, John Bingham.”

The Radical Republican-controlled Congress, helmed by Charles Sumner in the Senate (center) and Thaddeus Stevens in the House (right), passed the Civil Rights Act of 1866 over President Andrew Johnson’s veto. John Bingham (left) emerged as the main force behind the drafting process for what would become the 14th Amendment.

In January 1863, “the Great Emancipator” began his crusade for the freedom of all Americans with the Emancipation Proclamation. Later that same year and moments after Civil War photographer Mathew Brady shot the background photo documenting Lincoln (circled) at Gettysburg, Pennsylvania, the president would deliver the Gettysburg Address.

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As Gerard Magliocca, a professor of law at Indiana University, recounted in his 2013 book, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment*, shortly after his 1862 electoral defeat, Bingham wrote to U.S. Treasury Secretary and fellow Ohio Republican Salmon P. Chase. He stated that the “limitations of the Constitution upon the states in favor of the personal liberty of all of the citizens of [the] republic black and white [are] soon to become a great question before the people.”

Radical Republicans were able to secure passage of the 1866 Civil Rights Act over Andrew Johnson’s veto, but their feud with the president—whom they would eventually try to remove from office—caused them to look at more permanent ways of enacting their agenda. “The 14th Amendment was the GOP’s opportunity to put the results of the Civil War into the Constitution so they could not be easily changed by subsequent congresses,” says Eric Foner, a professor of history at Columbia University.

Foner argues there were a number of different concerns among congressional Republicans, including some arcane issues that have been lost to history—such as whether former Confederates could hold office. However, Foner maintains the framers were clearly concerned about potential state infringement of the rights of all people, particularly the newly freed slaves.

“It’s so obvious that we forget about it, but the people who wrote it and voted for it expected it to be abided by,” says Foner. “They expected all of the states to follow it.”

Bingham emerged as the main force behind the drafting process for what would become the 14th Amendment. He essentially wrote most of Section 1, which holds: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

According to Magliocca, Bingham had previously submitted drafts that included an explicit anti-discrimination clause and was clear in his belief that the 14th Amendment applied...
the Bill of Rights to the states. As Magliocca argued in his book, one man’s views do not control how the 14th Amendment should be interpreted. Nevertheless, his ideas would become highly influential and would set the stage for a drastic expansion of individual rights.

But not at first.

WHO RULES?

For one thing, the framers of the amendment left open-ended the matter of enforcement. “They didn’t really think it through,” says Foner. “That’s why the fifth section is so vague. They didn’t expect massive resistance to it. They never came up with a way to do it, and the Supreme Court didn’t help.”

Michael Les Benedict, an emeritus professor of history at Ohio State University, argues that the main responsibility for enforcement shifted to the courts—a revolutionary concept at the time.

“Before the Civil War, no one thought of the federal courts as having the main responsibility for protecting individual rights,” says Benedict, who points out that state courts didn’t really perform this role, either.

“The Supreme Court simply did not see its main job to be the protection of individual rights, and there were no civil rights organizations to ask it to,” says Benedict. “When the court did finally do something to protect rights, it was an effort to protect the rights of slave owners to take slaves into the territories in the Dred Scott decision. And that caused an absolute uproar.”

Benedict says that Bingham worded the amendment in a way that gave the federal courts a role in enforcing the 14th Amendment alongside Congress, specifically as insurance if Congress flipped to the Democrats in the future. “If Bingham had not done that, the courts would have had no power to enforce the 14th Amendment,” says Benedict. “Instead, the 14th Amendment virtually imposed the responsibility on the courts to enforce the rights protected by the 14th Amendment. But they did not really want to do so—it was a new obligation they were not used to.”

In the decades immediately following the amendment’s adoption, the Supreme Court seemed to retreat from its enforcement responsibilities. Starting with the Slaughter-House Cases in 1873, the court found that the 14th Amendment only protected rights relating to U.S. citizenship and did not restrict states from utilizing their plenary powers. Justice Samuel Miller found that the first sentence of Section 1 distinguished between citizenship of the United States and citizenship of a state, and that the 14th Amendment only covered the privileges or immunities listed in the Constitution. In his dissent, Justice Stephen J. Field criticized the majority for turning the 14th Amendment into a “vain and idle enactment,” arguing that the amendment protected certain fundamental rights from state intrusion.

Michael Curtis, a professor at Wake Forest University School of Law, finds the court’s interpretation to be puzzling. “The federal privileges and immunities that the court found to be covered by the 14th Amendment were things like protection on high seas and in foreign lands,” says Curtis. “The major reason for having the 14th Amendment is to protect the newly freed slaves, but how many of them are actually going to be out on the high seas or in foreign lands?”

Several years later, the court took a narrow view of incorporation, ruling in United States v. Cruikshank that the 14th Amendment did not apply the Bill of Rights to the states. The Civil Rights Cases of 1883 declared the 1875 Civil Rights Act unconstitutional and limited enforcement of anti-discrimination statutes to states or state actors, exempting private individuals and businesses.

In his dissent, Justice John Marshall Harlan predicted that decision would lead to widespread discrimination against African-Americans and other racial minorities—a prediction that bore fruit as Jim Crow laws became dominant in the South.

OTHER PATHS

Lisa Crooms-Robinson, a professor at Howard University School of Law, argues that, even if you limit the 14th Amendment to the sole purpose of protecting newly freed slaves, there had to be a broad range of rights they had to be entitled to. “The 14th Amendment didn’t necessarily have gender equality in mind, but both men and women were slaves,” says Crooms-Robinson. “As such, the newly freed women slaves would be entitled to certain rights that may not have been contemplated by the framers, such as the right to bodily integrity.”

But the court chose that narrow path. “I wouldn’t say the court was wrong, but there are other, perfectly plausible interpretations of the 14th Amendment that the court could have opted for,” says Foner. “The court could have held that the 14th
Amendment was meant to guarantee basic rights and empower the federal government to make sure people would be able to exercise these basic rights. Instead, over and over again, the court opted for a narrow view of the 14th."

Curtis, meanwhile, believes the court would have been well within its bounds to interpret the 14th Amendment as giving Congress the power to protect the fundamental rights of citizens against political terrorists like the Ku Klux Klan that were acting as private organizations.

"The most disappointing aspect is that these cases could have been decided the same way without reading the Bill of Rights out of the 14th Amendment," Curtis says.

That's not to say that all 14th Amendment cases during the first couple of decades went in favor of the states. When Chief Justice Morrison Waite gavelled to order the case of Santa Clara County v. Southern Pacific Railroad Co. in 1886, he started with an aside that would have major repercussions for the country over the next several decades and beyond. The case, actually several cases consolidated into one, saw railroad companies challenge a California tax under the theory that they were people under the definition of the 14th Amendment and entitled to equal protection under the law.

The point had been briefed by both parties and promised to be a major point of contention during the oral argument, until Waite waved both lawyers off before the argument even started. "The court does not wish to hear argument on the question whether the provision in the 14th Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations," Waite said. "We are all of the opinion that it does."

As a result, over the next several decades, the court would consistently rule against state and federal laws aimed at regulating businesses, including minimum wage and child labor laws.

The Lochner era (named after the 1905 case of Lochner v. New York, which struck down a state maximum work hours law), has been criticized by numerous legal scholars, both liberal and conservative, and fell into disfavor during the New Deal era.

"I think those cases are viewed as a low moment in the court's history," says Deborah Rhode, a professor at Stanford Law School. "It wasn't a very diverse group of justices and did not include any justices who had much personal experience or empathy with the concept of discrimination. But they did have lots of empathy for business interests."

RIGHTS MUSIC
What the early years of the 14th Amendment proved is that it had an accordion quality—expanding or contracting based on the people interpreting it.

"The 14th Amendment can move us forward and also backward," says John Fabian Witt, a professor at Yale Law School. "Equal protection and due process don't necessarily guarantee an upward march toward ever greater freedom. ... We know they can make the world better, and they can make the world worse because they have done both."

