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ADVERTISING & MARKETING
VP, SALES SUZIE SMITH, 410-584-1980,
SSmith@networkmediapartners.com
ACCOUNT EXECUTIVE CARLY HEIDEGER, 410-316-9853,
CHeideger@networkmediapartners.com
PRINT CLASSIFIED AD SALES DEBRA MacDONALD, 312-988-6065,
Debra.MacDonald@americanbar.org
IN-HOUSE AD COORDINATOR REBECCA LASS, 312-988-6051,
Rebecca.England@americanbar.org
REPRINTS RHONDA BROWN, 219.878.6094, RhondaB@fosterprinting.com

ABA JOURNAL 321N, Clark St., Chicago, IL 60654, 312-988-6018, 800-285-2221
FAX: 312-988-6014 EMAIL: ABAJournal@americanbar.org
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BOB DYLAN’S WORDS OF REASON
Regarding “Decision Dylan,” April, page 22: At the 2017 Innocence Network Conference in San Diego in March, California Innocence Project Director Justin Brooks belted out a rousing rendition of Bob Dylan’s “I Shall be Released” with over 100 exonerees in the audience. It was the perfect song for that time and place. Dylan is like that.

Sean O’Brien
Kansas City, Missouri

THE IMMIGRATION ACT IS NOT BROKEN
A key to solving the immigration court backlog and structural issues described in “Legal Logjam,” April, page 52, would be for Congress to update existing sections 249 and 245A of the Immigration and Nationality Act.

Section 249, the registry provision, could be amended to authorize undocumented people present from—as a proposal—2005 to register, obtain permanent residency and continue with their work, schooling and lives inside the United States. A criminal record would bar approval.

The current date for use of the registry provision on U.S. Citizenship and Immigration Services Form I-485 requires proof of undocumented presence since 1972. Prior registry dates enacted by Congress have been 1921, 1928, 1940 and 1948. Congress could take comfort in the judgment of previous lawmakers and change the date from 1972 to 2005.

Section 245A, the legalization provision enacted in 1986, could also be updated to perhaps 2012—from 1982—and thereby legalize workers and their families who more recently arrived outside the administrative visa system planned by Congress.

These twin changes to dates in the existing act would reduce immigration court caseloads and can be justified for economic, humanitarian and national defense reasons.

The problems with the Executive Office for Immigration Review’s immigration courts would be greatly reduced by enacting two new dates. Caseloads would drop as eligible respondents opt to register or legalize. The Immigration and Nationality Act need not be declared broken.

Carol Hildebrand
Denver

CORRECTIONS
“Exposing the Bail Trap,” April, page 10, misreported the percentage of arrestees convicted. Cherise Fanno Burdeen should have been quoted as saying: “There are 12 million arrests each year, but only 6 percent go to state prison—the rest are sentenced to probation or local jail time.”

The Law Scribbler article “1 Step Beyond: TBD Law’s 2nd conference again skips past the basics,” May, page 31, should have identified Stephen B. Keogh as a member of the team that created a tool to help detainees, not Steven Weigler. Keogh is a Norwalk, Connecticut, elder law and probate attorney.

“HP Mandates Diversity,” May, page 14, should have stated that the ABA House of Delegates passed Resolution 113 last August.

The ABA Journal regrets the errors.
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Independent Courts Are Vital to Democracy

Our judiciary safeguards rights and liberties and needs to be protected from attacks. Judicial independence is one of the most important principles of the rule of law. It is critical in defending people from intrusions and overreach by the government and preserving a free and democratic society.

James Madison, when drafting the Constitution, sought to guard against a “tyranny of the majority” by designing a government that was balanced, with three separate, co-equal branches—including an independent judiciary.

Article III, Section 1 of the Constitution protects the federal judiciary by granting lifetime appointments “during good behavior” and compensation that “shall not be diminished.” This means federal judges can’t be threatened with the loss of their jobs or a pay cut if they render an unpopular decision.

An independent judiciary envisions that courts should follow the rule of law, basing their decisions on constitutional principles, applying relevant statutes and legal precedents to the facts of each case. Unlike politicians, judges should be immune from public opinion and special interests and must decide cases according to the law, even when doing so may be unpopular.

But the structure set up by our nation’s founders is not enough to guarantee this very important tenet of our democracy.

Public trust is eroded when leaders attack judges’ character and competence. Disagreeing with a decision is one thing. But personal attacks on judges are attacks on our Constitution. The ABA and the legal community cannot tolerate assaults on the judiciary because they can chip away at the legitimate authority of that branch of government and give undue influence to the legislative and executive branches.

In many jurisdictions, state court judges face elections. Campaign contributions and interest group pressures during these elections, at the very least, create an appearance of influence and undermine public confidence in the impartiality of the judiciary. So do political attack ads that mislead the public about the legal process and the role of judges.

Because judges must follow professional codes of conduct that prohibit them from speaking about pending cases, they are often prevented from publicly defending themselves from attacks. It is therefore up to the bar, the legal community and all citizens to protect the integrity of the courts.

In his book, On Tyranny, Yale history professor Timothy Snyder studies the ways that authoritarian regimes came to power and offers lessons to protect against tyranny. He argues that it is imperative to defend institutions, which include the press, trade unions and, of course, the courts. He points out that although institutions normally protect people, there are times when institutions cannot protect themselves and need to be defended.

“Judicial independence does not just happen all by itself,” associate Supreme Court justice Sandra Day O’Connor wrote in 2008. “It is tremendously hard to create, and easier than most people imagine to destroy.”

The American Bar Association, often in partnership with state and local bar associations, has long made defending the courts and preserving judicial independence a priority. The ABA evaluates the professional qualifications of federal judicial nominees, responds to unwarranted criticism of judges and, through programs like Law Day, provides information about the role of the judiciary in our system of government. We recently compiled some of the ABAs many resources at ambar.org/ProtectOurJudiciary. Please share them widely.

The ABA has opposed state and federal legislation that has attempted to punish judges for making unpopular decisions or even from hearing cases that deal with controversial issues. These are attempts to circumvent the authority of the courts.

Because the bar is uniquely qualified for this role, it will continue its important work to preserve the independence of the judiciary and take action when judges are subjected to attacks.

The legal community must remain diligent and vigilant in their support of institutions, especially the autonomy of the courts. Judicial independence ensures the rule of law, safeguards our democracy and is what former Supreme Court Chief Justice William Rehnquist called “the crown jewel of our system of government.”

Follow President Klein on Twitter @LindaKleinLaw or email abapresident@americanbar.org.
Accelerated Liberties

To handle its funding surge, the ACLU looks to Silicon Valley

A MASSIVE INFLUX OF FUNDING IS A BOON TO ANY NONPROFIT. But it can come with challenges, as well, including: how to swiftly scale the organization to put that money to use; how to maximize the efficiency of every dollar; and how to plan more ambitiously and strategically than before.

Shortly after raising more than $24 million in a single weekend—more than six times an entire year's typical donations—the American Civil Liberties Union sought answers to those questions by enrolling in the Y Combinator startup accelerator.

The Mountain View, California-based company's accelerator program runs for three intensive months. Y Combinator is best known for launching startups such as Airbnb, Reddit and Uber. The ACLU is no startup, of course. It was founded in 1920. But there's no question that support for and interest in the civil liberties nonprofit has surged since the election.

“When we put the word out that we'd be including the ACLU in our winter batch, more than 1,500 people signed up to volunteer their help,” says YC partner Kat Manalac.

While participating in the accelerator, the ACLU focused on overhauling its app, in addition to finding more experts and volunteers to support its cause. At Demo Day in March, participants presented to a couple thousand potential donors. Y Combinator provided the ACLU with $200,000, as well as pro bono engineering services to assist with the organization's technology platforms and adapt to its growing membership base, says Anthony D. Romero, executive director of the ACLU and an attorney in New York City.

"Beyond financial contributions, the Silicon Valley community can help organizations like ours harness recent membership surges and spread the word about what the ACLU is doing to protect people's rights from violations by the Trump administration," Romero says. "Y Combinator and [president] Sam Altman are true pioneers in innovation, and now they're also pioneers in the defense of civil liberties."

The ACLU has been challenging President Donald Trump's travel and immigration ban, and the group plans to continue to work to protect immigrant rights. News about the ACLU's participation raised some eyebrows because YC's part-time partner Peter Thiel is a Trump adviser. Romero says Thiel had no role in the project, though the ACLU imposes no political litmus test on its supporters or volunteers.

“We set our own agenda and work with any and all individuals willing to advance our goals of promoting civil liberties and civil rights,” he says.

For its part, Y Combinator doesn’t have a say in what happens to the ACLU’s monetary windfall. “We don’t get anything out of the partnership—other than the honor of helping an organization that has an enormous job right now,” Manalac says.

—Kate Rockwood

“We set our own agenda and work with any and all individuals willing to advance our goals of promoting civil liberties and civil rights.”

—Anthony Romero, ACLU executive director
Overworked, Seeking Overtime
Contract lawyers push for better pay

A RECENT JOB POSTING FROM the Posse List, a temporary legal employment site, reads: Company X “is seeking attorneys for a project starting tomorrow, March 29th, and running 5-6 weeks. Must have prior document review exp, be admitted to practice in a US jurisdiction. Must be able to work a minimum of 60 hours/wk. Rate: $30/hr (no OT).”

Contract lawyers handle everything from document review to intellectual property audits to transactional due diligence to language translation. Since the Great Recession, rates for these services have plummeted from as much as $60 per hour to as little as $19. And because of falling wages, many project-based lawyers are seeking something normally reserved for blue- and gray-collar personnel: overtime pay.

Overtime eligibility hinges on whether the worker is considered a professional or a laborer. Courts are split about contract lawyers, says Gregory Bufithis, founder of the Posse List.

In 2015, a federal court tossed out Henig v. Quinn Emanuel Urquhart & Sullivan, a class action proposed by a contract attorney against the firm and a staffing agency for failing to pay overtime for document review. The judge determined the work was routine but involved the practice of law, exempting it from the overtime protections of the Fair Labor Standards Act. In a similar case involving overtime, Lola v. Skadden, Arps, Slate, Meagher & Flom, an agency and firm settled with three contract attorneys in 2015 for $75,000.

Reuel Schiller of the University of California’s Hastings College of the Law in San Francisco says there’s an “increasing mismatch” between old labor laws and the reality of modern work. The fact that professional employees are excluded from the FLSA’s benefits “made complete sense in 1938 because no one expected professionals would be doing repetitive tasks,” says Schiller, who specializes in labor and employment law. “Fast-forward to a radically changed economy.”

Contract lawyers’ plight reflects an economy saturated with qualified temp workers, whether to run errands or to review discovery files. Every year there’s a glut of new lawyers, while cost-conscious clients are looking for alternatives to paying firm rates for what they consider rote work. So firms and companies outsource. The Posse List, started by Bufithis in 2002, now has about 180 organizations that post temp jobs.

Because they’re not employees, contract attorneys have no benefits or job security, are sometimes relegated to basement-style working conditions, and are typically unemployed between projects. While they perform tedious tasks such as coding documents, they acquire no new skills, have no opportunities for promotion and experience little intellectual stimulation. “The oligarchs are turning us—as they did to workers in the 19th-century steel and textile factories—into disposable human beings,” Bufithis wrote on his site in March 2016.

But overtime is contentious, dividing even contractors themselves. When the Department of Labor recently re-evaluated the issue, the United Contract Attorneys—an association of temporary lawyers who advocate for overtime—argued that they should be eligible because the work usually doesn’t require professional judgment. Also, they don’t earn a professional salary, despite working more than 40 hours per week.

“The reality is we’re taking on a certain risk because we lose opportunities for permanent positions,” says Andrew Spence, a contract attorney in New York City. “Firms have the option of charging us out at associate rates and making a profit. Plus, we’d feel more like professional attorneys if we get a decent pay rate.”

But other contract lawyers don’t want to lose exempt status. They reason that if overtime is required, regular rates will drop and they’ll be forced to work more to make the same amount. Also, arguing for overtime implies that a JD isn’t necessary, which could further reduce pay and steer jobs to nonlawyers. Document review projects vary, they say, and some require judgment and strategy.

Schiller agrees in part, predicting that contract lawyers won’t be granted overtime pay anytime soon. “In the past, this work would have been done by first- and second-year associates. That doesn’t mean the overtime structure doesn’t require evaluation,” he says. But until that happens, contract lawyers “are probably out of luck.”

—Leslie A. Gordon
Making It Work

is a new column in partnership with the Working Mother Best Law Firms for Women initiative, in which lawyers share how they manage life’s challenges and work’s demands. Visit workingmother.com for more.

By Sonya Rosenberg

The legal profession is tough on women. When I say women, I mean women of all ages, stages of career and relationship status. I am glad to see that in my 10 years of practice, this issue has gotten some serious attention and some real progress has been made. But I also know the road ahead is still a long and challenging one. I start with this point because I don’t know and can’t claim to provide some kind of a “magic fix” to the ever-elusive goal, for many of us and myself included, of “making it work.” But I can share some guiding principles that consistently have come through for me, helping me to appreciate and enjoy my practice of law.

1. Do what’s important to you, and be persistent about it.

I am careful in choosing my words here because I don’t want to suggest you should do only what you love or do that for only as long as you love doing it. If I followed that often-given advice, I am not sure where I’d be. But it would not be a happy place! The practice of law is challenging. You can feel incredibly exhilarated at times and absolutely crushed at others, and the learning curve steep and leaves little room for error. What we do requires grit and a long-term commitment. But with all that, I have found that at long as I can have a gut check—even at the toughest of times—and I still believe in what I do and it’s still important for me to succeed at it, I will find the drive to push ahead with positivity. The trade-off is that, inevitably, experience tends to make us stronger and better at what we do—and over the years, it has helped to make my practice rewarding.

Outside work, I also have persistently done what has been important and nourishing to me on a personal level—even when that has not necessarily followed conventional wisdom. For example, I married my husband in my first year of law school and had my first child as a junior associate. I refuse to view these decisions as problematic because I knew they were personally important and right for me when I made them. So I knew I would do—and I did—what I needed to make them work for me. The same can be said for anything else, no matter how minor or how significant. Whether it’s finding and sticking with an exercise routine that gives you the energy you need to function, and taking up a new hobby or something much more serious—such as taking care of an ill parent—I have been unapologetic about my personal commitments. This has in turn helped fuel me with the energy and a healthy perspective I have needed for my work.

2. Develop a support network at and outside work.

As lawyers, we generally are not known for needing or asking for help. But I have not shied away from doing that. A successful, long-term legal career is difficult; if not impossible, to achieve without a strong support network. That holds true for men and for women.

At work, I seek out and try to build trusting, long-lasting relationships with mentors, mentees, associates and partners and, of course, my clients and professional contacts. I invest a great deal of time and effort in these relationships. I do it because I feel like I have to but because I enjoy it! However, by their nature, professional relationship experiences are not seamless, and they cannot all be positive. For example, my first boss was notoriously tough, but I learned a tremendous amount from his case management and charismatic approach. On a similar note, although it’s never pleasant to receive criticism on your work product, being open to it is, at a minimum, a valuable learning experience that contributes to developing a competent and confident style of your own.

Strong professional relationships are half of the puzzle for me—the other half being my relationships outside work. I don’t tell him this enough, but I have a pretty amazing husband. He has a challenging and time-consuming job, too. But through our many years of marriage we have worked together to build a partnership in which we truly support each other. We are equal-level caregivers to our children. And we play to our different, individual strengths to help each other at home and to encourage each other professionally. My family and friends are incredibly important for me, too. I make it a priority to spend time with my parents as they get older and to connect and relax with my friends. All these relationships have helped shape me as a person, and they also have informed how I approach various personalities and situations through my work.

3. “Do your best, and forget the rest!”

Imagine Papa Smurf saying this in a thick Russian accent, and that’s just about what my dad sounds like whenever I share any problem or dilemma with him. Although it’s simple, the message is really quite powerful. Many of us, and women in particular, can experience immense guilt about various things we think we should or shouldn’t do, should do differently or should do better. As women juggling work and various personal commitments, it’s normal at times to feel stretched too thin or like it’s impossible to keep up on either front. I certainly get these feelings from time to time, but I refuse to indulge them. As female attorneys, we work too hard and give too much to not appreciate ourselves and what we do. As long as I can be honest with myself, applying the “reasonable person” standard that I did my best, I can move on positively without allowing guilt or resentment to fester while striving to treat myself and the people in my support networks with deserved kindness.

Sonya Rosenberg is a partner at Neal, Gerber & Eisenberg in Chicago. She counsels clients on employee-related legal issues and represents employers in litigation matters, including administrative and appellate proceedings.
Opening Statements

10 QUESTIONS

Field Goals

Dwayne Woodruff, a judge and former NFL player, pushes himself to achieve while he inspires others to succeed

JUDGE DWAYNE D. WOODRUFF IS ALL ABOUT the challenge. He challenges others, such as the juvenile offenders who come before him in the family court division of the Allegheny County Court of Common Pleas in Pittsburgh. He directs them to do better and volunteers for several programs to help at-risk kids succeed. Woodruff also rises to his own challenges. A former professional football player—and Super Bowl champion—Woodruff went to law school full time while he played defensive back for the Pittsburgh Steelers. Now, after more than a decade on the court bench, Woodruff is running for a seat on the state supreme court, campaigning nights and weekends while he maintains his docket and his community service commitments.

You’re busy right now juggling a lot of different things, but you’re no stranger to being busy. When you were in law school, you went to night school for four years while also playing professional football. How did you make that work?

It was a grind. I’d get out of practice at 4:30-5 p.m., grab a sandwich and be at my seat at school by 6 p.m. I was in class until 9 p.m., and I’d study until midnight and do the same thing all over again the next day.

Why did you choose to go back to school and not just segue from football to sports broadcasting or coaching?

For me, it was always about furthering my education. My dad was in the military, and when he came back from Vietnam he was a paraplegic, but he went back to school even though he didn’t have to. He showed me that he had the drive to better himself. My mother was a young bride and traveled all over the world with my dad in the service. But she went back to school even though she had just gotten her degree, and I had just graduated from kindergarten. There are kids who look up to me because of football, but that can be taken away from you at any moment. An education is always with you.

Did you concerned you’d get injured and not be able to play anymore?

No. Injuries are part of the game. As a player, you don’t dwell on it; you just do your job. I went to law school because I knew football was going to be over someday, and I was still going to be a somewhat young man. This was back in the day before the million-dollar contracts, and I needed to be in a position to continue to care for my family when my football career was over.

Can you share the fun story behind your choice to pursue a law degree?

My wife and I had been constantly thinking about what I was going to do after football, and we were watching PBS one night during the pledge drive, and one of the items on the auction table was an LSAT prep course. We’d talked about law school, so I thought, “Maybe this is a sign.” I bid and bid again, and then I won! I took the course, took the test, did well and got accepted to law school.

You give a lot of inspirational speeches, and you’ve worked as a mentor to at-risk kids. It’s easy to say “Work hard, stay in school.” But how do you make sure that message resonates with today’s kids? Does your role in family court give you an insight for how to reach them?

It does. A lot of kids who come into my courtroom don’t think they have anyone in their corner. I tell these kids: “Don’t let anyone tell you that you can’t be successful.” Everyone makes mistakes, but you can’t let a failure in one phase of your life define you. I don’t give up on them. I say: “I believe in you.” They just need to hear that someone believes they can do it, and they can make it.