The accordion would start to expand over the next 60 years.

In 1938, a commerce power case demonstrated the importance of footnotes. In United States v. Carolene Products Co., Justice Harlan Fiske Stone's majority
opinion almost single-handedly changed the way courts would apply the equal protection clause. In his famed Footnote 4, Stone established the legal principle that laws targeting minorities and other historically disadvantaged groups would have to clear a higher burden in order to be deemed constitutional.

“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the 14th Amendment than are most other types of legislation,” Stone wrote. “Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious ... or national ... or racial minorities, ... whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

Stone’s footnote would become the foundation for the three-tiered approach to judicial scrutiny that continues to exist today: rational basis, heightened scrutiny and strict scrutiny.

And it was a dissent that helped resurrect Bingham's intentions to apply the Bill of Rights to the states via the 14th Amendment. In the years since Cruikshank and the Civil Rights Cases, the court had applied certain “fundamental rights” within the Bill of Rights.
Rights to the states. They include the freedom of speech, press and assembly components of the First Amendment and the Fifth Amendment provision prohibiting the taking of private property without compensation. In the 1940s, Justice Hugo Black started sounding the horn for total incorporation of the Bill of Rights (other than the Ninth and Tenth amendments, which don't list individual rights) to the states. Arguing that all of the rights guaranteed in the first eight amendments were fundamental, Black maintained that they should all be automatically protected against state interference.

In 1947, Black came up on the losing end in *Adamson v. California*, which re-affirmed the decisions of those post-14th Amendment courts in holding that the Fifth Amendment right against self-incrimination did not apply to the states. In his lengthy dissent, Black took the opportunity to resurrect Bingham's ideals. Calling Bingham "the Madison of the first section of the 14th Amendment," Black criticized the majority for refusing "to appraise the relevant historical evidence of the intended scope of the first section of the [14th] Amendment" and, instead, relying on "previous cases, none of which had analyzed the evidence showing that one purpose of those who framed, advocated and adopted the amendment had been to make the Bill of Rights applicable to the states."

As more like-minded justices joined the Supreme Court throughout the 1950s and 1960s, Black's views on incorporation became the basis for a series of opinions that explicitly applied most of the Bill of Rights to the states. Black took a victory lap, of sorts, in the seminal case of *Gideon v. Wainwright*,...
writing for a unanimous court that the Sixth Amendment right to counsel applied to the states. “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours,” Black wrote.

Black may have won the war for incorporation, but he became horrified when his court brethren started using the 14th Amendment to expand the notion of fundamental rights beyond those listed in the original Bill of Rights.

**FREEDOMS AND INTERFERENCE**

The doctrine of substantive due process became dominant on the court as justices found that the 14th Amendment’s due process clause contained a substantive component, as well as the more widely accepted procedural component. These justices held that there were certain fundamental freedoms that were protected from state interference, even ones that weren’t spelled out explicitly in the Constitution.

In *Griswold v. Connecticut* (1965), the court held that an anti-contraception statute violated the right to marital privacy. The majority was divided over the constitutional basis for a right to such privacy, with Justice William O. Douglas arguing the right was implied through several “penumbras” in the Bill of Rights, including the right against self-incrimination and the right to free association. Other justices cited the due process clause of the 14th Amendment, and Justice Arthur Goldberg would cite both the 14th and Ninth amendments in an influential concurrence.

In dissent, Black excoriated the majority for acting like a legislature: “No provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous.”

Several years after *Griswold*, the court expanded on that reasoning in *Roe v. Wade* (1973). “This right of privacy, whether it be founded in the 14th Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, ... is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,” Justice Harry Blackmun wrote in his majority opinion.

Some would argue that the use of substantive due process has been a bridge too far. To textualists like Justices Antonin Scalia or Clarence Thomas, substantive due process simply isn’t supported by the text of the 14th Amendment as it was understood at the time.

And John Harrison, a law professor at the University of Virginia, argues that it doesn’t matter what Bingham and the others believed the 14th Amendment covered. It only matters what they actually wrote. To him, the due process clause focuses on procedure, not substance—otherwise the framers would have said so.

“When you learn that, when something was adopted, the people who drafted it thought it was going to produce a particular result, that’s just evidence,” says Harrison. “They might have made a mistake, might have been assuming something; some things that were true at the time might not be anymore.”

Rhode argues the framers intended for the 14th Amendment to be adapted to changing times and needs, such as in *Brown v. Board of Education*. “Most of the framers did not contemplate it would end segregation, but I think there’s no question that the vast majority of the public, as well as experts in the field, view it as being on the right side of history and that it was an important moment for the Supreme Court to step in with unanimity and forge a path toward greater racial equality,” says Rhode. “The courts can never do it by themselves. They can only serve as a catalyst for change.”

In recent years, the 14th Amendment has been used to invalidate same-sex marriage bans, anti-gay statutes and gender-discrimination policies. It has been
used to enforce congressional statutes and strike down caps on damages. It has been used to apply the Second Amendment to the states, and it has even been used to elect a president. It has been the subject of countless scholarly articles, and its various components continue to be debated today.

“The 14th Amendment really is like a mini-Constitution,” says Witt from Yale. “It touches on so many different issues: the Bill of Rights, equal protection, due process, enforcement, citizenship, etc. It’s like an entire constitution wrapped up into one.”

FUTURE ISSUES

And there still seems to be some unsown ground when it comes to the 14th. During Donald Trump’s presidential candidacy, he challenged birthright citizenship—disputing the idea that natural-born children of undocumented immigrants were U.S. citizens under the 14th Amendment.

“The question of what comes purely from the grant of citizenship in the very first sentence of the 14th Amendment is an issue the courts in the 20th and 21st centuries haven’t really gotten into,” Harrison says. “Is citizenship thick or thin? Does a lot come with it? Or does it just really mean ‘you’re part of a political community and entitled to live here,’ but that’s it?”

Rhode is looking at the opposite end of the life spectrum. “The right to die and to assisted suicide are issues that are going to become increasingly important, given the demographics of the aging baby boomer population,” says Rhode. “I don’t think we have really come to terms with how to deal with end-of-life issues.”

Meanwhile, Crooms-Robinson still sees the original vision of the 14th Amendment as unfulfilled.

“I take the view that the 13th and 14th amendments are linked,” Crooms-Robinson says. “The 13th takes property and makes them persons. The 14th is supposed to take those persons and make them into citizens.

“However, that last transition is still happening and has not been fully realized. The question is: Will we get there?”
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The 1st Amendment doesn’t always protect government workers on or off the job.
High-profile controversies over police shootings, questionable promotions, racial profiling, attacks on law enforcement and race-based incidents have led to an increase in public employees being disciplined for publicly posting commentary deemed offensive or incendiary.

Public employees have been suspended for all manner of speech—supporting the shooting of police officers, lauding officers for shooting citizens, criticizing their students or co-workers, mocking minorities or religions and for a litany of other messages on social media. Consider the following:

• A Nashville, Tennessee, police officer was fired in February after an investigation into a Facebook comment he made about how he would have shot motorist Philando Castile five times instead of four. Castile died last July after a St. Paul, Minnesota, officer shot him four times during a traffic stop.
• A fire captain in Austin, Texas, was suspended in November after posting inflammatory political opinions regarding Hillary Clinton and President Barack Obama on Facebook.
• A Mount Vernon, New York, fire lieutenant was suspended last August for an Instagram post expressing support for Micah Johnson, who killed five Dallas police officers and wounded seven others in a sniper attack.
• A New Rochelle, New York, police sergeant was suspended in August because of a Facebook post criticizing the Black Lives Matter movement and protesters.

The number of such social media cases involving public employees disciplined for posts has been on the rise, observers say.

“I suspect the reason why is that social media has become a uniquely visible and widely used platform for communication over the past decade,” says Daniel Horwitz, a constitutional lawyer in Nashville. “Today, for example, if a public employee posts a racist statement on Facebook or Twitter, the statement can be widely disseminated in a matter of minutes, and the public exposure can be almost instant. Obviously, that wasn’t the case 20 or 30 years ago, so similar incidents became public much less frequently.”

In the past, public employees could engage in inflammatory speech on the telephone or in personal conversations at home or work without those conversations being memorialized. However, when public employees post such statements online for the world to see, there can be negative ramifications.

“These Facebook posts are the new watercooler talk,” says Paul Secunda, a Marquette University law professor whose scholarship addresses the free speech rights of public employees. “Public employers do have the right to discipline employees to maintain discipline,” he says. “Unprofessional rants that are inconsistent with the norms of a police officer can rightfully lead to punishment.”

However, some believe it’s unseemly to allow the government to punish employees for purely off-duty speech created in the privacy of one’s home. Missouri City, Texas-based attorney Larry
Watts represents public employees in free speech cases. “When speech is made off duty,” he says, “whether by voice, gesture, smoke signals, Morse code or Twitter ... the speech should be protected. It is called off-duty or private time.”

**THE MEASURE OF POLICIES**

Some of these public employee social media policies seem overly broad. For example, the police department in Petersburg, Virginia, issued a policy that prohibited any negative comments about the department. One of the provisions provided: “Negative comments on the internal operations of the bureau, or specific conduct of supervisors or peers that impacts the public’s perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law.”

Two veteran police officers, Herbert Liverman and Vance Richards, were punished for making comments critical of the department for promoting young officers who did not have sufficient experience. One of the posts read:

“There used to be a time when you had to earn a promotion or a spot in a specialty unit ... but now it seems as though anything goes and beyond officer safety and questions of liability, these positions have been ‘devalued.’ ”

A three-judge panel of the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, ruled in December in *Liverman v. City of Petersburg*, that the social media policy was too broad. Judge J. Harvie Wilkinson noted the “astonishing breadth of the social networking policy’s language.”

He wrote that “the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers’ freedom to debate matters of public concern.”

The case has been remanded back to the district court, and the plaintiffs have now filed a motion for summary judgment.

The policy was too broad, explains Richmond-based attorney Andrew T. Bodoh, who represents Liverman and Richards. “The policy went so far as to claim that the employees had no free speech protections when they made comments that negatively impacted the department, city or employees,” he says. “The policy treated the police department as having all the power.”

For many years, public employers did have all the power and public employees had no free speech rights. The prevailing view was expressed by then-Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes Jr. in *McAuliffe v. New Bedford* (1892): “The petitioner may have a constitutional right to talk politics, but he does not have a constitutional right to be a policeman.” The prevailing wisdom was that public employees willingly relinquished their free speech rights when they accepted public employment on or off duty.

That view held sway until the late 1960s, when the Warren court changed free speech law for public employees with *Pickering v. Board of Education*. The high court held that Illinois public school teacher Marvin Pickering had a free speech right to send a letter to the editor of his local newspaper critical of the school board’s allocation of money.

Justice Thurgood Marshall wrote: “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.”

The court later refined this public concern and balancing inquiry in *Connick v. Myers* (1983), a case involving renowned New Orleans district attorney Harry Connick Sr. (father of the famous musician), who fired an assistant district attorney for distributing a questionnaire at work that criticized office policies. The court sided 5-4 with Connick, the majority characterizing the assistant DA’s questionnaire as mainly “an employee grievance about internal office policy.”

For years, courts first asked whether a public employee spoke on a matter of public concern or importance. If the speech is merely a private grievance, a First Amendment claim fails, because the speech doesn’t carry much importance for the public at large. If the speech touches on matters of public concern, then the court balances the employee’s right to free speech against the employer’s interests in an efficient, disruption-free workplace.

To determine whether a public employee’s speech is too disruptive, a court asks whether it affects close working relationships, interferes with the employer’s normal operation of business or impairs discipline on the job.

**A NEW THRESHOLD**

The so-called *Pickering-Connick* balancing test served as the legal lodestar for several decades until the U.S. Supreme Court introduced a categorical threshold test. In *Garcetti v. Ceballos* (2006), the court declared that when public employees make statements pursuant to their official job duties, they have no free speech protection at all—even if the speech blows the whistle on alarming governmental corruption. The *Garcetti* decision left many public employees without a constitutional remedy, forcing them to rely on whistleblower statutes, which vary from state to state and may not protect their speech.


Garcetti has had an indelible impact on free speech cases of public employees. In fact, many plaintiffs attorneys refer to the phenomenon of being “Garcettized.” However, Garcetti often doesn’t control public employee online-speech cases, as the employees often are not engaging in official, job-duty speech when they post online comments.

Nonetheless, public employees often lose free speech cases because courts defer to an employer’s judgment that the employee’s inflammatory posts will cause disharmony or make the public view the public employer with derision or disrespect.

“Public sector employees still find themselves in the Pickering-Connick-Garcetti line of cases,” Secunda says. “It is very difficult to win these cases.”

The Supreme Court offered a glimmer of hope to public employees in its most recent relevant decision, Lane v. Franks (2014). In that case, the court ruled that public university officials violated the First Amendment when they disciplined a college administrator for his truthful court testimony about financial improprieties involving an Alabama state representative receiving monies from the college.

“Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes,” wrote Justice Sonia Sotomayor. “That is so even when the testimony relates to his public employment or concerns information learned during that employment.”

Secunda believes that Lane “cabins Garcetti and makes clear the employee speech must be pursuant to official duties and not just speech about their work. This may signal the pendulum starting to slowly swing back in favor of public employee free speech.”

WHAT'S PROTECTED SPEECH?

The legal landscape is less than clear as to when public employees can vent online and avoid problems at work. “I think that courts increasingly defer to government’s efforts to control its employees’ speech—both on duty and off duty—to protect its own expression,” says University of Colorado law professor Helen Norton. “In many of these cases, courts and employers appear concerned not about what
such off-duty speech reflects about the worker’s job performance but instead about what it might lead the public to attribute to the employer.”

Secunda draws the distinction. “Generally, when public employees vent on Facebook or another social media platform, they are not speaking pursuant to their official duties,” he says. “They are speaking more like Marvin Pickering did when he wrote his letter. In other words, Facebook posts are the 21st-century equivalent of Pickering’s letter.”

But what should happen when a public employee vents frustration on Facebook and that venting goes viral or causes a problem at work?

“Yes, public employees can and should be able to vent,” says Exeter, Rhode Island-based attorney J. Curtis Varone, who practices law in that state and Maine. “However, when the venting shows a racial animus—or gender, ethnicity, religion, disability, etc.—that is inconsistent with the ability to serve everyone in the community. They have identified themselves as having a bias that is inconsistent with what we expect from our public employees. This goes to both sides. Minority employees who harbor and espouse hate should be treated the same as white employees who harbor and espouse hate.”

Experts acknowledge that when a public worker’s speech creates actual disruptions on the job, bosses should have the ability to mete out discipline. “A public employer should be able to discipline a public employee for online speech when the speech is made on work time, on the employer’s electronic hardware, and is actually disruptive of ongoing processes or a threat to public safety,” Watts says.

**COMMUNITY CONCERNS**

When a public employee’s posts create a real fear of backlash from the community, courts often defer to the employer’s judgments. “For example, I think such concerns are especially strong where a police officer’s off-duty speech—on social media or elsewhere—undermines a police department’s ability credibly to communicate its commitment to evenhanded law enforcement regardless of race,” Norton explains. “For example, consider the message sent to the public if a police chief were to march in a Klan parade while off duty—or sends a series of racist tweets.”

“Employers have an interest in distancing themselves from hateful speech, racist speech or other speech that would undermine the effectiveness of the workplace,” Nashville lawyer Horwitz says. “These concerns are also especially heightened for first responders and other public employees who require the public’s complete trust that they will discharge their duties faithfully and impartially without regard to factors like a person’s race, gender or sexual orientation.”