As a former professional athlete, how do you approach the election process? Do you enjoy the competitiveness of campaigning?

I approach the election process as a requirement, a necessity. We are public servants, so it’s important that the public has access to us.

Are there fans who come to your campaign events because you’re a former Pittsburgh Steelers player?

If so, does that annoy you?

I do get fans who come to meet me, and they bring balls and photographs for me to sign. I take a lot of selfies. I don’t mind—I understand the idea of campaigning, and I understand what it’s like to be a fan and to see someone you’ve watched for 12 years. So it’s my time to thank them for their support of the team and to ask them for their support in this race. I hope they’ll see what I’m about and when they leave, they’ll think I’m not just a good football player—I am someone they want to represent them, as well.

Is there a program or a ruling that ranks among those you’re most proud of?

You give a lot of inspirational speeches, and you’ve worked as a mentor to at-risk kids. It’s easy to say “Work hard, stay in school.” But how do you make sure that message resonates with today’s kids? Does your role in family court give you an insight for how to reach them?

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I do get fans who come to meet me, and they bring balls and photographs for me to sign. I take a lot of selfies. I don’t mind—I understand the idea of campaigning, and I understand what it’s like to be a fan and to see someone you’ve watched for 12 years. So it’s my time to thank them for their support of the team and to ask them for their support in this race. I hope they’ll see what I’m about and when they leave, they’ll think I’m not just a good football player—I am someone they want to represent them, as well.

Is there a program or a ruling that ranks among those you’re most proud of?
There are two things that I am very proud of. The first is serving on the board of the National Council of Juvenile and Family Court Judges, and I am happy to have had a leadership role in making judicial education mandatory in the state. The second is a national campaign called Do the Write Thing. It’s a program that asks middle schoolers to discuss in written form how violence has affected their lives and what can be done about it. We have a banquet to recognize the participants, and two are chosen to serve as national ambassadors and to go on an all-expenses-paid trip to Washington, D.C. It’s a big opportunity for them, and it gives the community great ideas on how to stop violence.

**What do you think of the science about the correlation between football and brain injury?**

I am fortunate not to have had any aftereffects from playing football. I had a great time, and I loved every minute of it. But it’s a demanding, high-impact game. When you hit something, something has got to give. In my day, they didn’t call it a concussion; they’d call it a “dinger.” They’d give you smelling salts, you’d come to, and they’d send you back into the game. But concussions are a serious matter, and I think the league and the players are addressing it appropriately.

**Do you ever use football metaphors on the court bench?**

Not really. If you come to my courtroom, it’s serious. That calls for serious talk, and football metaphors rarely have a spot in that discussion. I try to keep it uplifting, encouraging and supportive. At the same time, there are consequences for kids who come to my courtroom, so we have to talk about that. But sometimes I’ll show kids my Super Bowl ring. Not the first time they come in, but if they’re on the right track, I’ll let them try it on. I’ll say: “Look, you can accomplish great things—maybe things you can’t even think about now—but success will come to you.” —Jenny B. Davis

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**Winner’s Circle**

Canadian lawyer saddles up to test the limits of her endurance

**Heidi Telstad, 43, enjoys** her job as vice president, general counsel and chief legal officer for Pacific Customs Brokers in Surrey, British Columbia, where she handles imports and exports, tariffs and contracts.

But for Telstad, office life can’t compare to the excitement that begins when her four weeks of vacation roll around.

Telstad has an unusual hobby: She likes to race horses. Most recently, she won the 2016 Mongol Derby in China, crossing the finish line with two other riders.

“Mongolia was my first time racing semi-feral horses. I enjoy adventures and always need something to look forward to,” Telstad says. “I must admit, I am a thrill-seeker, as there must be a dangerous element to it.”

The Mongol Derby certainly fits the bill with a grueling 10-day, 1,000-kilometer trek (that’s more than 621 miles) through inhospitable terrain. First, riders choose a horse.

“The horses did not like strangers,” Telstad says. “They would bite us, turn around and kick us. And one particularly aggressive horse struck my partner in the face. That was all before we even mounted.”

Then there was the weather. Telstad rode through blistering heat of 100-plus degrees. Sometimes she had to dismount and lead her horse, with little access to water. Hours later she found herself riding up the mountains into a snowstorm. And that wasn’t even the worst of it.

“It was terrifying when packs of big dogs were chasing our horses and biting at our legs. We knew if our horses stumbled that the dogs would tear us apart,” Telstad says.

Telstad, who grew up on a farm in Canada, has been riding horses almost her entire life. Despite her equestrian experience, she says one of the hardest parts about the race was getting over the fear of being hurt. About 40 riders competed, but only 23 finished. Competitors’ injuries included a dislocated shoulder, fractured spine and brain hemorrhage. Telstad says all riders had GPS tracking devices so they could be found if injured.

Telstad is happy she can check the Mongol Derby off her bucket list, and she is already considering what her next feat will be.

Her cousin Kimberley St. Pierre wasn’t surprised that Telstad was willing to sign up for such an extreme experience.

“I was thoroughly impressed that she chose this as her next adventure and knew that this was going to be an extremely tough test,” St. Pierre says. “I mean, a 1,000-kilometer race on horseback—who does that? It is a true testament to Heidi’s character and drive.” —Cristin Wilson

**Heidi Telstad raced 621 miles over 10 days in the Mongol Derby.**
Tearing Down Walls
Challenges to solitary confinement are effecting change

GARY C. MOHR, THE DIRECTOR OF THE OHIO Department of Rehabilitation and Correction, was on the phone with Tom Clements, his counterpart in Colorado, the day before Clements was murdered by a man who had just been released directly from solitary confinement into the community.

The topic of their conversation? How to address public safety concerns, including the high numbers of inmates released from solitary confinement in both their states without intervention.


Mohr and other experts say the 2013 murder of Clements, who was known for his reform efforts, was a galvanizing factor in a growing nationwide movement that seeks to reduce excessive reliance on solitary confinement, also known as restrictive or segregated housing.

“There was an era in which solitary confinement was seen as a solution to a problem, and now solitary confinement is seen as a problem,” says Judith Resnik, the founding director of Yale Law School’s Arthur Liman Program and Fund, which has co-published studies on the issue with the Association of State Correctional Administrators.

The United Nations special rapporteur on torture defines solitary confinement as holding someone in isolation for at least 22 hours a day, a practice known to have harmful effects on mental and physical health. The U.N. calls for an outright ban on solitary confinement that is indefinite or lasts more than 15 days.

The ABA’s Governmental Affairs Office has testified before Congress about the detrimental effects of the practice, and the ABA Criminal Justice Standards on the Treatment of Prisoners state: “Segregated housing should be for the briefest term and under the least restrictive conditions practicable.”

Nevertheless, at least 67,442 people were being held in such conditions for 15 days or more in the United States in fall 2015, according to a Yale/ASCA study. This year, a lawsuit was filed on behalf of Louisiana death row inmates who are automatically placed in solitary. One plaintiff has been isolated for more than 30 years.

Amy Fettig, deputy director of the American Civil Liberties Union’s National Prison Project, says such statistics have helped propel the movement to reduce such housing.

“Solitary confinement would not have developed the way it did in this country if the sunshine had been let in [earlier],” Fettig says.

Today, there is a growing awareness of the harms of solitary confinement. In March, TV station Spike aired a documentary on Kalief Browder, a 16-year-old charged in 2010 with stealing a backpack who spent three years at Rikers Island —two in solitary—without facing trial. Eventually, the charges were dismissed. But after he was released, Browder committed suicide in 2015. He was 22.

Like Clements’ case, Browder’s rose quickly to the top of high-level conversations about restrictive housing abuse. Last year, President Barack Obama cited Browder when he banned solitary confinement for juveniles in federal prisons. Justice Anthony M. Kennedy did, too, in a 2015 concurring opinion that asked whether “workable alternative systems for long-term confinement exist and, if so, whether a correctional system should be required to adopt them.”

Big changes are already in progress. Last year, the American Correctional Association (Mohr is president-elect) adopted standards to regulate the use of solitary confinement. Litigation in California and New York, led by advocates and teams working pro bono from Weil, Gotshal & Manges and Morrison & Foerster, respectively, resulted in sweeping reforms in those states’ prison systems. New York City Mayor Bill de Blasio has banned the use of solitary confinement for inmates who are 21 and younger.

In Connecticut, first-of-its-kind legislation was introduced earlier this year to codify many steps the state has taken to voluntarily reduce the number of inmates in solitary confinement. Since 2003, the number of inmates in solitary has decreased from more than 200 to fewer than 40. The ACLU of Connecticut expected the bill, H.B. 7302, to be voted on in the full legislature by the end of May.

“We’re in a really amazing place in terms of reform,” says David J. McGuire, executive director of the ACLU of Connecticut, which has worked with the prison system there.

In some cases, the only opposition to such efforts has come from corrections officers who argue that they are less safe without the threat of restrictive housing.

Leann Bertsch, the director of the North Dakota Department of Corrections and Rehabilitation and a former prosecutor, says she faced pushback when she began making changes. “It’s easy to always take the risk-averse choice —’Someone’s not behaving perfectly? Put them in solitary,’ ” she says. “But we’re the department of corrections. We’re not actually correcting behavior when we do that.”

—Rebecca Beyer
Hearsay

Merger Mania
Law firm mergers and acquisitions set a blistering pace in the first quarter of 2017, with 28 combinations announced in the United States. The largest combo of the quarter: Norton Rose Fulbright, a global firm with 3,700 lawyers, and Chadbourne & Parke, a New York City-based 300-lawyer firm.
Source: altmanweil.com (April 5).

Sound Advice
A new study by audio-branding company PHMG warns that law firms risk losing business if they make customers wait on hold for more than half a minute. The research found 46 percent of law firms leave customers waiting in silence, 41 percent use generic music, and 13 percent subject callers to beeps. A previous study of 2,234 U.S. consumers found that 59 percent won’t do business with a company again if their first call isn’t handled satisfactorily, and 65 percent of customers feel more valued if they hear customized voice and music messages while on hold.
Source: phmg.com (Jan. 10).

Cartoon Caption Contest
CONGRATULATIONS to Frank M. Kocs of Paso Robles, California, for garnering the most online votes for his cartoon caption. Kocs’ caption, far right, was among more than 130 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, June 11, with “June Caption Contest” in the subject line.
For complete rules, links to past contests and more details, visit ABAJournal.com/contests.

“I never thought I would get to witness blind justice on appeal.”
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African-American prisoners convicted of murder are about 50 percent more likely to be innocent than other convicted murderers. Part of that disparity is tied to the race of the victim. Black people imprisoned for murder are more likely to be innocent if they were convicted of killing white victims. About 15 percent of murders by African-Americans involve white victims, but 31 percent of innocent black murder exonerees were convicted of killing white people.
Source: law.umich.edu (March 7).

2%
The percentage increase of employees who worked remotely within the legal industry from 2012 (41 percent) to 2016 (43 percent), according to Gallup. Researchers predict the number of remote workers will continue to increase with greater mobility and the surge in on-demand legal services providers.
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Source: nytimes.com (Feb. 15).
While investigating an online child pornography ring, the FBI asked a Virginia judge to sign a warrant that would permit the agency to search an unlimited number of computers anywhere in the world. The warrant, issued in 2015, was used in Operation Pacifier, during which the FBI commandeered a popular child pornography website called Playpen and infected visitors’ computers with malware to track them remotely.

As a result, the Department of Justice charged 214 people. The warrant allowed access to 8,700 IP addresses in some 120 countries, according to documents filed in the U.S. District Court for the Western District of Washington. Because of its broad nature, however, some courts have suppressed evidence collected through the warrant.
Nonetheless, the authority to erase jurisdictional boundaries for warrants in hacking cases has become a part of Rule 41 of the Federal Rules of Criminal Procedure, the rule governing warrants. With this change, instituted in December, a bipartisan group of politicians, criminal defense lawyers, and advocacy organizations is concerned that the amended rule is a threat to the Fourth Amendment and gives the Justice Department unchecked and overly expansive authority. Law enforcement, however, says the amendment is needed to keep up with the increasing sophistication of online crime and does not impinge on individual rights.

In the Playpen cases, federal judges in Massachusetts, Oklahoma, and Washington found the warrant to be a violation of the old Rule 41. In Massachusetts and Oklahoma, judges went as far as suppressing the evidence collected through the warrant. Other jurisdictions have not found fault with the warrant.

Colin Fieman, a federal public defender in Seattle with multiple clients being prosecuted with evidence from Operation Pacifier, sees the actions taken by the FBI as “unprecedented and deeply troubling.”

**REINING IN WARRANTS**

In the United States, warrants have two major components: particularity and territoriality. The founders wanted the government to specify what they were looking for after dealing with malicious general warrants—a vague writ used by the British to search their subjects at will.

Particularity requires that a warrant is specific about who or what is to be searched, where and what is being sought. Territoriality generally means that the search warrant is issued in the jurisdiction it will be executed in, with a few exceptions. The amended Rule 41 effectively does away with these standards in hacking cases.

The Justice Department claimed in a series of blog posts that Rule 41, which was originally codified in 1917 with intermittent updates, was out of date because of technology advances.

These include anonymizing technology such as Tor, a private way to search the internet, and botnets, a network of private computers infected with malicious software that gives control to a third party.

Leslie Caldwell, then the head of the DOJ’s Criminal Division, argued on the blog last November that these technologies make it nearly impossible to know where a computer is located for the sake of a warrant application, which “makes it unclear which court—if any—an investigator is supposed to go to with a search warrant application when investigating anonymized crime.”

However, some think that the expanded breadth of Rule 41 ensnares innocent people. Wayne Brough is the chief economist at FreedomWorks, an advocacy organization in Washington, D.C. He explains that the challenge of investigating botnets, which send spam and run denial of service attacks—last October they temporarily shuttered Twitter and the PlayStation Network—is part of the problem.

“You’re having millions of people not involved in criminal activity suddenly having their emails and ... computers exposed to federal investigators,” Brough says. This is because the amended rule allows for the search of any computer involved with a botnet—whether a victim, called a “zombie,” or the criminal controlling the botnet, called a “bot master.”

When asked if this rule change could ever be constitutional, Brough said he did not think so, because the amended rule has “such a blanket and sweeping reach.”

**TESTING TERRITORIAL LIMITS**

Legally, the path to this rule change started with In re Warrant to Search a Target Computer at Premises Unknown from April 2013. In this warrant application, the government, investigating an online fraud case in the Southern District of Texas, wanted to install malicious software on a target computer that would extract information and give a location. The warrant did not state for whom, what or where the warrant was intended.

Magistrate Judge Stephen Smith denied the warrant application on multiple grounds. Chiefly, he found that since the location of the target computer is unknown, it is likely the warrant would be executed in another jurisdiction, which would not meet the territoriality standard. With these limits, Smith concluded that “there may well be a good reason to update the territorial limits of [Rule 41] in light of advancing computer search technology.”

Six months later, the DOJ recommended amending Rule 41 to the Advisory Committee on Rules of Criminal Procedure. These changes, which became law on Dec. 1, allow investigators to apply for a warrant “in any district where activities related to a crime may have occurred” if the location of a computer has been concealed through technological means or if a violation of the Computer Fraud and Abuse Act has damaged computers in five or more jurisdictions. There are 94 district court jurisdictions in the United States.

According to the American Civil Liberties Union, the impact of this rule change raises the issue of forum shopping, the process of looking for a court favorable to these types of searches. The ACLU, in its 2014 comment to the advisory committee, stated that the rule change opens the door for investigators to apply for a warrant in dozens of districts until a favorable jurisdiction is found.

While Fieman and Brough agree that law enforcement has a unique challenge when investigating online crimes, Fieman says it is the conduct of investigators that is troubling. “The rule change itself is not
necessarily a good thing or a bad thing,” Fieman states. “My real concern with all this is that we have a track record of the FBI abusing the hacking powers that they haven’t been granted in the past.”

A DOJ representative says the amended rule did not change the fact that warrants must comport with the Fourth Amendment and indicates that there was no further guidance on the rule’s application. The FBI declined to comment.

CHALLENGING RULE 41

Last year, a bipartisan group of senators failed to stop the amended Rule 41 from going into effect. Democratic Sen. Ron Wyden of Oregon and Republican Sen. Rand Paul of Kentucky, both strong online privacy advocates, proposed the Stop Mass Hacking Act, which would have prevented the rule changes.

“Act never received a vote, and a similar bill had not been introduced in the new Congress at press time. With new leadership in Washington, it is hard to know what direction this issue will take.”

FreedomWorks economist Brough says there is room to improve upon last year’s rule change. Specifically, the reauthorization of Section 702 of the Foreign Intelligence Surveillance Act offers an opportunity for these issues to be reconsidered.

“It may be a heavier lift if the administration gets a little more pro-law-enforcement,” Brough says.

On the campaign trail, President Donald Trump promised to restore “law and order,” and his appointment of Kansas Rep. Mike Pompeo to lead the CIA is an indicator. “Legal and bureaucratic impediments to surveillance should be removed,” Pompeo wrote last year in a Wall Street Journal opinion piece.

With all this change, Brough is not willing to forecast. He did say that whatever the direction this debate takes, “2017 is going to be interesting with how things play out.”

In the 1950s and 1960s, civil rights activists took to the streets to protest segregation laws, voting discrimination and racism. Their collective action of nonviolent mass protests galvanized communities, resulting in profound changes in American society.

Those efforts also led to a fertile development of First Amendment jurisprudence, as courts were forced to grapple with free expression claims from the protesters and the need for the government to ensure safety and security.

In 1961, for example, 200 African-American students marched down the streets of Columbia, South Carolina, singing religious hymns and carrying “Down with segregation” signs as they headed to the Statehouse. Authorities arrested 187 students for breach of the peace.

Their case reached the U.S. Supreme Court, which reversed the convictions in Edwards v. South Carolina (1963). “The circumstances in this case reflect an exercise of these constitutional rights in their most pristine and classic form,” Justice Potter Stewart wrote for the court. “The 14th Amendment does not permit a state to make criminal the peaceful expression of unpopular views.”

More than 40 years later, similar pressures have erupted across the United States, as activists protest the Dakota Access Pipeline, police shootings, labor disputes, gender inequality, President Donald Trump’s travel ban and other hot-button issues.

“We are certainly seeing an upsurge in social activism, from protesting in the streets and at airports to a huge increase in people contacting government representatives, attending town hall meetings and using social media to organize,” says Traci Yoder, director of education and research for the National Lawyers Guild in New York City.

HEAVY MEASURES

As a result, legislators in nearly 20 states have responded with a flurry of bills that increase penalties for protesters, ban the wearing of masks, charge for police protection and even immunize drivers who hit protesters with their cars. Measures have been introduced in Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Iowa, Michigan, Minnesota, North Dakota, Oklahoma, South Dakota, Tennessee, Virginia and Washington.

These include an Arkansas bill that creates the crime of “unlawful mass picketing,” a bill in Iowa that would impose up to a five-year penalty for blocking a highway with protest activity, a measure in Arizona that would enable the police to seize the assets of protesters when a demonstration turns violent, and one in Minnesota that would prohibit protests on freeways and near airports and train stations.