However, Horwitz explains that “problems arise when an employer
punishes an employee to promote a personal agenda, when discipline is more severe than necessary, or when discipline is meted out inconsistently for similar offenses.”

An example might be when “an offensive comment about Donald Trump supporters is treated differently from an offensive comment about Black Lives Matter supporters,” says Horwitz. “In other words, the onus should be on the employer to demonstrate that the effectiveness of the workplace was actually undermined in some meaningful way as a consequence of an employee’s decision to speak out.”

Professor Norton believes the courts should impose some duty on government employers to demonstrate how off-duty employee speech actually harms the government’s job operations.

“Courts’ unconstrained deference to government’s ability to constrain their workers’ off-duty speech could permit public employers to punish workers for any off-duty speech to which the public might object without any meaningful relationship to the government’s effectiveness,” she says.

However, the 4th Circuit’s decision in Liverman may signal a trend of courts closely examining public employers’ social media policies. This decision is important because, like Sotomayor in the 2014 Lane decision, it recognizes the importance of public employees’ speech to the marketplace of ideas.

“Public employees typically are the people that have the knowledge and the experience to speak as experts on a lot of these important issues,” Bodoh says. “You wouldn’t want me as a lawyer acting as your dentist. We the public want the people with the most knowledge to speak on matters of public policy.”

“I would love to see more robust protections introduced to safeguard whistleblowers and protect public employees from discipline when they have communicated with elected officials or the press,” Horwitz adds. “I’d love to see more states award employees automatic treble damages and attorneys’ fees whenever a court determines that they were disciplined improperly for engaging in protected speech. Provisions of this nature should help deter employers from engaging in questionable disciplinary practices while simultaneously helping to offset the chilling effect that is created by the average employee’s inability to afford protracted litigation.”

David L. Hudson Jr., a regular contributor to the ABA Journal, serves as the ombudsman for the Newseum Institute’s First Amendment Center.

“Employers have an interest in distancing themselves from hateful speech, racist speech or other speech that would undermine the effectiveness of the workplace.”

Nashville, Tennessee, lawyer

Daniel Horwitz
CONGRESS HAS BEEN SILENT ON GUNS—but states haven’t. So change is on the horizon.
Even after the Dec. 14, 2012, shooting in which 20 children and six adults were killed at Sandy Hook Elementary School in Newtown, Connecticut—when prognosticators proclaimed that this was the outrage that would make Congress take action—federal legislators were unable to pass a single new gun law.

States, however, became hives of activity. As state legislators passed more and more laws that affected gun use and ownership, one could reasonably predict which would impose restrictions on gun rights and which would remove them based on whether the state was red or blue.

Take the red state of Georgia. In 2014, it watered down its law that permitted religious institutions to ban guns in their facilities. That same year, progressive California trended the opposite way, enacting background checks for ammunition purchases.

However, Congress might soon enter the fray. President Donald Trump’s election, along with Republicans’ seizure of control of the U.S. Senate and continued control of the House of Representatives, bodes well for gun-rights advocates and ominously for those who seek more federal legislation that curbs gun rights.

“Everything’s different now,” says Adam Winkler, author of *Gun Fight: The Battle Over the Right to Bear Arms in America*, who teaches constitutional law with a specialty in the Second Amendment at the UCLA School of Law. “A lot of people were expecting that Hillary Clinton would win the White House. That would mean a continuation of more of the same—in a sense, a White House
committed to gun control and a Republican House committed to gun rights, with a stalemate ensuing and no significant legislation passed.

With Trump in the White House, “we’re going to see a liberalization of America’s gun laws,” Winkler says. “The National Rifle Association and Congress are no longer on the defensive but on the offensive. They’re no longer trying to defeat Barack Obama’s agenda and putting their own agenda on the back burner. The NRA has a very clear, affirmative agenda it’s going to pursue and likely going to get enacted.”

It’s the moment gun proponents have been waiting for. Michael Hammond, legislative counsel for Gun Owners of America in Springfield, Virginia, says nationwide concealed carry reciprocity—which would require all states to recognize gun owners’ right to carry concealed weapons as permitted by their home state—is the top priority for his group and the NRA, which did not respond to interview requests. And that’s just for starters.

ALL OVER THE MAP

Those who track and study gun laws in the United States say the slaughter of elementary school children at Sandy Hook rattled many Americans in a way other mass shootings never did. State after state reacted by legislating gun use—although not always restricting it.

“Many people feel nothing changed after Newtown, but that’s not true,” Winkler says. Almost half of Americans live in states that have had new and restrictive gun control laws enacted since Newtown, according to Winkler. “Before then, the Democratic Party had sort of given up on gun control. It was considered a loser,” he says. “In 2008 and 2012, Barack Obama didn’t talk about gun control, and that’s remarkable given how central gun control became to his identity. He staked out the issue in December 2012, a month after his re-election, and it was fed by a steady diet of mass shootings and horrific incidents with firearms after then.”

The post-Newtown gun-control momentum also stems from the re-emergence of former New York City Mayor Michael Bloomberg, Winkler notes. Before Newtown, he funded several gun-control groups, including Mayors Against Illegal Guns and Moms Demand Action for Gun Sense in America. Then in 2014, Bloomberg launched the umbrella organization Everytown for Gun Safety, under which those entities would operate going forward. He also committed $50 million of his personal wealth to building grassroots support for those efforts.

“The Everytown gun violence program is essentially a Michael Bloomberg production, and that has created an economically powerful and relatively strategically sophisticated pro-gun-control lobby group as a permanent and sustained presence,” says Franklin Zimring, a professor at the University of California at Berkeley School of Law. “It’s matching the NRA, but it still has a long way to go to fully match that power.”

Gun-control advocates have indeed had successes. The San Francisco-based Law Center to Prevent Gun Violence, which tracks and analyzes gun laws nationwide, reports that more than 160 laws that restrict gun use or ownership were passed in 42 states and the District of Columbia after Newtown. Among the strongest is New York’s SAFE Act, passed in 2013. It includes provisions that broaden the definition of assault weapons to include more firearms and bans sales of gun magazines with a capacity of more than seven rounds.

“We’ve seen an unprecedented wave of smart gun laws being passed, especially since the tragedy at Newtown,” says Hannah Shearer, a staff attorney at the law center. In March 2016, the group merged with the Americans for Responsible Solutions Foundation, an entity founded by former U.S. Rep. Gabrielle Giffords and her husband, retired Navy Capt. Mark Kelly, after she survived a gunshot wound to the head. “That includes states that are very conservative.”

The scope of new gun-control measures is broad. “We’re seeing a lot of states try to step up and close the loopholes Congress failed to close after Newtown,” Winkler says. They include universal background checks of all buyers; bans on so-called assault rifles and high-capacity magazines; and restrictions on what gun-control advocates consider especially dangerous weapons, such as assault weapons.

“A number of states have also passed laws for family members worried about someone going through a mental health crisis that gives them the ability to report that to local police and possibly take someone’s firearms away temporarily,” Winkler says. “Several states have also strengthened domestic violence bans. There are more prohibitions on people under restraining orders or who’ve been convicted of domestic violence, even in states where you wouldn’t expect gun control to pass.”

Louisiana, for example, is among the states that have passed laws to prevent people convicted of domestic abuse from carrying a concealed weapon.

“That type of law seems to have a lot of, or as many, NRA members politicking against it,” says Melissa Hamilton, a visiting criminal law scholar at the University of Houston Law Center. “Even in
amended their gun laws to be more pro-Second Amendment. I don’t normally agree with Adam Winkler. But he recently said there was a very small number of states that are anti-gun, and that everybody else seems to be moving in the other direction. I agree with that.”

**CULTURE CLASH**

The division among the states on gun regulations isn’t likely to change anytime soon. That’s in part because of how they shake out culturally and because the makeup of their legislatures isn’t shifting considerably.

States are “all over the place on gun control,” Hamilton says. “A few are doing nothing at all. Those are primarily states with smaller populations and more rural communities. Take North Dakota. I haven’t seen it on the map doing anything. It’s the kind of environment in which residents have had guns but not necessarily for personal protection; they’re generally ranchers and people who need and use guns to kill predators or for meat.”

Hamilton’s research has led her to conclude that the state divide depends on factors such as whether a state has urban populations with heavy drug sales and gun violence, as well as how many of the state’s residents are hunters and use guns for legitimate reasons.

“I’m a former police officer, and I see the Second Amendment and gun control through the eyes of having been on the street and having a gun on my hip,” Hamilton says. “You have different cultures as well as politics. As you can imagine, red states are more likely to be affirmatively passing laws allowing greater use of guns. The more blue states are on the forefront of passing restrictions.”

Darrell A.H. Miller, a professor at Duke University School of Law who analyzes the Second Amendment from a constitutional law perspective, generally agrees. “It’s fair to say that if you live in a red state and you have most of the branches of the state government controlled by Republicans, those states have tended to loosen their firearms regulations,” he says. “ Whereas if you live in a blue state, those states have tended to tighten them up—not uniformly, and there are always exceptions. There have been states, such as Arizona, that had pro-gun legislation passed and then vetoed by a Republican governor. I think it’s fair to say gun politics very much mirrors the divided politics of the United States.”

None of that is likely to change based on last November’s election results. For example, the gun-control lobby succeeded in getting voters to approve universal background checks in Nevada (although the FBI and the state attorney general determined in December that the measure could not be enforced). But gun-rights advocates beat back a similar effort in Maine. “By and large, the state election results will repeat the emerging trend of the last six years, and that is a move to Republicans having about two-thirds of the state governorships and holding about 70 of the 98 partisan legislative bodies,” Hammond says. “That trend hasn’t reversed, much to Democrats’ moaning and groaning. I think we’ll continue to have that disparity.”

Winkler’s prediction is growing polarization among the states. “Many will increasingly push to make their laws more permissive,” he says. “They’ll do things like eliminating permitting for concealed carry and allowing guns on college campuses. There’s an aggressive gun-rights agenda, and it’s being pursued in many states. And there’s a very active gun-control agenda, and it’s being pursued, too.”

Another factor affecting the direction of state gun legislation has been mass shootings, according...
to an October 2016 working paper, *The Impact of Mass Shootings on Gun Policy*. Michael Luca, an assistant professor of business administration at Harvard University, conducted the study with his colleague Deepak Malhotra and doctoral student Christopher Poliquin.

They concluded that mass shootings can lead to significant policy responses, and that policymakers might use them as a chance to propose bills that are consistent with their ideology.

To reach their conclusions, Luca and his colleagues analyzed the effects of shootings in which four or more people, aside from the perpetrator, perished in an incident unrelated to gangs, drugs or other criminal activity. Those types of shootings, they found, accounted for about 0.13 percent of all gun deaths and 0.34 percent of gun murders between 1989 and 2014. But a single mass shooting leads to a 15 percent increase in the number of firearms bills introduced within a state in the year afterward.

“This effect is largest after shootings with the most fatalities—and holds for both Republican-controlled and Democrat-controlled legislatures,” according to the study.

The types of laws enacted depend on the party in power.

“Republicans are more effective at systematically loosening laws than Democrats have been at systematically tightening them,” Luca says. In states controlled by Republican legislatures, a mass shooting increases the number of new laws that loosen gun restrictions by 75 percent. However, the corollary isn’t true. The researchers found no significant effect of mass shootings on laws enacted by state legislatures controlled by Democrats.

“Certainly, there are high-profile examples of states with legislatures controlled by Democrats tightening gun laws in the wake of a mass shooting,” Luca says. “But it’s not a statistically significant relationship. The effect we see for Republicans we don’t see for Democrats.”

Luca doesn’t have a scientific answer for why that’s the case yet, although he has a theory.

“My intuition is that there’s more of a systematic push by NRA-backed legislators in the wake of mass shootings to loosening gun laws,” he says.

“It isn’t that legislators are sitting there saying, ‘How are gun fatalities trending over time, and what should we do about it?’” Luca says. “It’s that there’s a mass shooting, and that opens a policy window. I think Republican

“THERE’S AN AGGRESSIVE GUN-RIGHTS AGENDA, AND IT’S BEING PURSUED IN MANY STATES. AND THERE’S A VERY ACTIVE GUN-CONTROL AGENDA, AND IT’S BEING PURSUED, TOO.”

ADAM WINKLER, UCLA SCHOOL OF LAW

VIRGINIA-BASED GUN GROUP LEADS THE CHARGE

THE TOP PRIORITY FOR THE LOBBYING GROUP GUN OWNERS OF AMERICA IS MAKING CONCEALED CARRY RECIPROCITY A NATIONWIDE MANDATE. THIS WOULD REQUIRE STATES TO RECOGNIZE GUN OWNERS’ RIGHT TO CARRY CONCEALED WEAPONS AS PERMITTED BY THEIR HOME STATE.
legislators are effective at turning that into legislative action.”

THE WILL OF LEGISLATORS
In contrast to the states, Congress now appears more unified on gun issues. Some members already have launched efforts to reshape the nation’s pro-gun laws.

It took three days into the new year for Rep. Richard Hudson, R-N.C., to introduce H.B. 38, the concealed carry reciprocity legislation advocated by the NRA and Gun Owners of America. That same day, Rep. Thomas Massie, R-Ky., introduced H.B. 34, which would repeal the Gun-Free School Zones Act of 1990.

Shearer admits the congressional election results have made the work of the Law Center to Prevent Gun Violence more difficult.

“Our operating assessment is that, federally, an uphill battle to pass the kinds of bills we want to pass has gotten harder,” she says. “We’re concerned that Republicans in Congress are trying to introduce bills that are very dangerous. They’re trying to push through dangerous legislation on the state level, and we might see that in Congress, as well.”

Is there any chance Congress will put gun issues on hold while it digs in on other priorities? Hamilton from the University of Houston thinks it’s possible because the electorate was so fractured in 2016.

She also interprets the actions of President Trump and Congress so far as indicating they have other priorities.

“When I’m reading the political headlines, nobody’s talking much about gun rights anymore,” she says. “Also, the NRA has a whole lot of Republican candidates in office, and it doesn’t really have pull in trying to force legislation anymore because those people have already been in office.”

Miller from Duke University sees the landscape differently.

“Without question, we’ll see congressional action,” he contends, referring to the quick introduction of the concealed carry reciprocity bill. “It has a realistic chance of getting through the House. Whether it would be filibustered in the Senate is something I don’t know. I can imagine a lot of pro-gun legislation being written and advanced in the next four years, and certainly in the next year or two.”

That’s also Winkler’s expectation. “I think there’s no chance Congress stays its hand on these issues,” he predicts. “I think you’ll see national reciprocity of concealed carry. Donald Trump has already said he supports the legislation.” He thinks Congress can pass it “pretty quickly.” Winkler also expects a rollback of Obama’s gun-related executive actions. “The truth is that he wasn’t able to get much done,” Winkler says. “But anything he did, the NRA will try to get removed from law.”

That’s another one of the goals of Gun Owners of America. “We’ll be looking at pushing back the nasty anti-gun stuff and repealing Obama’s excessive executive actions, like trolling Social Security to take away guns from people whose checks are sent to guardians,” legislative counsel Hammond says. “All of the anti-gun stuff that Obama has tried to do by executive fiat will be repealed.”

That was Hammond’s prediction in January. And by February, the Republican Congress had undone that very order, reversing an Obama-era regulation requiring FBI background checks for gun owners who received Social Security disability benefits because of a mental health condition, possibly preventing them from buying firearms.

Miller also is unwilling to confidently predict wins for gun-rights advocates, starting with concealed carry reciprocity. “If anything, predictions have been shown to be a complete fool’s game this last election,” he says. “Who knows what will happen?” Miller asks. I think it’s fair to say the NRA sees an ally in Trump and Republican control of both houses of Congress. And there are vulnerable Democrats in red states who otherwise might want to oppose broadened gun rights.