In February, four measures in North Dakota—including one outlawing the wearing of masks in any public forum—were signed into law. One enables the governor to respond to protests using emergency powers.

Arkansas Senate Bill 550, which the governor vetoed on April 6, would have created the crime of unlawful mass picketing for those who obstruct access to lawful places of employment, public streets, highways, railways, airports or other means of travel. Republican Sen. Trent Garner, who introduced the measure, says it would have “made a clear distinction between constitutionally protected First Amendment rights and harmful actions.”

Garner says there can be reasonable restrictions to protect the public. The vetoed bill, he says, would have prevented a person from blocking
another's access to roads or to their workplace or home. “The line is clear: Someone has the right to protest until they take harmful actions against another person, like preventing anyone who makes minimum wage from going to work or threatening violence against a citizen's family outside of their home,” Garner says.

HOW FAR IS TOO FAR?

But some measures seem to go too far. “The government should be in the business of encouraging lawful assembly,” says John Whitehead, founder of the Rutherford Institute. “I see a lot of paranoia about free speech from the government. I saw the same thing in the 1960s when many people protested and engaged in activism. Government officials often target free expression if it imperils their agenda.”

“I've never seen a pattern this broad related to protest,” says Lee Rowland, senior staff attorney with the American Civil Liberties Union. “My sense is that this rash of bills followed a year of incredible activism in the streets. If we continue to see an active citizenry, my sense is that we will see more of these anti-protest bills.”

Several First Amendment experts label many of the proposals as unnecessary. “Another troubling thing about several of these bills is that they increase crimes for conduct that is already illegal,” says Cleveland-Marshall College of Law professor Kevin O’Neill.

John Inazu, a professor at Washington University School of Law in St. Louis, agrees. “Almost every jurisdiction already has laws on the books governing riot, unlawful assembly and peace disturbance,” he says. “If anything, some of these existing laws are too restrictive of First Amendment rights.”

Legal experts believe many of the measures were passed to suppress free expression. “Regardless of the substance of the protests, any legislation that reacts to robust protests in the street by attempting to punish protesters is a result not permitted by the Constitution and a fundamental misunderstanding of counter effective tactics used in recent protests.”

Some of the bills border on the ridiculous. “There is some evidence that many of these bills have stalled in part because they have rightfully received public mockery in response,” says Rowland. “Some of the more egregious bills, such as one in Tennessee that would immunize drivers for hitting protesters and one in Arizona that would allow protesters to lose their homes in forfeiture, have been soundly defeated.”

SAFETY CONCERNS

However, the protection of public highways may be another matter. There have been reports of highway protests preventing or delaying ambulances from reaching the hospital and causing other problems.

Republican Rep. Nick Zerwas, the chief sponsor of a measure in Minnesota that prohibits protests on freeways and roads near airports and trains, defends his bill as a commonsense measure to protect safety. “First Amendment rights of free speech don't extend to the center lane of a freeway,” he says. “We have to keep our freeways and airports open and running.” Zerwas says he introduced the measure after two constituents reported missing medical or family appointments because of delays caused by protests.

“Protesting on public highways is a difficult area,” Rowland admits. “However, some of these measures that turn protesters into felons simply because they are on the road because there are so many protesters is problematic to say the least.”

Experts worry about the possible chilling effects such measures will have on demonstrations. Another impact may emerge during the ensuing legal responses.

“Lawyers representing protesters arrested under existing or proposed laws should look to the right of assembly in addition to the free speech right,” explains Inazu, who wrote the book Liberty's Refuge: The Forgotten Freedom of Assembly. “The more assertions of the right of assembly we see at the trial level, the likelier we are to see appellate courts eventually help to define the nature and contours of that right. One of the most striking deficiencies of modern First Amendment law is the near absence of any doctrinal guidance about the contours of the right of assembly.”

O’Neill says some protesters may be unaware that permits are required for large gatherings, while others ignore such laws. “Some of the protesters seem to have taken a cue from the Occupy movement and refuse to obtain permits.”

“I think we can anticipate more attempts to limit protests through legislative measures in the near future, especially if protests continue to be effective in gaining media attention and mobilizing support,” Yoder says. “I suspect that a lot of the current bills are tests to see how far states can go in curbing dissent and punishing protesters and organizers.”

FOOTNOTES

1. O'Neill believes some of the recent legislation justifies suppressing forms of dissent in the interest of public safety or national security, which can make them appear more legitimate. “I think it is important to note the context in which these bills were introduced,” she says. “The timing and exact focus of the bills indicate that they have been drafted to
Many observers believe the court can—and should—decide more cases. Now come two legal scholars with a radical proposal for adding to the court’s docket. Not by finding more cases that are clearly worthy of cert, by whatever standard, they say, but by just adding more cases—at random.

In a paper titled “The Lottery Docket,” Daniel Epps and William Ortman propose that the court grant review of a significant number of additional cases each term purely by chance from final judgments of the federal circuit courts.

“We question the premise that only ‘important’ cases deserve the court’s attention,” the authors write in the paper to be published in the Michigan Law Review. “The legal system would be improved if every term, the Supreme Court were forced to decide some unquestionably unimportant cases—some run-of-the-mill appeals dealing with the kinds of ordinary and seemingly inconsequential legal questions that the lower courts resolve every day,” they write. “Over the long run, a lottery docket would offset the pathologies of the certiorari system without depriving the court of its ability to resolve questions that have divided the lower courts.”

UP TO 40 MORE CASES

Epps, an associate law professor at Washington University in St. Louis, and Ortman, an assistant law professor at Wayne State University in Detroit, say those “pathologies”—besides hearing too few cases and an unrepresentative sample at that—include ignoring particular areas of the law and having a docket that’s been captured by the elite practitioners of the Supreme Court bar.

“There are a lot of cases that just
miss the court’s attention, and that's a problem,” Epps says.

Epps and Ortman say some aspects of their idea are open for discussion, such as whether it would take action by Congress or simply the court itself to implement, and whether to include state court decisions.

But the idea itself is simple enough. The court would accept a number of cases each term, selected randomly from all final judgments. This would introduce more randomness than allowing losing parties to decide whether to enter the lottery, though if a case were chosen, that losing party would still decide whether to proceed.

“Normal rules of forfeiture and waiver would apply, but otherwise the appellant could make any argument properly preserved in the court below,” the paper says. “The Supreme Court, in turn, would have an obligation to rule on the merits of the dispute—just as a circuit court panel would.”

The authors recommend a range of 20 to 40 cases. “Our view is that the court should hear enough new cases so as to meaningfully increase the likelihood that the court will be exposed to a wide range of issues, at least over a multiyear period—but not so many new cases that the court feels overwhelmed by the influx,” the paper says.

The scholars argue that there would be multiple benefits: The court would be exposed to a much wider spectrum of federal litigation. There would be more accountability for lower federal courts, since many circuit judges currently know a case of theirs lacking in cert-worthy qualities is unlikely to be accepted for review by the Supreme Court. A lottery docket would make every final judgment a potential candidate for high court review.

And even though the lottery would bring many relatively unimportant disputes before the justices, there is the possibility that it would add a case of importance that likely wouldn't get granted under the Supreme Court’s current procedures.

One flaw with the circuit-split standard, the authors say, is that federal appeals courts often “coalesce” around a particular position, and sometimes no split emerges.

“You end up with these cascades, but it doesn’t mean that every court of appeals has kicked the tires independently on an issue,” Epps says.

**A JURIST’S CRITIQUE**

Putting aside, for a moment, whether the idea is feasible, the proposal has drawn objections, some of which the authors take on preemptively. For example, they note that Judge J. Harvie Wilkinson III of the 4th U.S. Circuit Court of Appeals at Richmond, Virginia, has written that critics of the Supreme Court’s case selection process are offering solutions in search of a problem. Wilkinson, reviewing “The Lottery Docket” at the ABA Journal’s request, says he did not find it persuasive for a number of reasons.

“To begin, ‘randomness’ is the very opposite of rationality, and a ‘lottery’ is the very antithesis of what justice is meant to represent,” Wilkinson says. “Why should some litigants be favored over others with what essentially amounts to a roll of the dice?”

Further, the judge says, an underlying premise of the proposal is that the Supreme Court should devote itself to what the authors term “unimportant” cases at the expense of that cohort of cases that will affect many thousands—and indeed millions—of Americans.

“That is an odd allocation of a finite resource, to say the very least,” Wilkinson notes.

“Moreover, ordinary cases are not suffering from neglect,” the judge continues. “They have been subject to multiple rounds of litigation in the lower state and federal courts. There is no reason to review further cases whose resolution the broadest swath of judges would regard as correct.”

Epps and Ortman say that the Supreme Court’s approach to certiorari reflects a number of trade-offs. “In its heavy reliance on imperfect proxies, the court appears to have concluded that the limited time and attentions of the justices are best spent on the merits cases, not on gatekeeping,” they write.

**GUARDING THE CERT POOL**

As it happens, Epps was a law clerk for Judge Wilkinson before going on to serve as a clerk for Justice Anthony M. Kennedy during the 2009-10 term. That means he was a participant in the cert pool and had a firsthand role in that gatekeeping function.

In that respect, he shares an experience with the court’s newest member. Justice Neil M. Gorsuch was a clerk to both Justice Byron R. White and to Kennedy during the 1993-94 term.

Gorsuch thus participated in the cert pool, in which the clerks divvy up all the cert petitions and write a single “pool memo” for each that is shared among all the participating chambers.

A review of Gorsuch’s pool memos by this reporter for SCOTUSblog while his nomination was pending found that among some 50 he wrote during that term, Gorsuch recommended few if any grants. Besides the fact that Gorsuch managed to avoid drawing memo duty for pending appeals involving some high-profile issues, such as abortion, most of the petitions he reviewed simply did not present cert-worthy issues.

That review of pool memos, which required paging through several thousand from that term just to find ones written by Gorsuch, also left the indelible impression that a random selection of some appeals for merits review would leave the court with some strange and meritless cases.

But such critiques and skeptical observations have not deterred Epps and Ortman from advancing their idea.

“We’re academics,” Epps says. “Part of the freedom we have is to make speculative proposals designed to get you thinking, even if no one is going to be implementing them tomorrow.”
“It is no longer a question of imitation, nor duplication, nor even parody. It is a question of substituting the signs of the real for the real.” —Jean Baudrillard, Simulacra and Simulation

In January, I watched two events transpire in sequence on television: the inauguration of President Donald Trump and then the women’s marches and protests that took place on the same Washington mall and throughout the world. The president’s inauguration speech was a story about American carnage, providing a bleak vision of burned-out factories in decay and decline, set pieces and selected imagery that easily could have been borrowed from the movie The Road Warrior.

The following day, there were images of massive crowds at the Women’s March on Washington: the marchers protesting the new administration, rekindling the possibilities of collective action in a media world that seldom seems to record or value the responses of people within it.

As is customary, panels of talking heads on cable TV provided commentary that affixed meanings to the surfaces of dramatic images. Pundits looked back into our past, argued over their own interpretations of events, and then inevitably were drawn forward into the future. They filled up the news cycle and provided their predictions and speculations of what the future would hold for us all, and what would happen next in a political story that no one could rightfully see or anticipate and that only becomes clear in hindsight.

Of course, this form of news programming enables viewers to tune in and out at any time, and the tension of conflict and argument always segues nicely into the endless loops of commercial interlineations. The commentaries on Trump’s first two days were akin to earlier pieces about the presidential campaigns, in which recurring casts of familiar pundits and surrogates were inevitably wrong in their predictions of what lay ahead—the tectonic plates of democracy shifting in ways that defied predictability.

SIZE MATTERS

On the second day after Trump’s inauguration, the debate twisted into a dispute not about interpretation of facts but about the underlying “facts” themselves: competing stories about the metrics of crowd size. Initially, Trump’s media surrogates claimed that the crowd size at his inauguration was “just as big” as it was at President Barack Obama’s. These crowds had been “simply tremendous” at Trump’s inauguration in comparison to the Women’s March.

There are many ways to think about the truth. For the most part, the truth in question here is not the correspondence of words to something real but the justification for particular beliefs about events. Jack L. Sammons, a legal philosopher and professor emeritus at Mercer University School of Law in Savannah, Georgia, says: “The shock of the Trump claim was the weakness of the justification for the belief. Both sides were generally in agreement on how that truth should be determined—by observations and the reports of others.”

As the data (and the images) validated the pundits’ perspective rather than the president’s, the argument shifted, as if the story could be transformed by the pull on a rhetorical lever. Then, as the late Jerome Bruner, an educational psychologist and professor at New York University School of Law, might have put it, the argument “went meta” with Kellyanne Conway arguing famously that there are no “actual facts,” only “alternative facts.” The president tweeted, and the surrogates attacked with another story: The images in various photos and the data collected were all part of a lie concocted by a villainous liberal media in a conspiracy to destroy the young presidency. (Or as Alfred Hitchcock observed, “The more successful the villain, the more powerful the story.”)
I watched with dismay. When the Trump surrogates spoke of alternative facts, I thought initially of Big Brother in George Orwell’s dystopian novel *1984*—the Ministry of Truth’s “reality control” and the Party’s call to “reject the evidence of your eyes and ears,” denying reality as “something objective, external, existing in its own right.” But then I recalled an alternative framing story—Paddy Chayefsky’s masterful screenplay for Sidney Lumet’s visionary satire of television journalism in the film *Network*.

**LIFE IMITATES ART**

In *Network*, Howard Beale, an aging television anchor who is about to be fired for declining ratings, suffers an on-air breakdown and is transformed into “the Mad Prophet of the Airways.” In doing so, he unleashes a ratings bonanza and TV news morphs into infotainment and reality television.

In a signature scene, Beale implores a vast audience of passive “videots” to rise from their passivity, shut off their TV screens, go to their windows and scream out into the night: “I’m as mad as hell, and I’m not going to take this anymore.” Without hesitation, the audience obeys his command. Later in the film, Beale's populist message is co-opted and transformed by corporate oligarchy, and Beale morphs from a celebrity to a martyr when he is assassinated on live television, resurrecting his once-again declining ratings after he finally adopts the party line. I recast Trump in the role of the Beale character, unleashing the passive audience’s populist anger and then attempting to turn that anger back on the corporate and elitist media. Why? In part because the media had, throughout the primaries and presidential campaign, uncritically showcased Trump’s speeches and rhetoric, and also in part because, like Beale, Trump in turn had bolstered the cable networks’ ratings. And for-profit cable media adopted another effective low-cost strategy: reporting what experts on both sides think about events as sufficient to tell the “truth” about events rather than undertaking more costly (and perhaps more off-putting and less entertaining) investigative reporting characteristic of print journalism. That is, the media left it up to the audience to choose what to believe based on competing opinions, rather than on presentation of evidence.

Now under attack, the newly outraged television media claims some things are simply true; that there’s indeed a “there” there after all—and that not all beliefs are justified. Is truth a matter of what is believed subjectively by the audience? Does it still matter whether the belief is not justified by the evidence? This is not a new question, but it is a question ever more pressing for our time. It also is a question that is especially important for lawyers.

Let's go back in time to the mid-20th century, when academic theorists sensed that something important was afoot in how we processed information and how, in turn, these processes would redefine who we are now, and the stories we tell in constructing our worlds and our own identities within these worlds.

Marshall McLuhan, the late communications theorist and philosopher, provided what might seem, in retrospect,
Practice

a naive and romantic vision of a world interconnected by newly emergent technologies into a “global village.” Baudrillard’s vision was darker: We were migrating outside ourselves, into the dangerous simulacra of unmediated images, a “hyper-reality” of free-floating narratives, a sound chamber echoing unrealties and consumerist dissatisfactions back into us. Perhaps Baudrillard now has the upper hand.

THE CRUX FOR LAWYERS

Cut to my law school classes. Students locked behind their computer screens addicted to various custom-designed cyber worlds. Are they following along with the cases? Or surfing Twitter feeds? Catching up with Facebook postings? Are classes merely a respite from texting and media and cellphone and cyberspace addictions?

I tell students in my first-year classes the practice of law anticipates the interaction between law and facts; legal doctrine matters only as applied to “the facts.” If we exist exclusively in a hall of mirrors where there are no actual facts but only alternative facts, then there may be judgment but not justice.

Many students find my perspective naïve; it no longer fits their worldview. One of my students (now a lawyer) put it this way: “As a general rule, the justice system seems to favor the ‘knowable’ version of the truth. Lawyers tend to believe the opposite. By their behavior and their beliefs, lawyers view the truth as an unapproachable ideal.”

“Leaving aside examples where it is so clear that an account of an event is ‘true’ or at least so clear that no one wants to bother arguing about it—the truth is unknowable. Since there is no way truth can be definitively proven, the role of the lawyer is not to aid in the search for truth, which is an oxymoronic phrase anyway, but to arrange any and all facts available to produce the story that best suits his client’s needs.”

I don’t dispute that there is some realism in my former student’s skepticism. But if the possibility of factual truth is now oxymoronic, may we permissibly gauge truth not by justified belief based on evidence but by the entertainment value of the narrative? Or by our trust in the authenticity of the performer’s view? Or by the supposed authority and power of narrative? Or by our trust in the authenticity of the performer’s view? Or by our trust in the supposed authority and power of the voice? Or by the supposed authority and power of the speaker? Are we more like the passive viewers in Chayefsky’s Network than we may care to admit?

I fear that when alternative facts become the norm, and the fair-minded application of the law to facts to achieve justice seems a naïve and romantic pursuit lost in a different time, then the practice of law, like politics, is potentially transformed. We then move into dangerous, uncharted territory.

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

The Blog Difference

California sets boundaries to distinguish between noncommercial information and advertising By David L. Hudson Jr.

A lawyer wants to increase her profile in the legal world and perhaps attract new clients. She also wishes to show the world some success stories from prior cases. Many lawyers have blogged about their cases to achieve greater visibility.

The key question for professional responsibility purposes is whether these blogs contain noncommercial informational posts or whether they are communications that fall within the scope of their state’s advertising or solicitation regulations. Professional responsibility rules prohibit advertising that is false, misleading or deceptive. Attorney advertising can be misleading if it creates unjustified expectations on the part of potential clients, speaks about the quality of legal services without verification, or otherwise creates uncertainty or confusion on the part of clients.

The question also carries important constitutional ramifications because in First Amendment law, political speech receives much more protection than purely commercial advertising or what is called commercial speech.

Late last year, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion No. 2016-196, which provided guidance to attorneys through the examination of several hypotheticals involving various types of blogs.

“This opinion is not intended to chill or limit the protected speech of any lawyer, but rather to provide guidance to attorneys engaged in blogging activity as to the types of blogs or blog posts that may fall within the ambit of those regulations and statutes,” the opinion reads.

The opinion distinguishes between blogs that contain merely informational posts and those with an offer for the reader to contact and engage the attorney for professional purposes.

LINE OF COMMUNICATION

The hypotheticals featured five attorneys—A, B, C, D and E—who blogged about their past cases, linked to their professional websites and blogged about other subjects.

For example, Attorney A, a criminal defense lawyer, writes a stand-alone blog—Perry Mason? He’s Got Nothing on Me!—in which he blogs about his successful defense of a client who possessed large amounts of cocaine in his car. The blog identifies Attorney A as “one of California’s premier criminal defense lawyers” and contains a hyperlink to his law firm’s professional website. Attorney A also says he has won 50 cases in a row.