So Republicans can peel some of them off to avoid a filibuster, but maybe not enough.

FULL-COURT PRESS
Increased legislative activity is sure to beget increased legal scrutiny.

In District of Columbia v. Heller in 2008, the U.S. Supreme Court struck down a D.C. law that banned possession of handguns in the home. That marked the first time the high court held that the Second Amendment ensured a person’s right to keep and bear arms for self-defense in the home. In McDonald v. City of Chicago in 2010,
the court invalidated the laws in the city and suburban Oak Park that effectively prohibited handgun possession by almost all private citizens.

Both were 5-4 opinions, with the late Justice Antonin Scalia, who died in February 2016, in the majority. And *Heller* left open many questions—the biggest being: Can the Second Amendment protect a right to carry firearms in public, and under what circumstances?

Yet since those two opinions, courts have let stand most gun-control laws passed in recent years. “There have been more than 1,090 decisions since *Heller*, and 94 percent of smart gun laws have been upheld,” says Shearer, whose organization also tracks Second Amendment challenges to gun laws in state and federal courts.

The Supreme Court has shown little appetite to provide further guidance on the reach of the Second Amendment. It has turned down numerous challenges.

In 2014, it declined to hear *National Rifle Association v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, which challenged the ban on selling guns from federally licensed firearms dealers to people under age 21. It also declined that year to hear *National Rifle Association v. McRae*, a case that sought to address whether the right to bear arms applies outside the home.

“Paul Clement, the uber Supreme Court advocate, filed a brief on behalf of the NRA in the ATF case arguing the court had to get involved because the lower courts were doing a massive assault on *Heller*,” Winkler says. “The justices turned the case down.”

The court’s only pronouncement on the topic since *Heller* came last year in *Caetano v. Massachusetts*, which involved the possession of stun guns.

In a per curiam and unanimous decision, the Supreme Court “sent the case back for reconsideration, saying the lower court didn’t apply *Heller* properly,” Winkler says. “I see that as a signal from the court suggesting it’s not interested in overturning *Heller*. They expanded it and applied it to a new case with new facts.”

Why has the court declined further review of gun laws? “The most obvious explanation is that there haven’t been major splits in the federal circuits,” Winkler says. “However, let’s be clear. When the justices really want to rule on an issue, they won’t wait for a circuit split. They don’t need and don’t require one. They’ve had a number of opportunities to take cases to clarify the scope of the Second Amendment, and they’ve turned them down. I think that suggests they’re not interested in engaging the issue at this particular point.”

Berkeley Law’s Zimring agrees. “That tells you that firearms control issues and Second Amendment issues aren’t the absolute top priority of America’s supreme constitutional court,” he says. “*Heller* is very important to people who care deeply about guns. But I’m not sure a lot of those people are on the Supreme Court.”

**THE FUTURE OF GUN LAWS**

The confirmation of Trump nominee Judge Neil Gorsuch to the Supreme Court may or may not change the status quo. Although Hammond admits it’s a bit of a guessing game predicting how a nominee will rule in the future, he says his research on Gorsuch’s firearms-related rulings suggests he would be as pro-gun as Justices Scalia and Clarence Thomas.

Winkler has a similar take. “I think he’s going to be pretty strongly in favor of a robust view of the Second Amendment,” Winkler says, pointing out Gorsuch’s position in the 2012 case *United States v. Games-Perez* as “a very powerful statement of his views on the Second Amendment.”

“I don’t think he’s a gun nut,” Winkler says. “I don’t think he’s going to vote to overturn bans on felons possessing firearms. But we don’t know how he’ll view many of the issues that might come before the court. Does he believe the Second Amendment protects the right to carry a gun in public?”

If so, can the government put a permit on that? And what kind of permitting system can government have? Does he believe bans on assault weapons are permissible? We don’t have much to go on with Judge Gorsuch.”

As with any presidency, another vacancy also could arise. “I’d guess within the next four years, we’re probably not only going to replace Scalia but we could also replace maybe Ruth Bader Ginsburg, Stephen Breyer and Anthony Kennedy,” Hammond speculates. “I’m guessing we’ll come out of this administration with a more useful *Heller*. It was a more theoretical right, but that would permit a follow-up decision that will allow it to be used to challenge laws like New York’s SAFE Act and California’s restrictions.”

Pure gun-rights issues aren’t the only matters the high court might face in the future. Miller is keenly interested in cases that could pit gun rights against free speech rights. For example, the Florida case *Wollschlaeger v. Governor of Florida*—nicknamed “Docs v. Glocks”—involved a 2011 state law, the Firearm Owners’ Privacy Act, that prohibited doctors from asking patients about guns in their home.

In February, the 11th U.S. Circuit Court of Appeals at Atlanta determined that the law did not implicate the right to bear arms in *Wollschlaeger*. But it raised a flag concerning the First Amendment. In a 10-1 decision, the court decided that the law infringed on doctors’ freedom of speech. Although the case was remanded back to the district judge, it could still be appealed to the Supreme Court.

In a similar case in 2016, *Glass v. Paxton*, three University of Texas at Austin professors argued that their free speech rights would be chilled by allowing implementation of the 2015 state law that permits students to bring guns into college classrooms. In August, a federal court denied the professors’ request to block the law’s implementation.

G.M. Filisko is a lawyer and freelance writer based in Chicago.
BY STEPHANIE FRANCIS WARD

PROFITABLE DELAY

ARIZONA SUMMIT OFFERS STIPEND FOR AT-RISK GRADS TO PUT OFF EXAM AND GET EXTRA BAR PREP
A year ago, Kelly Blake was stressed out. The Arizona Summit Law School graduate was studying for the state bar examination and suspected her chance of passing was about 50 percent.

“A bar coach told me that if I was having doubts, there was this program coming up,” says Blake, referring to the school’s Legal Residency Program. To participate in it, Arizona Summit graduates would delay taking a bar exam; in exchange they got four months of specialized bar review courses, optional law clerk positions and a stipend of about $36,000.

The program’s lead instructor, Alan Mamood, tells the ABA Journal that the program is open to all Arizona Summit graduates planning to take a bar exam, but the school does not encourage it for those who appear ready for the test.

Blake decided to join the program. The January 2015 graduate and 35 other participants prepared for the February 2017 bar exam.

“I had studied all summer for the bar, and I wanted to take it. But I had not secured a job, and I have four children,” says Tracy Gillespie, another graduate in the pilot program. “It’s a great opportunity the school offers for those people who, for whatever reason, are not able to really get the full studying the first time around.”

BAR HELPER

But what may be a career saver for some law students has come under fire from some law school critics who see it as a way to change the bar-passage rates law schools are required to report under ABA accreditation standards. The cynical view is that money spent on the pilot program could be a cost of doing business for the law school, which has 279 students and charges $45,424 for annual, full-time tuition.

A for-profit law school that is part of the InfLaw System, Arizona Summit had a bar-passage rate of 24.6 percent for its July 2016 first-time test takers.

In March, the school was placed on probation by the council of the ABA Section of Legal Education and Admissions to the Bar; it will be required to take remedial actions. The council will examine the bar-pass rate for first-time test takers this February and July during a compliance hearing in November.

Donald Lively, the law school’s president, objects to accusations that his school’s Legal Residency Program is meant to be a tool to deceive people.

“No one is bought off. All we’re trying to do is come up with an innovative solution for what has been a very vexing problem,” Lively says. “We bring in students who are in catch-up mode. They’ve gone to schools in less advantaged communities, and many have not had the same level of quality education as people who grew up in more fortunate circumstances.”

From August to December, program participants attended lectures four days a week, focusing on writing and strategic approaches to multiple-choice questions. After class and on Fridays, they spent up to 20 hours a week clerking for various legal offices. Their stipend came from the law school, Lively says, not lawyers who benefitted from the work. There was no cost to participants. The classes and clerking stopped in January so participants could devote themselves to bar study. All participants interviewed by the Journal opted for online bar review.