The California ethics opinion reasons that this blog would fall under the reach of the rules of professional conduct and may qualify as a false, misleading or deceptive communication. “The blog posts describe the attorney’s services as a criminal defense lawyer and make specific representations concerning the quality...
of those services,” the opinion explains. “The posts also implicitly express Attorney A’s availability for professional employment and invite readers to employ Attorney A’s services.”

On the other hand, Attorney E is an employment law attorney who blogs about jazz. The blog includes links to his professional website, along with contact information and a brief biographical note.

The California opinion classifies this blog as a “nonlegal blog linked to professional webpage” and concludes that it is not a communication or advertisement within the meaning of the California Rules of Professional Conduct.

The ethics opinion explains that “commercial motivation is only a factor to be considered.” A key question is whether the post concerns “the availability for professional employment.”

The opinion concludes that attorney posts are not communications or advertisements subject to the ethics rules “unless the blog expresses the attorney’s availability for professional employment directly through words of invitation or [an] offer to provide legal services, or implicitly, for example, through a detailed description of the attorney’s legal practice and successes in such a manner that the attorney’s availability for professional employment is evident.”

“The California opinion does an excellent job of analyzing the hypotheticals and reaching the correct results as to whether such blogs are communications within the meaning of the advertising rules,” says professor John Cary Sims of the University of the Pacific’s McGeorge School of Law, who teaches professional responsibility.

“The opinion focuses on the critical question of whether certain attorneys blogging about their cases qualifies as a communication.”

“Just because an attorney’s blog contains a link to his or her website does not necessarily mean it is a communication,” Sims adds. “Some of the blogs are classic examples of attorneys trying to make the world aware of their experience for the purpose of increasing their employment opportunities.”

MONEYED MOTIVATION

One source the California opinion cited was Hunter v. Virginia State Bar ex. rel. Third District Committee (2013), a Virginia Supreme Court decision that determined Horace Hunter’s blog, devoted to his successes as a criminal defense attorney, qualified as advertising under the Virginia Rules of Professional Conduct.

The Virginia high court emphasized that Hunter’s motivation for the blog was economic, and that he predominately wrote about cases in which he obtained a positive result for his client. “When considered as a whole, the economically motivated blog overtly proposes a commercial transaction that is an advertisement of a specific product,” the court wrote.

Two justices dissented, reasoning that speech about the criminal justice system and criminal cases qualifies as political speech protected by the First Amendment. “Even if marketing was Hunter’s sole motivation, economic motivation cannot be the basis for determining whether otherwise political speech is protected,” the dissent read.

The U.S. Supreme Court declined to review the case. First Amendment expert Rodney A. Smolla, who represented Hunter, maintains that the Virginia high court reached the wrong result in its decision. “I have advocated that when a lawyer in a narrative way describes the outcome of prior cases, and when the lawyer explains this is not intended as advertising and results in individual cases may differ—such speech is political speech, not commercial speech.”

“Even though one of the motivations is to promote oneself,” Smolla explains, “the communication still contains much noncommercial speech and should not be considered purely commercial advertising.”

Smolla, who is now the dean of Delaware Law School at Widener University, warns that the trend is in favor of the reasoning of the Virginia Supreme Court majority in Hunter. “The momentum favors bar regulators and disfavors the First Amendment defense. The result in the Hunter case probably captures where lower courts are right now in terms of these issues. I hope someday the U.S. Supreme Court will take a similar case and change the law.”

Smolla also notes the irony of declining support for free speech protection for lawyer advertising in the same era as the U.S. Supreme Court has expanded protection generally for commercial speech. Since the mid-1990s, the court has struck down various restrictions on ads for liquor pricing, gambling, tobacco and other topics.

But, Smolla says, when it comes to questions related to commercial speech, “lawyer advertisers are considered second-class citizens in what is already a second-class area of First Amendment law.”
The Principle of End Weight

Creating sentences with emphasis

By Bryan A. Garner

Let's investigate a little-known secret of style.
Quick: What's the most emphatic part of a sentence?
Many legal writers don't know, and this explains why many are so poor at phrasing. Believe it or not, the most emphatic position isn't the beginning of a sentence, but the end. That's why the great Karl Llewellyn said that every sentence ought to be arranged so that the punch word (or sometimes punch phrase) comes last.
That's also the key to effective joke-telling. It's all about timing.

MAKE IT SIZZLE
You might ask what this has to do with legal writing. The answer is everything. A good writer pays close attention to phrasing and to placing strong words in emphatic positions. A poor writer, by contrast, pays little attention to these matters and often ends sentences with words that don't sizzle, but fizzle.

It doesn't matter what type of writing we're talking about. Consider a state legislative provision: "The company may specify on a certificate the expiration date on which the term of the member would otherwise expire, unless reappointed."
That's 54 words—bad for an average sentence, which ought to be closer to 20—and the syntax is hard to parse successfully. Most readers would need to read that sentence two or three times to grasp its meaning fully. One advantage of writing shorter sentences is that you gain more positions of emphasis in the prose—more of those valuable sentence-ends.

Let's see what we can do in revising that provision: "A new member serving only part of a seven-year term in office may continue to serve until a qualified successor has been appointed. But unless reappointed, the new member cannot serve for more than one year after the date on which the term would otherwise expire."
Now we understand the meaning in a single reading.

ENDINGS WITH EMPHASIS
The principle of end weight works in advocacy as well, and you can use it in both writing and editing. See every sentence as a crescendo. Try reading your prose aloud, exaggerating each sentence's final phrase. If the reading sounds foolish or the end just trails off, then the sentence probably needs recasting.
Years of editing with this principle in mind have led me to formulate some general rules:

Never end a sentence with a date unless it comes as a surprise ("She was expected on May 13 but didn't arrive until May 30.").

Never end a sentence with a citation—especially if you're putting all the bibliographic material (volume numbers, page numbers, etc.) in the text, as most legal writers infernally persist in doing. If you're citing in text, arrange the prose so that you have separate "citation sentences." If you're citing in footnotes (but still, one trusts, being clear what courts and cases you're talking about in the text), you've uncluttered the paragraph and can write much more emphatically.

Never end with in many circumstances, generally speaking, or any similar qualifying phrase. Put a word such as usually or typically earlier in the sentence.

Avoid ending with a litigant's name unless it comes as a surprise ("Everyone was expecting to see Johnson at the door, but it was Kilgore.").

Instead of using syntax to provide emphasis, many legal writers misguidedly highlight words and phrases with italics, boldface, boldface italics and (worst of all) underlined boldface italics. (Some even misuse quotation marks for emphasis.) They end up looking like hectoring loudmouths who wrote their briefs at a bar after getting a little sloppy.
I'm talking about midparagraph words and phrases,
not point headings (which are justifiably boldface). Typically, the more gimmicky the emphatic formatting, the more inept the writer. That’s why Ralph Waldo Emerson, the legendary 19th-century writer, said that in really good prose every word is italicized. That’s an overstatement, of course, but only a gentle one. Use visual emphasis sparingly (I’m not counting white space and bullet dots here). You can do this if you understand syntactic stress points.

An aggravating circumstance in legal writing is that when you cite cases in the text, a great deal of italic type in the form of case names necessarily invades your paragraphs. The extratextual clutter is compounded by volume numbers, page numbers, other bibliographic information and parentheticals that are seen as obligatory appendages. All this clutter dilutes the visual emphasis you’d get by italicizing only one word—for example, not. So with that loss of impact, you might be tempted to boldface the not as well—maybe even to underline it, too, for good measure. The result isn’t the emphatic crescendo you wanted but a distracting, amateurish cacophony.

One bad typographic habit leads to another. That’s why so many pages of court filings—perhaps 20 percent—have some pages that look like ransom notes prepared by teroristic sociopaths.

The litigators reading this know that this isn’t an exaggeration. It’s just that the writers have lost control. They’re desperate to have their pages looked at, and their desperation shows. They then produce pages that would cause any rational reader to avert his or her eyes immediately.

And, of course, they’ve long since lost sight of how to phrase sentences with natural emphasis.

CAREFUL WITH TYPEFACE

Let’s stipulate, though, that for some reason you can’t wholly abstain from emphatic type. What guidelines might you follow? How much of a sentence should you italicize? And are italics alone enough?

Three suggestions: (1) Never boldface a word or phrase within a paragraph. The minute you do this, the page becomes less readable. The reader will look at the boldface words and then start skimming—and soon turn the page. (2) Italicize the fewest possible words—the smallest semantic unit deserving emphasis, as gauged by what word or phrase would be most heavily stressed if you were reading aloud. (3) If italicized case names appear near the word or phrase you need to emphasize, achieve that emphasis instead through syntactic placement.

But never forget that the emphasis is best achieved by smart phrasing, especially by putting the emphasis-worthy term at the sentence’s caboose.

Not long ago I was working with a plaintiffs lawyer on a settlement proposal. One passage read like this: “At the time when Paul’s plane hit the ground, Paul’s wife Betty was helping a friend with a garage sale. Shortly after the accident, Betty received a call from Billy Nugent. He came by and drove Betty to her parents’ house, where she was told of the death of her husband about 30 minutes earlier.”

Now analyze that passage. Just look at how the sentences end. That’s what makes the passage so ineffective. I explained to my lawyer-friend the principle of end weight, which to him was entirely novel.

Together we worked through the passage and produced this revision: “Betty, Paul’s wife, was helping a friend with a garage sale when Paul’s plane crashed. Shortly after the accident, Betty received a call from Billy Nugent. He came by and drove Betty to her parents’ house, where she was told of the death of her husband about 30 minutes earlier.”

When you read powerful prose, pay attention. Notice how the sentences and paragraphs end. And realize that in all your work—both written and oral—this end-weight technique is crucial.

Bryan A. Garner, the president of LawProse Inc., is the editor-in-chief of Black’s Law Dictionary and the author of Garner’s Modern English Usage (available as a mobile app) and The Chicago Guide to Grammar, Usage, and Punctuation.
Recently, I saw a TV ad recruiting Uber drivers. It showed a young guy, apparently a family man, seamlessly moving back and forth from earning money driving to “chilling.” Whatever you think about ride-booking services in general, or Uber in specific, it certainly made driving for Uber seem like an easy way to earn some money.

This got me wondering what on-demand lawyering might look like. You wake up, fire up the laptop or tablet and voila! Six new matters are waiting for you. Making money on these new matters is a snap. You click, read about the client’s issues and get cranking.
Maybe more work comes in throughout the day. Perhaps you make a few hundred bucks from on-demand counseling sessions, handle a remote appearance or file a few documents remotely. You knock off at 6 p.m. In the words of the ad, you’re done earning. It’s time to chill.

This image of on-demand lawyering is a bit of science fiction. On-demand lawyering probably will never look exactly like Uber or its biggest competitor, Lyft, because even the simplest legal work is not as easy to learn nor to do as getting in the car, stepping on the gas and picking someone up.

Still, given that a lot of people who could afford a lawyer don’t engage one, those who can’t afford legal services now might buy them if the services were offered at the right price or in the right manner. The day is not far distant that someone figures out how to aggregate consumer demand at scale and pass that business back to a team of hungry, waiting lawyers.

NOT COMPLETELY NEW

In a manner of speaking, the on-demand attorney has always existed. They are called “freelance lawyers.” Although Uber for legal doesn’t exist yet, today’s smart freelance lawyer is a bridge between where we are today and this utopian vision of the “lawyer on demand.” If we use the popular software numerical versioning of 1.0 for the first version of the freelance lawyer, then the modern freelance lawyer—the one optimized for today’s economy and consumer—would be Freelance Lawyer 2.0.

As a heavy user of ride-booking services, I’ve talked to several drivers and learned that while the ad romanticizes the gig somewhat, smart freelance drivers have a few tips and tricks to help them find...
success. And just as the smart drivers know how to maximize making money, Freelance Lawyer 2.0 has tricks to make freelance lawyering more profitable.

Here are three tips I’ve picked up from freelance drivers that are also applicable to Freelance Lawyer 2.0.

**TIP 1: OWN THE AIRPORT RUN**

In other words, know your market. In most cities, ride-booking service drivers will tell you that the airport run is profitable. The airport usually is a fair distance from downtown hotels and other hospitality options, and there’s a steady stream of arriving travelers who need a ride.

Freelance Lawyer 2.0 has to know the equivalent of the airport run in their market. In short, they have to specialize. This is a more complicated process than simply finding the airport, and it might vary from attorney to attorney. But that doesn’t mean it’s not important.

As one example, the on-demand general practitioner is not making the legal equivalent of airport runs. If some internet or technological tool can collect and allocate work to waiting lawyers, this tool is going to be smart enough to direct that work to the lawyer who has the most experience with
that work and can do it most efficiently (and most profitably for the lawyer), not to the lawyer who is doing it for the first or second time.

Another term for specialization is finding a niche. A niche practice is key to Freelance Lawyer 2.0 for several reasons. But two that come to mind immediately are efficiency and marketing. On the efficiency front, having a niche practice means that a lawyer is dealing with a relatively small number of issues in a familiar domain in a repeatable fashion. As noted above, this is far more efficient than learning a new domain or even type of matter from scratch as many general practitioners do.

Having a niche also helps with marketing. Instead of marketing to the whole world or anyone with a legal issue, niche practitioners are interested in serving a very specific type of client who has a very specific problem.

Becoming a specialist also helps your work-life balance. As a lawyer’s expertise in serving a niche market increases, the demand for that lawyer becomes more focused. This kind of niche or specialization allows the lawyer to be in greater control of their schedule and less likely to receive midnight phone calls or urgent requests that interrupt family time or vacations.

In the same way that smart drivers are doing everything they can to get an airport run—to specialize instead of hanging out in the suburbs or even downtown waiting for some short ride—Freelance Lawyer 2.0 understands the importance of specialization.

**TIP 2: WORK NIGHTS OR WEEKENDS**

Go where the clients are—and lawyers aren’t. Smart drivers adjust their schedules to take advantage of fluctuating rider demand. Drivers have told me they work late in the evening or early in the morning to take advantage of times when others aren’t driving or when rider demand is at its peak.

For Freelance Lawyer 2.0, this idea is an extension of the specialization or niche practice discussed above. They only have to figure out where their target market is and who the target market finds credible, and then they have to market to those people or resources. Specific questions that Freelance Lawyer 2.0 asks about clients include: “Are my prospective clients online or offline?” “Is my ideal prospective client a consumer, a member of the general public?” “Is my ideal client another lawyer? In-house or even at another firm?”

Freelance Lawyer 2.0 also understands that unique niche practices present an opportunity to serve a clientele that potentially isn’t being served or isn’t being served in as full or comprehensive a way as their niche practice might. In this way, freelance lawyers set themselves apart from other lawyers by claiming territory the others don’t want.

Like the smart ride-booking service driver, Freelance Lawyer 2.0 is working the clients whom other drivers aren’t serving because of the lateness or earliness of the hour.

**TIP 3: LEVERAGE THE TECHNOLOGY**

I’ve met many drivers who offer their services with both Uber and Lyft. When they’re waiting for a fare, they turn on both apps. When a call comes in from either, they take the fare and turn off the other app. These drivers are making the best use of their time, using technology to ensure they can make their driving time as efficient and profitable as possible.

I’ve talked to other lawyers who use technology to closely track the amount they make per mile, how much and where they travel (to extend the analogy).

Technology is a powerful tool for Freelance Lawyer 2.0. Not only can it be the way clients find their lawyer—as envisioned at the beginning of this article—but it also can empower the lawyer to serve clients more quickly (using document assembly, sharing and automation) and manage the practice more effectively.

Freelance lawyers may be solos, but they are not alone. Whether it’s virtual assistants, outsourced reception, other freelance resources or even automated tech, Freelance Lawyer 2.0 appreciates and heavily leverages technology. Not only does technology allow Freelance Lawyer 2.0 to untether from expensive office space, it also allows for remote management of the practice from anywhere the lawyer has an internet connection.

Additionally, technology seamlessly connects Freelance Lawyer 2.0 with a network for virtual resources that don’t have to be employees or even contractors but can help Freelance Lawyer 2.0 with firm management and maintenance.

Leveraging technology isn’t about displacing lawyers with artificial intelligence (as many have suggested). It’s true that lawyers would be wise to use technology to handle highly repeatable tasks. But leveraging technology really means to outsource those functions that others can do better, so lawyers can focus on using their highly tuned legal skill set in the most cost-effective manner.

Making good money as a driver for a ride-booking service isn’t a given. It takes some thought and some commitment. Making money as a freelance lawyer in the modern economy is even harder, particularly because the legal services sector is still evolving to the point that all clients come to one or two places for affordable, reliable, quality service.

In the meantime, freelance lawyers and particularly those who understand and leverage the tools of the modern economy—Freelance Lawyer 2.0—can make a good living and have a good work-life balance. They can earn and chill with relative ease.

*Dan Lear is the director of industry relations at Avvo, the online legal services marketplace.*
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TECH TRIALS
COMPETITIONS BOOST INTEREST AND INVOLVEMENT AT THIS YEAR’S EVENT

By Victor Li

ADDED SOME SPICE TO THE AGENDA OF THE ABA TECHSHOW 2017, two competitions debuted at the March event, offering access to justice for military veterans and access to technology for law firms seeking legal services.

The inaugural Startup Alley competition, hosted by Robert Ambrogi of LawSites and Mary Juetten of Evolve Law, pitted 12 legal startups against one another in a knockout-style contest, with audience members voting for the winners.

All competitors received a discount to display their services in the exhibit hall, with the first-place winner getting a $5,000 advertising package with Above the Law. The participants included trust accounts simplification tool TrustBooks; lawyer matching services LegalClick, AggregateLaw and Court Buddy; Alt Legal, trademark and docketing software; ClariLegal, a platform for buying legal services; eBrevia, contract analysis; Just Legal, support staffing; and Paladin, a provider of pro bono opportunities.

First place went to Ping, an automated timekeeping program that allows lawyers to automatically track and bill their hours without starting or stopping a timer. According to Ping CEO Ryan Alshak, most lawyers have to keep track of time manually and rely on a lot of guesswork when they do their billable hours. It was a phenomenon he knew all too well.

“I was a BigLaw lawyer for three years, and I was the worst timekeeper in America,” he told the ABA Journal. “I’d wait until the end of every week and then go back and guess what my billable hours were. I knew I was leaving a lot of time on the table.”

By his estimation, lawyers can lose up to $15,000 a month simply because they aren’t tracking their hours accurately. In addition to timekeeping, Ping tracks data so lawyers can gain more insight into how their practices work and create more accurate budgets. Alshak started Ping last May—a month after he quit his law firm job. The technology is currently part of a pilot program with a law firm of 40 lawyers. His goal is to go to market by the summer.

Second place went to Doxly, a secure portal and management platform for corporate transactions. UniCourt, a program that provides easy access to state and federal case law and legal analytics, finished third.

Videos for several of the businesses are on the ABA Journal YouTube channel.

And during the traditional morning plenary session, Techshow chair Adriana Linares announced the winners of the Tech for Justice Hackathon plus Veterans event.

First place and $5,500 went to Carry On, a project to help victims of military sexual trauma. The service features a chatbot, a system of alerts, forums and real-time chat to connect victims with services and provide them with resources on how to file a report, get help or learn about their symptoms.

Taking home the second-place prize and $2,500 was Veterans Will Center, an interactive estate-planning checkup service to determine what probate documents a veteran should have and where to go to get the documents generated free of charge or at a low price.

The hackathon also awarded a $1,500 third-place prize to Vet’s Panic Button, an app that quickly links a suicidal veteran with other veterans willing to help. A $500 fourth prize went to the Service Connection, an online portal for veterans to learn more about and apply for benefits.

A list of projects, as well as the people who worked on them, can be found on the Devpost website.

“We are excited by the tremendous support we had from everyone,” Jeffrey Aresty, president of Internetbar.org and co-organizer of the event, wrote in an email. “The veterans groups have all committed that they will use the justice innovations our teams invented both for themselves and to be a beacon for all who need access to justice.”

A roundup of ABA Journal coverage of the show can be found at ABAJournal.com.

ST startup alley winners: (top) Ping CEO Ryan Alshak and COO Kourosh Zamanizadeh, and (above) Doxly CEO Haley Altman.
Absent Funds
Anti-truancy program’s success stunted by a lack of cash
By Terry Carter

There was much to celebrate last fall with the 25th anniversary of the Truancy Intervention Project, in which pro bono lawyers in the Atlanta area represent youngsters who miss too much school, helping keep them in the classroom and out of the courtroom.

Yet there could and should have been so much more to applaud that October. Not that TIP isn’t a resounding success. But like so many other endeavors for social needs, the organization took a hard hit with the severe economic downturn of 2008. The 215 or so volunteers—165 of them lawyers—work for free, but money for training, administration and other overhead necessities doesn’t grow on peach trees.

At its height, TIP had increased its reach with 22 affiliated programs around Georgia through the help of various donors, particularly grants from the Georgia Bar Foundation. Now there are just four in other locations. And TIP, with four full-time employees and two part-time slots, now handles two school districts in Fulton County and its county seat, Atlanta.

Since the crash, extremely low interest rates have reduced IOLTA (interest on lawyers trust accounts) funds to small fractions of what they used to be, leaving the Georgia Bar Foundation with little grant money to hand out. Most of TIP’s funding is from private sources, although Fulton County provides a small grant and a substantial in-kind gift of office space.

Taking early action
TIP takes assignments pro bono in all truancy cases that reach juvenile court and also operates an early intervention program in 20 elementary schools to keep kids out of the court system.

The pro bono work has saved the courts $5.3 million. That’s not an exaggerated estimate: It’s based on the amount courts otherwise would have paid appointed counsel. Representation is mandatory when truants are brought into the juvenile justice system.

TIP was launched in 1991 through efforts by the Atlanta Bar Association, whose president at the time, Atlanta litigator Terry Walsh, came up with the idea and developed it with then-Fulton County Juvenile Court Judge Glenda Hatchett.

“We got a perfect storm: more kids in need just as public and private funding declined,” says Walsh, now retired from Atlanta’s Alston & Bird, which gave TIP a $200,000 grant at the outset and has continued to help with funding. “Almost all of their caregivers were dropouts themselves, so helping one child has an impact on a generation or more. These are the poorest of the poor. These are all Title I schools” with high percentages of low-income families.

Dropouts are 4½ times more likely to become delinquents, he adds, and girls who leave school are 6½ times more likely to get pregnant while in their teens.

In attendance
TIP has now helped more than 10,000 students. The statistics are impressive, such as the average number of school days missed now being just 13½ a year, compared to 40 in 1999, when the ABA Journal last looked at the program. The
success rate for ending recidivism—meaning truants returning to court—has gone from 70 percent in 1999 to 76 percent now. The early intervention efforts in elementary schools, which began in TIP’s second decade in 2001, are keeping 99 percent of the children who had been missing too much school from entering the juvenile justice system at all.

The lawyers and others, such as law firm staff, handle those matters within the school system.

“The monetary costs to society—and the social harm—are much less when we can reach kids before a serious crisis point,” says Hedy Nai-Lin Chang, executive director of Attendance Works, a national organization that promotes policies to stem truancy, such as tracking absences for each student from kindergarten, then offering personalized approaches to problems. “We’re better off investing in prevention and early intervention—with a systemic approach.”

TIP has a system, but its funding is more ad hoc.

“There is a philosophical divide that includes the argument that: ‘Oh, the churches will do it,’ ” says Jessica Pennington, TIP’s executive director. But “it” is just too big.

LAWYER MENTORS

There is, though, a lot more to TIP than handling court cases and dealing with school administrators for early intervention. Its volunteer lawyers typically mentor clients and more.

As often as possible, TIP board member Adwoa Awotwi meets socially with her clients on weekends, taking them to lunch, a movie or to get their nails done.

“I’m hoping they get the message that if they work hard in school, they will be able to get a job and do these sorts of things on their own,” says Awotwi, who began handling TIP cases in 2003 at the suggestion of a partner in the law firm where she was a newly minted lawyer. She’s general counsel for the website LocumTenens.com, which provides physicians, nurses and others for short-term staffing assignments at medical facilities.

With parents’ permission, Awotwi has her female clients spend a weekend at her home, experiencing the normalcy of a safe neighborhood and another perspective on possibilities in life.

CHANGES MADE

TIP has morphed in two significant ways since its inception. First was the launch of the early intervention program in 2001; then in 2013, Georgia completely rewrote its juvenile code with the Child Protection and Public Safety Act. The statute decriminalized truancy, removing it from the list of status offenses and calling for nonjudicial handling of “children in need of services.”

“So we’re now getting only the kids who are really, really having trouble,” says Pennington, who became TIP’s executive director in 1995. Approximately 40 percent of truants entering the court system now have significant behavioral problems such as depression, bipolar disorder and other mental health concerns, she says. TIP is building a behavioral component and trying to get funding for treatment.

TIP also has a “holiday adoption” program in which the organization gathers wish lists from the children it helps and provides them and others in their families with gifts. Typically, four or five big law firms get involved.

“We got them bikes this year,” says Pennington. “A lot of volunteers want to get their kid something nice.”

It would be even nicer if TIP’s stocking was filled with funding.
Less Loss

Litigation cost insurance covers losing plaintiffs’ expenses

By Karen M. Kroll

PLAINTIFFS LAWYERS KNOW THE RULE: If they lose their lawsuits, they and their clients pay the expenses, while defendants often have insurance to defray legal costs. But what if there were a way to mitigate the financial risk plaintiffs assume in bringing a case to trial?

Level Insurance offers litigation cost protection insurance, which covers certain litigation expenses if a case results in a defense verdict. The insurance was developed by Justin Leto and Larry Bassuk, trial attorneys and law partners at Leto Bassuk in Miami. “It’s a safety net for plaintiffs attorneys and plaintiffs themselves,” Leto says, noting that losing a case can destroy a plaintiffs lawyer’s business. Unlike the defense, who often can turn to a client’s insurance, no similar coverage had been available to plaintiffs.

FILLING A VOID

The concept of plaintiffs insurance started several years ago. Bassuk and Leto, although not partners at the time, were practicing trial lawyers. They searched for any instruments that would cover the financial investment required of attorneys who handle plaintiffs’ cases. “Nothing was available,” Bassuk says. “We saw the need for innovation in the legal industry.”

Bassuk and Leto became partners and set about developing the coverage now available through Level Insurance—a journey that took more than three years. “It’s rare that a new insurance product comes to market,” Leto says. The two had to develop the product and technology—applications are completed online—and obtain licensure. “This was something that didn’t exist and that we wanted to get behind,” says Gregg Miller, senior vice president with Socius Insurance Services Inc., a wholesale broker based in San Francisco that administers the policies. “We felt there was a real need for innovation in the legal industry.”

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Level Insurance launched last June in five states for state court actions, Bassuk says. As of early May, it was available in 21 states and for any federal district court case. “We accelerated our strategic growth in response to demand,” he says, adding that they hope to reach all 50 states. While Level Insurance initially targeted attorneys working mainly on personal injury, medical malpractice and commercial litigation cases, it has received inquiries from those involved in a range of lawsuits, including product liability and breaches of contract.

It’s also sold policies to firms of all sizes, Bassuk says, noting that some use litigation cost protection as part of their risk management policy. When plaintiffs themselves purchase coverage, the insurance won’t reimburse their legal fees. It will, however, cover money spent on deposition transcripts, their attorneys’ travel expenses and filing fees, among other costs. The policies differ from products offered by litigation finance companies in that they’re not loans. In addition, unlike the terms of some litigation finance loans, the policies don’t restrict how policyholders invest in their cases, Bassuk says. “We worked extremely hard,” Leto says, “and are proud of the end product.”
Filling a Gap
Dental malpractice firms apply expertise to oral claims

By Ed Finkel

WHEN AN ELDERLY MAN DIES after a dentist drops a tool down his throat or a 17-year-old passes away under sedation during wisdom teeth extraction, attorneys like Mark Glassman, Stanley Lane and Edwin Zinman take the case.

They’re among a handful of dental malpractice attorneys scattered across the country: Glassman and Lane, who took the two aforementioned cases, practice together in Plantation, Florida, while Zinman’s offices are in San Francisco.

Their cases seldom involve wrongful death claims on behalf of next of kin; they are far more likely to involve chronic injuries due to dental work—such as facial nerve damage—that cause ongoing pain or lack of sensation.

“Typically, those are the only cases you hear about,” Glassman says of the death situations. “But those aren’t the everyday cases.” In addition to injuries, Zinman says common types of claims include unnecessary dentistry and spoliation of dental records.

The Lane Glassman law firm has a caseload of about 75 at any one time and fields 10 to 15 calls per day, most of which the firm does not pursue because they would not lead to a high-enough settlement or verdict to be worth the time spent, Glassman says.

“The vast majority of calls are [complaints]: ‘My crown is broken. They sold me dentures that don’t fit. I have an infection after a root canal,’” he says. “You’re not going to build a practice on ‘My dentures don’t fit.’

“You have to be comfortable that the thousands you invest on the front end comes out the back end. A denture case where the top end might be $2,500 is not going to fit the bill of a viable practice,” Glassman adds.

THEIR OWN EXPERTS

Attorneys typically need a dentist to serve as an expert witness in dental malpractice cases, although Lane Glassman and the Law Offices of Edwin J. Zinman each has that covered: Lane and Zinman both have dental degrees. Glassman, whose practice centered on medical malpractice for most of his career, teamed up with Lane, an old family friend and former head of oral surgery at Mt. Sinai Hospital in New York City, about three years ago.

“Having a partner who’s an oral surgeon, who taught oral surgeons, certainly helps when it comes time to depose the provider,” Glassman says. “We have an expert witness in-house who knows more than most expert witnesses we hire.”

Medical malpractice attorneys who handle dental cases “have to consult with a dentist to find out what’s really wrong,” adds Lane. “I can determine it instantaneously after reviewing the records.”

The dental background is essential to evaluating cases, agrees Zinman, who has handled dental malpractice cases across the country since the 1970s, after several years as a periodontist.

“You need to be able to distinguish the avoidable from the unavoidable risk,” he says. “Particularly on the plaintiff’s side, you have to be able to say what a reasonable dentist would do, what the standard of care would be.”

SPLIT DUTIES

Lane says his role is typically to review cases as they come in and handle discovery and depositions. Glassman handles the legal motions and filings, and they team up for trials or mediations.

Medical malpractice firms that occasionally handle dental cases “have a standard expert, a friend they play golf with,” Lane says. “It’s typically a slice of their practice—far from the whole thing.”

But more often, med-mal firms refer out to firms like theirs, Glassman says.

“They get a call about a dental case and say, ‘Stop right there; let me give you a number,’ ” he says. “Our outreach has been to those medical malpractice firms.”

In the early days, most of Zinman’s referrals came from the Yellow Pages, while more recently they’ve come from the internet or other attorneys.

“There are only a few dentist-attorneys who have done this on any consistent basis,” he says. “There are a number of firms that handle it across the United States, but there’s only a few that concentrate on it.”
My research on the legal profession has enabled me to study rainmakers up close. Jane Allen, founder of Counsel on Call, based in Nashville, Tennessee, certainly fits one of the profiles.

Allen is affable and easy to talk to, getting high marks as a conversationalist because she asks good questions and seldom has to talk about herself. Her eyes and body language convey that she is listening and interested. As the dialogue continues, you share your problems and concerns. Allen then provides some keen insights that make them seem smaller and more tractable. Thus, in the most natural and sincere way, Allen becomes indispensable to your decision-making process.

This is how she goes through life. And, as it turns out, some of the people she talks to have legal problems. In the late 1990s, Allen had her own problems to solve. She had the résumé of a successful corporate lawyer—an honors graduate of the University of Kentucky College of Law, executive editor...
of the school’s *Kentucky Law Journal*, clerkship with a federal judge. But the arrival of her third child made the demands of her full-time law firm practice with Trauger & Tuke in Nashville incompatible with her personal goals. She negotiated a new work track in which she obtained a more flexible schedule in exchange for a reduced hourly rate for clients.

This new work arrangement had a big appeal to other female attorneys. Being a natural problem-solver, Allen decided to start a business called Counsel on Call in 2000 that made these capable lawyers available to other law firms to help with peaks in workflow or fill a temporary position.

A few months after opening, Allen got a phone call from Cathy Sowers, then the head of litigation for health care giant HCA, one of the largest employers in Nashville. “Jane, you’ve missed your market,” Sowers said. “More than law firms, legal departments need high-quality specialized lawyers to cover things like family leave or staff a temporary surge in work.”

Almost instantly, Allen’s small-firm practice was transformed into a business that managed a large stable of high-quality, on-demand lawyers.

By the mid-2000s, Allen’s high-powered clients were complaining about the inefficiencies of law firms and the lack of credible alternatives. She offered to collaborate with them to create teams of specialized lawyers. By 2007, the volume of work was sufficiently large that Counsel on Call opened its first managed services center in Nashville.

In 2007, Allen had never heard the term *managed services*. The layering on of vocabulary from other industries would happen a few years later. But with growing demand, additional centers would open in Atlanta and Dallas.

Counsel on Call is a growing $50-million-per-year business that employs more than 1,000 lawyers (as W-2 employees, not contract workers), does work for one-third of the Fortune 100, and operates in the United States and Europe.

### A NEW LEGAL BUSINESS

Counsel on Call is one example of legal managed services, but there are many others, including Axiom, Elevate, Pangea3 and UnitedLex. Legal managed services providers design, build and staff process-driven systems that efficiently complete legal work. The work’s content often is sophisticated and important to the client’s long-term commercial interests. Yet the volume is too large to
be performed cost-effectively by
law firm associates and too narrow
and repetitive to warrant hiring
more in-house lawyers.

E-discovery is a prominent exam-
ple of the managed services business
model. But the number of additional
use cases is growing and now
includes corporate due diligence;
internal investigations; contract
management; patent valuation and
portfolio analysis; and compliance
programs that surround employment
law, corporate governance, cyberse-
curity and data privacy.

Although the initial driver for
using a managed services provider
often is cost, additional advantages
include quality, timeliness and trans-
parency. In-house lawyers come to
depend upon the metrics that enable
them to monitor, measure and eval-
uate the large volume of legal work
under their supervision. These me-
trics also are used internally to dem-
onstrate to chief financial officers
and CEOs that legal departments are
making wise sourcing decisions.

If someone logs in to the Dun
& Bradstreet Hoovers database
and searches for Counsel on Call
or other legal managed services,
they'll see that these companies are
listed under the North American
Industry Classification System as
541110 Offices of Lawyers.

That's the same designation given
to Skadden, Arps, Slate, Meagher &
Flom, Jones Day and your local gen-
eral practice solo. Yet in contrast
to a law firm, these companies are
substantially or wholly owned by
nonlawyer investors. Axiom and
UnitedLex are backed by venture
capital companies. Counsel on
Call has been majority-owned by
Gridiron Capital in New Canaan,
Connecticut, since 2014.

(Counsel on Call was formed
as a C corporation—it’s taxed
separately from its owners—with
Allen’s husband, Greg, who is a fellow
shareholder and a businessman.)

If you are a lawyer and wondering
how these finance methods are pos-
sible under ethics rules that bar non-
lawyer investment, you should direct
your inquiries to Lucian T. Pera, a
legal ethics specialist at Adams &
Reese and Allen’s longtime lawyer.
Pera also is chair of the coordinating
council of the ABA Center for
Professional Responsibility and
the incoming president of the
Tennessee Bar Association.

In a nutshell, Counsel on Call
and other managed services provid-
ers are attorney-to-attorney busi-
nesses. They contract with in-house
legal departments to supply lawyers
with specialized domain expertise,
combined with access to outstand-
ing technology, process and business
know-how. Counsel on Call attorneys
work under the direction of in-house
or outside legal counsel.

According to the 2012 economic
census survey, released by the U.S.
Census Bureau, more than three-
quarters of all legal services are
sold to organizations (mostly cor-
porations) rather than individu-
als. Obviously, larger organizations
tend to have general counsels. The
addressable market for legal man-
aged services providers is the same
market pursued by the Am Law 200.

A SEGMENTED MARKET
The first time I heard the term
managed services was in April 2013.

Law professor Dan Katz of Chicago-
Kent College of Law and I were
interviewing Mark Harris, then
the CEO of Axiom, as part of a
documentary film project
on new legal services

providers. Arguably, Axiom had
the most distinctive brand in this
space, as its rise had been chronicled
extensively in the legal press.

Sitting in a conference room in
Axiom’s San Francisco office, my
first question was: “Have you won
yet?” Harris replied, “I feel like we
have just gotten to the starting line.”

Harris then explained how the
company was at about $50 million
per year in revenue in 2008 when
the financial crisis hit. Before that
time, the client mindset was one
of interest, but not urgency, toward
companies such as Axiom. But after
2008, there was “real demand for a
different way of operating.”

Although demand for legal ser-
dices finally rebounded, complex-
ity (what Harris called the “third
dimension”) continued to increase
because of the blurring of geographic
boundaries and the proliferation
of new and more novel regu-
lations. This created cost
pressure that could
only be solved
by quantum
leaps in
lawyer productivity. As a result of the change in client mindset, Harris explained, Axiom was able to achieve a size, scale and geographic footprint that made the company credible to the world’s biggest and most significant corporate clients.

“Now we are here. We are in the game—12 years to get into the game, to get our ticket punched,” said Harris, who co-founded Axiom in 2000. “We are finally in a position where we can build something transformative.”

By 2013, annual revenue exceeded $150 million. That transformation will happen, according to Harris, because general counsels are being forced to fundamentally rethink the perceived zero-sum trade-off between risk and cost.

“Ultimately, the part of our business that will be most instrumental [in making this shift] will be what we call managed services,” Harris said.

Struggling to explain this concept, Harris dragged a whiteboard into the room and began to draw. The first diagram (labeled “Legal Demand Circa 2013,” facing page) was rectangular. This reflected the segmentation of the corporate legal services market into three parts: extraordinary events (Segment 1), experienced demand (Segment 2) and efficiency demand (Segment 3). As the type of work moves from bottom (efficiency) to
top (extraordinary), Harris said, a
perception among lawyers and cli-
ents is that cost and risk invariably
have to move in unison.
“If you go back in history, there
was one transformational moment,
and that was when the modern law
department was created—with
[general counsel] Ben Heineman
at General Electric,” Harris said.