“I am feeling very optimistic,” Mamood says. “The level of growth the majority of students displayed from the beginning to end was substantial.”

It’s not uncommon for a law school to suggest that a student postpone a bar exam, if there’s a sense that he or she is not ready, say legal academics; but paying a stipend for it is novel. ABA accreditation standards do not appear to prohibit the stipends; however, if a significant portion of a class participated in the program, it could raise questions about whether the institution was in compliance with Standard 501, which states that schools should not admit people who don’t appear capable of completing its program and being admitted to the bar.

“Schools at the bottom tiers take more at-risk students, and it’s entirely possible you have difficulties trying to accomplish all of your goals in three years,” says University of Maryland professor Russell McClain, who directs the academic achievement program at the law school.

“It’s unquestionably the obligation of a law school to ensure that if you admit students, you give them the support that they need,” McClain says. “For students at risk, this could give them additional time to master the skills they need to become contributing members of the bar.”
LEADING ROLES
Candidates for president-elect, Board of Governors show strong ABA roots
By Lorelei Laird
If ABA president-elect candidate Robert M. Carlson looks familiar to House of Delegates members, there’s a good reason for that: He’s been there before.

Carlson, a partner at Corette Black Carlson & Mickelson in Butte, Montana, is seeking the president-elect position three years after ending his stint as chair of the House of Delegates. His ABA involvement goes deep: He’s been part of the House since 1999 and has been involved in many committees. Currently, he serves on the council of the Section of International Law and co-chairs the Section of Litigation’s ABA Resource Committee.

Carlson has practiced law for more than 35 years with the same eight-lawyer firm in Butte, which also is his hometown. He says he’s seen the value that the ABA provides to lawyers concerned about “the nuts and bolts of law practices”—law practice management, practice area updates and legal news. Through his ABA involvement, he says, he’s also seen how “the ABA and our profession make a difference” in wider ways.

“Our message is more relevant than ever,” he says. “Who in our profession does not believe in the work we are doing for our veterans, the work we do to advocate for the rule of law, our tangible support for legal services and access to justice, and the work we do to support human rights?”

Carlson will stand for election as president-elect unopposed at the ABA Annual Meeting in New York City in August. After confirmation, he will become president in August 2018. He would succeed current president-elect Hilarie Bass, who is co-president and a shareholder at Greenberg Traurig in Miami.

Also up for consideration in August are 12 uncontested candidates for members of the Board of Governors. They are running for seats that represent geographic districts, ABA sections or divisions. Each will serve a three-year term.

ROBERT M. CARLSON
PRESIDENT-ELECT

W. ANTHONY JENKINS
DISTRICT 2

Member and chief diversity officer of Dickinson Wright in Detroit. Currently serves as vice-chair of the House's Committee on Issues of Concern to the Legal Profession. Member of the council of the ABA Fund for Justice and Education, the Standing Committee on International Trade in Legal Services, and the Standing Committee on Bar Activities and Services. Former member of the Standing Committee on the Federal Judiciary. Received service awards from the ABA Commission on Multi-Jurisdictional Practice and the ABA Committee on Prepaid Legal Services. Sustaining life fellow of the American Bar Foundation. Former member of the Standing Committee on Technology and Information Systems. Current Vermont state chair and fellow of the American Bar Foundation. Past president of the Vermont State Amateur Hockey Association. Received his JD from the New York University School of Law in 1980.

FRITZ LANGROCK
DISTRICT 1


LEE DeHIHNS III
DISTRICT 6

Retired from Alston & Bird in Atlanta. Currently special adviser to the ABA representative to the United Nations. Member of the House's Committee on Drafting Policies and Procedures. Former chair of the ABA Sustainable Development Task Force. Delegate to the House's executive committee of the Section of Environment, Energy and Resources. Past chair of the ABA Section Officers Conference. Received his JD from the Catholic University of America's Columbus School of Law in 1974.

ALLEN C. GOOLSBY
DISTRICT 4

Special counsel to Hunton & Williams in Richmond, Virginia. Currently serves on the Board of Governors’ Board Governance Committee and the Nominating Committee’s steering committee. Chairs the ABA AEFC Pension Plan Administration Committee. Served on the Board of Governors (2011-2014). Life fellow of the American Bar Foundation. Past president of the Virginia Bar Association. Received his LLB from the University of Virginia School of Law in 1968.
RANDALL D. NOEL
DISTRICT 12

Attorney at Butler Snow in Memphis. Currently a member of the House’s Technology and Communications Committee and the Nominating Committee. Served on the councils of the Section of Litigation and the Standing Committee on the Federal Judiciary. Past president of the Tennessee Bar Association and the Southern Conference of Bar Presidents. Life fellow and past Tennessee state chair of the American Bar Foundation. Received his JD from the University of Mississippi School of Law in 1978.

DAVID L. BROWN
DISTRICT 10

Partner at Hansen, McClintock & Riley in Des Moines, Iowa. Member of the House of Delegates since 1997. Currently serves on the Standing Committee on the American Judicial System. Served on the Standing Committee on the Federal Judiciary (2010-2013). Current Iowa state chair and life fellow of the American Bar Foundation. Received the Iowa State Bar Association’s Award of Merit in 1999, the President’s Award in 2005 and the Keeper of the Flame Award in 2014. Received his JD from Drake University Law School in 1975.

LYNNE B. BARR
BUSINESS LAW SECTION

Of counsel at Goodwin Procter in Boston. Currently a member of the ABA Task Force on Gatekeeper Regulation and the Profession. Past chair of the Business Law Section and former member of the section’s council. Former editor-in-chief of the section’s quarterly publication, The Business Lawyer. Former member of the ABA Task Force on Financial Markets Regulatory Reform. Life fellow of the American Bar Foundation. Received the section’s Jean Allard Glass Cutter Award in 2005. Received her JD from George Washington University Law School in 1975.

MICHAEL H. BYOWITZ
SECTION OF INTERNATIONAL LAW

Of counsel at Wachtell, Lipton, Rosen & Katz in New York City. Currently a member of the Standing Committee on Membership. Elected this year to the Board of Governors’ 2017 Annual Meeting Committee. Former chair of the Section of International Law. Received the section’s Lifetime Achievement Award in 2011. Life leadership fellow and former New York state co-chair of the American Bar Foundation. Received the Outstanding State Co-Chair Award from the ABF Fellows in 2012. Received his JD from the New York University School of Law in 1976.
C. EDWARD RAWL JR.
YOUNG LAWYERS DIVISION

Senior counsel at the Boeing Co. in Charleston, South Carolina. Currently on the council of the Young Lawyers Division and former director of membership. Served as the YLD’s District 10 representative for South Carolina and the U.S. Virgin Islands (2011-2013). Received a Compleat Lawyer Award in 2016 from the University of South Carolina School of Law, where he earned his JD in 2007.

TOM BOLT
LAW PRACTICE DIVISION


EILEEN KATO
GOAL III WOMAN MEMBER-AT-LARGE

Retired in 2016 as a judge on the King County District Court in Seattle. Member of the Standing Committee on Meetings and Travel. Current Washington state co-chair and life fellow of the American Bar Foundation. Former chair of the ABA Judicial Division’s National Conference of Specialized Court Judges. Former member of the ABA Justice Kennedy Commission on Sentencing. Former president of the District and Municipal Court Judges’ Association. Received her JD from the Santa Clara University School of Law in 1980.

MYLES V. LYNK
GOAL III MINORITY MEMBER-AT-LARGE

Professor at Arizona State University’s Sandra Day O’Connor College of Law. Current chair of the Standing Committee on Ethics and Professional Responsibility. Former chair of the Section of Civil Rights and Social Justice (then Individual Rights and Responsibilities) and the Standing Committee on Professional Discipline. Former national chair of fellows of the American Bar Foundation. Former president of the District of Columbia Bar. Received his JD from Harvard Law School in 1976.
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As the ABA Center on Children and the Law approaches middle age, it has become a prominent feature of the association’s public face. But it also is changing.