Drawing an inverted triangle with
the legal departments at the bottom
(labeled “Before the In-House
Revolution,” above), Harris claimed
this change was primarily an exercise
in segmentation, as GE and other
legal departments realized “there are
serious savings available with John
as an employee of GE rather than
John as an employee of Cravath.”

Harris then colored the ends
of the pyramid now sticking out
from the rectangle, signaling that
this work could be done cheaper
with no drop-off in quality.

WORK ON THE MOVE

Harris’ core point is that true
transformation requires legal
work to move between segments.
Harris then drew a third diagram
(labeled “Where the Market Is
Headed,” page 44) of an upright
triangle that reflected where the
market was expected to go over
the next several years. Pointing to
the shrinking extraordinary events
market, Harris said, “You can no
longer just cruise up here,” citing
the relatively recent failure of the law
firms Howrey and Dewey & LeBoeuf.
(See “Dewey’s Judgment Day,” ABA
Journal, February 2015, page 36.)

Pressures in the top and middle
of the market were catalysts for
Orrick, Herrington & Sutcliffe’s
back-office facility in Wheeling,
West Virginia, and Fenwick &
West’s Flex program, which supplies
experienced lawyers as temporary
help for legal departments.

Pointing to the bottom of the dia-
gram, Harris continued: “This is the
part of the market that is growing,”
noting the 50 percent annual growth
rate of legal process outsourcers.
Harris said managed services
provide a credible way to move to
a lower-cost segment without in-
creasing risk. A 50 percent savings
is possible by moving from Segment
1 to Segment 2 (e.g., moving from
a global law firm to a regional
law firm). But if you can go from
Segment 1 to Segment 3, in which
work is performed by technology-
and process-enabled contract attor-
neys, paralegals or foreign lawyers,
the savings can be 90 percent.

For this to work, Harris said, a
company such as Axiom has to break
the linkage between risk and cost.
For a huge volume of legal work,
a highly pedigreed associate in an
elite law firm is no match for a well-
designed workflow with standardiza-
tion, feedback metrics and escalation
protocols—procedures that deter-
mine when a supervisor has to be
called in. When the largest buyers of
legal services fully grasp this fact, he
predicted, the legal market is going
to undergo a massive transformation.

Remember, these comments were
made in 2013. According to Harris,
Axiom revenue currently is “in the
neighborhood of $300 million.” (In
November 2016, Harris transitioned
from CEO to executive chairman.)

E-DISCOVERY SERVICES

Josh Kubicki, chief strategy offi-
er at Seyfarth Shaw in its Chicago
office, says the rise of legal managed
services is traceable to the explosion
of electronically stored information
and to the financial impact of ESI on
the cost of litigation.

From 2004 to 2007, Kubicki
worked as a regional vice president
in the D.C. office of Adecco, a legal
temp agency. As the volume of
electronically stored information
in major litigation continued to
skyrocket, law firms discovered that
they could hire contract lawyers for
as low as $50 per hour and bill them
out at rates almost identical to asso-
ciates. Unlike associates, the cost
to pay the contract lawyers stopped
when the cases were done.

Kubicki remembers periods
when his law firm clients were using
hundreds of contract lawyers per
day. “Each attorney was generating
gross profit of between $20 and $30
per hour,” Kubicki says. “Obviously,
that adds up quick.” By 2006,
Kubicki’s jobs were generating
more than $20 million in revenues.
The growing size and scale of e-discovery engagements eventually led the agencies to start experimenting with what Kubicki calls beta or version 1.0 project management.

“It had become clearer that our clients needed help designing larger-scale solutions,” he says. “That is when I first heard the term managed services. But we didn’t market it that way because, frankly, we already had too much work.”

Around the same time as the financial crisis, corporate clients were wising up to the massive labor arbitrage and began to look for ways to capture some of the cost savings for themselves. This turned out to be a major break for legal process outsourcers.

During this time, David Perla, managing director of investment company 1991 Group, was the co-CEO of Pangea3. Before that, he was an associate at Katten Muchin Roseman in New York City and vice president of business and legal affairs at Monster.com.

“When we started in 2004, we would make a pitch touting our unique combination of cost and quality and got a lot of ‘That’s interesting!’ responses,” Perla says.

Similar to Harris at Axiom, Perla thinks the financial crisis fundamentally shifted the client mindset. “2008 was hands down the best thing ever to happen to the entirety of the industry,” Perla says.

**THE STRUGGLE TO KEEP UP**

As the “unbundling” movement took hold after the financial crisis, large law firms and lawyers attempted to stay in control by creating their own e-discovery units.

Jeff Brown was among those lawyers. A partner at LeClairRyan in its Richmond, Virginia, office until 2013, he headed the discovery solutions practice and was on the firm’s executive committee. During his last several years there, Brown’s group experienced a relentless decline in the hourly rates clients were willing to pay for document review and e-discovery services typically provided by third-party vendors.

“The only plausible way to keep up was to provide clients with an integrated e-discovery platform, which required an eight-figure investment in technology, process and related resources,” Brown says. “Restrictions against law firms receiving money from outside investors make that option near impossible.”

Brown and other lawyers in his group became advocates of the potential opportunity to transfer more than 400 lawyers and other personnel to UnitedLex to create a new Richmond-based managed services facility.

The transaction eventually obtained full support within the firm, with LeClairRyan signing on as a major UnitedLex client. According to Brown, who was among the lawyers who joined UnitedLex, the per-hour price for document review services has decreased as much as 50 percent since the deal closed.

This declining cost curve is largely what UnitedLex CEO Dan Reed expected. Reed is a JD-MBA graduate of Vanderbilt University, and he also is a CPA and a former corporate law associate at Greenberg Traurig. In the early 2000s, Reed decided to leave the law to work at Capgemini, a multinational consulting, outsourcing and technology company based in Paris. Capgemini was a pioneer in the IT managed services space.

By that time, the managed services playbook was well-developed.

One of the reasons IT managed services took off is that every large business needs high-quality IT support. But each small IT department is a cost center outside the company’s core expertise. By outsourcing information technology, the client gets a much more attractive bundle of services and features. But it also is good for the IT workers, who now have access to better tools and training, a larger group of professional peers, and a career path that provides opportunities to learn and advance.

In 2006, when Reed left Capgemini to start UnitedLex, he could see the clear parallel between information technology and the opportunity to redepoly and retool the growing number of e-discovery experts who work in large law firms. That was only the starting point, as he could see myriad other managed services use cases—data management, contract management, intellectual property—in which a combination of technology, process and business know-how could revolutionize the highly insular corporate legal services market.

Reed says one of the best analogues to UnitedLex is Accenture—but with a core expertise at the intersection of law and business. In fiscal year 2016, Accenture grossed $32.9 billion. Although UnitedLex’s current revenue is between $175 million and $200 million, Reed is not shy about his goal of turning the company into one with several billion dollars in annual revenue.

**A FEW WINNERS?**

Returning to Harris’ last diagram, it is possible that the largest and fastest-growing portion of the legal market, efficiency demand, is going to be dominated by a relatively small number of managed services companies.

If the future plays out this way, it will happen through a massive reallocation of work from law firms and in-house legal departments to companies such as Axiom, Counsel on Call, Elevate, Integreon, Pangea3 and UnitedLex. This market segmentation, as Harris referred to it, will produce the type of deal flow and revenue that will enable investors of several of these companies to exit through an initial public offering.

Although many lawyers would argue such a business structure is impermissible under existing legal
ethics rules, we already have an example of a large legal managed services company being owned by public investors: Pangea3, which has been owned by Thomson Reuters since 2010.

At the time of acquisition, annual revenue exceeded $25 million. Since then, “legal managed services have increased in size and seen substantial growth,” says Joseph Borstein, global director at Pangea3.

At least in North America, the revolution in legal services has not waited for the legal regulators. Motivated entrepreneurs and investors have figured out ways to build such companies under the existing regulatory structure. Only now, years later, the practicing bar is beginning to take notice.

STILL BILLABLE

For many years, my writings and discussions with law firms and bar associations have advanced the view that legal innovation requires shifting the risk of cost overruns away from the client to the services provider, primarily by scuttling the billable hour in favor of flat fees.

But as I have researched this story, I gradually have concluded that I was wrong. Legal managed services companies are tremendously innovative.

Yet virtually all of them price projects on a per-hour basis. This mystery started to unravel in a conversation I had with Vince Verna, who became CEO at Counsel on Call in January 2015 after Gridiron Capital obtained a controlling interest. Before that, he was an executive in the IT managed services space, most recently at Experis, a subsidiary of the ManpowerGroup, a Fortune 500 company that specializes in human resources.

Verna says that although the managed services model was pioneered and perfected in the IT sector, the playbook essentially works the same way when it is applied to other industry verticals: Create a less expensive, less risky, higher-quality and easier-to-use solution than what your target clients can develop on their own.

“But for this to work as a business, you need volume,” Verna says. “The volume justifies the investment in process, data and technology. Once those systems are in place, you can generate enormous throughput at a very low and predictable cost.”

Although a law firm might laugh at the profit margin of a managed services company such as Counsel on Call, that margin can generate enormous wealth if the services provider can capture, say, 10 to 15 percent of the efficiency demand market.

I had lent Verna my notebook, and he drew three circles—one for law firms, one for legal departments and one for managed services.

“I WAS FRUSTRATED WITH RISING COSTS AND THE OPTIONS WE HAD TO MANAGE THEM. ALLEN LISTENED VERY CAREFULLY AND CAME UP WITH IDEAS TO TRULY PARTNER WITH US.” —CHERYL MASON

PROCESS PROS

The distinguishing feature of managed services providers is that they are experts in process, technology and project management. This means they have highly accurate schedules and budgets to price and sell their work.

This core strength is crucial to the business model in ways that go...
well beyond the client. Specifically, the lawyers who do the work in legal managed services typically are paid by the hour and have no obligation to work beyond a pre-negotiated limit, usually 40 hours or less per week.

The bargain they have struck is a good, professional wage; freedom from business development pressures; and guarantees of flexibility and a life-work balance.

The only way this bargain can be kept is through processes and project management that make the work truly predictable. (One Axiom lawyer, who leads a managed services group in Chicago, quipped, “The faster we get to boring, the better.”) But the balanced workweek is not the only thing that draws experienced and highly specialized lawyers to legal managed services companies.

Over the last year, I have visited managed services facilities at Axiom, Counsel on Call and UnitedLex. In each case, I was struck by the enthusiasm that virtually every lawyer displayed for the team-based environment and an unambiguous goal to continuously improve quality, efficiency and the client experience.

These companies employ several full-time recruiting specialists who cultivate a highly skilled workforce that, in many cases, has become disillusioned with the business practices and lifestyle of large law firms.

Part of the value proposition of a legal managed services provider is a 100 percent alignment of interests between the lawyer and the client—something more important to many lawyers than prestige or money.

The growth potential of the Counsel on Call model became more apparent after talking with Cheryl Mason, vice president of litigation at HCA. She recounted a visit from founder Allen more than 10 years ago—when Mason moved from Los Angeles to Nashville for the HCA job.

“I was frustrated with rising costs and the options we had to manage them. Allen listened very carefully and came up with ideas to truly partner with us,” Mason said.

That conversation eventually led to the creation of Counsel on Call’s first managed services center. Mason handed me a document prepared by Counsel on Call. The first page had a table and a graph that summarized three trend lines from 2008 to 2015.

The first trend line showed a tenfold increase in electronically stored information collected for litigation (from 279 to 2,946 gigabytes).

The second trend line showed progress on data reduction techniques, such as predictive coding and technology-assisted review, moving from 68 to 95 percent, reducing the impact of the massive increase in data subject to discovery.

The third trend line showed a 50 percent increase in total fees billed to HCA for e-discovery.

“This reflects a real solution to my business problems,” Mason said. “I appreciate the metrics, which I routinely share with our general counsel.”

**MAKING RAIN**

It is hard to get Allen to talk about herself. But if you’re persistent and her team members are present and nudge her a bit, you’ll eventually find strings worth pulling.

One of those strings is the story of how she and her husband decided to seek outside investors. Allen describes a growing feeling that the company was hitting a wall—in terms of capital and the expertise needed to make wise growth decisions. It also was very stressful on her family.

She approached her client advisory board for guidance. “Much to my surprise, one of the members said, ‘You’ve been standing on that windowsill for a long time. It’s time to jump and learn how to fly,’” she said.

Counsel on Call eventually settled on Gridiron Capital, largely because “it was the only firm that was truly interested in our lawyers.” This values alignment was crucial to Allen.

Before they would close the deal, Gridiron Capital requested “net promoter” data from Counsel on Call clients. This is a common metric used by corporate America to measure customer satisfaction. It typically asks, “How likely is it that you would recommend [us] to a friend or colleague?” Zero is not at all likely; 10 is extremely likely.

According to legal ethics specialist Pera, Counsel on Call clocked in at a phenomenal 9.8.

Wondering which two clients thought they did not receive level-10 service, Allen followed up. One of them confided that they were actually very satisfied. But in the legal field, “a 10 is a unicorn. It really doesn’t exist.”

Professor William D. Henderson is the Val Nolan faculty fellow at Indiana University’s Maurer School of Law in Bloomington.

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Mergers have become an increasingly popular option for law firms seeking to expand their national or global footprint and to weather the changing legal climate. But determining whether a merger is the right option takes more than due diligence. It requires extreme soul-searching and a laser focus on the long game. To this end, Mayer Brown’s playbook could be considered a case study for a successful merger.

In the last 11 years, the firm has undergone three mergers on three continents, transforming it from a Chicago-based firm with just 3 percent of its attorneys outside the U.S. to a global firm with nearly half its lawyers in foreign offices. The firm’s exponential growth was driven by clients’ increasingly global needs, says Paul Theiss, the firm’s Chicago-based chairman.

How to pull off a successful law firm merger

by Leslie A. Gordon
The mergers are working just as the firm intended: Recently, Mayer Brown's outpost in Hong Kong collaborated on a client matter with a new lawyer in the Frankfurt, Germany, office. And it’s worked out for the attorneys, too: Mayer Brown experienced a 47 percent growth in net income and a 35 percent increase in profits per partner between 2012 and 2015.


While not a novel tactic, mergers have become much more common since the Great Recession, according to Andrew Jillson, a Dallas-based law firm consultant. “Mergers are a way that many firms are reacting to upheaval in the legal market,” Jillson says. “So there’s been a steady pace upwards.”

According to consulting firm Altman Weil, which keeps a running log of law firm acquisitions on its MergerLine website, 91 law firm combinations were announced in the U.S. in 2015, representing the highest annual total recorded in the 10 years MergerLine has been compiling data. Along with a record number of combinations, 2015 also saw the largest-ever law firm merger when 2,600-lawyer Dentons combined with a 4,000-lawyer Chinese firm, Dacheng Law Offices. In another significant match, DLA Piper acquired firms in both Sweden and Canada last fall.

THE MERGER STRATEGY

While increasingly popular, merging is not a foolproof business strategy. There are plenty of cautionary tales—mergers that failed altogether, resulting in distress or disaster, or suffered client or lawyer attrition—including those of Bingham McCutchen and Dewey & LeBoeuf.

Indeed, experts agree that a merger should not be an endgame for its own sake. Instead, it should serve a broader business goal. For some firms, that might be reaching new markets or adding practice groups that clients are demanding. For other firms, that might be recruiting higher-caliber lawyers or creating efficiency.

“A law firm merger needs to further a strategic imperative that the firm arrived at in a clear-thinking way, and that imperative should not just be growth,” Jillson says. “If you don’t approach a merger correctly, you can just end up adding more weight to the firm in a way that doesn’t further any strategy.” Firm leaders should determine what they’re trying to accomplish “before the mating dance starts,” he says.

Achieving practice group, industry or geographic synergy—“filling in some holes”—bodes well for a strong merger, says Peter Zeughauser, a management consultant based in Newport Beach, California. “Nobody can hire you if they’ve never heard of you,” Zeughauser explains. “Data supports the notion that the more breadth and depth a firm has, the better known you will be. A firm’s size, relative to market, strengthens the brand. You need to be big relative to your market and ‘market’ is practice, industry or geography.” So a top IP firm in Los Angeles doesn’t need to be 1,000 lawyers, for example, but it may need to be 100 lawyers. “A merger can help you build breadth and depth more efficiently because it’ll be quicker and cheaper than building through lateral hires.”

When Bradley Arant Rose & White, a 250-lawyer multi-office Alabama-based firm, merged with midsize Nashville, Tennessee, firm Boult, Cummings, Conners & Berry in 2009, there were “two overriding rationales,” says Beau Grenier, chairman of Bradley Arant Boult Cummings, now a 500-lawyer firm. “The way the industry was moving, having a more geographically diverse firm better positioned us in the market to serve and attract clients. So the business case to becoming a super-regional firm was compelling. Also, specific synergies between the two firms made that business case even stronger.” In particular, one legacy firm had health care clients but not many health care lawyers, whereas the other legacy firm had the opposite, Grenier says. Since the merger, revenue is up about 65 percent. Also up are profits per equity partner and
LAW FIRM MERGERS & ACQUISITIONS
TOTALS: 2007-2016

Source: Altman Weil MergerLine.
Not Ready for a Merger?

Law firm networks offer an expansion alternative

For law firms eager to gain geographic diversity, Hope Krebs suggests an approach she believes is far less risky than merging: a law firm network.

"With a global merger, there are so many hurdles you have to overcome in each jurisdiction," says Krebs of Philadelphia, who co-chairs the international practice group at Duane Morris. "If you're going to expend those resources, you'd better make sure you know what you're getting. With a network, you know the quality of the lawyers. In a network, although resources are consumed, it's nothing like a merger."

Krebs serves as chair of Multilaw, a global network of independent law firms that links clients with attorneys internationally. Member firms pool resources and refer client matters, forming an alliance that serves as a distinct alternative to merging with a law firm in another country. Founded in 1990 and headquartered in London, Multilaw boasts 8,500 attorneys from 80-plus member firms in more than 150 cities. Eight U.S. firms make up Multilaw's American contingent. "We're friendly competitors," Krebs says.

Due diligence and quality control mechanisms are the hallmark of Multilaw, according to Krebs. "This is not a Yellow Pages. These are trusted advisers who can service the needs of your clients in many countries," she says. Multilaw firms undergo a rigorous recruiting and invitation process, resulting in a known legal quantity that surpasses what you might get by sending a random SOS for local counsel to lawyer friends, Krebs explains. "You're not going to just get someone you met once at a conference. Our firms are the go-to firms in their jurisdictions. You'd be hard-pressed to find
a better firm in their areas. Lawyers are also incredibly responsive to Multilaw clients. You get a certain level of attention and quality.

Once members, firms are subjected to an “intense appraisal system.” Every three years, on a rolling basis, firms are re-evaluated “to make sure we’re all still in alignment because we’re only as strong as our weakest link.”

Member firms may turn to Multilaw colleagues for a discrete matter or for a full-blown request for proposal. Each member firm has a “contact partner,” who serves as a bridge into and out of that firm. As Duane Morris’ contact partner, Krebs receives inbound or outbound Multilaw requests by email or phone at least once a day, sometimes in the middle of the night.

A member firm may have its own international offices but still uses Multilaw “to complete the world,” Krebs notes. “Multilaw firms recognize that you can’t have an office everywhere.” At the time of the Journal’s interview with Krebs, Multilaw had a pending RFP that spanned 72 countries.

Once the relationship is established, the firm doing the work typically bills the other firm’s client directly. Not surprisingly, business development is another huge benefit of an international network. Krebs recounts a recent meeting between one of her Duane Morris partners and a potential client. The partner asked the general counsel what kept him up at night. The GC answered: “All the compliance work we have in the foreign countries where we have subsidiaries.” Krebs’ partner responded confidently: “I think we can help.” Not only did the firm get the client at least in part because of the Multilaw connection, but that engagement generated additional real estate and employment work for the sister Multilaw firms originally hired to do the compliance work.

Krebs is eager to dispel misconceptions about law firm networks. “It’s not just a bunch of little firms cobbled together,” she says. “It’s a strategic network. For my firm, it’s a way to complete our geographic footprint. It makes us bigger than the biggest with low risk.”

HOPE KREBS

“Multilaw firms recognize that you can’t have an office everywhere. ... It’s a strategic network.”

the number of client matters imported and exported among the firm’s now nine offices.

Like Mayer Brown and Bradley, other firms have successfully completed mergers in recent years, including Arnold & Porter Kaye Scholer, Bryan Cave, Hogan Lovells, Reed Smith, Sidley Austin and Wilmer Cutler Pickering Hale and Dorr, to name a few.

Despite this record of successful industry mergers, firms must pursue acquisitions with “a high level of discipline,” Jillson advises. Firm leadership must define criteria that will guide them and then remain faithful to that criteria through the process. A merger, adds firm management consultant John Olmstead in St. Louis, “is a very serious thing.” It must not be “a knee-jerk decision that’s all about the short term, all about money.”

Experts offer specific tips for the process of merging once a firm decides the approach is in its best interest. Brad Hildebrandt, a New Jersey-based law firm consultant, suggests keeping preliminary meetings between the two firms small. “Usually, it’s just me and the two law firm chairs,” Hildebrandt says. “Later, we include the two executive committees and then key practice group leaders. After that, it’s a delicate balance. You have to put it out there [to the wider firm] or you have a timing problem. If you’re quiet too long, the partners at large may revolt.”

But before spending months and months on a merger, Hildebrandt says leaders should work quickly to resolve potential deal breakers. First and foremost, firms must look very early for conflicts, particularly business conflicts in which the two firms represent clients that compete with each other. “Most mergers that don’t go anywhere are because the firms waited too long” to iron out conflicts, Hildebrandt says, citing as an example a doomed merger
between Pillsbury Winthrop Shaw Pittman and Orrick Herrington & Sutcliffe.

Even if conflicts are overcome, sometimes merger talks fail for more personal reasons, Hildebrandt adds. Partners can have an extreme emotional attachment to the legacy firm, making them unable to get behind a new combination. “Partners’ egos get in the way,” he says. “Plus, there’s always the infamous discussion about the new firm’s name. No one wants to be second. My advice? Put off the name discussion a little bit. Let people get excited about the merger first.”

That said, law firms must also have the discipline to end discussions when necessary. “You can’t get so invested in the thrill of the pursuit that you make a bad decision,” Jillson says. “You need to be able to say, ‘This looked like a good deal, but we need to walk away.’” Danger signs include firms that seem desperate to merge or one firm that tries to out-negotiate the other. Another potential red flag: Firms that have recently acquired one of the two firms’ operations, the combined firm should seize the chance to adopt new approaches that are an improvement for both, according to experts. To that end, Hildebrandt recommends moving forward “as if starting a new law firm.” Everything from cybersecurity to governance should be re-evaluated and possibly restructured.

Experts agree that the most important area to ensure compatibility is culture. Both firms “better make sure they really understand the two cultures and whether they fit,” Bradley chairman Grenier advises. “There are always cultural differences between two institutions—you can’t avoid that. But you do need a fundamental understanding about critical elements such as governance, work-life balance and how you treat your people.” In Bradley’s case, the two firms spent 18 months talking before the merger closed in early 2009. “By that time, we knew each other really well. It was the lowest point of the economic downturn and the two firms got to go through it together,” Grenier says. “It was tough for everybody but a great bonding experience.”

Even though a merger may make economic sense, talks may still fail because law firms are “very tribal in their culture,” Zeughauser says. “As much as they’re the same, they’re different and differences emerge during merger talks.” Culture includes everything from workload expectations to the client service commitment to staff employment policies. It’s personalities,
philosophies and lifestyles. In talking with potential merger partners, “start with the people and the culture first,” Olmstead advises. “Many mergers fail because the wrong people got married.”

**TEAM POWER**

Once a merger is underway, a transition committee composed of lawyers and staff from both firms should gather input from rank-and-file lawyers and employees. An integration plan with a timetable should be developed as early as possible to avoid stumbling through decisions by default. “That can sound counterintuitive,” Jillson notes. “Many firm leaders think: ‘Let’s get the deal done and we’ll deal with integration later.’ But it’s smart to be thinking early about how the firms will be integrated. You must dedicate a lot of time post-closing—at least as much as before—establishing processes and procedures. You can’t just flip a switch.”

In Mayer Brown’s case, it became increasingly apparent with each merger that the new partners should be immediately commingled in client teams and practice leadership. “Just as for lateral hires—it’s not good enough to say, ‘Here’s your office, computer and assistant; let us know if you have questions’—the same principle applies to a merger,” Theiss explains. Mayer Brown’s recent Hong Kong-Germany crossover was the fruitful result of new lawyers traveling to different offices to learn about everyone’s expertise and clients. “That builds internal trust and gives a superior level of service” to clients.

Indeed, the real work begins after the transaction closes, Grenier adds. “There’s a whole psychology around how people respond to change. It’s called change management. People feel a certain sense of loss. We know a lot more about that in hindsight.” — Beau Grenier

One clear measure of a merger’s success is clients who come to believe the combined firm is better able to service their needs, resulting in more matters being sent there. “Consummating a merger is hard work,” Mayer Brown’s Theiss says. “But that’s actually the easier part. The harder part is making it work weeks and months after” and teaching clients about the advantages of a merger. “We explain that the merger provides them with a very strong solution for their complicated problems.”

“Consummating a merger is hard work,” Mayer Brown’s Theiss says. “But that’s actually the easier part. The harder part is making it work weeks and months after” and teaching clients about the advantages of a merger. “We explain that the merger provides them with a very strong solution for their complicated problems.” — Beau Grenier

Leslie A. Gordon, a former lawyer, is a legal affairs journalist based in San Francisco.
VIDEO DISPLACES—
BUT CAN’T
REPLACE—THE
COURTROOM
SKETCH ARTIST

BY TERRY CARTER

ILLUSTRATIONS FROM
THE ILLUSTRATED COURTROOM:
50 YEARS OF COURT ART
BY ELIZABETH WILLIAMS
AND SUE RUSSELL
(ABOVE) JUDGE HIROSHI FUJISAKI ON THE BENCH DURING THE 1996 WRONGFUL DEATH CASE AGAINST O.J. SIMPSON BROUGHT BY THE VICTIMS’ FAMILIES. NICOLE BROWN SIMPSON’S SISTER DENISE BROWN (LEFT); THE DEFENDANT (TOP LEFT); FRED GOLDMAN, FATHER OF RON GOLDMAN, SITS NEXT TO HIS DAUGHTER, KIM.

(LEFT) ROBLES DREW THIS PORTRAIT OF SIMPSON AT THE FORMER FOOTBALL STAR’S CIVIL TRIAL.
Gary Myrick is an accomplished courtroom sketch artist—an artist-journalist, he calls himself—whose work has been seen by many TV news viewers. His work amazes, given the almost instant turnaround time, with richly textured, clear images. Long after cameras entered Texas courtrooms decades ago and stifled the business, he still calls this his vocation: “That’s what I am,” he says resolutely.

Myrick gets some trial work now and then, and two years ago, managed to quit working as a security guard in a half-full shopping center in a poor section of Fort Worth, Texas. That was the “real job” he had dreaded taking, doing so in the mid-1990s when his career was finally overwhelmed by the new video normal. He became eligible for Social Security retirement benefits in 2015. Before that, the Law Library of Congress, through a donor, purchased his archives. He has enough to get by.

“Business has been terrible for courtroom artists here in Texas,” says Myrick, who lives in Fort Worth. In his heyday in the 1980s he sketched three trials in three cities in one day for TV news.

“I used to do several trials a month, some of the big ones, gavel to gavel,” he says. Now it’s maybe a handful a year for a few days each.

Ticket into the Courtroom
The art of courtroom sketching had a meteoric rise after TV news expanded from 15 minutes to a full half-hour in 1963. Months later, Howard Brodie, who had done combat sketches of U.S. troops in WWII, Korea and Vietnam, approached a friend at CBS News seeking assignment to illustrate the trial of Jack Ruby in the shooting death of Lee Harvey Oswald. Brodie got the work and the graphics-oriented television executives quickly recognized the art form as a way to take viewers where cameras couldn’t go.

But things changed after the U.S. Supreme Court’s 1981 decision in Chandler v. Florida gave approval to cameras in the courtrooms. Now all 50 states have some variation on when, where and how cameras can be used.

Federal courts continue to resist the technology, thus still providing work for courtroom sketch artists.

“No, this is not a dying art,” says Bill Robles, who is based in Santa Monica, California, and succeeded Brodie as the unofficial dean of courtroom artists. “I’m just as busy and making more money than before. You don’t work every day unless you do a trial, and they come up once in a while.”

California is rich in high-profile trials, says Robles, whose comments belie the fact that he now is often the only illustrator at hearings. “A lot of judges were scared of cameras after the O.J. Simpson trial became such a circus,” he says, “and the ridicule Judge [Lance] Ito received.”

Cameras had been banned from courtrooms after their abusive and distracting use in the 1935 trial of Bruno Richard Hauptmann in the kidnapping death of Charles Lindbergh’s toddler son. As a result, the ABA approved Canon 35 of the Canons of Judicial Ethics to recommend against the use of cameras, and it was widely adopted.

Post-O.J., many California judges handling high-profile trials now invoke an option to ban cameras, Robles says.

Federal Opportunities
The federal courts still keep Robles busy. Last June, he covered the Led Zeppelin copyright trial in U.S. district court in Los Angeles, where a jury found the band had not ripped off a riff from someone else’s music.

A force of his own in courthouses, when the trial ended, Robles was invited back into the
courtroom by the head of security, where he got band members Robert Plant and Jimmy Page to autograph two of his drawings. That will bring in good money, in addition to his usual fee of $500 per day—$750 if a TV network’s affiliates also use his art.

Robles acknowledges that the business has been and is contracting. “Sometimes I can go a month without getting something,” he says. “Also, the drawing pool has shrunk.”

Only two courtroom artists now typically get work in the Los Angeles region: Robles and Mona Shafer Edwards. “Mona and Bill are about the best,” says Linda Deutsch, the Associated Press reporter who retired in 2014 after 48 years covering trials such as those of Charles Manson, Michael Jackson and Simpson. “You almost feel like the subjects are there in front of you,” she says of their art. “They work so quickly, and it’s just incredible how in a couple of minutes they can grab an expression or movement.”

Deutsch and Robles met in 1970 at the Manson trial. It was the first trial for the reporter and the artist, and the launchpad for their fame.

Robles’ sketch of Manson leaping from his seat in an attempt to assault the judge displays a tantalizingly kinetic detail of motion, including a pencil falling from the defendant’s grasp as he flew through the air. It led the CBS News broadcast that evening.

The Manson drawing is also the cover for the book The Illustrated Courtroom: 50 Years of Court Art by courtroom illustrator Elizabeth Williams and crime writer Sue Russell. Featuring drawings from high-profile trials between 1964 and 2014, it includes work by Brodie, Robles, Williams, Aggie Kenny and Richard Tomlinson. “There was this great boom of wonderful courtroom art beginning with Howard Brodie’s first trial, and it lasted into the 2000s,” says Williams, who spent nine years on the book. “There’s never going to be another time like this, and there wasn’t before.”

**FISCAL RESTRAINTS**

The problem isn’t just cameras in courtrooms. Williams says: “The news budgets were bigger. They keep cutting, and that includes us.”

The Library of Congress began acquiring courtroom sketches in 1965 and now has more than 10,000, including Brodie’s work from the Ruby trial. Last year, the library purchased a collection of 95 original drawings from high-profile trials over four decades, with work by Kenny, Robles and Williams.

The purchase was funded by Thomas V. Girardi, founding partner of the Los Angeles law firm Girardi Keese, who is on the library’s private-sector advisory board. Girardi was lead counsel in litigation against Pacific Gas & Electric Co., the basis for the film Erin Brockovich.

The new addition includes some gems that never saw the light of TV or print. They include Kenny’s drawing of an obscure witness sporting a bright-red tie during the 1974 trial of U.S. Attorney General John Mitchell and Commerce Secretary Maurice Stans, both charged with and acquitted of blocking an investigation of secret funding for the Watergate burglary. The witness: FBI’s No. 2 official W. Mark Felt, who in 2005 admitted that he was Deep Throat, the source for the Washington Post’s exposé.

The library also got funding for an exhibit of courtroom art called “Drawing Justice,” says Sara W. Duke, a curator for popular and applied graphic art. It features 98 illustrations, from 1964 to the present day. It will be open until Oct. 28 in the library’s South Gallery in the Thomas Jefferson Building in Washington, D.C.

**THE ART OF THE TRIAL**

Williams got her start in 1980, thanks to a helping hand from Robles, who looked at some of her drawings and introduced her to a reporter for a TV station that didn’t have an artist. She soon was working trials regularly in the greater LA area.

Her stint there was capped by the pretrial hearings and trial of auto executive John DeLorean. DeLorean was charged in October 1982 with bankrolling a huge cocaine deal; a jury found him not guilty two years later.

At the trial, Williams did an unusual sketch that didn’t make it onto TV news. During a break, she was permitted to sit where the lawyers do in court, and she looked back at her colleagues finishing sketches they’d outlined during the hearing. She drew them at work and inserted herself in her usual place. They are Brodie, Bill Lignante, Robles, David Rose, Walt Stewart and Williams.

VISIT ABAJOURNAL.COM FOR A GALLERY OF COURTROOM ARTISTS’ WORK.
(ABOVE) AFTER PLEADING NO CONTEST IN MAY 1977 TO CHARGES RELATED TO SPRAYING GUNFIRE INTO A SPORTING GOODS STORE IN THE INGLEWOOD SECTION OF LOS ANGELES, PATTY HEARST RECEIVED PROBATION.

(RIGHT) IN FEBRUARY 1976, HEARST TOOK THE WITNESS STAND DURING HER TRIAL IN SAN FRANCISCO FOR HER ROLE IN A BANK HOLDUP COMMITTED WITH THE SYMBIONESE LIBERATION ARMY.
After the DeLorean trial, Williams left for New York City because as well as courtroom sketching, she wanted to do general illustration work such as advertising and fashion.

“In LA, that’s more focused on Hollywood, and I didn’t want to get into it,” Williams says. “And it was easy to get courtroom work in New York because my [TV] clients in LA provided introductions.” She still gets trial assignments somewhat regularly but augments her income with other work, including New Jersey State Bar Association events: Lawyers seem to like courtroom-art style illustrations of their meetings.

This year, the New Jersey Bar Foundation expanded its educational programs for public understanding of the law by adding something to the mock trial competition for high school students: the Courtroom Artist Student Competition, in which student artists sketched their school’s mock trial team at work in local courthouses.

**ILUSTRATIONS BY BILL ROBLES**
AMERICAN BAR ASSOCIATION
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Linda Klein is using her year as ABA president to advocate for veterans and defend the rule of law
By Terry Carter
When ABA President Linda A. Klein read a piece in Forbes in early December that scolded the association for ignoring a laundry list of needs and issues, she didn’t respond with a letter to the editor. Instead, Klein invited the columnist to breakfast, and they soon spoke over eggs.

“I was prepared for a bit of defensiveness,” says Mark A. Cohen, a Forbes contributor on law practice. “And what I received instead was a very constructive attitude, mixed with a bit of ‘Well, here are some things perhaps you didn’t know about the ABA.’”

Klein told him about her near-constant travel, which in her year as president-elect included a tour to meet with individuals and small groups of lawyers away from the big cities to learn about their needs. She walked Cohen through a slew of ABA initiatives that address matters he wrongly believed the association had failed take up, from access to justice and delivery of legal services to diversity and inclusion and defending the rule of law.

And Klein detailed her signature effort for the year, the ABA Veterans Legal Services Initiative, which has quickly brought together all manner of efforts by organizations and agencies around the country. It is fast becoming a high-impact, enduring legacy with a comprehensive network to help those who serve or have served in the military and who now suffer because of legal needs that often go unrecognized.

A few weeks later, on Christmas Day, Cohen seized on Klein’s style: the personal touch. He says she is “very pragmatic and open, and her EQ [emotional quotient] and people skills are extremely high. She’s just a thoroughly engaging and engaged person who is deeply committed to the profession, not her own aggrandizement.”

Although Klein is a big-firm lawyer in Atlanta, she is the senior managing shareholder of Baker, Donelson, Bearman, Caldwell & Berkowitz, she launched projects geared to the little guys: active military and veterans needing legal services, and solo and small-firm lawyers who want to worry less about the nuts and bolts of starting, building and maintaining a practice. Either of those efforts alone might have made for a significant presidential year, with other smaller ventures along the way. But there are years when a sudden, unanticipated event requires an ABA president to step up as the profession’s voice.

DEFENDING THE PROFESSION

Klein was faced with two such events: first when President Donald Trump made personal attacks on a federal judge and later when he proposed zeroing out the Legal Services Corp. in his budget.

On Jan. 27, just five days before the ABA Midyear Meeting in Miami began, Trump issued an executive order banning travel to the United States from seven majority-Muslim countries. On Feb. 3, U.S. District Judge James Robart blocked the travel ban nationwide. The following day, Trump complained on Twitter about the “so-called judge” who “takes law-enforcement away from our country.”

Klein jettisoned her prepared remarks for the ABA House of Delegates meeting on Feb. 6. Instead, she issued a call to arms for lawyers to defend the rule of law in response to the apparently flawed executive order and personal attacks on the judiciary.

Klein immediately mobilized ABA efforts to save the LSC, and she has exhorted others in nearly every speech and meeting since then to push for its full funding. “Within an hour or so of learning about the president’s budget, we put up DefendLegalAid.org,” she says. There, citizens can fill out forms to tell their own members of Congress why they want LSC funding to continue. Those were printed out at the ABA’s office and delivered to the legislators during ABA Day celebrations in April in Washington, D.C.

“Linda’s been there every step of the way, in fact, leading the band,” says John G. Levi, chairman of the LSC board. “She’s our champion.” For more about the efforts to save the LSC, see page 68, “The Fight for Legal Services.”

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Since Klein was handed the ABA gavel as president in August, she has been exceedingly cost-conscious. For example,
Even before Samantha Licata attended any classes at Brooklyn Law School, she was thinking about ways to transfer out. Thanks to online law student forums and a Barbri Law Preview course, she knew that good grades could make her goal doable.

So as a 1L in 2015, she read as many class outlines as she could find and used the information to make her own outlines, even skipping Thanksgiving with her family to examine more fact-pattern hypotheticals.