The most significant change has been Howard Davidson’s retirement in 2015. He was brought in by the association in 1979 as director of the new venture. For the center’s first 36 years, he was its driving force. Last July, Prudence Beidler Carr was named director, bringing with her a lengthy record of representing and advocating for children in court and foster care systems, as well as work in government, policy and fundraising.

“Howard left a solid organization in place, and it’s a huge testament to the center’s past that most of the staff have been here over 15 years,” Carr says.

The center primarily provides how-to help and training for lawyers, judges, welfare and protective agencies, and others. It does not engage in legal representation.

To many, Davidson’s focus and force were so instrumental in its growth and development that he embodied the center. But the center grew organically because over the years he hired staffers with deep backgrounds and hands-on experience in providing justice for children in matters of abuse and neglect, as well as other safety and welfare issues.

“Howard was really good at big-picture thinking at the intersection of law, policy and practice—and he could see things coming down the road and how the center fit in,” says Anne Marie Lancour, the center’s associate director and director of state projects who’s been at the ABA for more than 24 years. “He gave us room to grow our expertise and build out the center.”

CLEAR CAREER FOCUS

Carr’s history of advocating for children began during her four undergraduate years at Harvard University, when she directed a K-5 after-school program in a low-income area of Boston. While she was a student at Northwestern Pritzker School of Law, Carr worked on children’s issues in the Illinois attorney general’s office, with the Office of the Cook County Public Guardian, and in the county’s juvenile detention center. The list of her activities as an advocate for children grew after graduation in both her legal work and her nonprofit efforts.

One of her jobs as a lawyer wasn’t child-welfare specific, although it sometimes dealt with immigration issues that concerned children. Carr was in the general counsel’s office of the Department of Homeland Security, where she eventually managed a $30 million budget and an office of 150 lawyers. More recently, while her husband worked in the U.S. Embassy in Mexico City, Carr was involved with the Juconi Foundation, an organization that provides intensive therapeutic support to children who live on the streets.

The capability of the Center on Children and the Law to attract grant funding “was eye-opening to me,” Carr says. “I look forward to building on that very solid grant-funding model.”

The center receives a small fraction of its financial support from the ABA’s general revenue. It is almost entirely self-funded through mostly project-specific monies—receiving federal, state, local and private grants and donations, as well as support from the ABA Fund for Justice and Education.

“For every $1 of ABA support, the center leverages an additional $12 of outside grant funding,” says ABA President Linda A. Klein of Atlanta. The center “is just one more way in which our association makes a major, positive difference.”

Davidson hopes the association will do whatever is necessary to keep it going. “The center is more important than ever in a political environment in which resources might not be there for the most vulnerable in the child-protection system,” he says. Besides funding, “accountability and monitoring are crucial. If it gets turned over to the states with no federal guidance, kids and families will suffer greatly.”

From its inception, the center has worked closely with other groups whose missions involve child welfare and justice, such as the Children’s Defense Fund, the National Council of Juvenile and Family Court Judges, and the National Association of Counsel for Children.

For many people who are involved in such efforts nationwide, the center’s work has been their primary lens for viewing the ABA. It has “an amazing record of working in individual communities throughout the country to improve legal representation for children and families, and the legal systems that affect their lives,” Klein says.
ABA Notices

DELEGATE-AT-LARGE ELECTION
Pursuant to §6.5 of the ABA Constitution, six Delegates-at-Large to the House of Delegates will be elected at the 2017 Annual Meeting for three-year terms beginning with the adjournment of that meeting and ending with the adjournment of the 2020 Annual Meeting. Candidates are to be nominated by written petition. The deadline for petitions is Tuesday, May 16. For rules and procedures, go to ambar.org/largeelection.

DELEGATE-AT-LARGE ELECTION (VACANCY)
Due to the nomination of Michael H. Byowitz and Tom Bolt to the ABA Board of Governors, two Delegate-at-Large vacancies will exist and two Delegates-at-Large to the House of Delegates will be elected at the 2017 Annual Meeting for a one-year term beginning with the adjournment of that meeting and ending with the adjournment of the 2018 Annual Meeting. Candidates are to be nominated by written petition with a deadline of Tuesday, May 16. For rules and procedures, go to ambar.org/largevacancyelection.

GOAL III MEMBERS-AT-LARGE ON THE NOMINATING COMMITTEE
The Secretary hereby gives notice that the President will appoint one Goal III minority member-at-large, one woman member-at-large and one disability member-at-large to the Nominating Committee for the term 2017-2020. Nominations for these appointments will be broadly solicited from the diversity commissions, sections, divisions, forums, state and local bar associations, and the membership at large. If you are interested in submitting a nomination or have questions, contact Leticia Spencer (Leticia.Spencer@americanbar.org) c/o Office of the Secretary, by Wednesday, May 10.

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Guardsmen Kill 4 Students

The Vietnam War was not going well on April 30, 1970, when President Richard Nixon announced on national television that he had ordered American troops into Cambodia to destroy North Vietnamese encampments there. After enumerating his reasons for expanding the war into a neutral nation, Nixon veered into an attack against protesters, particularly college students, who were opposing the war in Southeast Asia.

“We live in an age of anarchy, both abroad and at home,” Nixon told that Thursday night audience. “Even here in the United States, great universities are being systematically destroyed.”

Reaction on campuses the following day was immediate and, in many cases, unruly. But that weekend, protests at Kent State University in Ohio grew particularly extreme. A Friday afternoon march on campus turned, by nightfall, into a window-breaking binge in downtown Kent. And though a group of students returned the next morning to help clean up the mess, angry Gov. James Rhodes deployed the National Guard.

Tensions remained high on Saturday and boiled over when a fire broke out at the campus ROTC building. Firefighters arriving to quell the blaze were met with jeers. Their hoses were cut. Though they returned quickly with heavy police protection, the building burned to the ground. And on Sunday, students challenging a 5 p.m. curfew were herded by police and guardsmen into their dormitories, where nearly 70 were arrested.

At a defiant noon rally on Monday, May 4, students were ringing the school’s Victory Bell on the campus commons—a football season ritual—when a National Guard officer ordered them to clear the area. When three canisters of tear gas punctuated his order, the students scattered in three directions: back toward their dorms, up a hill near the football practice field and along the edge of a parking lot.

As they scattered, guardsmen began scaling the hill in gas masks—single file, rounds chambered—when they suddenly stopped and turned. Some stood still; some crouched with M-1 rifles raised. They fired on the terrified students, discharging 67 rounds in 13 seconds. Four students—two women and two men—were killed. Nine others were wounded, one paralyzed when a bullet shattered his spine.

The aftermath was unfettered recrimination. A guard officer claimed the attack was triggered by sniper fire from the protesters, a charge law enforcement officers on the scene could not confirm. Some guardsmen claimed students, believing the chambered rounds to be blanks, had tried to wrest their weapons from them—a charge quickly debunked. But while all agreed that tensions were high, that some students had hurled rocks and bottles, and that some of these part-time soldiers might have perceived themselves to be in danger, investigations revealed no credible threat to life that could justify the shootings.

Lawsuits filed by the nine survivors and the families of the four killed ended in 1979 with a $750,000 settlement with the state, but it brought no resolution as to the cause of the attack.

The litigation did, however, produce evidence of an armed civilian: Terrance B. Norman was a criminology student who’d been reporting to campus police and the FBI about protesters, photographing them for FBI files. He admitted to brandishing a .38-caliber revolver when students confronted him after the shooting. But there was also a report, denied by Norman, that he had discharged the gun into the air during a confrontation shortly before the guard opened fire.

After the incident, Norman surrendered the handgun to a state police officer, who turned it over as part of an FBI investigation. In a letter disclosed during Norman’s deposition, FBI Director J. Edgar Hoover denied any relationship with Norman, and no FBI analysis of the weapon was ever produced.
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