The hard work paid off. After her first year wrapped up with straight A’s, she’s now a second-year student at the University of Pennsylvania Law School.

Faced with dwindling admissions, some law schools seek out overachieving 1Ls.

Although the number of student transfers has been decreasing, law schools are interested in taking transfer students to bring in more revenue, according to higher-education consultants. It’s become a seller’s market for first-year students at the top of their class: They easily can move to a higher-ranked school or stay put and get bigger tuition discounts.

GAIN, RETAIN, REPEAT

There are a few incentives to keep or attract 1Ls with good grades—people who do well their first year generally pass bar exams on their first attempt, and transfer students traditionally pay full tuition. Nothing in the ABA Standards and Rules of Procedure for Approval of Law Schools speaks specifically to financial aid packages that law schools offer as an inducement to transfer or existing students, says Barry Currier, managing director of the ABA Section of Legal Education and Admissions to the Bar.

The number of law students who transferred between 2015 and 2016 has actually decreased, says Jerome Organ, a professor at the University of St. Thomas School of Law in
Law School’s 2015 graduates, 63.9 percent of graduates who started as 1Ls.

Law school admissions declined.

"The number of transfers dropped to 1,749 in 2016, down from 1,979 in 2015, and from 2,187 in 2014 and 2,501 in 2013," Organ says. "It’s hard to know how many law schools are offering deals to students to stay put, he acknowledges, because that information is not specifically reported in the Standard 509 Information Reports.

"It is possible that with increases in the size and number of scholarships available to incoming students, the cost differential for transferring has grown and made it less attractive," Organ says. "It is possible that some schools are being more generous in offering scholarships to retain potential transfer students. We just don’t know because this information is not collected and published."

Some deans complain that transfers hurt their bar passage rates. But it’s not likely that the council of the legal education section would create accreditation rules that restrict transfers because that could stand in the way of student opportunities, says Organ, whose work focuses on transparency in financial aspects of the decision to attend law school.

In terms of ABA accreditation standards and transfer regulation, schools must disclose transfers in the 509 reports, and there are some rules about accepting credits from other schools.

Organ says it’s possible that the legal education section might add reporting requirements for a law school’s graduating class or collect more information about how transfer students’ bar passage rates compare to those of graduates who started as 1Ls.

"That is an area about which we know very little," Organ says. "Even though my guess is that those transferring to another school assume that they are likely to see comparable bar passage and employment outcomes as those reported for the graduating class as a whole…. That may or may not be an accurate assumption."

COST VS. OPPORTUNITY

More possibilities for jobs influenced Licata’s decision to transfer. Of Brooklyn Law School’s 2015 graduates, 63.9 percent had full-time, long-term jobs that required law degrees, according to its employment summary information. Comparatively, 89.8 percent of Penn Law’s 2015 graduates had full-time, long-term JD-required jobs.

Tuition costs between the two schools aren’t much different. Brooklyn Law charges $50,310 annually for its full-time three-year program, and Penn Law charges $57,242.

Licata has a summer associate position lined up at a large law firm. She didn’t participate in on-campus interviews at either school but made recruiter connections at various networking events hosted by LGBT student groups.

The big firms didn’t care that she completed first-year work outside Penn Law, Licata says. "They can look at us and know that we worked really hard that first year. If they see that we transferred in, it means that we were at the top of our class," she says.

Traditionally, first-year law students interested in transferring would reach out to schools on their own. Now, when law schools deny admission or wait-list an applicant, they increasingly tell them to check back in after first-year grades, sometimes keeping up the communications throughout the applicant’s first year, says David Mulligan, CEO of Eduvantis, a Chicago company that focuses on higher-education marketing and strategies for enrollment.

"It’s fairly recent phenomena. Generally, there’s been a more genteel approach to the law school transfer market," says Mulligan, adding that the transfer market can be more lucrative for schools than adding non-JD programs.

Law school and non-JD programs have comparable tuition. But non-JD programs only run one year, while law schools get two years of money from transfer students.

George Washington University Law School indicated that it had 106 transfer students in its 2016 509 report. Fifty-one of those students came from American University Washington College of Law.

"We need to dig deeper to find out why students feel the need to move. For us, this is a moment of self-reflection," says Camille Nelson, who became American University’s law school dean in July 2016, shortly after the students transferred.

Annual, full-time tuition at GW Law is $56,244, according to its 509 report for 2016. Of its 2015 graduates, 64.7 percent had full-time, long-term JD-required jobs, according to the school’s employment summary information.

American University’s employment summary information shows that 44.2 percent of its 2015 graduates had full-time, long-term positions practicing law. The school’s tuition is lower than GW Law’s, with annual, full-time tuition at $53,016, according to its 509 report for 2016.

Regarding whether American University offers tuition discounts to students who have transfer opportunities, Nelson says financial awards are available for high-performing first-year students.

"When students come to speak to us [about transferring], we really try to counsel them about their options. If one option includes greater monetary support, that’s part of the conversation," she says.

Blake Morant, dean of GW Law, did not respond to ABA Journal interview requests.

‘WORTH IT TO TRY’

Schools that try to keep potential first-year transfers frequently warn the students that their GPAs start fresh at new schools, and that getting on law review will require participation in write-on competitions.

Students such as Licata say potential employers only care about applicants’ first-year grades, and transferring to a higher-ranked law school benefits them more than being guaranteed a law review spot.

Michael Matta, who started law school at George Washington in 2015, transferred last fall to the UCLA School of Law with a GPA that he thinks was in the top 35 percent of his class and an LSAT score of 165.

Matta previously was wait-listed by the California school. Following the advice of another law student who transferred from GW to UCLA, last spring Matta asked the dean of admissions for a campus tour, and they met in person during the visit.

"You want to plant a little seed in terms of your name," Matta says.

A California resident, he now pays in-state tuition, which is $45,338, according to the school’s 509 report for 2016. According to its employment data, 73.7 percent of its 2015 graduates have full-time, long-term JD-required jobs.

Transferring to a higher-ranked law school, Matta says, is easier than one might think.

"Even if it doesn’t end up panning out, it’s still totally worth it to try. It’s not really a huge time-suck," he says. "A lot of people would really kick themselves in the butt if they knew they could do it and didn’t."
The Fight for Legal Services
The ABA takes several approaches to helping the LSC program survive

By Lee Rawles

When President Donald Trump proposed a budget in March that would eliminate funding to the Legal Services Corp., the nation’s largest provider of civil legal aid services, the American Bar Association was ready.

Rumors had been swirling since January that the nonprofit was at risk of being defunded, and under the guidance of ABA President Linda A. Klein, the Governmental Affairs Office had been hard at work developing a strong response.

“Establishing justice is a founding principle of our nation and should not be denied because a person can’t afford basic representation in civil matters, such as housing, domestic violence and veterans’ needs,” Klein says. “Support for the Legal Services Corp. is bipartisan because guaranteeing representation to all is not a political issue but an issue of fairness. It benefits every congressional district and returns far more on every dollar spent than it costs.”

The day after Trump announced his proposed budget cuts, the ABA launched DefendLegalAid.org as part of a major social media campaign to save the LSC. Visitors to the site were asked to express in their own words why they support the LSC’s mission and to identify their state and the congressional members who represent them. Their personal messages were printed and taken to Capitol Hill during ABA Day 2017, the annual lobbying event in Washington, D.C., April 25-27.

Messages were hand-delivered by ABA staff and the state delegations so that congressional members received comments from their own constituents. More than 6,000 people signed up as Legal Aid Defenders on the ABA’s site, and more than 19,000 personal messages were delivered to representatives and senators.

People who sign up as Legal Aid Defenders are added to the ABA’s Grassroots Action Team. This database allows the ABA to send out action alerts when an important vote or other development in Congress becomes imminent, giving instructions on how individuals can help. Focus is given to federal issues so as not to impede state bar efforts.

The ABA’s campaign was not limited to DefendLegalAid.org. Videos and graphics highlighting the fact that the LSC provides legal services for 1.9 million low-income Americans—while only requiring 1/10,000th of the federal budget—were rolled out through ABA Twitter and Facebook channels.

For those looking for additional ways to improve access to justice and support legal aid, the ABA Standing Committee on Legal Aid and Indigent Defendants has created the HelpLegalAid.org webpage.

MORE AID DEFENDERS
At the ABA Techshow 2017 in March, Avvo CEO Mark Britton, Rocket Lawyer CEO Charley Moore and LegalZoom CEO John Suh, keynote speakers at the event, promised to use their resources to promote the LSC and access to legal aid. Klein used the opportunity of her Techshow plenary session to say that this was a defining moment for the legal profession, and everyone should be fighting to preserve legal aid funding.

“The ABA and President Linda Klein are doing a wonderful job of shining a spotlight on the importance of funding for the LSC and on the role of civil legal aid in our justice system,” says James J. Sandman, who has been president of the LSC since 2011.

And the ABA is not alone in coming to the defense of the LSC. The heads of more than 150 U.S. law firms had written to the Trump administration, even before the budget was proposed, urging the president to fully fund the LSC.

“The pro bono activity facilitated by LSC funding is exactly the kind of public-private partnership the government should encourage, not eliminate,” the law firm heads wrote.

The deans of 166 law schools and the general counsels from 185 companies wrote letters to Congress asking that the LSC’s funding be preserved and even increased. Justices from at least two state supreme courts have also publicly asked their congressional delegations to oppose the cuts.

“It is inspiring to see thousands of lawyers, law students and others defending the Legal Services Corp. and standing up for millions of people who rely on legal aid every year,” Klein says. “This incredible constituent support for the LSC demonstrates the need for members of Congress to continue their bipartisan support of this vital program. Our justice system depends on it.”

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ABA opposes tort reform bills that amend court rules and limit damages
By Rhonda McMillion

The ABA is pushing back against tort reform proposals in Congress that the association maintains would impede access to the civil justice system.

The House of Representatives quickly passed bills that addressed class actions and frivolous lawsuits during the first few weeks of the 115th Congress, and a medical liability measure was ready for a House floor vote before the April recess began.

H.R. 985 and H.R. 720 would amend the Federal Rules of Civil Procedure by bypassing the Rules Enabling Act, a time-proven process that Congress established in 1934 to ensure the federal rules are amended only after a comprehensive and balanced review.

Under the act, the Judicial Conference of the United States drafts proposed rules and amendments based on changes suggested by a wide range of legal professionals, makes them available for public comment, and submits them to the U.S. Supreme Court after Judicial Conference approval. The Supreme Court transmits the proposal to Congress, which retains the final authority to reject, modify or defer any rule or amendment before it takes effect.

MEETING THE STANDARDS
H.R. 985, the first bill to clear the House, would amend Rule 23, which governs certification of class actions—lawsuits in which one party represents a collective group of plaintiffs who have been injured by the same defendant. The rule, first adopted in 1966, requires that plaintiffs must meet rigorous threshold standards to proceed with a class action case.

The legislation would change current standards and mandate that no federal court shall certify any proposed class that seeks monetary relief from personal injury or economic loss unless the party affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative.

“This requirement places a nearly insurmountable burden for people who have suffered personal injury or economic loss at the hands of large institutions with vast resources, effectively barring them from bringing class actions,” ABA Governmental Affairs Office Director Thomas M. Susman conveyed to Congress during consideration of the legislation.

In addition, the bill is more comprehensive than previous proposals and contains more than a dozen new provisions that have never been examined by Congress.

NO MORE TRIVIAL CASES
Also bypassing the Rules Enabling Act is H.R. 720, which proponents see as a way to stop frivolous lawsuits. Currently, judges are authorized under Rule 11 to impose sanctions to deter future litigation abuses. The bill would reinstate a mandatory sanction provision, which was adopted in 1983 but eliminated 10 years later because of unintended adverse consequences that led to an entire litigation industry revolving around Rule 11 claims. The measure would require judges to impose monetary sanctions to reimburse the prevailing party for reasonable attorney fees and litigation costs attributable to the frivolous claims.

“The ABA’s objective in opposing the enactment of H.R. 720 is not to stifle discourse over the underlying issues,” Susman said in correspondence to the House, emphasizing that the association respects the deep concerns about frivolous lawsuits expressed by some members of Congress.

CAPS ON DAMAGE COSTS
Following passage of H.R. 985 and H.R. 720, the House moved on to even more controversial legislation to cap noneconomic damages at $250,000 and place limits on contingency fees that lawyers can charge in medical liability cases. The bill, H.R. 1215, goes against ABA policy by pre-empting medical liability laws in the states in which the authority to determine such laws rests on and represents a hallmark of the American justice system.

The ABA opposes caps on compensatory damages at either the state or federal level. It emphasizes that research has shown limits on noneconomic damages, including pain and suffering, diminish access to the courts and full compensation for low-wage earners—the elderly, women and children—who are less likely to be able to obtain counsel.

Summing up the association’s strong opposition to the bill, Howard T. Wall III, chair of the ABA Standing Committee on Medical Professional Liability, says the ABA “remains committed to maintaining a fair and efficient justice system where victims of medical malpractice can obtain redress based on state laws, without arbitrary or harmful restrictions.”

This report is written by the ABA Governmental Affairs Office and discusses advocacy efforts by the ABA relating to issues being addressed by Congress and the executive branch of the federal government. Rhonda McMillion is the editor of the ABA Washington Letter, a Governmental Affairs Office publication.
NOTICE BY THE SECRETARY:
NOMINATING COMMITTEE MEETINGS
The Nominating Committee will meet during the 2017 Annual Meeting in New York City on Sunday, Aug. 13, beginning with the business session at 9 a.m. in the Trianon Ballroom, 3rd Floor, at the New York Hilton Midtown Hotel. Immediately following that session, the Nominating Committee will hear from candidates seeking nomination at the 2018 Midyear Meeting. This portion of the meeting is open to Association members. If you have any questions regarding the foregoing, please contact Leticia Spencer at 312-988-5160 or Leticia.Spencer@americanbar.org.

Mary T. Torres, ABA Secretary

NOTICE BY THE SECRETARY:
MEETING OF THE MEMBERSHIP
This is to notify members of the American Bar Association that the meeting of the membership will be held in conjunction with the Nominating Committee Business Session and Coffee with the Candidate Forum, Sunday, Aug. 13, at 9 a.m. in the Trianon Ballroom, 3rd Floor, at the New York Hilton Midtown, New York City.

Mary T. Torres, ABA Secretary

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CREATING COOPERATION
Klein’s passion rubs off on others, such as Nanette M. DeRenzi, a vice admiral who retired as the Navy’s judge advocate general in 2015. DeRenzi was just about to start a new career in the private sector when she was approached to co-chair Klein’s Commission on Veterans Legal Services.

DeRenzi had not been involved in the ABA before and feared taking on a time-consuming activity at the outset of her new job. “Then I came in to talk to Linda,” says DeRenzi, the chief operating officer of the consulting firm Jefferson Solutions in Washington, D.C. “Two minutes into our conversation, I thought, ‘Whatever this woman is doing, I’m all in.’ She had passion, she had a plan, and she was putting herself into it.”

DeRenzi is overcoming her own inexperience and reluctance to fundraise. “I’ve never done it. But for this, I’m willing to learn and try to succeed.”

The Veterans Legal Services Initiative has come together quickly. Previously, there was little or no coordination between lawyers, says Nan Heald, executive director of Pine Tree Legal Assistance in Maine. Pine Tree Legal Assistance pioneered ways to help veterans, who now represent 10 percent of the organization’s clients.

Separate efforts to assist veterans had been launched by both groups and individuals, including Veterans Affairs service officers, doctors, various legal aid providers, law school clinics and others.

Last June, 165 professionals from more than 100 organizations gathered in D.C. for the Military and Veterans Legal Services Network Summit, organized by the ABA and Army OneSource.

“By breaking down silos and putting all stakeholders in that same room, Linda’s initiative is really changing the dynamic,” says Heald. “This is creating a network, and thanks to Linda’s efforts, there will be lawyers waiting to help veterans. It is really the right initiative at the right moment in time.”
Unions Confront Jersey’s ‘Boss Hague’

June 5, 1939

For three decades, Frank Hague was more than simply the mayor of Jersey City, New Jersey. In the ferocious politics of the Garden State, he headed the Democratic Party machine—a power broker, a kingmaker, a boss.

Born to Irish Catholic immigrants in a city ruled by Protestants, Hague nonetheless rose quickly through the party ranks. The Irish and Italians had long been gerrymandered to an area of the city known as the Horseshoe. But by embracing the image of progressive reform championed by Gov. Woodrow Wilson, Hague was able to transform immigrant estrangement into personal political power.

As the commissioner of public safety, Hague sacked scores of corrupt cops and set higher pay and standards for new hires. But he also hired cronies from the Horseshoe. Known as “the Zeppelins,” these hand-picked officers formed a cadre of enforcers who ensured Hague’s reforms, often by extralegal means.

He cleaned up the brothels, rousted vagrants and cultivated a reputation for official violence that helped make Jersey City what he unartfully proclaimed “the most moralest city in the country.”

Elected mayor in 1917, Hague ruled with a complex blend of lawlessness and Catholic largesse. He welcomed women into the ranks of voters but kept them out of bars. He commanded state funding for new schools and a vast public medical center. He provided voters with food baskets and jobs—and political enemies with an occasional beating.

But there were rumors of kickbacks, gambling payoffs, silent interests in real estate deals and bank accounts infused by couriers with cases of cash—seemingly confirmed by an opulent lifestyle. When a city official questioned his intervention in a court case in 1937, Hague blurted: “I am the law!”

A titular progressive, Hague had railed against large corporations but never warmed to labor unions. A 1924 city ordinance, aimed at union organizers, forbade virtually any kind of pamphleteering.

Hague’s hand grew even heavier in the grip of the Great Depression, as he courted industrial relocation to Jersey City with a “no strike zone.” In April 1930, a new ordinance prohibited “public parades or public assembly in or upon the public streets, highways, public parks or public buildings” without a city permit, with the understanding there would be none.

In 1937, a clash between competing union groups—the American Federation of Labor and the Congress of Industrial Organizations—forced Hague to take sides. He considered the upstart CIO to be communist and threw his power behind the AFL.

On Hague’s order, police disrupted pickets, seized pamphlets and pressured meeting halls not to rent space to the CIO. The Zeppelins patrolled ferry arrivals, “deporting” anyone who wore a CIO badge back to New York City. When the prominent Socialist Norman Thomas sued over his own deportation, a state judge expressed typical contempt, saying Thomas “has no more right to speak in public places ... than he has to invade a citizen’s home without invitation.”

Federal courts, however, reacted differently. Hearing CIO arguments by the American Civil Liberties Union, U.S. District Judge William Clark enjoined Hague and Jersey City from “placing any previous restraint” on CIO gatherings or their access to public spaces—except for legitimate public conflicts. When Clark’s injunction was affirmed on appeal, Hague took his frustration to the U.S. Supreme Court.

In Hague v. CIO, decided on June 5, 1939, the mayor argued that by pre-empting union activism, he was preventing “riots, disturbances or disorderly assemblage.”

In a plurality decision, the justices disagreed: The right to free speech in a public space is subject to some regulation. It is subject to public convenience, as well as peace and good order. “But it must not, in the guise of regulation, be abridged or denied.” Both Jersey City ordinances were declared void.
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